Criminal Law Deskbook

Practicing Military Justice

January 2019

Note: This version of the Criminal Law Deskbook reflects changes to the military justice system resulting from the Military Justice Act of 2016, most of which took effect as of 1 January 2019. The July 2018 version of the Criminal Law Deskbook was the most recent version to address pre-Military Justice Act law and procedure.

Criminal Law Department
The Judge Advocate General's Legal Center and School
U.S. Army

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Foreword

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The Criminal Law Department at The Judge Advocate General's Legal Center and School, US Army (TJAGLCS) produces this deskbook as a resource for Judge Advocates and Paralegals, for both training and actual practice in UCMJ proceedings. The deskbook is a reference, practical guide, and training tool that covers the substantive and procedural aspects of military justice. It is a thorough resource and an excellent starting point for research. However, the deskbook is not an all-encompassing academic treatise. Readers must carefully review relevant caselaw and other primary sources, and form their own opinions about the interpretation of precedent or policy.

History of the Deskbook. Deskbooks at TJAGLCS exist in each of the academic departments, and all of them began as an outline for Officer Basic Course and Graduate Course students. During the 1990s, the Criminal Law Deskbook took many forms–one version for the Basic Course, another version for the Graduate Course, etc. A new deskbook would be generated and printed for each newly-arriving course.

In the mid-2000s, the various versions of the deskbook were consolidated into two volumes of substantive and procedural criminal law. A third volume was added to address advocacy, and a fourth volume was added in 2011 to address special topics like capital and complex litigation. In 2013, the Criminal Law Department combined all of the volumes into a single deskbook. In 2015, the deskbook was updated and edited resulting in a smaller document. In 2017, the deskbook was reorganized to put chapters into chronological order more consistent with criminal procedure, and all of the advocacy chapters were removed. The advocacy chapters were edited and included in the 2017 update to The Advocacy Trainer. Also, all of the policies and programs related to SHARP, FAP, SVC, VWL, and victim's rights were consolidated into one chapter.

The January 2019 version of the deskbook is the first version to reflect changes to the military justice system resulting from the Military Justice Act of 2016, **most** of which took effect as of 1 January 2019. The July 2018 version of the Criminal Law Deskbook was the most recent version to address pre-Military Justice Act law and procedure. Practitioners must **always** consider the applicable effective date of Military Justice Act provisions when conducting research because the date of the offense may dictate whether or not certain Military Justice Act amendments apply in a particular situation.

Moving forward, the Criminal Law Department will continue to assess the usefulness and value of the deskbook chapters with the following factors in mind: (1) existing criminal law publications already available to the field; (2) the role of TJAGLCS and the Criminal Law Department in the training and development of Judge Advocates and Paralegals; and (3) the mission of the Criminal Law Department to provide quality ABA instruction to our LL.M. students.

We ask for your input. Readers are encouraged to note any discrepancies or make any suggestions to improve this deskbook. Please contact the TJAGLCS

Criminal Law Department with your suggestions; contact information is provided on the following page of this deskbook.

The deskbook does not reflect Army or Department of Defense policy. It was created and is managed by military personnel in an academic setting for use primarily by students as a reference tool. The deskbook does not speak for the agency. Military justice practitioners and military justice managers are free to reproduce from this deskbook as needed.

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CHAPTER 1
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I. INTRODUCTION

A. Basic Goals. The fundamental objective of any criminal law system is to discover the truth, acquit the innocent without unnecessary delay or expense, punish the guilty proportionately for their crimes, and prevent and deter future crime. Military justice shares each of these objectives, and also serves to enhance good order and discipline within the military.

B. Separate System. A question that has been debated often, especially whenever there is a high profile case that captures the public's attention, is why we have a separate military justice system? What we are frequently reminded from these debates is that "the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733 (1974). As the U.S. Supreme Court noted in *Parker v. Levy*, the "differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'" *Id*. at 743, citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). The military is a "separate society" warranting its own military justice system. *See* Francis A Gilligan & Fredric I. Lederer, Court-Martial Procedure, Fourth Edition, 1-4 (2015) (foreword by former Chief Judge James E. Baker). The reasons often cited to for maintaining a separate military justice system include:

1. The worldwide deployment of military personnel;
2. The need for instant mobility of personnel;
3. The need for speedy trial to avoid loss of witnesses due to combat effects and needs;
4. The peculiar nature of military life, with the attendant stress of combat; and
5. The need for disciplined personnel. *Id*.

C. Good Order and Discipline. Of all the rationales for a separate system, perhaps the most persuasive is the need for disciplined personnel. Members of the Armed Forces are subject to rules, orders, proceedings, and consequences different from the rights and obligations of their civilian counterparts. *United States v. Watson*, 69 M.J. 415 (2011). In the military justice system, discipline can be viewed as being every bit as important as individual liberty interests. The Preamble to the Manual for Courts-Martial (MCM) recognizes the importance of discipline as part of military justice:

"The purpose of military law is to promote justice, *to assist in maintaining good order and discipline in the armed forces*, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Manual for Courts-Martial, Preamble, I-1 (2012). Given the necessity for discipline in the military, military justice is under the overall control of the commander.

1. Commander's Discretion. Commanders have a wide variety of options available to them to deal with disciplinary problems. These options include administrative actions ranging from an informal counseling, extra training, withdrawal or limitation of privileges, and administrative separations, to punitive options such as punishment under Article 15, UCMJ, and trial by court-martial.

2. Prosecutorial Discretion. Prosecutorial discretion lies with the commander and not the judge advocate, a concept unfamiliar to civilian practitioners who are more accustomed to prosecutorial discretion being entrusted to a prosecuting attorney. In the military justice system, the commander, with the advice of his or her legal advisor, decides whether a case will be resolved administratively or referred to a court-martial. If the case is to be referred to a general court-martial, Article 34, UCMJ, requires that a judge advocate make findings that there is probable cause to believe an offense under the UCMJ has been committed and that the accused committed it. In practice, this process is true for both special and general courts-martial. Technically, it is the commander who approves and signs the charging document and who ultimately makes the decision whether a case is to be referred to a trial by court-martial.

D. Key References.

1. Military Justice – Army Regulation 27-10
2. Manual for Courts-Martial (MCM)
3. Rule for Courts-Martial (R.C.M.)
4. Military Rule of Evidence (M.R.E.)
5. Uniform Code of Military Justice (UCMJ)
6. Military Judges' Benchbook – DA Pamphlet 27-9

II. CREATION OF THE MILITARY JUSTICE SYSTEM

A. Authority. In order to provide for the common defense, the Constitution gives Congress the power to raise, support and regulate the Armed Forces. U.S. Const., Preamble, art. I, § 8, cls. 11-14 (War Power). Under this authority, Congress enacted the UCMJ in 1950. 10 U.S.C. §§ 801-946 (Articles 1 - 146). The UCMJ is the code of military criminal law and procedure applicable to all U.S. military members worldwide.

B. Implementation. The Constitution makes the President the Commander-in-Chief of the Armed Forces. U.S. Const., art. II, § 2, cl. 1. Also, Congress expressly delegated UCMJ authority to the President to make rules and set punishment limits for cases arising under the UCMJ. 10 U.S.C. §§ 836, 856. Under these authorities, the President implements the UCMJ through Executive Orders. The MCM was created in 1984 by Executive Order 12473 (April 13, 1984), and it is intended to be a self-contained practitioners manual for Judge Advocates and Commanders. The President also delegated authority to each of the Service Secretaries, including the Department of Homeland Security (for the Coast Guard), to further implement the UCMJ and the rules contained within the MCM. Each Sister Service supplements the MCM to meet its individual needs. For instance, the Army uses Army Regulation 27-10. The Navy and Marine Corps use the Manual for the Judge Advocate General, and the Air Force uses Air Force Instructions.

C. The Manual for Courts-Martial. The MCM contains the relevant statutes (UCMJ), rules (R.C.M. and M.R.E.), forms, scripts, and analysis for practitioners in the field. The MCM covers almost all aspects of military criminal law and is intended to serve as a portable manual to help facilitate military justice in remote and austere locations. The rules contained in Parts I-V of the MCM are directed from the President and serve as requirements. The other parts of the MCM include forms, scripts, discussion, and analysis which serve only as guidance. *See* Manual for Courts-Martial (2019). The different parts of the MCM are listed and explained below:

1. NOTE: Practitioners should be advised that the MCM historically (from 1994-2019) has been updated every three or four years. Such updates are too infrequent to ensure precision, and users are reminded to conduct appropriate research before relying on the printed MCM. Online updates to the MCM can be found here: http://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/.

2. NOTE: Practitioners must also remember that the MCM is only a reflection of the law and procedural rules – the actual statutory authority exists in 10 U.S.C. §§ 801-946, and the rules of procedure and evidence are found in Executive Orders from the POTUS. The MCM is merely a user's manual. It was created to improve efficiency and portability. While the MCM can be cited as authority and is vital to the day-to-day practice of military justice, practitioners must remember to seek out the original authority when required by motion or argument. The Executive Orders upon which the MCM is built are addressed below in paragraph C.14.

3. Part I, Preamble. This part explains the sources of authority and the structure of the MCM.

4. Part II, Rules for Courts-Martial. This part sets forth the rules that govern court-martial jurisdiction, command authorities, court-martial procedure, and post-trial requirements. For trial practice, including motions, depositions, subpoenas, and other pre-trial matters, the Rules for Courts-Martial (R.C.M.) are similar to the Federal Rules of Criminal Procedure.

5. Part III, Military Rules of Evidence. This part establishes the evidentiary rules applicable in each court-martial. The M.R.E. are modeled after and closely resemble the Federal Rules of Evidence (FRE), except with regard to Federal civil matters and military-specific provisions. For example, all of Section III of the M.R.E., rules 301-321, are military-specific, and there is no corollary in the FRE. The M.R.E. are to be construed to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law. M.R.E. 102. Non-binding discussion paragraphs were added to Part III in 2012.

6. Part IV, Punitive Articles. This part addresses the criminal offenses contained in the UCMJ. It is organized by paragraph and is intended to provide basic and necessary information about each criminal offense, as follows: (a) text of the statute; (b) elements of the offense; (c) explanation of the offense; (d) lesser included offenses; (e) maximum punishments; and (f) sample specifications. While Congress provides the text of the statute, the President provides the remaining portions of Part IV by Executive Order. This part also has non-binding discussion paragraphs to alert practitioners to case law and other practical considerations. *See* Manual for Courts-Martial, Punitive Articles, IV-1 discussion (2019)

7. Part V, Nonjudicial Punishment Procedure. Often overlooked, this part of the MCM establishes the basic requirements of and protections from nonjudicial punishment. In practice, each Service has promulgated regulations that implement Part V of the MCM. Practitioners are likely much more familiar with their Service regulation; however, it is imperative to know where nonjudicial punishment authority is derived – Article 15 from Congress, and Part V of the MCM from the President.

8. U.S. Constitution, contained in Appendix 1.

9. Uniform Code of Military Justice. Appendix 2 contains the entire UCMJ, Articles 1-146.

10. Maximum Punishment Chart, contained in Appendix 12.

11. **MJA 2016** Listing of Lesser Included Offenses. New Appendix 12A is intended to be the listing of all lesser included offenses, instead of putting this information in Part IV of the MCM, where it used to reside. The reason for the new Appendix 12A is to allow the Joint Service Committee to more conveniently update LIOs as they are impacted by appellate precedent and to conform to *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2011), and its progeny.

12. Scripts and Forms, contained in various Appendices.

13. Analysis. The R.C.M., M.R.E. and Punitive Articles (Parts II, III, and IV) each have analysis in Appendices 15, 16, and 17, respectively. While discussion paragraphs are meant to serve as guidance in the form of treatise, the analysis is more akin to legislative intent and historical record-keeping. The "intent" captured in the analysis is usually from the Joint Service Committee on Military Justice (JSC). The JSC is the entity that researches and proposes changes to the MCM and UCMJ. The JSC also drafts the Executive Orders that the President will sign to update the MCM. The analysis appendices in the MCM are a repository of notes from the JSC. On the spectrum of authority, the UCMJ is most powerful; then the rules prescribed by the President in Parts I-V of the MCM; then Service regulation and the discussion paragraphs in the MCM; and then the analysis. Discussion paragraphs and Service regulations are often cited by appellate courts as a form of authority, but the analysis is less compelling and cited less often.

14. Historical Executive Orders. Appendix 19 of the MCM lists all of the Executive Orders that comprise the MCM. The MCM was first created in 1984 by a very large Executive Order and has since been updated, almost annually, by subsequent orders. These orders had originally been printed in Appendix 25 of the MCM but were removed in 2012. Copies of the actual Executive Orders that comprise the MCM are now available online at the JSC Website.

15. Prior Versions of Article 120. Appendices 20-22 contain, respectively, the pre-2007 and the 2007 versions of Article 120. These appendices were added to the 2012 MCM to help practitioners in charging older sexual offenses.

III. JURISDICTION

A. Article 2, UCMJ, defines and establishes jurisdiction over all Servicemembers (Army, Navy, Air Force, Marine, and Coast Guard). The UCMJ also provides for jurisdiction over several other categories of individuals, including but not limited to: Reserve Component and National Guard members, certain retired military members; military members serving a court-martial sentence; members of the National Oceanic and Atmospheric Administration and Public Health Service and other organizations when assigned to serve with the military; enemy prisoners of war in custody of the military; and, in times of declared war or contingency operations, persons serving with or accompanying an armed force in the field. Article 2, UCMJ; 10 U.S.C. § 802.

B. Court-Martial Jurisdiction. Under the MCM, jurisdiction of a court-martial means "the power to hear a case and to render a legally competent decision." *See* R.C.M. 201(a)(1) discussion. Under R.C.M. 201(b), a court-martial has jurisdiction if the following are all true:

1. The court-martial must be convened by an official empowered to convene it;

2. The court-martial must be composed in accordance with the Rules for Courts-Martial with respect to number and qualifications of its personnel (military judge and members must have proper qualifications);

3. Each charge before the court-martial must be referred to it by competent authority;

4. The accused must be a person subject to court-martial jurisdiction (personal jurisdiction); and

5. The offense must be subject to court-martial jurisdiction (subject matter jurisdiction).

C. The nuances of court-martial jurisdiction are beyond the scope of this outline, however, it is enough to say generally that jurisdiction of a court-martial does not depend on where the offense was committed; it depends solely on the status of the accused. *See Solorio v. United States*, 483 U.S. 435, 447 (1987). Also, a court-martial exists by order of a commander and is not a standing tribunal like an Article III federal court. A court-martial is derived from Article I authority in the Constitution: Congress created our court system with the UCMJ, and Congress gave commanders the authority to convene a court-martial. A court-martial is not a standing court; rather it comes into existence when a commander "refers" a case, and it ceases to exist after sentencing when the court-martial "closes".

IV. TYPES OF OFFENSES

A. Overview: A court-martial may try any offense listed in the punitive articles of the UCMJ. The punitive articles include Articles 77 through 134 of the UCMJ. 10 U.S.C. §§ 877-934. Some of the offenses listed within Articles 77 through 134 have a civilian analog while others are exclusive to the military.

1. Civilian Analog Offenses. Examples of civilian analog offenses under the UCMJ include conspiracy (Article 81); murder (Article 118); rape (Article 120); robbery (Article 122); and assault (Article 128).

2. Military-Specific Offenses. Examples of military-specific offenses include desertion (Article 85); absence without leave (Article 86); insubordinate conduct (Article 91); mutiny and sedition (Article 94); misconduct as a prisoner (Article 98); malingering (Article 83); and conduct unbecoming an officer (Article 133).

B. General Article 134. In addition to the enumerated offenses discussed above, a Servicemember may be tried at a court-martial for offenses not specifically covered within the punitive articles. General Article 134 states that all "crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court martial, according to the nature and degree of the offense." For more detail on Article 134, see Chapter 20 of this deskbook.

1. Federal Assimilative Crimes Act (18 U.S.C. § 13). The military uses Article 134 to assimilate state and federal offenses for which there is no analogous crime in the UCMJ in order to impose court-martial jurisdiction. The potential punishments for violations generally match those applicable to the corresponding civilian offense.

2. Preemption doctrine. The preemption doctrine prohibits application of Article 134 to conduct already covered under Articles 80 through 132.

V. INVESTIGATION OF OFFENSES

A. Report of misconduct. When a Servicemember has reportedly committed an offense, his or her commander is usually notified by military law enforcement (via daily "blotter reports" from the installation Provost Marshal), or by a report from an alleged victim or through direct observation of the alleged misconduct. After receiving notification that a Servicemember committed an offense triable by court-martial, the commander must at a minimum, direct that a preliminary inquiry be conducted before disposing of a case. R.C.M. 303.

B. Commander's Inquiry. The inquiry by the command may range from an examination of the possible charges and an investigative report to a more extensive investigation depending on the offense(s) alleged and the complexity of the case. The investigation may be conducted by members of the command or, in more complex cases, military and civilian law enforcement officials. By policy, the Department of Defense and each Sister Service "requires" that allegations of sexual offenses be reported to the appropriate Military Criminal Investigative Organization (for the Army that is the Criminal Investigation Command, or CID; for Navy/Marine, NCIS; for Air Force, OSC). See DODI 6495.

C. Commander's Options. After the investigation is complete, the appropriate commander must make a disposition decision. By policy, the Secretary of Defense has withheld the disposition authority for all sexual offenses (Article 120 rape and sexual assault, and Article 125 forcible sodomy) to the first O-6 special court-martial convening authority in the chain of command. Commanders may make the following disposition decisions UP R.C.M. 306(c):

1. Take no action;

2. Initiate administrative action (which can include separation from the Army);

3. Impose non-judicial punishment (a form of punishment that is not considered a conviction, but can result of loss of rank, pay, and other privileges);

4. Prefer charges (the process of formally charging a soldier with and offense for resolution at court-martial); or

5. Forward to a higher authority for preferral of charges.

D. Preferral of Charges. The first formal step in a court-martial, preferral of charges consists of drafting a charge sheet containing the charges and specifications against the accused. A specification is a plain and concise statement of the essential facts constituting the offense charged. R.C.M. 307(c)(3). The M.C.M. contains model specifications to assist trial counsel and the chain of command in drafting the specifications. The charge sheet must be signed by the accuser under oath before a commissioned officer authorized to administer oaths. R.C.M. 307(b). Any person subject to the UCMJ may prefer charges as the accuser. R.C.M. 307(a).

E. Referral of Charges. After charges have been preferred, they may be referred to one of three types of courts-martial: summary, special, or general. R.C.M. 401(c). The process of "referral" is simply the order that states that charges against an accused will be tried by a specific court-martial. The Court Martial Convening Authority, a commander, determines which level of court-martial to which the charges are to be referred. R.C.M. 504. That commander must be advised by her Staff Judge Advocate or legal advisor before making her determination (this is required for general courts-martial by Article 34, UCMJ; however, R.C.M. 401 and 601 require legal advice for any referral to special or general court-martial). Usually, the seriousness of the offenses alleged determines the type of court-martial.

VI. TYPES OF COURTS-MARTIAL

A. Unlike Article III federal courts, courts-martial are not standing courts. Courts-martial are created by individual Court-Martial Convening Orders (CMCO). Without a CMCO, there is no court and thus no authorization to adjudicate any charged offense. Congress, in creating the military justice system, established three types of courts-martial: (1) summary court-martial, (2) special court-martial, and (3) general court-martial. Article 16, UCMJ; 10 U.S.C. § 816. While the Rules of Courts-Martial and the Military Rules of Evidence are applicable to all courts-martial, the jurisdiction and authorized punishments vary among the different courts-martial types.

B. Summary Courts-Martial. The function of the summary court-martial is to "promptly adjudicate minor offenses under a simple procedure" and "thoroughly and impartially inquire into both sides of the matter" ensuring that the "interests of both the Government and the accused are safeguarded and that justice is done." R.C.M. 1301(b). The summary court-martial can adjudicate minor offenses allegedly committed by enlisted Servicemembers.

C. Special Courts-Martial. Special courts-martial generally try offenses that are considered misdemeanors. The formality and procedural protections are much more involved in a special court-martial as opposed to a summary court-martial. Convening authorities can refer a case to two types of special courts-martial: those consisting of a military judge and four members (although the accused can later elect to trial by military judge alone); and those consisting of a military judge alone.

D. General Courts-Martial. A general court-martial is the highest trial level in military law and is reserved for the most serious offenses.

E. See Chapter 6 of this Deskbook for more details about Summary Court-Martial.

VII. PROCEDURAL SAFEGUARDS

A. The Constitution specifically exempts military members accused of a crime from the Fifth Amendment right to a grand jury indictment. Based upon this exemption, the Supreme Court has inferred there is no right to a civil jury in courts-martial. *See Ex Parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). Despite this exemption, the military justice system has created, in most instances, equal if not greater procedural protections for military members. For instance, Congress has, in Article 32, UCMJ, provided for a pretrial hearing that performs the same basic function as a grand jury. However, the Article 32 has the added benefit of allowing the accused to call witnesses, present evidence, and cross examine government witnesses. Below are some of the key procedural safeguards afforded an accused under the UCMJ.

B. Constitutional Safeguard: Presumption of Innocence

1. "The principle that there is a presumption of innocence in favor of the accused is undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895)

2. General Courts-Martial: If the accused fails to enter a proper plea, a plea of not guilty will be entered. R.C.M. 910(b). Members of a court-martial must be instructed that the "accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond a reasonable doubt." R.C.M. 920(e). The accused shall be properly attired in uniform with grade insignia and any decorations to which entitled. Physical restraints shall not be imposed unless prescribed by the military judge. R.C.M. 804

C. Constitutional Safeguard: Right to Remain Silent

1. "No person... shall be compelled in any criminal case to be a witness against himself...." Amendment V.

2. General Courts-Martial: Coerced confessions or confessions made without the statutory equivalent of a Miranda warning are not admissible as evidence. Article 31, UCMJ, 10 U.S.C. § 831. The trial counsel must notify the defense of any incriminating statements made by the accused that are relevant to the case prior to the arraignment. Motions to suppress such statements must be made prior to pleading. M.R.E. 304.

D. Constitutional Safeguard: Freedom from Unreasonable Searches & Seizures

1. "The right of the people to be secure… against unreasonable searches and seizures, shall not be violated; no Warrants shall issue, but upon probable cause…." Amendment IV.

2. General Courts-Martial: "Evidence obtained as a result of an unlawful search or seizure... is inadmissible against the accused..." unless certain exceptions apply. M.R.E. 311. An "authorization to search" may be oral or written, and may be issued by a military judge or an officer in command of the area to be searched, or if the area is not under military control, with authority over persons subject to military law or the law of war. It must be based on probable cause. M.R.E. 315. Interception of wire and oral communications within the United States requires judicial application in accordance with 18 U.S.C. §§ 2516 *et seq*. M.R.E. 317. A search conducted by foreign officials is unlawful only if the accused is subject to "gross and brutal treatment." M.R.E. 311(c).

E. Constitutional Safeguard: Assistance of Effective Counsel

1. "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." Amendment VI.

2. General Courts-Martial: The accused has a right to military counsel at government expense. An accused may choose individual military counsel, if that attorney is reasonably available, and may hire a civilian attorney in addition to military counsel. Article 38, UCMJ, 10 U.S.C. § 838. Appointed counsel must be certified as qualified and may not be someone who has taken any part in the investigation or prosecution, unless explicitly requested by the accused. Article 27, UCMJ, 10 U.S.C. § 827. The military recognizes an attorney-client privilege. M.R.E. 502.

F. Constitutional Safeguard: Right to Indictment and Presentment

1. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger...." Amendment V.

2. General Courts-Martial: The right to indictment by grand jury is explicitly excluded in "cases arising in the land or naval forces." Amendment V. Whenever an offense is alleged, the commander is responsible for initiating a preliminary inquiry and deciding how to dispose of the offense. R.C.M. 303-06. Prior to convening a general court-martial, a preliminary hearing must be conducted. R.C.M. 405. This investigation, known as an Article 32 preliminary hearing, is meant to ensure that there is a basis for prosecution. R.C.M. 405(a).

G. Constitutional Safeguard: Right to Written Statement of Charges

1. "In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation...." Amendment VI.

2. General Courts-Martial: Charges and specifications must be signed under oath and made known to the accused as soon as practicable. Article 30, UCMJ, 10 U.S.C. § 830

H. Constitutional Safeguard: Right to be Present at Trial

1. The Confrontation Clause of Amendment VI guarantees the accused's right to be present in the courtroom at every stage of his trial. *Illinois v. Allen*, 397 U.S. 337 (1970).

2. General Courts-Martial: The presence of the accused is required during arraignment, at the plea, and at every stage of the court-martial unless the accused waives the right by voluntarily absenting him or herself from the proceedings after the arraignment or by persisting in conduct that justifies the trial judge in ordering the removal of the accused from the proceedings. R.C.M. 801.

I. Constitutional Safeguard: Prohibition against Ex Post Facto Crimes

1. "No... ex post facto law shall be passed." Art. I, § 9, cl. 3.

2. General Courts-Martial: Courts-martial will not enforce an ex post facto law, including increasing the amount of pay to be forfeited for specific crimes. *United States v. Gorki*, 47 M.J. 370 (C.A.A.F. 1997).

J. Constitutional Safeguard: Protection against Double Jeopardy

1. "... [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb...." Amendment V.

2. General Courts-Martial: Double jeopardy clause applies. *See Wade v. Hunter*, 336 US 684, 688-89 (1949). Article 44, UCMJ prohibits double jeopardy, provides for jeopardy to attach after introduction of evidence. 10 U.S.C. § 844. General court-martial proceeding is considered to be a federal trial for double jeopardy purposes and are subject to "dual sovereign" doctrine, i.e.: federal and state courts may prosecute an individual for the same conduct without violating the clause. Double jeopardy does not result from charges brought in state or foreign courts, although court-martial in such cases is disfavored. *See United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982). If military authorities turn over a Servicemember to civilian authorities for trial, military may have waived jurisdiction for that crime, although it may be possible to charge the individual for another crime arising from the same conduct. *See* 54 AM. JUR. 2D, Military and Civil Defense §§ 227-28.

K. Constitutional Safeguard: Speedy & Public Trial

1. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...." Amendment VI.

2. General Courts-Martial: In general, the accused must be brought to trial within 120 days of the preferral of charges or the imposition of restraint, whichever is earliest. R.C.M. 707(a). The right to a public trial applies in courts-martial but is not absolute. R.C.M. 806. The military trial judge may exclude the public from portions of a proceeding for the purpose of protecting classified information if the prosecution demonstrates an overriding need to do so and the closure is no broader than necessary. *United States v. Grunden*, 2 M.J. 116 (CMA 1977).

L. Constitutional Safeguard: Burden & Standard of Proof

1. Due Process requires the prosecution to prove the defendant guilty of each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

2. General Courts-Martial: Members of court martial must be instructed that the burden of proof to establish guilt is upon the government and that any reasonable doubt must be resolved in favor of the accused. R.C.M. 920(e).

M. Constitutional Safeguard: Privilege Against Self- Incrimination

1. "No person... shall be compelled in any criminal case to be a witness against himself...." Amendment V.

2. General Courts-Martial: No person subject to the UCMJ may compel any person to answer incriminating questions. Article 31(a) UCMJ, 10 U.S.C. § 831(a). The accused may not be compelled to give testimony that is immaterial or potentially degrading. Article 31(c), UCMJ, 10 U.S.C. § 831(c). No adverse inference is to be drawn from an accused's refusal to answer any questions or testify at court-martial. M.R.E. 301(f). Witnesses may not be compelled to give testimony that may be incriminating unless granted immunity for that testimony by a general

court-martial convening authority, as authorized by the Attorney General, if required. 18 U.S.C. § 6002; R.C.M. 704.

N. Constitutional Safeguard: Right to Examine or Have Examined Adverse Witnesses

1. "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him...." Amendment VI.

2. General Courts-Martial: Hearsay rules apply as in federal court. M.R.E. 801 *et seq*. In capital cases, sworn depositions may not be used in lieu of witnesses, unless court-martial is treated as non-capital or it is introduced by the defense. Article 49, UCMJ, 10 U.S.C. § 849.

O. Constitutional Safeguard: Right to Compulsory Process to Obtain Witnesses

1. "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor...." Amendment VI.

2. General Courts-Martial: An accused has the right to compel appearance of witnesses necessary to their defense. R.C.M. 703. Process to compel witnesses in a court-martial is to be similar to the process used in federal courts. Article 46, UCMJ, 10 U.S.C. § 846.

P. Constitutional Safeguard: Right to Trial by Impartial Judge

1. "The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress ... may establish. The Judges ... shall hold their Offices during good Behavior, and shall receive ... a compensation, which shall not be diminished during their continuance in office." Article III § 1.

2. General Courts-Martial: A qualified military judge is detailed to preside over the court-martial. The convening authority may not prepare or review any report concerning the performance or effectiveness of the military judge. Article 26, UCMJ, 10 U.S.C. § 826. Article 37, UCMJ, prohibits unlawful command influence of courts-martial through admonishment, censure, or reprimand of its members by the convening authority or commanding officer, or any unlawful attempt by a person subject to the UCMJ to coerce or influence the action of a court-martial or convening authority. Article 37, UCMJ, 10 U.S.C. § 837.

Q. Constitutional Safeguard: Right to Trial by Impartial Jury

1. "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury...." Art III § 2 cl. 3 "In all criminal prosecutions, the accused shall enjoy the right to a... trial, by an impartial jury of the state...." Amendment VI.

2. General Courts-Martial: A military accused has no Sixth Amendment right to a trial by petit jury. *Ex Parte Quirin*, 317 U.S. 1, 39-40 (1942) (dicta). However, "Congress has provided for trial by members at a court-martial." *United States v. Witham*, 47 MJ 297, 301 (C.A.A.F. 1997); Article 25, UCMJ, 10 U.S.C. § 825. The Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual members, but also their conduct during the trial proceedings and the subsequent deliberations. *United States v. Lambert*, 55 M.J. 293 (C.A.A.F. 2001).

R. Constitutional Safeguard: Right to Appeal to Independent Reviewing Authority

1. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion, the public Safety may require it." Article I § 9 cl. 2.

2. General Courts-Martial: The writ of habeas corpus provides the primary means by which those sentenced by military court, having exhausted all military appeals, can challenge a conviction or sentence in a civilian court. The scope of matters that a court will address is

narrower than it is in challenges of federal or state convictions. *Burns v. Wilson*, 346 U.S. 137 (1953). However, Congress created a military court with all civilian justices (non-military retirees), the Court of Appeals for the Armed Forces, to review military cases. Articles 141-146, 10 U.S.C. §§ 141-146.

S. Constitutional Safeguard: Protection against Excessive Penalties

1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Amendment VIII.

2. General Courts-Martial: Death may only be adjudged for certain crimes where the accused is found guilty by unanimous vote of court-martial members present at the time of the vote. Prior to arraignment, the trial counsel must give the defense written notice of aggravating factors the prosecution intends to prove. R.C.M. 1004. A conviction of spying during time of war under Article 106, UCMJ, carries a mandatory death sentence. 10 U.S.C. § 906.

VIII. POST-TRIAL REVIEW

A. Generally. Any conviction at a court-martial is subject to an automatic post-trial review by the convening authority.

B. Process. The post-trial process (which was significantly amended by the Military Justice Act of 2016) starts with the assembly of the trial record. The accused is then given an opportunity to present matters to the convening authority. R.C.M. 1106. Beginning in 2013, court-martial victims were permitted to submit matters to the convening authority as well. R.C.M. 1106A. After matters are submitted, the convening authority consults with the staff judge advocate regarding what action to take. R.C.M. 1109(d)(2). Finally, the convening authority reviews the matters and legal advice and takes initial "action" on the court-martial before there is appellate review. R.C.M. 1109 and 1110.

1. The convening authority used to have broad powers in taking action; however, Congress significantly limited that power in 2013 by amending the UCMJ to prevent convening authorities from taking certain actions in sexual assault convictions and other cases dealing with more serious offenses. *See* 10 U.S.C. § 860. Prior to these changes, the accused's best hope for relief or clemency existed at post-trial, before appellate review.

2. The convening authority may, among other remedies *and subject to the limitations of Article 60*, suspend all or part of the sentence, disapprove a finding or conviction, or reduce the sentence. R.C.M. 1109 and 1110. The convening authority does not have the authority to increase the sentence.

3. See Chapter 28 of this deskbook to learn more about the post-trial process or the commander's authorities to grant clemency.

IX. APPELLATE REVIEW

A. Generally. After the convening authority takes action and the military judge enters judgment, the case is ripe for appellate review. Convictions by special or general court-martial are subject to an automatic appellate review by a service Court of Criminal Appeals if the sentence includes confinement for two years or more, a bad-conduct or dishonorable discharge, death, or a dismissal in the case of a commissioned officer, cadet, or midshipman. R.C.M. 1116. The Military Justice Act of 2016 added certain new categories of cases subject to appellate review upon request of the accused that would otherwise fall below the mandatory review threshold. The Military Justice Act of 2016 also expanded review under Article 62 and added a government right to appeal a sentence under Article 56(d).

1. Wavier. Military appellate courts are required to review cases over which they have jurisdiction unless the appellant waives his or her right to an appeal. An appellant may not waive his or her right to an appeal when the sentence includes death. R.C.M. 1115.

2. Non-qualifying convictions. All court-martial convictions not reviewable by the service courts are reviewed by a judge advocate to determine if the findings and sentence are correct in law and fact. Article 65, UCMJ, 10 U.S.C. § 865.

B. Review. If the conviction is affirmed by the service court, the appellant may request review by the Court of Appeals for the Armed Forces (CAAF). R.C.M. 1204. The CAAF is a court composed of five civilian judges appointed by the President. Article 67 UCMJ; 10 U.S.C. § 867. With the exception of a case where the sentence is death, the review by the CAAF is discretionary. The appellant may also seek review by the U.S. Supreme Court. R.C.M. 1205. As with the review by CAAF, the review by the Supreme Court is discretionary. However, the Supreme Court review by writ of certiorari is limited to those cases where CAAF has conducted a review, whether mandatory or discretionary, or has granted a petition for extraordinary relief. The Court does not have jurisdiction to consider denials of petitions for extraordinary relief. R.C.M. 1205(a)(4). Servicemembers whose petitions for review or for extraordinary relief are denied by CAAF may seek additional review only through collateral means, for example, petitioning for habeas corpus to an Article III court, which could provide an alternate avenue for Supreme Court review.

C. See Chapter 29 of this deskbook to learn more about the appellate process.

APPENDIX A
FIELD GRADE NJP v. SCM CHEAT SHEET
(Enlisted Soldiers)

	NJP	SCM
Punishment: E1-E4	45 extra duty/45 restriction (60 if no extra duty); reduce to E1; **½ of one month's pay for 2 months**	**1 month confinement**, or 45 extra duty/45 restriction (60 if no extra duty); reduce to E1; **2/3s pay for one month**
Punishment: E5-E6	**45 extra duty**/45 restriction (60 if no extra duty); reduce one grade; ½ of one month's pay for 2 months	2 months restriction; reduce one grade; 2/3s pay for one month
Punishment: E7-E9	**45 extra duty**/45 restriction (60 if no extra duty); ½ of one month's pay for 2 months	2 months restriction; **reduce one grade**; 2/3s pay for one month
UCI applies	Yes	Yes
Soldier can turn down	Yes	Yes
Considered a conviction	No	No
Bring all known offenses at once	Yes	Yes
Bring action after state conviction (DUIs)	Yes (requires GCMCA approval)	Yes (requires GCMCA approval)
Double jeopardy attaches	Yes for other NJP; No for court-martial	Yes
Type of offense	Minor (BCD, 1 year of less)	Minor or Major (except capital offenses, mandatory minimum cases)
Proof beyond a reasonable doubt	Yes	Yes
Military Rules of Evidence apply	No	Yes
Adversarial (cross-exam)	No	Yes
Counsel rights	Consult with counsel; spokesman at hearing (at own expense)	Consult with counsel; lawyer at trial (at own expense)
Appeal or clemency	Soldier has 5 days to file; command acts within 5 days.	Accused has 7 days to submit matters (may get an additional 20)
Review	A judge advocate (usually the TC)	An independent judge advocate (usually an administrative law attorney)

APPENDIX B
MAXIMUM PUNISHMENT CHEAT SHEET

Type	Restriction/Confinement	Forfeitures	Reduction	Discharge
Summarized Art. 15	14 days extra duty/restriction	None	None	None
Company grade Art. 15	14 days extra duty/restriction	7 days	1 grade (E1-E4)	None
Field grade Art. 15	45 days extra duty/restriction (60 days restriction if no extra duty)	½ of 1 month's pay for 2 months	1 or more grades (E1-E4); 1 grade (E5-E6)	None
General officer Art. 15	Same as field grade for enlisted; for officers, 60 days restriction or 30 days house arrest	Same as field grade	Same as field grade	None
Summary CM (enlisted only)	1 month confinement (E1-E4); or 45 days hard labor without confinement (E1-E4); 2 months restriction (E1-E9) (max combination of restriction/hard labor without confinement is 45 days).	2/3 pay for one month	1 or more grades (E1-E4); 1 grade (E5-E9)	None
Special CM (referred to MJ alone)	6 months	2/3 pay per month for 6 months	Lowest enlisted grade. Officers may not be reduced	None
Special CM	12 months	2/3 pay per month for 1 year	Lowest enlisted grade. Officers may not be reduced	BCD (enlisted only)
General CM	Maximum for the offense	Total forfeitures of pay and allowances	Lowest enlisted grade. Officers may not be reduced.	DD (E1-E9, noncommissioned warrant officers); dismissal (commissioned officers)

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CHAPTER 2
UNLAWFUL COMMAND INFLUENCE

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I. INTRODUCTION

A. Basics

1. Unlawful command influence (UCI) is the improper use, or perception of use, of superior authority to interfere with the court-martial process. *See* Gilligan and Lederer, Court-Martial Procedure § 18-28.00 (4th ed. 2015).

2. The primary legal source for the prohibition against UCI is Article 37, UCMJ. This article is reproduced as Rule for Court-Martial (R.C.M.) 104.

B. UCI is consistently called "the mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004); *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010); *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013).

1. The mere *appearance* of UCI can be as devastating to public perception about the fairness of our system as *actual* UCI: "This Court has consistently held that any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned." *United States v. Hawthorne*, 22 C.M.R. 83, 87 (C.M.A. 1956).

2. The distinction between apparent and actual UCI is akin to the distinction between implied and actual bias in the *voir dire* context. The ability of the convening authority, for instance, to pick panel members may make the public wonder if the convening authority is improperly influencing the court-martial.

C. Accusatory v. Adjudicative UCI

1. Unlawful command influence is divided into two types: accusatory, that is, unlawful influence in how the case is brought to trial; and adjudicative, that is, unlawful command influence in how the case is tried.

2. Accusatory UCI includes issues related to preferral, forwarding, and referral of charges. Adjudicative UCI relates to interference with witnesses, judges, members, and counsel. *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995).

D. Who can commit UCI

1. Generally commanders (or their staffs) commit UCI – but *anyone* subject to the code can commit UCI.

a. *Convening authorities* are prohibited from censuring members, the military judge, or counsel with respect to the findings or sentence or the exercise of their functions in the proceedings. Art. 37(a); R.C.M. 104(a)(2).

b. *Anyone subject to the code* is prohibited from attempting to coerce or improperly influence the court-martial or the members, or a convening, reviewing, or approving authority in respect to their judicial acts. Art. 37(a); R.C.M. 104(a)(2).

2. Legal advisors can commit UCI. To avoid committing UCI themselves, SJAs and legal advisors need to be clear with subordinate commanders when they are giving their personal legal views and when they are expressing the views of a superior commander. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994); *see generally United States v. Kitts*, 23 M.J. 105.

3. CAAF has used a "mantle of authority" test. The best way to interpret these cases is to say that *former leaders, peers, and subordinates* of potential witnesses generally do not commit UCI when they discourage someone from supporting an accused. Someone needs to use their rank or status to try to influence the action – friendship, neutral mentorship, or peer pressure is not enough.

a. *United States v. Ayala*, 43 M.J. 296 (C.A.A.F. 1995)

(1) A friend of the appellant sought letters in support of clemency for the appellant from many members of his unit, and even though some promised him letters, all but one declined. According to the friend, the current command sergeant major had asked one witness to review the appellant's counseling file, and then that person decided not to provide a letter; a former sergeant major said he would not provide a letter unless the current sergeant major was also providing one; the current sergeant major told the friend that what he was doing was putting the friend's career at risk; the current and former company commanders did not want to provide a letter because that would be inconsistent with the chain of command; and the battalion commander did not want to speak out against the chain of command. The court said that the appellant did not sufficiently allege UCI because, among other things, he did not allege that anyone acting under a "mantle of authority" worked to influence these potential witnesses.

(2) The court cited *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994) for that proposition. In that case, the alleged UCI came from the *peers* of a lieutenant. The court clearly included convening authorities, commanders, and staff judge advocates in the category of "mantle of authority" but excluded peers.

(3) The dissent noted that the majority's reasoning was "fatally flawed" because Article 37(a) clearly states that *anyone* can commit this kind of UCI.

b. *United States v. Barry*, 78 M.J. 70 (C.A.A.F. 2018)

(1) After receiving bad advice from his staff judge advocate, the convening authority reached out to his friend and fellow Rear Admiral, the Deputy Judge Advocate General of the Navy for advice. The convening authority wanted to set aside the findings and sentence as he felt that the military judge's rulings unfairly prejudiced appellant at trial but DJAG told him not to "put a target" on his back and to approve the findings and sentence.

(2) After ordering a *DuBay* hearing, CAAF concluded that the convening authority considered DJAG's comments legal advice that amounted to actual UCI. CAAF held that anyone subject to the code can commit UCI, like the DJAG, despite the fact that he wasn't a commander, a convening authority, or an SJA.

(3) In a footnote, CAAF held that the mantle of authority test that it had previously applied for nearly 30 years was now simply a factor that the court could consider.

E. CAUTION! When you review the case law on UCI, recognize that the current framework for analyzing the problem was established in 1999, in the case of *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999). Look to pre-*Biagase* cases for help on what types of facts constitute UCI, but look to post-*Biagase* cases for how to analyze the problem. The pre-*Biagase* case law contains inconsistent statements of law.

F. CAUTION! The case law on whether an accused forfeits claims of accusatorial UCI if he does not raise it at trial changed in 1996, to where the accused does forfeit claims of accusatorial UCI if not raised at trial. *United States v. Drayton*, 45 M.J. 180 (C.A.A.F. 1996); *United States v. Brown*, 45 M.J. 389 (C.A.A.F. 1996). The pre-*Drayton/Brown* cases on accusatorial UCI cases may contain bad law on this point.

G. Relationship of UCI to Pretrial Punishment.

1. The facts of a case might implicate both Article 37 (UCI) and Article 13 (Pretrial Punishment). Generally, in order for facts that would satisfy Article 13 to also satisfy Article 37, there needs to be some connecting between the disparaging remarks or treatment and the reluctance of witnesses to appear, the accused feeling forced into entering a plea agreement, or an impact on the actual panel members. *See United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994); *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987).

H. Relationship between UCI and convening authority disqualification in post-trial matters.

1. If a convening authority has otherwise engaged in unlawful command influence, particularly for communicating an inflexible attitude toward punishment or clemency, then he or she might later be challenged on the post-trial action for lack of impartiality. *See United States v. Glidewell*, 19 M.J. 797 (A.C.M.R. 1985); *see generally United States v. Walker*, 56 M.J. 617 (A.F. Ct. Crim. App. 2001); *United States v. Davis*, 58 M.J. 100 (C.A.A.F. 2003). Note that this disqualification is based on a different source of law than UCI.

I. Someone who commits UCI in a court-martial could be punished under Article 98 (Noncompliance with procedural rules). While UCI is a court-martial concept (see generally *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009)), someone who commits something similar to adjudicative UCI in an administrative proceeding could be punished under Article 134 (Wrongful interference with an adverse administrative proceeding).

J. While UCI is generally related to the trial itself, the accused can argue that documents submitted in sentencing (like Article 15s) were themselves tainted by UCI and so should not be admitted. The theory is that the admission of tainted documents might infect the later trial. *United States v. Lorenzen*, 47 M.J. 8 (C.A.A.F. 1997). During sentencing phase of trial, the defense litigated the admissibility of NJP based on a claim of unlawful command influence. The service court said that if the appellant had wanted to contest the UCI issue, he could have turned down the Article 15. CAAF disagreed. An accused does not waive UCI issues related to an Article 15 by accepting the Article 15 as his forum. However, in this case, there was no prejudice.

II. ADJUDICATIVE UCI

A. Witness Intimidation.

1. Direct attempts to influence witnesses.

a. *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004). Prior to trial, the defense attempted to obtain character witnesses but was prevented from doing so due to unlawful command influence on the part of the convening authority, a naval commander. The military judge conducted *Biagase* analysis, found UCI, and applied the remedy of dismissal of the charges and specifications with prejudice. The NMCCA agreed that there was UCI, but "concluded that the military judge abused his discretion in fashioning a remedy," and ordered the military judge to "select an appropriate remedy short of dismissal." CAAF applied the abuse of discretion standard of review and "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." While the court has long held that dismissal is a drastic remedy, "dismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings." The MJ "precisely identified the extent and negative impact of the [UCI] in his findings of fact." The MJ further concluded the Government failed to prove that the UCI had no impact on the proceedings and explained why other remedies were insufficient.

b. *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994). An officer witness for the accused testified that members of the Junior Officers Protection Association (JOPA) pressured him not to testify. This did not amount to UCI because JOPA lacked "the mantle of command authority" but may have been obstruction of justice. A petty officer also was harassed by someone who outranked him and advised not to get involved. This did amount to UCI, but that UCI was harmless beyond a reasonable doubt.

c. *United States v. Gleason*, 43 M.J. 69 (C.A.A.F. 1995). A sergeant major was put on trial for, among other things, contacting a retired soldier to kill the captain who reported him for misconduct. The service court found: "there was no single act on which to hang the label of unlawful command influence. Rather, it was a command climate or atmosphere created by the action of [the commander]. His actions of relieving the command structure of Company B without explanation; the characterization of the defense counsel as the enemy; returning the appellant to Okinawa in chains and under guard and placing him in the brig and requiring unit members to receive command permission to visit him; the inspections and unit lock-downs without explanation; adverse officer efficiency reports and reliefs of individual [sic] without explanation shortly after testifying for the appellant created . . . a pervasive atmosphere in the battalion that bordered on paranoia. We find that the command climate, atmosphere, attitude, and actions had such a chilling effect on members of the command that there was a feeling that if you testified for the appellant your career was in jeopardy." CAAF agreed, found that UCI pervaded entire trial, and set aside the contesting findings and sentence.

d. *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987). The chain of command briefed members of the command before trial on the "bad character" of the accused, to include disclosing his unit file. During trial, the 1SG "ranted and raved" outside the courtroom about NCOs condoning drug use. After trial, NCOs who testified for the accused were told "that they had embarrassed" the unit. Court found UCI necessitated setting aside findings of guilt and the sentence.

e. *United States v. Newbold*, 45 M.J. 109 (C.A.A.F. 1996). Ship commander held all-hands formation at which he referred to four sailors accused of rape as "rapists," "scumbags" and "low-lifes." He repeated the berating at additional formations and in meetings with female

crewmembers. CAAF found no UCI because the commander was not a convening authority, no panel members were drawn from the ship in question, there was no allegation that the accused was deprived of witnesses, and the UCI did not cause the accused to plead guilty.

f. *United States v. Plumb*, 47 M.J. 771 (A.F. Ct. Crim. App. 1997). The appellant was a captain in the Air Force Office of Special Investigations (AFOSI). He was accused of fraternization, adultery, and conduct unbecoming. AFOSI agents (in this case, members of the appellant's chain of command or otherwise agents of the commander) pressured, harassed, targeted for prosecution, and otherwise interfered with and intimidated defense witnesses. The court agreed with the trial judge that the defense presented some evidence of UCI but said that the trial judge did not take enough remedial measures to ensure that there was no appearance that UCI affected the proceedings, and here, where there was such a large volume of potential UCI issues, that was needed. The court reversed the findings.

g. *United States v. Jameson*, 33 M.J. 669 (N.M.C.M.R. 1991); *United States v. Jones*, 30 M.J. 849 (N.M.C.M.R. 1990); *United States v. Jones*, 33 M.J. 1040 (N.M.C.M.R. 1991) (related cases). Two witnesses testified on behalf of an accused who was charged with engaging in lesbian activities. The command distributed copies of transcripts of their testimony and the two were relieved of drill sergeant duties and had their MOSs revoked. This was evidence of unlawful command influence that might have affected the action in the case.

h. *United States v. Bradley*, 48 M.J. 777 (A.F. Ct. Crim. App. 1998) (following remand to *Dubay* hearing in *United States v. Bradley*, 47 M.J. 715 (A.F. Ct. Crim. App. 1997). A potential defense witness called the OSJA to find out where to go for trial. The person who answered the phone was the SJA, who identified himself. The defense witness then began asking questions about the case, which the SJA answered appropriately. After hearing about the case, the defense witness said that he might now not want to testify. The SJA then realized he was talking to a defense witness and said he had to testify and that it was not his intention to dissuade the witness from testifying. The court found that because the witness was the one that initiated the questions and because the SJA gave the witness appropriate instructions, there was no UCI.

i. *United States v. Clemons*, 35 M.J. 770, 772 (A.C.M.R. 1992). Prior to the court-martial, the battalion commander called in three potential defense witnesses and told them that they needed to be careful who they were character references for. The military judge found UCI and ordered several remedies. The court found that the military judge's remedies prevented the proceedings from being tainted.

j. *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010). The senior recruiter at the appellant's office ordered the appellant not to talk to any potential witnesses; prohibited the appellant from contacting anyone in the unit for non-work related issues; openly disparaged the appellant and expressed his certainty of the appellant's guilt in front of others; intimidated potential defense witnesses; and intimidated the appellant from filing an IG complaint about these activities. The military judge found UCI and implemented some remedies (the military judge did not follow *Biagase* analysis, though). CAAF reversed the findings and sentence because there was no evidence in the record that the remedies were actually implemented.

2. Indirect or Unintended Influence.

a. *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984). CG addressed groups over several months on the inconsistency of recommending discharge-level courts and then having leaders testify that the accused was a "good soldier" who should be retained. The message

received by many was "don't testify for convicted soldiers." The guilty plea was affirmed but the sentence was reversed. *See also United States v. Glidewell*, 19 M.J. 797 (A.C.M.R. 1985); *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986); *United States v. Giarratano*, 20 M.J. 553 (A.C.M.R. 1985); *United States v. Anderson*, 21 M.J. 670 (A.C.M.R. 1985).

b. *United States v. Francis*, 54 M.J. 636 (A. Ct. Crim. App. 2000). Accused's squad and platoon leaders told other NCOs and soldiers in the unit to stay away from the accused and they feared "trouble by association." Without ruling that those facts did or did not amount to some evidence of UCI, the court found that the government satisfied its burden under *Biagase*.

c. *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998) (companion case to *Griffin*, discussed in the Accusatorial UCI section, below). In addition to a command policy letter that has UCI issues (but which was quickly remedied), the battery commander said at a PT formation that there were drug dealers in the battery and that Soldiers should stay away from those involved with drugs. The CG ordered a 15-6 investigation when he learned about the battery commander's comments and the commander retracted his statements at another formation. Later, the trial counsel directed that the command should interview some potential alibi witnesses and had the commander read the witnesses their rights. The military judge conducted exhaustive fact finding and found no actual UCI. CAAF said that it had no reason to believe that the military judge was affected by UCI, and the appellant had not raised an issue that he chose a judge alone trial because he was concerned about having his panel tainted by UCI. While some evidence of UCI was raised, the court was satisfied beyond a reasonable doubt (particularly because of the thorough actions taken by the military judge) that the proceeding was not affected by UCI.

d. *United States v. Drayton*, 45 M.J. 180 (C.A.A.F. 1996). The appellant was convicted of shoplifting from the PX. Two weeks after he was charged with shoplifting, the battalion commander held an NCOPD where he showed the NCOs security tapes from the PX (but not the ones he was in). Six witnesses testified for the appellant during sentencing. The court found that this amounted to just a bare allegation because there was no allegation that any witness was actually influenced.

e. *United States v. Ashby*, 68 M.J. 108 (C.A.A.F 2009). The appellant did not show that comments made by senior officials following the Aviano gondola incident amounted to some evidence of UCI.

B. Panel member composition. Court-martial stacking is a form of unlawful command influence.

1. *United States v. Upshaw*, 49 M.J. 111 (C.A.A.F. 1998). The issue is the convening authority's intent. If the motive for choosing a certain panel composition (even if mistaken) is benign, then systematic inclusion or exclusion of certain members may not be improper. In this case, the exclusion of some members was just a mistake, so no UCI. *See also United States v. McKinney*, 61 M.J.767, (A.F. Ct. Crim. App. 2005).

2. *United States v. White*, 48 M.J. 251 (C.A.A.F. 1998). Convening authority's memo directing subordinate commands to nominate their "best and brightest staff officers," and that "I regard all my commanders and their deputies as available to serve as members" did not constitute court packing.

3. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986). The staff judge advocate excluded junior members because he believed that they were more likely to adjudge light sentences. This belief came from discussion with past panel members, and the convening authority considered

recent, unusually light sentences at the time that he made his selections. The court reversed the sentence (the trial was a guilty plea before a panel).

4. *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991). After a series of results that they disagreed with, the SJA and trial counsel decided to try to exclude certain members from the panel through the use of peremptory challenges. When the military judge denied these challenges, the SJA decided to shuffle the panel. After an investigation, the higher level commander withdrew the original convening authority's power to convene courts. While the initial convening authority's actions were UCI, the accused was tried by a new panel that was not tainted by the UCI so no prejudice.

5. *United States v. Brocks*, 55 M.J. 614 (A.F. Ct. Crim. App. 2001). Base legal office intentionally excluded all officers from the Medical Group from the list of court member nominees sent to the convening authority. The SJA and chief of justice based this action on the fact that all four alleged conspirators to distribute cocaine and many witnesses came from the Medical Group. Decision to exclude came from desire to avoid conflicts and unnecessary challenges for cause. The exclusion of the Group nominees did not constitute UCI. Motive of SJA and staff was to protect the fairness of the court-martial, not to improperly influence it.

6. *United States v. Riesback*, 77 M.J. 154 (C.A.A.F. 2018). Following voir dire and challenges, the seven member panel that convicted and sentenced appellant was composed of five women, four of whom were victim advocates trained to provide support and counseling to victims of rape and sexual assault. CAAF held that the government failed to prove that the panel selection process was not motivated by gender-based court stacking. Additionally, the government failed to prove beyond a reasonable doubt that the appellant received a fair trial from an impartial panel free from the effects of UCI.

C. Influencing the panel members' decisions.

1. Article 37 says that the convening authority cannot censure the panel members based on their findings or sentence, and no one may consider a person's service on the panel when preparing evaluation reports or when making assignment decisions.

2. Through command or commander policy in the deliberation courtroom.

a. *United States v. Kirkpatrick*, 33 M.J. 132, 133 (C.M.A. 1991). The military judge gave an explicit sentencing instruction on the Army's policy regarding use of illegal drugs: "[H]ere we have a senior noncommissioned officer directly in violation of that open, express, notorious policy of the Army: Through[sic] shalt not [use marijuana]." The court noted that it has long condemned any reference to department or command policies being placed before members charged with sentencing responsibilities. This implicated UCI concerns in the sense that the government attempted to, in effect, bring the commander into the courtroom and constituted plain error which was not waived by the defense's failure to object; sentence set aside.

b. *United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002). SPCMCA sent an email to subordinate commanders "declaring war on all leaders not leading by example." The email also stated the following: "No more platoon sergeants getting DUIs, no more NCOs raping female soldiers, no more E7s coming up 'hot' for coke, no more stolen equipment, no more approved personnel actions for leaders with less than 260 on the APFT, …., -- all of this is BULLSHIT, and I'm going to CRUSH leaders who fail to lead by example, both on and off duty." At a subsequent leaders' training session, the commander reiterated his concerns. After consulting with the SJA, the commander issued a second email to clarify the comments in the first. The commander stated that he was expressing his concerns about misconduct, but

emphasized that he was not suggesting courses of action to subordinates, and that each case should be handled individually and appropriately in light of all circumstances. He specifically addressed duties as a court-martial panel member and witness. At trial, the defense counsel challenged all of the panel members from the brigade based on implied bias and potential for unlawful command influence. The military judge denied the challenge using R.C.M. 912 as the framework. CAAF remanded for a *DuBay* hearing, stating that the military judge should have used an unlawful command influence framework to determine the facts, decide whether those facts constituted UCI, and conclude whether the proceedings were tainted.

c. *United States v. Baldwin***,** 54 M.J. 308 (C.A.A.F. 2001). Nine months after her court-martial, appellant filed an affidavit alleging that the GCMCA conducted OPDs where he commented that officer court-martial sentences were too lenient and stated that the minimum should be at least one year. Appellant also alleged that her court-martial was interrupted by one of these sessions (mandatory for all officers assigned to the installation). The court stated, "We have long held that the use of command meetings in determining a court-martial sentence violates Article 37." The court found that this allegation was sufficient to raise a UCI issue and remanded for a limited hearing.

d. *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003). Appellant was convicted of various offenses to include rape, indecent assaults, indecent acts, and maltreatment of trainees at Aberdeen Proving Ground. He contended that he was denied a fair trial because of apparent UCI related to pretrial publicity and official comments related to his case. As support, appellant cited the Army's "zero tolerance" policy on sexual harassment; a chilling effect on the command decision-making process stemming from the Secretary of the Army's creation of the Senior Review Panel to examine gender relations; public statements made by senior military officials suggestive of appellant's guilt; and public comments by members of Congress and military officials regarding the "Aberdeen sex scandal." In preparation for filing motions at trial, the defense counsel interviewed the GCMCA and SPCMCA and cross-examined them at trial, and conducted extensive voir dire of the panel members on this issue. The court held that there was no nexus between the purported unlawful or unfair actions of senior military officials and the convening authority's decision to refer the case. Additionally, there was no nexus between acts complained of and any unfairness at trial and no evidence that court members were influenced to return guilty verdicts because that is what the Army or superiors wanted. CAAF listed several factors that existed in this case that showed that, in this case, the government proved beyond a reasonable doubt that UCI (if it existed) did not taint the proceeding.

e. *United States v. Dugan*, 58 M.J. 253 (C.A.A.F. 2003). Junior panel member provided defense counsel with a letter after court-martial detailing her concerns regarding statements made during sentencing deliberations. Panel member alleged that another member reminded the panel that the GCMCA would review their sentence and they needed to make sure they sent a "consistent message." (GCMCA held a "Commander's Call" several weeks before during which drug use was discussed). Defense counsel requested a post-trial Article 39a session. Military judge denied the request. CAAF determined the defense counsel successfully raised unlawful command influence and the Government must rebut the allegation and remanded for *DuBay* hearing. Of note, CAAF pointed out the limitations in place in questioning the panel members during the *DuBay* hearing.

f. *United States v. Youngblood*, 47 M.J. 338 (C.A.A.F. 1997). Staff meeting at which Wing commander and SJA shared perceptions of how previous subordinate commanders had

"underreacted" to misconduct created implied bias among three senior court members in attendance. The court reversed the case because the military judge failed to grant challenges for cause against those members without reaching the UCI issue. The court noted that despite the member's response that they could disregard the comments, it is "asking too much" to expect members to adjudge sentence without regard for potential impact on their careers.

g. *United States v. Martinez*, 42 M.J. 327 (C.A.A.F. 1995). Wing commander's "We Care About You" policy letter setting out reduction in grade and $500 fine "as a starting point" for first-time drunk drivers was clearly UCI, notwithstanding letter's preface that "[p]unishment for DWI will be individualized." However, the defense counsel was able to conduct extensive *voir dire* of the panel members and the military judge gave a proper curative instruction, so UCI was harmless beyond a reasonable doubt.

h. *United States v. Pope*, 63 M.J. 68 (C.A.A.F. 2006). Appellant was an Air Force recruiter involved in unprofessional conduct with prospective applicants. The Military Judge admitted (over defense objection that this was injecting command policy into the deliberation process) a letter offered by the government at sentencing which argued Air Force core values and endorsed "harsh adverse action" for those who committed recruiter misconduct. CAAF held that admitting the letter (especially without a limiting instruction) raised the appearance of improper command influence because it conveyed the commander's view that harsh action should be taken against an accused. CAAF was not convinced beyond a reasonable doubt that the members were not influenced by the letter. The sentence was set aside with a rehearing authorized.

i. *United States v. Reed*, 65 M.J. 487 (C.A.A.F. 2008). In support of an unlawful command influence motion, appellant introduced an email from the convening authority to his subordinates addressing a variety of command management issues and containing a thirty-one page slideshow. One slide contained the following statement: "Senior NCO and Officer misconduct – I am absolutely uncompromising about discipline in the leader ranks." Some noted examples included: "BAH Fraud, Fraternization, DUI, Curfew violations, Soldier abuse, Sexual misconduct." The appellant was charged with BAH fraud. Later, the CA, upon SJA advice, issued a clarifying email. The military judge allowed the defense to fully litigate the issue. The other convening authorities in transmittal chain testified that they had exercised independent judgment, and the military judge allowed extensive voir dire of the panel members. CAAF held that the government met its burden of demonstrating beyond a reasonable doubt that the proceedings were not affected by actual unlawful command influence or the appearance of unlawful command influence.

j. *United States v. Ayers*, 54 M.J. 85 (C.A.A.F. 2000). The appellant engaged in misconduct with a trainee at Fort Lee about the same time that the trainee abuse scandal at Aberdeen Proving Ground was happening. He filed a UCI motion based on the news coverage that accompanied the Aberdeen Proving Ground incidents, saying that the senior leaders comments associated with that scandal and others around the country would also affect his trial, or at least cause the perception of UCI at his trial. Here, the court could find no facts that connected any of that coverage to his actual trial, so the appellant failed the first *Biagase* factor.

3. By the commander physically being in the courtroom.

a. *United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006). During the government's closing argument on findings, the convening authority was present in the courtroom wearing a flight suit. Based on the apparent recognition of the convening authority by several panel members, defense counsel moved for a mistrial, which was denied by the military judge. CAAF set

aside the findings and sentence without prejudice, but limited the approved sentence at any rehearing to a punitive discharge. The military judge is the "last sentinel" in the trial process to protect a court-martial from UCI. The trial developments in this case raised "some evidence" of unlawful command influence and the military judge failed to inquire adequately into the issue. Specifically, the convening authority was present in the courtroom wearing a flight suit when the government's argument characterized appellant's conduct as a threat to the aviation community; the senior member of the panel was a subordinate member of the convening authority's command (and the subject of an unsuccessful challenge for cause); and there was some evidence that the panel was watching the convening authority during argument. Further, the military judge failed to then conduct *Biagase* analysis. CAAF noted that a convening authority is not barred from attending a court-martial, "[b]ut as this case illustrates, the presence of the convening authority at a court-martial may raise issues."

b. *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979). The military judge abused his discretion in denying mistrial where accuser's company commander's presence throughout proceedings was "ubiquitous" and commander engaged in "patent meddling in the proceedings."

c. While it is not *per se* UCI for the commander to be in the courtroom, if the defense raises the issue, it is fair to say that the commander being in the courtroom will *per se* satisfy the first *Biagase* factor. The burden will now shift to the government to prove beyond a reasonable doubt that the commander being in the courtroom did not constitute UCI, or if it did, that it did not influence the proceeding. So, the ultimate question is, if the commander wants to be in the courtroom (or if the SJA wants to be in the courtroom), is it worth it? In *Harvey*, the court stated: "We share [the responsibility to guard against UCI] with military commanders, staff judge advocates, military judges, and others involved in the administration of military justice. Fulfilling this responsibility is fundamental to fostering public confidence in the actual and apparent fairness of our system of justice." *Harvey*, 64 M.J. at 17. Probably the best solution is to find a way to observe the court-martial without physically being in the courtroom, or save observation moments for contested judge-alone cases.

4. By bringing the commander in the courtroom via argument.

a. *United States v. Mallett*, 61 M.J.761 (A.F. Ct. Crim. App.2005). Trial counsel's sentencing argument injected unlawful command influence into the proceedings because the TC referred to commanders in her argument. Specifically, the TC referred to "commander's calls" where the commander "would warn us to stay away . . . not to use drugs." After stating that the commander could not impose any particular punishment, but could only send the charges to court-martial, the TC then posited, "what would a commander say to get his unit's attention and say, 'I mean business about drugs,' if he had the authority to be the judge and jury in a case where you are, in essence, the jury deciding this?" The TC concluded that, a sentence that would "get people's attention" is "18 months [of] confinement and a bad conduct discharge." Trial defense counsel did not object to the argument. The court held that the TC's comments were improper under R.C.M. 1001(g), which expressly prohibits making reference to a convening authority or command policy in sentencing arguments and amounted to plain error, despite the lack of defense objection at trial. The court found that the appellant suffered prejudice and so set aside the sentence.

b. *United States v. Sparrow*, 33 M.J. 139 (C.M.A. 1991). The trial counsel argued that "General Graves has selected you. He said, "Be here. Do it. You have good judgment. I trust you. I know you'll do the right thing." The defense did not object. The court said that if there was UCI, it did not affect the proceeding.

5. Through the exercise of rank in the deliberation room.

a. Improper for senior ranking court members to use rank to influence vote within the deliberation room, *e.g.*, to coerce a subordinate to vote in a particular manner. Discussion, Mil. R. Evid. 606 (MCM 2016 ed.).

b. *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985) Allegation that senior officer cut off discussion by junior members, remanded to determine if senior officer used rank to "enhance" an argument.

c. *United States v. Lawson*, 16 M.J. 38, 41 (C.M.A. 1983). Straw votes are informal votes taken by members to see where they stand on the issues. They are not authorized by the RCMs or the UCMJ but are not specifically prohibited by these sources. However, the use of straw votes allows rank to enter the courtroom because it works against the anonymity rules.

d. *United States v. Reynolds*, 40 M.J. 198 (C.M.A. 1994). A split court could not agree whether the president of the panel (a major) made remarks (calling other members "captain" and using a tone of voice to impress inferiority of their rank) amounted to UCI.

6. Through surrogate witnesses. *United States v. Yerich*, 47 M.J. 615 (A. Ct. Crim. App. 1997). Testimony from a government witness (SFC) that the accused had no rehabilitative potential in the military did not constitute unlawful command influence. Court rejects argument that SFC's testimony was adopted, and therefore attributable to, the commanding officer.

7. Through improper rehabilitation evidence in sentencing. *United States v. Cherry*, 31 M.J. 1, 5 (C.M.A. 1990); *United States v. Ohrt*, 28 M.J. One of the problems (of many) with having a commander say, "No rehabilitation potential in the military" is that the commander has essentially told the panel what he or she thinks is the appropriate punishment: one that includes a punitive discharge.

8. Through the terms of a co-accused's agreement with the convening authority. *United States v. Schnitzer*, 44 M.J. 380 (C.A.A.F. 1996). Disclosure, during members trial, of the terms of co-accused's pretrial agreement does not *per se* bring the CA into the courtroom, provided it is otherwise admitted for a valid purpose.

D. Influencing the independent discretion of the military judge.

1. Prohibition: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . . ." UCMJ, art. 37(a).

2. Efficiency Ratings: "[N]either the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge." UCMJ art. 26(c).

3. In cases involving the military judge, the pressure will often come from people other than the convening authority – like other military judges or staff judge advocates.

a. *United States v. Rice*, 16 M.J. 770 (A.C.M.R. 1983). Improper for DSJA to request that the senior judge telephone the magistrate to explain the seriousness of a certain pretrial confinement issue.

b. *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991). Senior judge's letter, written to increase sentence severity, subjected judges to unlawful command influence.

c. *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976). Commander and SJA inquiries that question or seek justification for a judge's decision are prohibited.

d. *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006).

(1) The trial counsel, in concert with the staff judge advocate, attacked the character of the military judge in voir dire, accusing her of having a social interaction (a date) with the civilian defense counsel that was on the case. The MJ recused herself, and the fourth judge on the case granted a motion for a change of venue, disqualified the SJA and the convening authority from taking post-trial action in the case, and barred the SJA from attending the remainder of the trial.

(2) CAAF found that improperly seeking recusal of the military judge was actual UCI. Because the same trial counsel remained an active member of the prosecution, the government's later actions and remedial steps were undermined. Further, a reasonable observer would have significant doubt about the fairness of this court-martial in light of the government's conduct. Neither actual nor apparent unlawful command influence have been cured beyond a reasonable doubt in this case. CAAF dismissed the case with prejudice.

e. *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013). Unlawful command interference where trial counsel used the judge's official personnel file to find personal family information to seek recusal of the military judge. The SJA also called the circuit military judge about the issue. The trial judge recused himself. CAAF dismissed the case with prejudice.

f. *United States v. Tilghman*, 44 M.J. 493 (C.A.A.F. 1996). Unlawful command interference when commander placed accused into pretrial confinement in violation of trial judge's ruling.

g. *United States v. Campos*, 42 M.J. 253 (C.A.A.F. 1995). The military judge said on the record that he believed he was relieved of his position as senior judge because his superiors believed he was giving lenient sentences. During *voir dire*, he said he thought he could still be fair. Based on extensive trial record, CAAF found no nexus between assignment of other judge and accused's trial, that appearance taken care of at Art. 39(a) session and trial, and no abuse of discretion in not recusing himself.

h. *United States v. Allen*, 33 M.J. 209 (C.M.A. 1991). When making the decision to detail a judge to a case, a senior judge made the comment that a judge that was under consideration had a reputation for being a light sentencer and pro-defense. At a conference of SJAs, one session discussed "Problems with the Judiciary" where one of the action items was to approach the TJAG about how to deal with "inappropriate" judges. The court found that this raised the appearance of UCI, however, the UCI did not affect the proceeding.

E. Influencing the Defense Counsel.

1. Article 37 prohibits the convening authority from censuring, reprimanding, or admonishing the defense counsel with respect to the exercise of his or her functions in the conduct of the proceeding.

2. *United States v. Fisher*, 45 M.J. 159 (C.A.A.F. 1996). During a recess interview with the DC just before he was to be cross-examined on suppression motion, the CA told the DC that he questioned the ethics of anyone who would try to get results of urinalysis suppressed. The court found that this violated Art. 37, but found no effect on trial process because the defense counsel skillfully crossed the CA, and because defense never raised the claim until after trial. The court granted a remedy of sending the case back for a new action by a different convening authority.

3. *United States v. Crawford*, 46 M.J. 771 (C.G.Ct.Crim.App. 1997). The convening authority "dressed down" the defense counsel, told her the sentence was too light, that the appellant had

lied to her and encouraged her to put on false evidence. The defense counsel took offense and told him he better have proof of accusations like that. The convening authority turned to the appellant, who was also there, and said he was going to investigate whether he had perjured himself. The court found a violation of Art. 37. This happened after trial, so there was no effect on the trial. As a preventative matter, the convening authority withdrew himself from acting on the case. With him no longer involved in the case, the court could find no prejudice.

F. Influencing a subordinate commander in the exercise of their clemency actions. *United States v. Johnson*, 54 M.J. 32 (C.A.A.F. 2000). The appellant alleged that the intermediate commander strongly supported a suspension of some punishment. The original convening authority left command and a new convening authority, with a tougher stance, came in. Then, the intermediate commander decided not to go to bat for him. Following a *Dubay* hearing, the *Dubay* military judge found no evidence of UCI and the court found that military judge's findings were not clearly erroneous.

G. Influencing the accused to plead guilty.

1. If the accused enters his pleas of guilty because he is afraid to go to trial before a court that he believes has been unlawfully influenced (and so will not give him a fair trial), then courts may find that UCI has impacted the proceedings. *United States v. Gleason*, 43 M.J. 69 (C.A.A.F. 1995); *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986); *United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986).

2. Note that this is different than the accused negotiating for a better pretrial agreement in exchange for waiving an accusatorial UCI issue. *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995);

III. ACCUSATORY UCI

A. Independent discretion by each commander.

1. Article 37(a) states that *no one* may attempt to coerce or influence the action of *any* convening, approving, or reviewing authority with respect to his judicial acts.

2. R.C.M. 306 says that each commander has discretion to dispose of offenses, and that a superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

3. The key to these problems is to recognize that if the superior commander disagrees with how the subordinate commander is disposing of the case, the superior commander should withhold that case to his or herself rather than trying to get the subordinate commander to change his or her mind. This may cause some logistical problems but that is the cost of preventing UCI.

B. Cases.

1. *United States v. Martinez*, 42 M.J. 327 (C.A.A.F. 1995). The UCI occurred after the GCMCA had referred the case, so no impact on the accusatorial process.

2. *United States v. Rivera*, 45 C.M.R. 582, 583 (A.C.M.R. 1972). It was improper for a battalion commander to return a request for Article 15 to company commander with comment, "Returned for consideration for action under Special Court-Martial with Bad Conduct Discharge." The court noted that "The fine line between lawful command guidance and unlawful command control is determined by whether the subordinate commander, though he may give consideration to the policies and wishes of his superior, fully understands and believes that he has a realistic choice to accept or reject them." Here, the court found that the company commander did not and so reversed the case.

3. *United States v. Griffin*, 41 M.J. 607 (A. Ct. Crim. App. 1994). The division commander issued a five-page policy letter on physical fitness and physical training and addressed other fitness considerations such as weight, smoking, drinking, and drugs, stating: "There is no place in our Army for illegal drugs *or for those who use them*. This message should be transmitted clearly to our soldiers, and we must work hard to ensure that we identify drug users through random urinalysis and health and welfare inspections." The SJA took action when he learned about the letter and had the CG issue a new letter without the offensive language. The defense counsel further improved his client's position by negotiating a waiver of the issue. While there could have theoretically been UCI in the referral process, the issue was waived. See also *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998) (arose out of the same facts as *Griffin*).

4. *United States v. Reed*, 65 M.J. 487 (C.A.A.F. 2008). In support of an unlawful command influence motion, appellant introduced an email from the convening authority to his subordinates addressing a variety of command management issues and containing a thirty-one page slideshow. One slide contained the following statement: "Senior NCO and Officer misconduct – I am absolutely uncompromising about discipline in the leader ranks." Some noted examples included: "BAH Fraud, Fraternization, DUI, Curfew violations, Soldier abuse, Sexual misconduct." The appellant was charged with BAH fraud. The defense also presented evidence that a deputy commander of a subordinate unit addressed a "newcomer's briefing" with a warning that "BAH fraud is an automatic court-martial here." Further, the CA contacted the appellant's rater and senior rater during the preferral process to ensure that the accused got bad remarks on his evaluation. Later, the CA, upon SJA advice, issued a clarifying email. The military judge allowed full litigation on the issue, and the other convening authorities in transmittal chain testified that they had exercised independent judgment, and the military judge allowed extensive voir dire of the panel members. CAAF held that the government met its burden of demonstrating beyond a reasonable doubt that the proceedings were not affected by actual unlawful command influence or the appearance of unlawful command influence.

5. *United States v. Gerlich*, 45 M.J. 309 (C.A.A.F. 1996). After a commander subordinate to the SPCMCA adjudged an Art. 15, the victim went to the IG, when then wrote to GCMCA, who told the SPCMCA that he needed to relook the case because he thought that the Art. 15 would not achieve the GCMCA's justice goals. He told the SPCMCA to decide whether further action under the UCMJ was warranted. The SPCMCA then directed the lower commander to set aside the Art. 15. Charges were ultimately referred. The SPCMCA eventually testified and said that he used his independent judgment when deciding on the ultimate disposition and changed his mind based on what he learned in the subsequent investigation. CAAF stated, "[W]e have previously recognized the difficulty of a subordinate ascertaining for himself or herself the actual influence a superior has on that subordinate." Here, the court thought that the SPCMCA *considered all of the relevant information prior to being told to relook the case* and only changed his mind after receiving a letter from the superior commander *that suggested that he change his mind*. CAAF found that the government had not met its burden to show no UCI and so reversed the findings.

6. *United States v. Wallace*, 39 M.J. 284 (C.M.A. 1994). A company commander imposed Art. 15 punishment on the accused. The battalion commander learned of *additional* misconduct by the accused and told subordinate commander, "You may want to reconsider the [company grade] Article 15 and consider setting it aside based on additional charges." The company commander considered the new information, set aside the Article 15, preferred charges and recommended a court-martial. The company commander testified that he felt influenced to reconsider his original decision, but not to come to any certain conclusion after having reconsidered the new information, and that he did not feel any pressure related to making his final decision. CAAF said that these facts did not amount to UCI (note, this is a pre-*Biagase* case so that analysis was

not used). The military judge had fully developed the record and CAAF agreed with the trial judge that the company commander had exercised independent discretion.

7. *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004). In a conference call with three subordinate officers, the senior officer "very clearly and forcefully made his opinion known" to one of the subordinates that the case was too serious for nonjudicial punishment and that article 32(b) investigation was warranted. The military judge found that the subordinate officer knew that the disposition of the case was his to make. Viewed in a vacuum, the conference call would look like UCI, however the military judge's fact-finding determined that UCI did not actually occur. In particular, the subordinate commander initiated the conference call, and after the call was over, it was clear that the subordinate commander was free to make his own decision.

8. *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984). There was no evidence that the commander's improper comments had any impact on any subordinate's decision to swear to charges or recommend a particular disposition of charges.

9. *United States v. Johnston*, 39 M.J. 242 (C.M.A. 1994). The appellant did not present any evidence that the subordinate commanders were pressured into preferring or transmitting charges.

10. *United States v. Drayton*, 45 M.J. 180 (C.A.A.F. 1996). In a post-trial affidavit, the appellant asserted that when he talked to his company command, he said he thought that referral to a court-martial was a bit harsh for shoplifting. The appellant said that the commander told him that he agreed but the battalion commander wanted a court-martial. The company commander, in an affidavit, said that he met with the battalion commander and discussed the case, but that he exercised independent discretion. The court held that the appellant waived this claim by not raising it at trial.

11. *United States v. Brown*, 45 M.J. 389 (C.A.A.F. 1996). The original brigade commander went on television and said that a group of Soldiers in his command had brought shame to the Brigade. The SJA advised him to step aside in the case and he did. The case was transferred to a different brigade commander. The court found no error, saying that no one presented any information that this subsequent commander did not exercise complete, independent control over his jurisdiction.

12. *United States v. Weasler*, 43 M.J. 15 (1995). The company commander was going to go on leave. She told her subordinate (who would be the acting commander) to sign the papers when they came in. She testified that if he had done anything differently than she had directed, then she would have re-preferred the charges. The appellant waived the issue as part of a pretrial agreement but raised the ability to waive UCI in a pretrial agreement on appeal. The court found that this was UCI, but because it was accusatorial UCI, could be waived as part of a pretrial agreement.

13. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). The company commander gave the appellant an Article 15. The SJA, described as "aggressive," believed the case should be resolved at a court-martial and directed his subordinates to tell the brigade commander to prosecute this case, or else they would take the case up a level (to the commanding general). The brigade commander's first reaction was that the case probably should be at a field grade Art. 15. He eventually preferred charges and transmitted the case to the commanding general but said he did not feel pressured to do so. The court found that the SJA was expressing his personal opinion and not that of the superior commander and that the brigade commander's decision was not tainted by UCI.

14. *United States v. Richter*, 51 M.J. 213 (C.A.A.F. 1999). In a post-trial affidavit, the appellant alleged that the commander was coerced into preferring charges by the staff judge advocate's office, who threatened to remove the command team from the command if they didn't prefer

charges. The court found that the accused forfeited this claim by not raising it at trial because there was no evidence that the appellant could not have found out about this problem before trial.

15. *United States v. Villareal*, 52 M.J. 27 (C.A.A.F. 1999). The parties signed a pretrial agreement. Then, the convening authority withdrew from the agreement. He said that he received a lot of pressure from the victim's family members so he sought the advice of a mentor, who happened to be the acting superior convening authority. The superior commander said, "what would it hurt to send the issue to trial," and then the convening authority withdrew from the agreement. Following the withdrawal, the case was transferred to a new command. The court found that because the subordinate commander reached out for the advice, there was no actual UCI and even if there was apparent UCI, that was cured by the transfer of jurisdiction. (The court then examined if the withdrawal from the PTA was otherwise proper).

IV. APPARENT UCI

A. Basics

1. Allegations of unlawful command influence are reviewed for actual unlawful command influence as well as the appearance of unlawful command influence. "Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system." *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013).

2. In apparent UCI claims, the government must prove beyond a reasonable doubt that the unlawful command influence did not place an "intolerable strain" upon the public's perception of the military justice system and that "an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding.

B. Cases

1. *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013). Appellant was charged with one specification of child pornography. Trial counsel and unnamed other officers in discussing the military judge's definition of the term "minor," speculated that the military judge may have had a young wife. Trial counsel examined the military judge on the record who stated that he married his wife when she was seventeen. CAAF held that an objective, disinterested observer, fully informed of these facts and circumstances might be left with the impression that the prosecution in a military trial has the power to manipulate which military judge presides in a given case "depending on whether the military judge is viewed as favorable or unfavorable to the prosecution's cause…"

2. *United States v. Hutchins*, 72 M.J. 294 (C.A.A.F. 2013). Secretary of the Navy made widely disseminated, public comments about appellant's guilt which left no doubt about his strong view that appellant had already received clemency from the convening authority and would receive no more. Comments were made despite the case being considered on appeal and during the annual Naval Clemency & Parole Board (NC&PB) review process. CAAF held that the Secretary's "disturbing and inappropriate comments" created an intolerable strain on the public perception of the military justice system. The NC&PB's role was, however, limited to one of only advising the Secretary on a matter committed, by statute, to his discretion so the court's recourse was to criticize the Secretary and warn other civilian leadership from making similar intemperate remarks.

3. *United States v. Hutchinson*, 2015 CCA Lexis 269 (A.F.C.C.A. 2015). A military judge granted appellant's request to delay his court-martial to accommodate his originally appointed defense counsel. Trial counsel repeatedly asked the military judge for a 39a session to discuss why the defense was asking for what they felt was such an unreasonable, lengthy delay that carried with it speedy trial implications. The staff judge advocate reached out to the chief trial judge of the circuit who then called the military judge to discuss the delay. The Air Force CCA held that under the totality of circumstances, "we believe an objective, disinterested public would believe the appellant received a trial that was ultimately free from the effects of unlawful command influence…" The court noted that though the government got its request for the 39a session, the military judge continued to rule in favor of the defense counsel's positions which were consistent with each of his previous rulings.

4. *United States v. Walker*, 2015 CCA Lexis 539 (A.F. Ct. Crim. App. Dec. 2, 2015). During an installation wide sexual assault prevention and response event, the SPCMCA commented on five pending cases that were rapes and "egregious, terrible cases" and told the audience that they were doing everything in their power to prosecute these cases. In response to appellant's UCI motion, the military judge allowed both parties to voir dire individual panel members about sexual assault in the military in general and about the SPCMCA's remarks in particular. At the conclusion of voir dire, the military judge ruled that the government had met is *Biagase* burden beyond a reasonable doubt. The Air Force CCA concurred and found no UCI after reviewing the entire record, including the SPCMCA's comments, the panel member's responses during voir dire, and the resulting excusals and challenges of members.

5. *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017). The GCMCA received a telephone call by the Air Force Chief of Staff on the same day that he referred appellant's case to general court-martial. The Chief of Staff told the GCMCA that the new Air Force Secretary had lost confidence in his ability to command after his highly publicized decision to set aside the findings and sentence in another rape case involving a Lieutenant Colonel. The Chief of Staff told the GCMCA that he could retire or be removed from command. Shortly after the phone call, the GCMCA submitted his retirement paperwork. CAAF held that in apparent UCI claims no showing of intent or knowledge on behalf of the actor is necessary nor is there a requirement that prejudice to the accused be shown. The court is simply concerned about the effect of the UCI. CAAF held "we deem the totality of circumstances in this case to be particularly troubling and egregious. As such, we conclude that an objective, disinterested observer with knowledge of all the facts would harbor a significant doubt about the fairness of the court-martial proceedings."

V. LITIGATING UCI CLAIMS

A. Actual UCI - Basic framework. *United States v. Biagase*, 50 M.J. 143, 150-51 (C.A.A.F. 1999).

1. The defense has the burden to present sufficient evidence, which if true, constitutes UCI, that the court-martial proceedings were unfair and that the UCI was the cause of that unfairness.

a. The threshold is low – some evidence.

b. However, there must be more than a mere allegation or general speculation; something more than just "command influence in the air." *United States v. Johnston*, 39 M.J. 242 (C.M.A. 1994).

2. The burden then shifts to the government to prove, beyond a reasonable doubt, that:

a. The predicate facts do not exist; or

b. If true, the facts do not amount to UCI; or

c. If at trial, if the facts do amount to UCI, the facts will not prejudice the trial (by producing evidence that the UCI will not affect the proceedings).

d. If on appeal, if the facts did amount to UCI, that the UCI had no prejudicial impact on the court-martial.

B. Apparent UCI – Basic Framework. *United States v. Boyce*, 76 M.J. 242, 248-50 (C.A.A.F. 2017).

1. The defense has the burden to present sufficient evidence, which if true, constitutes UCI and that the UCI placed an intolerable strain on the public's perception of military justice such that an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.

a. The threshold is low – some evidence.

b. Unlike litigating a claim of actual UCI, there is no requirement to demonstrate prejudice to the accused.

2. The burden then shifts to the government to prove, beyond a reasonable doubt, that:

a. The predicate facts do not exist; or

b. If true, the facts do not amount to UCI; or

c. The UCI did not place an intolerable strain upon the public's perception of the military justice system and that an objective observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding.

C. CAUTION! Prior to *Biagase*, the case law is very inconsistent. Look to pre-*Biagase* cases for help on what types of facts constitute UCI, but look to post-*Biagase* cases for how to analyze the problem.

D. If the government fails to produce rebuttal evidence, the "military judge must find unlawful command influence exists and then take whatever measures are necessary . . . to ensure [beyond a reasonable doubt] that the findings and sentence" are not affected. *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990).

E. Any time before authentication or action the MJ or CA may direct a post-trial session to resolve any matter which affects the legal sufficiency of any findings of guilty or the sentence. *See United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998).

F. The military judge needs to build the record. *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). "Where the issue of unlawful command influence is litigated on the record, the military judge's findings of fact are reviewed under a clearly-erroneous standard, but the question of command influence flowing from those facts is a question of law that this Court reviews *de novo*."

VI. REMEDIAL ACTIONS

A. If the defense raises sufficient evidence of UCI then the burden is going to shift to the government to prove that the facts comprising the UCI do not exist. The government may also show that if the facts do exist, they do not amount to UCI; or if the facts do amount to UCI, that the proceedings will not be affected by UCI. By taking remedial actions – either the convening authority before referral, or the military judge or convening authority after referral – the government may be able to prevent the UCI from tainting the proceedings.

B. The remedies that follow are not mandatory for each case. *United States v. Roser*, 21 M.J. 883 (A.C.M.R. 1986). Remedies should be appropriately tailored for each case.

C. Before trial (directed by the convening authority or SJA).

1. Adjudicative UCI.

a. Rescind or clarify letters and pronouncements. *See United States v. Rivers*, 49 M.J 434. (C.A.A.F. 1998); *United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002); *United States v. Reed*, 65 M.J. 487 (C.A.A.F. 2008).

b. Tell the witness that they need to testify and that no one is intending to influence him or her. *See United States v. Bradley*, 48 M.J. 777 (A.F. Ct. Crim. App. 1998).

c. Reprimand the offending official in front of the people that he tried to improperly influence. *United States v. Roser*, 21 M.J. 883 (A.C.M.R. 1986).

2. Accusatorial UCI.

a. Rescind or clarify letters and pronouncements. *United States v. Griffin*, 41 M.J. 607 (A. Ct. Crim. App. 1994).

b. Tell the subordinate commander (in writing) that he or she is free to choose any disposition that he or she thinks is appropriate. *See generally United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004).

c. The defense can seek to waive the issue in exchange for a favorable pretrial agreement. *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995).

D. At trial (directed by the military judge or convening authority).

1. Adjudicative UCI.

a. Allow extensive *voir dire*. *United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002); *United States v. Martinez*, 42 M.J. 327 (C.A.A.F. 1995).

b. Allow extensive fact finding, to include interviews and cross examination of those who may have committed UCI. *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003).

c. Issue curative instructions. *United States v. Martinez*, 42 M.J. 327 (C.A.A.F. 1995).

d. Order the government to retract the offending policy statement. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1998).

e. Grant continuances to investigate the issue. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1998); *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010).

f. Issue a blanket order to produce all witnesses requested by the defense. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1998).

g. Advise each witness that it is his duty to testify and assure them that no adverse consequences would follow. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1998); *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010) (the parties fashioned a letter that was to be given to potential witnesses).

h. Order the government to transfer the person who committed UCI. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1998); *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999).

i. Prevent the government from calling aggravation evidence. *United States v. Clemons*, 35 M.J. 770 (A.C.M.R. 1992).

j. Not allow the government to attack the accused's reputation by opinion or reputation testimony. *United States v. Clemons*, 35 M.J. 770 (A.C.M.R. 1992); *United States v. Giarratano*, 20 M.J. 553 (A.C.M.R. 1985).

k. Give the defense wide latitude with witnesses. *United States v. Clemons*, 35 M.J. 770 (A.C.M.R. 1992).

l. Allow the accused to testify about what he *thought* witnesses might have said (as substantive evidence on merits or E&M). *United States v. Clemons*, 35 M.J. 770 (A.C.M.R. 1992).

m. Preclude the government from presenting evidence through direct or cross-examination about the accused's rehabilitative potential. *United States v. Souther*, 18 M.J. 795, 796 (A.C.M.R. 1984).

n. Offer to sustain any challenge for cause against any member who was present in command during period of UCI. *United States v. Souther*, 18 M.J. 795, 796 (A.C.M.R. 1984); *United States v. Giarratano*, 20 M.J. 553 (A.C.M.R. 1985).

o. Disqualify the offending official from any reviewing authority duties. *United States v. Giarratano*, 20 M.J. 553 (A.C.M.R. 1985);

p. Dismiss the case with prejudice.

(1) *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004). CAAF upholds military judge's decision to dismiss case with prejudice due to witness intimidation.

(2) Dismissal should be the last resort. "If and only if the trial judge finds that command influence exists . . . and finds, further, that there is no way to prevent it from adversely affecting the findings or sentence beyond a reasonable doubt should the case be dismissed." *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990).

2. Accusatorial UCI. If a commander has been coerced into preferring charges that he does not believe are true, the charges are treated as unsigned and unsworn. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994).

E. Military judges: Remember to complete the *Biagase* analysis. *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010). The military judge must follow up on the remedies and put it on the record that the remedies were fully implemented. Complete the *Biagase* analysis by saying what was done and that now the UCI that was found to exist will not prejudice the case beyond a reasonable doubt. If the military judge finds UCI but then does not complete the analysis, then the presumption still stands that the UCI will affect the proceeding. The record needs to reflect that the government has met its burden.

VII. WAIVER AND FORFEITURE

A. Accusatory UCI is *forfeited* if not raised at trial unless (1) the evidence was concealed from the accused at trial; or (2) the accused was deterred from raising it at trial by the UCI. *United States v. Drayton*, 45 M.J. 180 (C.A.A.F. 1996); *United States v. Brown*, 45 M.J. 389 (C.A.A.F. 1996); *United States v. Richter*, 51 M.J. 213 (1999).

B. Accusatory UCI can be affirmatively *waived* by the defense as part of a pretrial agreement, if the waiver originates from the accused. *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995); *see generally United States v. Bartley*, 47 M.J. 182 (C.A.A.F. 1997).

C. Adjudicative UCI is not forfeited if the defense fails to raise the issue at trial. *United States v. Baldwin*, 54 M.J. 308 (C.A.A.F. 2001); *United States v. Richter*, 51 M.J. 213 (C.A.A.F. 1999); *United States v. Kirkpatrick*, 33 M.J. 132 (C.M.A. 1991); *United States v. Sparrow*, 33 M.J. 139 (C.M.A. 1991); *United States v. Dykes*, 38 M.J. 270 (C.M.A. 1993).

D. It is unclear whether an accused can affirmatively waive adjudicative UCI or whether doing so as part of a pretrial agreement would violate public policy. *See United States v. Reynolds*, 40 M.J. 198 (C.A.A.F. 1994) (no majority opinion, split on whether the defense could affirmatively waive an issue of superiority of rank in the deliberation room, which the defense did at trial).

VIII. FURTHER READING

A. Robert A. Burrell, *Recent Developments in Unlawful Command Influence*, Army Law., May 2001.

B. James F. Garrett, *Recent Developments in Unlawful Command Influence, "I Really Didn't Say Everything I Said,"* Army Law., May 2002.

C. James F. Garrett, *Recent Developments in Unlawful Command Influence*, Army Law., May 2004.

D. Patricia A. Ham, *Revitalizing the Last Sentinel: The Year in Unlawful Command Influence,* Army Law., May 2005.

E. Patricia A. Ham, *Still Waters Run Deep? The Year in Unlawful Command Influence,* Army Law., June 2006.

F. Mark L. Johnson, *Confronting the Mortal Enemy of Military Justice: New Developments in Unlawful Command Influence,* Army Lawyer, June 2007.

G. Mark L. Johnson, *Unlawful Command Influence--Still with Us; Perspectives of the Chair in the Continuing Struggle Against the "Mortal Enemy" of Military Justice,* Army Lawyer, June 2008.

H. Daniel G. Brookhart, *Physician Heal Thyself- How Judge Advocates Can Commit Unlawful Command Influence,* Army Lawyer, March 2010.

I. James F. Garrett, Mark "Max " Maxwell, Matthew A. Calarco, and Franklin D. Rosenblatt, *Lawful Command Emphasis: Talk Offense, Not Offender; Talk Process, Not Results,* Army Lawyer, August 2014.

J. John L. Kiel, Jr., *They Came in Like a Wrecking Ball: Recent Trends at CAAF in Dealing with Apparent UCI*, Army Lawyer, January 2018.

APPENDIX A
THE 10 COMMANDMENTS OF UNLAWFUL COMMAND INFLUENCE

COMMANDMENT 1	Do not stack the panel, nor select nor remove court-members in order to obtain a particular result in a particular trial.
COMMANDMENT 2	Do not disparage the defense counsel or the military judge.
COMMANDMENT 3	Do not communicate an inflexible policy on disposition or punishment.
COMMANDMENT 4	Do not place outside pressure on the judge or court-members to obtain a particular decision.
COMMANDMENT 5	Do not intimidate witnesses or discouraged them from testifying.
COMMANDMENT 6	Do not order a subordinate to dispose of a case in a certain way.
COMMANDMENT 7	Do not coach or mentor subordinate commanders on military justice without talking to your legal advisor first.
COMMANDMENT 8	Do not disparage the accused or tell others not to associate with him, and do not allow subordinates to do so, either.
COMMANDMENT 9	Ensure that subordinates and staff do not commit unlawful command influence, inadvertently or not.
COMMANDMENT 10	If a mistake is made, raise the issue immediately and cure with an appropriate remedy.

APPENDIX B
RECURRING PROBLEM: THE POLICY STATEMENT

When commanders make policy statements about the military justice system, particularly about what types of offenses warrant what kinds of courts or sentences, commanders run the risk that they will commit both adjudicative UCI (some witnesses may not now come forward on the accused's behalf, and some panel members may now punish in accordance with what they believe the convening authority believes) and accusatory UCI (some subordinate commanders may transmit a case because that is what they think their superior commander wants them to do, not because that is their independent decision).

Commanders are accustomed to coaching and mentoring subordinates in all areas of command responsibility and leadership, but the law has carved out an exception for discussion that may unlawfully influence the action of a court. Judge Advocates must be diligent to insure that their supported commander seeks appropriate counsel before discussing criminal justice policy or the investigation or disposition of criminal matters within the command.

Note that Article 37(a) exempts general instructional or informational courses on military justice if such courses are designed solely for the purpose of instructing members of the command in the substantive and procedural aspects of courts-martial. Commanders should consider asking their staff judge advocate to provide general instruction and should allow judge advocates to give advice on particular cases.

The readings below help illuminate the line between mentorship and unlawful command influence.

1. *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984)

> The duties of a division commander as a court-martial convening authority and as the primary leader responsible for discipline within the division are among the most challenging a commander can perform. On the one hand, effective leadership requires a commander to supervise the activities of his subordinates diligently and ensure that state of good order and discipline which is vital to combat effectiveness. On the other hand, he must exercise restraint when overseeing military justice matters to avoid unlawful interference with the discretionary functions his subordinates must perform. The process of maintaining discipline yet ensuring fairness in military justice requires what the United States Court of Military Appeals has called "a delicate balance" in an area filled with perils for the unwary. Many experienced line officers have expressed similar conclusions. Excerpts from two particularly useful and authoritative examples are reproduced below.
>
> Correction of procedural deficiencies in the military justice system is within the scope of a convening authority's supervisory responsibility. Yet in this area, the band of permissible activity by the commander is narrow, and the risks of overstepping its boundaries are great. Interference with the discretionary functions of subordinates is particularly hazardous. While a commander is not absolutely prohibited from publishing general policies and guidance which may relate to the discretionary military justice functions of his subordinates, several decades of practical experience under the Uniform Code of Military Justice have demonstrated that the risks often outweigh the benefits. The balance between the command problem to be resolved and the risks of transgressing the limits set by the Uniform Code of Military Justice is to be drawn by the commander with the professional assistance of his staff judge advocate. Although the commander is ultimately responsible, both he and his staff judge advocate have a duty to ensure that directives in the area of military justice are accurately stated, clearly understood and properly executed.

2. Excerpts from a letter which the Powell Committee recommended The Judge Advocate General of the Army send to officers newly appointed as general court-martial convening authorities. (Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army: Report to Honorable Wilber M. Bruckner, Secretary to the Army, 17–21 (18 Jan 1960)).

> Because it is of the utmost importance that commanders maintain the confidence of the military and the public alike in the Army military justice system, the following suggestions are offered you as a commander who has recently become a general court-martial convening authority, in the hope that they will aid you in the successful accomplishment of your military functions and your over-all command mission.
>
> A serious danger in the administration of military justice is illegal command influence. Congress, in enacting the Uniform Code of Military Justice, sought to comply with what it regarded as a public mandate, growing out of World War II, to prevent undue command influence, and that idea pervades the entire legislation. It is an easy matter for a convening authority to exceed the bounds of his legitimate command functions and to fall into the practice of exercising undue command influence. In the event that you should consider it necessary to issue a directive designed to control the disposition of cases at lower echelons, it should be directed to officers of the command generally and should provide for exceptions and individual consideration of every case on the basis of its own circumstances or merits. For example, directives which could be interpreted as requiring that all cases of a certain type, such as larceny or prolonged absence without leave, or all cases involving a certain category of offenders, such as repeated offenders or offenses involving officers, be recommended or referred for trial by general court-martial, must be avoided. This type of directive has been condemned as illegal by the United States Court of Military Appeals because it is calculated to interfere with the exercise of the independent personal discretion of commanders subordinate to you in recommending such disposition of each individual case as they conclude is appropriate, based upon all the circumstances of the particular case. The accused's right to the exercise of that unbiased discretion is a valuable pretrial right which must be protected. All pretrial directives, orientations, and instructions should be in writing and, if not initiated or conducted by the staff judge advocate, should be approved and monitored by him.
>
> The results of court-martial trials may not always be pleasing, particularly when it may appear that an acquittal is unjustified or a sentence inadequate. Results like these, however, are to be expected on occasion. Courts-martial, like other human institutions, are not infallible and they make mistakes. In any event, the Uniform Code prohibits censuring or admonishing court members, counsel, or the law officer with respect to the exercise of their judicial functions. My suggestion is that, like the balls and strikes of an umpire, a court's findings or sentence which may not be to your liking be taken as ‘one of those things.’ Courts have the legal right and duty to make their findings and sentences unfettered by prior improper instruction or later coercion or censure.

3. Excerpts from an article by General William C. Westmoreland discussing the relationship of military justice to good order and discipline in the Army. (Westmoreland, Military Justice—A Commander's Viewpoint, 10 Am.Crim.L.Rev. 5, 5–8 (1971)).

> As a soldier and former commander, and now as Chief of Staff of the Army, I appreciate the need for a workable system of military justice. Military commanders continue to rely on this system to guarantee justice to the individual and preserve law and order within the military.
>
> An effective system of military justice must provide the commander with the authority and means needed to discharge efficiently his responsibilities for developing and maintaining good order and discipline within his organization. Learning and developing military discipline is little different from learning any discipline, behavioral pattern, skill, or precept. In all, correction of individuals is indispensable.... The military commander should have the widest possible authority to use measures to correct individuals, but some types of corrective action are so severe that they should not be entrusted solely to the discretion of the commander. At some point he must bring into play judicial processes. At this point the sole concern should be to accomplish justice under the law, justice not only to the individual but to the Army and society as well.
>
> I do not mean to imply that justice should be meted out by the commander who refers a case to trial or by anyone not duly constituted to fulfill a judicial role. A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.
>
> The protection of individual human rights is more than ever a central issue within our society today. An effective system of military justice, therefore, must provide of necessity practical checks and balances to assure protection of the rights of individuals. It must prevent abuses of punitive powers, and it should promote the confidence of military personnel and the general public in its overall fairness. It should set an example of efficient and enlightened disposition of criminal charges within the framework of American legal principles. Military justice should be efficient, speedy, and fair.

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CHAPTER 3
JURISDICTION

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I. INTRODUCTION

A. Jurisdiction means the power of a court to try and determine a case, and to render a valid judgment. Courts-martial are courts of special and limited jurisdiction. For example, courts-martial jurisdiction applies worldwide, but is limited in application to a certain class of people—members of the armed forces. In general, three prerequisites must be met in order for courts-martial jurisdiction to vest. They are: (1) jurisdiction over the offense, (2) personal jurisdiction over the accused, and (3) a properly convened and composed court-martial.

B. Whether a court-martial is empowered to hear a case—whether it has jurisdiction—frequently turns on issues such as the status of the accused at the time of the offense, or the status of the accused at the time of trial. These issues of courts-martial jurisdiction relate to either subject matter jurisdiction (jurisdiction over the offense) or personal jurisdiction (personal jurisdiction over the accused). Subject matter jurisdiction focuses on the nature of the offense and the status of the accused at the time of the offense. If the offense is chargeable under the Uniform Code of Military Justice (UCMJ) and the accused is a Servicemember at the time the offense is committed, subject matter jurisdiction is satisfied. Personal jurisdiction, however, focuses on the time of trial: can the government court-martial him? The answer is yes, so long as the accused has proper status; i.e., that the accused is a Servicemember at the time of trial.

C. Sources of Jurisdiction.

1. The Constitution: Article I, section 8, clause 14
2. UCMJ, Articles 2, 3 and 36
3. MCM, 2016 ed., R.C.M. 201 - 204
4. Customary international law and treaties

D. Five Elements of Court-Martial Jurisdiction, R.C.M. 201(b):

1. Proper jurisdiction over the offense (subject matter jurisdiction).
2. Proper jurisdiction over the person (personal jurisdiction).
3. Properly composed court (military judge and members must have proper qualifications.) Absent evidence of coercion or ineffective assistance of counsel, accused's request to be tried by military judge alone can be inferred from the record of trial (applying "substantial compliance" doctrine to Article 16. *United States v. Turner*, 47 M.J. 348 (C.A.A.F. 1997). Article 25 (request for enlisted members to serve on panel) is also satisfied by substantial compliance. *United States v. Townes*, 52 M.J. 275 (C.A.A.F. 2000). *See also United States v. Morgan*, 57 M.J. 119

(C.A.A.F. 2002). *[See Tab E (Court-Martial Personnel) of this Deskbook for additional information]*

4. Proper convening authority. A properly constituted court-martial may try any person subject to the UCMJ, even if the accused is not under the command of the convening authority. *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990), *set aside, on other grounds*, 36 M.J. 8 (C.M.A. 1992); *accord, United States v. Randle*, 35 M.J. 789 (A.C.M.R. 1992). *See also United States v. Cantrell*, 44 M.J. 711 (A.F.Ct.Crim.App. 1996). *[See Tab E (Court-Martial Personnel) of this Deskbook for additional information]*

5. Properly referred charges. *United States v. Pate*, 54 M.J. 501 (Army Ct. Crim. App. 1997). The PTA was not signed by the GCMCA, but instead the word "accepted" was circled and a notation made indicating a voco to the SJA. The accused argued that since the CA never signed the PTA, the "new" charge to which the accused was pleading guilty was never referred and, therefore, the court-martial lacked jurisdiction over that charge. The Army Court held that jurisdiction existed since a proper referral does not need to be in writing and the lack of signature was "insignificant." *See also United States v. Williams*, 55 M.J. 302 (C.A.A.F. 2001). *But see United States v. Henderson*, 59 M.J. 350 (C.A.A.F. 2004). *[See Tab G (Initiation and Disposition of Charges) of this Deskbook for additional information]*

II. JURISDICTION OVER THE OFFENSE

A. Historical Overview.

1. *O'Callahan v. Parker*, 395 U.S. 258 (1969). The Supreme Court establishes the "service-connection" test. *See also Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355 (1971) (the Court sets-forth the *Relford* factors as a template to determine "service-connection").

2. *Solorio v. United States*, 483 U.S. 435 (1987). The Supreme Court overrules *O'Callahan*, abandoning the "service-connection" test, and holds that jurisdiction of a court-martial depends solely on the accused's status as a member of the Armed Forces.

B. BOTTOM LINE: Subject matter jurisdiction is established by showing military status at the time of the offense.

C. Administrative Double Jeopardy Policies. Generally, a member of the Armed Forces will not be tried by court-martial or punished under Article 15, UCMJ, for the same act for which a civilian court has tried the Soldier. This policy is based on comity between the federal government and state or foreign governments. See AR 27-10, para. 4-2 (11 May 2016); JAGMAN, para. 0124.

D. Capital Cases.

1. *Loving v. United States*, 116 S.Ct. 1737 (C.A.A.F. 1996). Justice Stevens (concurring) raised the question of whether a "service connection" requirement applies to capital cases. *See also United States v. Simoy*, 46 M.J. 601 (A.F. Ct. Crim. App. 1996) (a capital murder case in which the court made a specific finding that the felony murder was "service-connected").

2. *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). The CAAF gives credence to Justice Stevens' concurring opinion in *Loving*. The CAAF makes a specific finding that there are sufficient facts present in *Gray*, a capital case, to establish a service connection to warrant trial by court-martial, but does not answer the question of whether a "service connection" requirement applies to capital cases.

E. Subject Matter Jurisdiction over Reservists/National Guard.

1. The offense must be committed while the reservist has military status. *See United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990) (Reserve Component warrant officer ordered to AD for training; provided urine sample that tested positive for cocaine pursuant to a urinalysis administered within 36 hours of initiation of AD period. Held: no subject matter jurisdiction because the government failed to prove beyond a reasonable doubt that the accused was subject to the UCMJ at the time he "used" the cocaine); *United States v. Morita*, 74 M.J. 116 (C.A.A.F. 2015) (Reserve Component officer who forged active duty and inactive duty training orders was not subject to jurisdiction under Article 2(a)(1), UCMJ, because that provision requires a reservist to be lawfully ordered to active duty or training in the armed forces; officer was not subject to jurisdiction under Article 2(c) for misconduct while he was not in a duty status because a reservist must be "'serving with' the armed forces at the time of the misconduct[] and meet the other four criteria set forth in the statute"). *But see United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993) (in a case where accused on AD for several months before given urinalysis, the court, in dicta, questioned the validity of the *Chodara* decision). *See also*, *United States v. Smith*, Case No. 9500065, WL35319910, (unpub.) (Army Ct. Crim. App. 1998) (holding there was no federal court-martial jurisdiction over an offense that the accused allegedly committed while he was enlisted in the Mississippi National Guard).

2. Jurisdiction attaches at 0001 hours of the effective date of the orders to active duty. *United States v. Cline*, 29 M.J. 83 (C.M.A. 1989), *cert. denied*, 493 U.S. 1045 (1990).

3. Jurisdiction may exist outside the parameters of the orders. *United States v. Phillips*, 58 M.J. 217 (2003). The accused was a reserve nurse ordered to perform her two-week annual training from 12-23 July 1999. Her orders authorized her one travel day (11 July) to get to her duty station. The accused traveled to her duty station on 11 July and checked into her government quarters. That evening, she consumed some marijuana brownies that she had brought with her from home. The accused tested positive for marijuana as part of a random urinalysis test conducted on 16 July. On appeal, the accused argued that the court lacked jurisdiction over her wrongful use of marijuana, because the use occurred prior to the start of her two-week active duty period. The CAAF disagreed and affirmed AFCCA's decision holding that jurisdiction existed over all of the offenses. The CAAF held that jurisdiction existed pursuant to Art 2(c), UCMJ, which "by its express terms, establishes a specific analytical framework." Applying a two-step analysis, the CAAF first held that the accused was "serving with" the armed forces on 11 July, because she was a reservist traveling to her duty station pursuant to orders issued for the purpose of performing active duty, she occupied government quarters, and she received compensation in the form of travel reimbursement, retirement credit, and base pay and allowances. For the second step in the analysis, the CAAF applied Art 2(c)'s four-part test, finding that on 11 July the accused: (1) submitted voluntarily to military authority; (2) met the minimum age and mental qualifications; (3) received pay and allowances; and (4) performed military duties by traveling to her duty station. The CAAF emphasized that "[t]he fact that her orders did not require her to report to a specific organization until July 12 does not detract from her voluntary performance of the duty, pursuant to orders, to travel on July 11."

4. New Rule: Pursuant to the Military Justice Act of 2016, after 1 January 2019, jurisdiction attaches to reservists and national guard members (when in federal service) while on inactive-duty training (IDT) and during the below designated periods. *See* Article 2(a)(3), UCMJ.

a) Travel to and from the IDT site of the member, pursuant to orders or regulations;

b) Intervals between consecutive periods of IDTs on the same day, pursuant to orders or regulations; and

c) Intervals between IDTs on consecutive days, pursuant to orders or regulations.

5. Old Rule: Prior to 1 January 2019, no personal jurisdiction during the periods between IDTs. *See United States v. Wolpert,* 75 M.J. 777 (CAAF 2016) (Accused allegedly committed sexual assaults between periods of IDT sessions over a weekend. Holding: reserve component Servicemembers are only subject to UCMJ jurisdiction when performing active duty or IDT under Article 2(a)(3), UCMJ, not during the period between IDT drills. CAAF distinguished *Wolpert* from *Phillips*, ruling that *Wolpert* was not ordered to active duty or on orders of any kind, therefore he was not serving with the Armed Forces at the time of the criminal offense for purposes of personal jurisdiction.)

6. Jurisdiction outside of orders is limited. In *Morita*, the court held that being a member of the Reserve Component, by itself, is not enough to establish that the accused was "serving with the armed forces" for purposes of Article 2(c). It affirmed the Air Force Court of Criminal Appeals' rejection of the military judge's finding that the fact the accused committed the offenses in his capacity as a military officer was enough for jurisdiction. The court reversed the lower court's determination that the accused was in an active duty status based on orders he forged, holding that forged orders do not place a reservist within an active duty or inactive duty training (IDT) – or drilling – status for purposes of Article 2(a)(1) and (3), UCMJ, especially since the record did not establish that he performed any military duties for the periods he was alleged to be IDT status, thus failing to establish jurisdiction under Article 2(a)(3). Article 2(a)(1) requires the accused to be lawfully called to active duty, so the accused's forged orders did not establish jurisdiction under that provision, for a "forgery is the antithesis of a lawful order." *Morita*, 74 M.J. at 122. As the government failed to demonstrate that the accused was receiving military pay or retirement credit for the days in question, or otherwise performed military duties during those times as required under Article 2(c), it failed to meet its burden to show personal jurisdiction over the accused for these offenses.

7. If a member of the National Guard is performing duties in a Title 10 status, a unit or commander in Title 32 status does not have jurisdiction over him. In *United States v. Dimuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005), the appellant was a member of the Air National Guard in Arizona who had been mobilized under Title 10 and was performing duty at Davis-Monthan Air Force Base. The commander of his Air National Guard unit, while in Title 32 status, ordered a unit urinalysis inspection of the appellant's Air National Guard unit during a Unit Training Assembly. The appellant submitted to the inspection and had a positive result for cocaine metabolites. He subsequently confessed. The military judge suppressed the urinalysis and the confession, ruling that while in a Title 10 status and attached to a Title 10 unit, the appellant was not subject to an inspection ordered by a commander from a unit that was in Title 32 status. The AFCCA affirmed.

8. Jurisdiction "is an interlocutory issue, to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence." *United States v. Oliver,* 57 M.J. 170, 172 (C.A.A.F. 2002). The CAAF found that the medical records submitted on appeal established that the accused had been retained on active duty beyond the expiration of his orders, thus satisfying subject-matter jurisdiction over the offense.

F. Time of the Offense.

1. *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009). Prior to joining the Navy, accused posted sexually explicit image of a child to his Yahoo! email account profile. The image was accessible to other Internet users. After accused enlisted, he continued to access his account and did not remove the image. NCIS investigators accessed the accused's profile and viewed the image. Accused was charged and convicted at a court-martial with distributing child pornography. The C.A.A.F. held that the accused committed an offense while on active duty

because he continued to maintain control over his account and others viewed the image he had posted on the account.

2. *Morita*, 74 M.J. at 122. Where the accused was not lawfully called to active duty or performing duty in IDT status at the time of some of his offenses, the court-martial lacked jurisdiction over those offenses under Article 2(a). The court-martial also lacked jurisdiction under Article 2(c) because the Government did not present sufficient evidence to show either that the accused was "serving with the armed forces" at the time of those offenses or that any of the other criteria under Article 2(c) were met.

III. JURISDICTION OVER THE PERSON

A. General Rule: In general, a person becomes subject to court–martial jurisdiction upon enlistment in or induction into the Armed Forces, acceptance of a commission, or entry onto active duty pursuant to order. Court–martial jurisdiction terminates upon a valid discharge.

B. General Provisions: UCMJ, Art. 2, provides jurisdiction over categories of persons with military status:

1. Enlistees; Inductees; Academy Cadets/Midshipmen

2. Retirees

a) Jurisdiction over retirees is constitutional. *Pearson v. Bloss*, 28 M.J. 376 (C.M.A. 1989); *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958); *Sands v. Colby*, 35 M.J. 620 (A.C.M.R. 1992).

b) *United States v. Huey*, 57 M.J. 504 (N-M. Ct. Crim. App. 2002). The accused had served 20 years on active duty and was placed on the Retired List on 1 January 1989. In 1996 he worked as a Naval civilian employee in Okinawa. He confessed to engaging in sexual intercourse several times a week over a nine-month period with his 16-year old adopted daughter. By the time the raping stopped, the accused was 58 years old and his daughter was pregnant with his child. At trial, the accused moved to dismiss for lack of personal jurisdiction based upon a violation of constitutional due process under the Fifth Amendment. The accused cited to *Toth v. Quarles*, 350 U.S. 11 (1955) and argued that he had "obtained civilian status" and was being deprived of due process rights available only in a civilian courtroom. The service court disagreed stating that there "is no doubt that a court-martial has the power to try a person receiving retired pay."*

c) *United States v. Stevenson*, 65 M.J. 639 (N.M.Ct.Crim.App. 2006), *rev'd on other grounds*, 66 M.J. 15 (C.A.A.F. 2008). Accused was a sailor on the Temporary Disability Retirement List who waived his military disability pay in favor of Veteran's Affairs disability compensation. Held: Court-martial had personal jurisdiction because accused was "entitled to pay", even if he was not receiving pay.

d) HQDA approval is required before prosecuting retirees (AR 27-10, para. 5-2 (11 May 2016)). Failure to follow "policy" and obtain HQDA approval to try a retiree, however, is not jurisdictional error. *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

e) The Article 2(d), UCMJ, involuntary recall process required for members of a reserve component, is not required to bring retirees and members of the Fleet Reserve or Fleet

* The service court set aside the findings and sentence, dismissed the charges, and abated the proceedings in this case on 29 Aug 2002 due to the accused's death on 2 July 2002 (ten days before the opinion was decided). *See United States v. Huey*, 2002 CCA LEXIS 186 (Aug. 29, 2002).

Marine Corps Reserve on to active duty in order to have jurisdiction over them. *United States v. Morris*, 54 M.J. 898 (N-M. Ct. Crim. App. 2001), *petition for review denied*, 55 M.J. 161 (May 22, 2001).

f) Involuntary Recall Retired Reservist. *Morgan v. Mahoney*, 50 M.J. 633 (A.F.Ct.Crim.App. 1999). Air Force retired reserve officer was involuntarily recalled to active duty under Art. 2(d)(1). Court held that the accused was subject to court-martial jurisdiction because: [1] he was a "person lawfully called or ordered into…duty" under Art. 2(a)(1); [2] he could be ordered involuntarily to AD under Art. 2(d)(1) & (2) for offenses committed while the accused was on AD or IDT (within the statute of limitations); [3] he was amenable to the UCMJ under Art. 3(d) despite the termination of AD/IDT; [4] the AF Reserve is a "reserve component of the armed forces;" [5] he was in a "retired status" under 10 U.S.C. 10141(b); and [6] at the time of his recall, he was a member of the Retired Reserve. Practitioners should note that retired Reserve Component personnel who are receiving hospitalization from an armed force are subject to court-martial jurisdiction without being recalled to active duty.

3. Persons in custody

a) Jurisdiction terminates once an accused's discharge is ordered executed (or enlistment expires) and he or she is released from confinement. The remaining suspended punishments are automatically remitted. *United States v. Gurganious*, 36 M.J. 1041 (N.M.C.M.R. 1993), *rev. denied*, 45 M.J. 13 (C.A.A.F. 1996).

b) *Fisher v. Commander, Army Regional Confinement Facility*, 56 M.J. 691 (N-M. Ct. Crim. App. 2001). An accused that still has military confinement to serve pursuant to a court-martial sentence, is still a military prisoner subject to military jurisdiction under the concept of "continuing jurisdiction," notwithstanding the execution of his punitive discharge and receipt of the DD Form 214. This is true even where the prisoner is serving time in a state civilian prison. The discharge merely terminated his status of active duty, but did not terminate his status as a military prisoner.

4. P.O.W.s

5. In time of <u>declared war or a contingency operation</u>, persons serving with or accompanying an armed force in the field. (covered in more detail in Part VI of this outline)

6. Reservist Component includes USAR and Army National Guard of the United States (ARNGUS) soldiers in Title 10, U.S. Code, duty status. (See sections II.E. and IV. of this outline).

C. Inception of Court-Martial Jurisdiction.

1. Enlistment**:** A Contract Which Changes "Status." UCMJ, Art. 2(b). The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

2. Involuntary enlistment: *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 758 (C.M.A. 1974) (coercion); *United States v. Lightfoot*, 4 M.J. 262 (C.M.A. 1978); and *United States v. Ghiglieri*, 25 M.J. 687 (A.C.M.R. 1987) (proposed enlistment as alternative to civil prosecution - no coercion).

3. Constructive Enlistment. The codification of *In Re Grimley*, 137 U.S. 147 (1890). UCMJ, Art. 2(c) (as amended in 1979):

Art. 2(c): Notwithstanding any other provision of law, a person serving with an armed force who—

(1) Submitted voluntarily to military authority;

(2) Met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) Received military pay or allowances; and

(4) Performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned."

D. Termination of Jurisdiction over the Person.

1. General Rule: Discharge Terminates Jurisdiction.

2. ETS/EAS by itself does not terminate jurisdiction.

a) R.C.M. 202(a) discussion: "Completion of an enlistment or term of service does not by itself terminate court-martial jurisdiction . . . court-martial jurisdiction normally continues past the time of scheduled separation until a discharge certificate or its equivalent is delivered or until the Government fails to act within a reasonable time after the person objects to continued retention."

b) *United States v. Poole*, 30 M.J. 149 (C.M.A. 1990). Jurisdiction to court-martial a Servicemember exists despite delay—even unreasonable delay—by the government in discharging that person at the end of an enlistment. Even if the member objects, it is immaterial—the significant fact is that the member has yet to receive a discharge. Caveat: Unreasonable delay may provide a defense to "some military offenses."

c) R.C.M. 202(c)(1): Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges. *See United States v. Self*, 13 M.J. 132 (C.M.A. 1982); *United States v. Benford*, 27 M.J. 518 (N.M.C.M.R. 1988).

d) *United States v. Lee*, 43 M.J. 794 (N.M. Ct. Crim. App. 1995). Focusing investigation on accused as prime suspect is enough to establish a "view towards trial" and preserve military jurisdiction beyond ETS/EAS. The court cites to apprehension, imposition of restraint, and preferral of charges as other actions, which attach court-martial jurisdiction, i.e., indicate a "view towards trial." See also *Webb v. United States*, 67 M.J. 765 (A.F.C.C.A. 2009)(initiation of criminal investigation and SJA memorandum placing accused on administrative hold were each sufficient to trigger attachment of court-martial jurisdiction).

e) Appellate Leave. *United States v. Ray*, 24 M.J. 657 (A.F.C.M.R. 1987) (jurisdiction upheld where accused, on appellate leave, was not provided discharge due to governmental delay in executing punitive discharge).

3. When is discharge effective?

a) General Rule: 10 U.S.C. §§ 1168 and 1169 serve as guidance when it comes to determining whether discharge has been effectuated for jurisdictional purposes. Discharge becomes effective upon: 1) delivery of DD-214, 2) completion of the clearance process, and 3) a final accounting of pay; unless such a result would clearly go against reason or public policy.

b) On delivery. *United States v. Melanson*, 53 M.J. 1 (C.A.A.F. 2000). Jurisdiction existed because pursuant to AR 635-200, a discharge takes effect at 2400 hours on the date of notice of discharge to the soldier. *See also United States v. Williams*, 53 M.J. 316 (C.A.A.F. 2000). A valid legal hold had been placed on accused prior to expiration of the date that constituted the effective date of the discharge. *United States v. Scott*, 11 C.M.A. 646, 29 C.M.R. 462 (C.M.A. 1960). A discharge takes effect at 2400 hours on the date of discharge; even if the discharge is delivered earlier in the day (unless it is clear that it was intended to be effective at the earlier time).

c) Valid Discharge Certificate: Discharge Authority's Intent. Early delivery of a discharge certificate for administrative convenience (e.g., command does not want to keep personnel office open until 2400) does not terminate jurisdiction when certificate is clear on its face that the commander did not intend the discharge to take effect until later. *United States v. Batchelder*, 41 M.J. 337 (C.A.A.F. 1994); *see also United States v. Guest*, 46 M.J. 778 (Army Ct. Crim. App. 1997).

d) Final accounting of pay. 10 U.S.C. §§ 1168 requires that the Gov't make final pay ready for delivery prior to discharge, which may occur at the local installation level. Final accounting of pay may also occur later than the final appointment at the local finance office. Jurisdiction may still exist several days after a Servicemember has undergone a clearing process and received their DD214, since the local finance office may be only the first of many steps required to accomplish a final accounting of pay. See *United States v. Hart*, 66 M.J. 273 (C.A.A.F. 2008). *See also United States v. Howard*, 20 M.J. 353 (C.M.A. 1985) (jurisdiction terminates on delivery of discharge and final pay); *United States v. Coker*, 67 M.J. 571 (C.G. Ct. Crim. App. 2008) (finance office having all the information it needed to compute final pay did not make final pay "ready for delivery" within the meaning of the statute governing discharge); *United States v. Wieczorek*, NMCCA 201100036 (N.M. Ct. Crim. App. 2011) (unpub.) (No *in personam* jurisdiction where no final accounting of pay, even when lack of final accounting is due to government pay clerk's negligence).

(1) *See United States v. Christensen*, 78 M.J. 1 (C.A.A.F. 2018) for discussion of a final accounting of pay delayed at the request of the Gov't.

e) Undergo a clearing process. *United States v. King*, 27 M.J. 327 (C.M.A. 1989) (sailor refused to complete re-enlistment ceremony after he received a discharge certificate). Three elements per King to effectuate an early discharge:

(1) Delivery of a valid discharge certificate;

(2) A final accounting of pay; and

(3) Undergoing a "clearing" process as required under appropriate service regulations to separate the member from military service.

f) Contrary to reason or public policy. CAAF held the three part test (from 10 U.S.C. §§ 1168 and 1169) serves as guidance- not as prerequisites- when it comes to determining whether a discharge has been effectuated for jurisdictional purposes. If all three of the criteria have been met, then an accused unequivocally is no longer subject to court-martial jurisdiction. If one or more of these criteria have not been fully met, then the military trial judge must consider the totality of the circumstances in making a jurisdictional determination. *See United States v. Christensen*, 78 M.J. 1 (C.A.A.F. 2018) (based on specific facts of the case, there was no personal jurisdiction over the accused at the time of the court-martial after the chief of justice requested delay of final of accounting of pay and then Gov't waited eight

months to prefer charges against the accused and to complete his reintegration into the military).

g) Discharge pursuant to failure to promote statute. *United States v. Nettles*, 74 M.J. 289 (CAAF 2014). 10 USC § 14505 requires discharge no later than a specific date for captains who failed to be selected for promotion on the second try. Since the Servicemember was not placed on active duty under an administrative hold on the date of the self-executing discharge orders, the Servicemember's discharge became effective on the date ordered- regardless of the failure to physically deliver the discharge certificate; and because the Servicemember was arraigned after the effective date of that discharge, personal jurisdiction no longer existed.

4. Erroneous Delivery. Erroneous delivery will not terminate jurisdiction. *United States v. Garvin*, 26 M.J. 194 (C.M.A. 1988) (premature delivery of a BCD certificate); *United States v. Brunton*, 24 M.J. 566 (N.M.C.M.R. 1987) (early delivery of discharge, in violation of Navy regulations, meant discharge was not effective on receipt).

5. Post-arraignment Discharge. A valid discharge of a soldier prior to trial operates as a formal waiver and abandonment of court-martial in personam jurisdiction, whether or not such jurisdiction had attached prior to discharge. *Smith v. Vanderbush*, 47 M.J. 56 (C.A.A.F. 1997). In personam jurisdiction was lost when accused was discharged after arraignment but before lawful authority resolved the charges. The court considered the intent of the discharge authority and found that there was no evidence to show that the discharge authority (not CA) did not intend to discharge accused on his ETS. In determining a valid discharge the court considered: 1) delivery of discharge certificate; 2) final accounting of pay; and 3) intent of discharge authority. ***Note:*** AR 27-10, para 5-16 (11 May 2016), now provides that after any charge is preferred, the DD Form 458 will automatically act to suspend all favorable action and that any issuance of a discharge certificate is void until the charge is dismissed or the convening authority takes initial action on the case (thus avoiding the issue raised in *Smith v. Vanderbush*).

6. Post-conviction Discharge.

a) Effect on Appellate Review and Power of Convening Authority

(1) *Steele v. Van Riper*, 50 M.J. 89 (C.A.A.F. 1999). After a court-martial conviction, but before the convening authority took action, the government honorably discharged the accused. When the convening authority finally took action, he approved the findings and sentence (which included a punitive discharge), declared that the honorable discharge was erroneous, and placed the accused in an involuntary appellate leave status. The accused challenged the invalidation of his honorable discharge. In a supplemental brief, the government concurred. As such, the CAAF denied the accused's writ-appeal, but advised that the honorable discharge does not affect the power of the convening authority or appellate tribunals to act on the findings and sentence. *See also United States v. Stockman*, 50 M.J. 50 (C.A.A.F. 1998).

(2) *United States v. Davis*, 63 M.J. 171 (C.A.A.F. 2006). Held: Where the appellate courts are invoked by an appellant and a rehearing is authorized, an intervening administrative discharge does not serve to terminate jurisdiction over the person of the accused for purposes of that rehearing. The power of the court-martial over appellant was established at his initial trial, and the intervening administrative discharge does not divest the appellate courts of the power to correct error, order further proceedings, and maintain appellate jurisdiction over the person during the pendency of those proceedings.

b) Post-conviction but Pre-Initial Action. *United States v. Estrada*, 69 M.J.45 (C.A.A.F. 2010). Accused sentenced to a BCD. Prior to initial action, accused erroneously issued an

administrative honorable discharge. Issue: Whether the administrative (honorable) discharge resulted in remission of the bad-conduct discharge. Held. The honorable discharge was automatically voided in accordance with AR 27-10, para. 5-16.

c) Post-conviction and Post-Initial Action. *United States v. Watson*, 69 M.J. 415(C.A.A.F. 2011). The HRC Commander issued CPT Watson an administrative honorable discharge after a BCD was adjudged at her trial and after the Convening Authority took initial action. Despite an affidavit from the HRC Commander stating that she "did not intend the discharge to act…as a remission of the conviction" the CAAF held, 3-2, that the administrative discharge remitted the BCD. *See also United States v. McPherson*, 68 M.J. 526 (Army Ct.Crim.App. 2009). Accused sentenced to a BCD. Accused received two administrative honorable discharges from HRC – one before initial action, and one after initial action. Held: The honorable discharge given prior to initial action was void pursuant to AR 27-10, but the honorable discharge given after initial action served to remit the punitive discharge.

7. Execution of Punitive Discharge.

a) *United States v. Keels*, 48 M.J. 431 (C.A.A.F. 1998). Promulgation of a supplemental court-martial convening order that ordered executed a punitive discharge does not terminate court-martial jurisdiction. Even when there is a punitive discharge, jurisdiction does not terminate until delivery of the discharge certificate and final accounting of pay. There is not instantaneous termination of status upon completion of appellate review.

b) *United States v. Byrd*, 53 M.J. 35 (C.A.A.F. 2000). In October 1996, the Navy-Marine Corps Court affirmed the accused's conviction and sentence, which included a punitive discharge. The accused did not petition CAAF for review until 22 January 1997. On 2 January 1997 the convening authority executed his sentence under Article 71. The service court held that since the accused did not petition CAAF for review within 60 days (a CAAF rule), the intervening discharge terminated jurisdiction. CAAF vacated the lower court's decision on the grounds that the Govt. failed to establish the petition for review as being untimely and, therefore, the sentence had been improperly executed. CAAF also held that jurisdiction existed notwithstanding execution of a punitive discharge under Article 71, and it was only a question of whether to consider the case under direct review or collateral review. *See also United States v. Engle*, 28 M.J. 299 (C.M.A. 1989).

8. *In Personam* Jurisdiction in a Foreign Country. *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998). The accused was convicted of premeditated murder and sentenced to death for murders he committed while stationed in Germany. The accused challenged the jurisdiction of the court-martial. He argued that the military investigators misled the German Government to believe that the United States had primary jurisdiction of the case under the NATO SOFA. Based on this information, the German Government waived its jurisdiction. Had the German Government asserted jurisdiction, the accused could not have been sentenced to death because the Constitution of Germany prohibits the death penalty. CAAF held that the accused lacked standing to object to which sovereign prosecuted the case. The important jurisdictional question to answer is: Was the accused in a military status at the time of the offense and at the time of trial? The court found that the accused was. The case was set aside and remanded on other grounds.

9. Exceptions to General Rule that Discharge Terminates Jurisdiction.

a) Exception: UCMJ, Art. 3(a).

(1) a person is subject to the UCMJ at the time of the offense;

(2) the person is discharged without trial; and

(3) the person subsequently re-enters the service and is thus subject to the UCMJ at the time of trial.

b) *Willenbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998). The CAAF holds that under the 1986 version of Article 3(a), UCMJ, court-martial jurisdiction exists to prosecute a member of the reserve component for misconduct committed while a member of the active component so long as there has not been a complete termination of service between the active and reserve components. In dicta, however, the CAAF advises that the current version of Article 3(a), UCMJ, "clearly provides for jurisdiction over prior-service offenses without regard to a break in service." *See also Willenbring v. United States*, 559 F.3d 225 (4th Cir. 2009) (affirming District Court denial of Willenbring's habeas corpus petition and reasoning that his service was not terminated because his early release and discharge from the regular component was conditioned upon a contractual obligation to immediately begin service in the reserve component); *but see Murphy v. Dalton*, 81 F.3d 343 (3d Cir. 1996) (holding that it is improper to involuntarily recall a member of the reserve component to active duty for an Article 32(b) investigation when the alleged misconduct occurred while the service member was a member of the active component). [Note: *Murphy v. Dalton* notwithstanding, the CAAF decision in *Willenbring* is controlling legal authority]

c) Break-In-Service. *United States v. Erickson*, 63 M.J. 504 (A.F. Ct. Crim. App. 2006). Appellant was convicted of violating a lawful order, rape and sodomy of a female under the age of 12, and indecent acts and liberties with a female under the age of 16. The crimes were committed while he was on active duty in the Army, he was discharged, and subsequently enlisted in the Air Force. He was sentenced to a DD and confinement for life with the possibility of parole. Where appellant was on active duty in the Army when he committed misconduct, was discharged and subsequently enlisted in the Air Force, and was on active duty at the time of trial, as here, the court-martial had jurisdiction over the appellant by virtue of Article 3(a), UCMJ.

d) Exception: UCMJ, Art. 3(b), person obtaining a fraudulent discharge.

(1) *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981). May the government prosecute a soldier whose delivered discharge (Chapter 8 - pregnancy) was revoked for being obtained by fraud? C.M.A. allowed the court-martial proceedings to continue. The 5th Circuit affirmed the district court's denial of Wickham's request for habeas corpus relief. The court-martial may proceed. *Wickham v. Hall*, 706 F.2d 713 (5th Cir. 1983).

(2) *United States v. Reid*, 46 M.J. 236 (C.A.A.F. 1997). The government must secure a conviction for fraudulent discharge prior to prosecuting the accused for other offenses. Article 3(b) clearly requires a two-step trial process. QUERY: What about offenses committed after the fraudulent discharge? Article 3(b) does not confer jurisdiction over offenses committed after the fraudulent discharge. The service court, in dicta, reasoned that after conviction for the fraudulent discharge, jurisdiction would exist over offenses committed after the discharge under UCMJ, Art. 2.

(3) *United States v. Pou*, 43 M.J. 778 (A.F. Ct. Crim. App. 1995). Accused faked his own death. Air Force initially designated him as "missing" before declaring him "dead." Held: Declaring a missing person "dead" is not the equivalent of a discharge of that person, therefore, Art. 3(b) is inapplicable, and court-martial jurisdiction exists.

e) Exception: UCMJ, Art. 3(c) - Deserter obtaining discharge for subsequent period of service. *United States v. Huff*, 7 C.M.A. 247, 22 C.M.R. 37 (C.M.A. 1956).

f) Exception: UCMJ, Art. 2(a)(7) - Persons in custody of the armed forces serving a sentence imposed by court-martial. *United States v. Harry*, 25 M.J. 513 (A.F.C.M.R. 1987) (punishment cannot include another punitive discharge); *United States v. King*, 30 M.J. 334 (C.M.A. 1990) (prosecuted after BCD executed but still in confinement).

g) Exception: UCMJ, Art. 3(d). Separation from Active Components to Reserve Status. Leaving a Title 10 status does not terminate court-martial jurisdiction.

h) Exception: Intent of the Discharge Authority – When the command places a hold on the accused prior to 2359 on the date of discharge, even though the discharge certificate had been delivered earlier that day, the discharge does not terminate jurisdiction. In *United States v. Harmon*, 63 M.J. 98 (C.A.A.F. 2006), the appellant was scheduled to be administratively separated from active duty on 17 May 2001. Early in the morning of 17 May, he participated in the robbery of another Servicemember. By 0815, NIS had identified him as a suspect. At 0900, appellant received his DD 214 (which listed his effective discharge date and time as 2359 on 17 May) and got on a bus to go home. At 1020, appellant's command learned of his involvement in the robbery and revoked his administrative discharge. The CAAF held that because the command placed a hold on appellant prior to the time his discharge became effective, jurisdiction was never lost.

IV. JURISDICTION OVER THE RESERVE COMPONENT

A. BOTTOM LINE: Army policy states that Reserve Component soldiers are subject to the UCMJ whenever they are in a Title 10 status: Inactive Duty Training (IDT), Active Duty for Training (ADT), Annual Training (AT), Active Guard Reserve (AGR), or Active Duty (AD). *See* AR 27-10, para. 20-2 (11 May 2016). After 1 January 2019, UCMJ jurisdiction exists over reservists during travel to and from the IDT training site of the member, during intervals between consecutive periods of IDTs on the same day, and during intervals between IDTs on consecutive days, pursuant to orders or regulations. Article 2(a), UCMJ (2019).

1. *United States v. Wall*, 1992 WL 198418 (A.F.C.M.R. 1992) (unpub.) (jurisdiction existed over the accused who absented himself during second half of training day).

2. *United States v. Morse*, No. ACM 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim. App. Oct. 4, 2000) *pet. for rev. den.*, 2001 CAAF LEXIS 1021 (Aug. 24, 2001) (accused's duty was not complete until travel forms were signed even if he did not sign the fraudulent travel forms until after he completed his travel).

3. *See also*, AR 27-10, Chp. 20 (11 May 2016); Air Force Instruction 51-201; and Paragraph II.E., this outline.

4. *United States v. Wolpert*, 75 M.J. 777 (CAAF 2016) (no personal jurisdiction over member of reserve component who committed a sexual assault between IDT periods) Military Justice Act of 2016 changed Article 2(a), therefore the *Wolpert* ruling only applies to crimes committed prior to 1 January 2019.

B. UCMJ, Art. 3(d). Prevents the termination of court-martial jurisdiction over a member of a Reserve Component who violates the UCMJ while in a Title 10 status by the member's release from active duty or inactive-duty training. Closes jurisdiction gaps recognized by *Duncan v. Usher*, 23 M.J. 29 (C.M.A. 1986).

C. Procedures and Restrictions: AR 27-10, Chapter 20 (11 May 2016) establishes procedures for taking punitive action (Art. 15, court-martial) against RC Soldiers.

D. Procedure: Involuntary Recall to Active Duty. UCMJ, Art. 2(d), authorizes a member of a Reserve Component, who is the subject of proceedings under Articles 15 or 30, UCMJ to be ordered involuntarily to active duty for: Article 32 investigations, trial by court-martial, and nonjudicial punishment.

1. Restrictions on the involuntary recall process.

a) A member may only be ordered to active duty by an active component general court-martial convening authority (GCMCA). UCMJ, Art. 2(d)(4); AR 27-10, para. 21-3 (11 May 2016).

b) Unless the order to involuntary active duty was approved by the appropriate Service Secretary, the member may not be:

(1) sentenced to confinement;

(2) forced to serve any punishment involving restriction on liberty except during a period of inactive duty training or active duty; or

(3) placed in pretrial confinement. UCMJ, Art. 2(d)(5).

c) General and Special Courts-Martial. Prior to arraignment the reservist must be on active duty. R.C.M. 204(b)(1).

d) Summary Courts-Martial. Can be initiated and tried within the reserve structure and without active duty involvement. R.C.M. 204(b)(2). But the summary court-martial officer must be placed on active duty. UCMJ, Art. 25; R.C.M. 1301.

E. Impact on the National Guard.

1. 32 U.S.C. § 505 - Training in a state status - No federal military jurisdiction.

2. 10 U.S.C. § 672 - Training in a federal status - Guard member is subject to jurisdiction and the reserve jurisdiction legislation's major provisions. This includes involuntary recall. *But see United States v. Dimuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005) (holding that a Guard member in Title 10 status was not subject to an inspection under M.R.E. 313 ordered by a commander in Title 32 status and suppressing the positive urinalysis resulting from that inspection).

3. Federal status continues until the guard member has completed his federal service (excluding AWOL time) and federal jurisdiction exists notwithstanding state action to terminating jurisdiction. *United States v. Wilson*, 53 M.J. 327 (2000).

V. PROCEDURAL CONSIDERATIONS

A. Pleading Jurisdiction. *See*, R.C.M. 307(c)(3) Discussion at (C)(iv) and (F).

B. Lack of Jurisdiction: Raised by Motion to Dismiss, R.C.M. 907. May be made at any stage of the proceeding.

C. Burden of Proof. Although R.C.M. 905 states that the burden of proof in a motion contesting jurisdiction is a preponderance of the evidence, if contested at trial, the government must prove jurisdiction beyond a reasonable doubt.

1. *United States v. Bailey*, 6 M.J. 965 (N.M.C.M.R. 1979); R.C.M. 905(c)(1)(preponderance); R.C.M. 905(c)(2)(B) (burden of persuasion on government); *see also United States v. Hoxie*, 14 M.J. 713 (N.M.C.M.R. 1982) (burden is preponderance at motions hearing before the military judge, but if raised as a defense during trial the burden is beyond a reasonable doubt).

2. *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983) (for "peculiarly military" offenses like AWOL, an accused's military status is an element of the offense which must be proved beyond a reasonable doubt to the fact finders); *see also United States v. Roe*, 15 M.J. 819 (N.M.C.M.R. 1983).

3. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990) (Reserve Component warrant officer ordered to AD for training; provided urine sample that tested positive for cocaine pursuant to a urinalysis administered within 36 hours of initiation of AD period. Held: no subject matter jurisdiction because the government failed to prove beyond a reasonable doubt that the accused was subject to the UCMJ at the time he "used" the cocaine).

VI. JURISDICTION OVER CIVILIANS

A. MEJA. Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261, Pub. L. No. 106-523.

1. The MEJA was approved by Congress and signed into law by the President on 22 November 2000. This legislation *does not expand military jurisdiction*; it extends federal criminal jurisdiction over certain civilians (DOD employees, contractors, and dependents thereof, and military dependents) accompanying the military overseas. The implementing regulations went into effect on 3 March 2005. The Act was amended in 2005 to cover civilian employees, contractors, and contractor employees of any Federal agency "to the extent such employment relates to supporting the mission of the Department of Defense overseas." See 2005 NDAA, Sec. 1088.

2. The Act applies to felony level offenses that would apply under federal law if the offense had been committed within the "special maritime and territorial jurisdiction of the United States."

3. The Act provides for an initial appearance proceeding, which may be carried out telephonically, conducted by a Federal magistrate judge. At this proceeding, the magistrate will determine if there is probable cause to believe a crime was committed and if the person committed it. If pretrial detention is an issue, the magistrate will also conduct a detention hearing as required by federal law. This detention hearing may also be conducted telephonically if the person so requests.

4. The Act directly involves the military in two ways.

a) The Act, depending on implementing rules, may authorize DOD law enforcement personnel to arrest those civilians covered by the Act.

b) The Act entitles those civilians covered by the Act, to representation by military counsel (i.e. judge advocates) at the initial hearing, if determined by the Federal magistrate.

5. MEJA Resources

a) DODI 5525.11 (3 Mar 2005)

b) DA Message (13 May 2005)

c) OTJAG Info Paper (24 May 2005)

d) AR 27-10, Ch. 26 (11 May 2016)

e) Secretary of Defense Memorandum, "UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations." (10 March 2008)

f) DoD General Counsel DTM 09-015 (16 February 2010)

6. *United States v. Brehm*, 691 F.3d 547 (4th Cir. 2012)

a) On Thanksgiving Day 2010, Sean Brehm (a South African), who was a contractor working for a U.S. company on Kandahar Airfield, Afghanistan (KAF), stabbed another contractor in the arm and stomach causing serious injuries. As part of his "Foreign Service Agreement" Brehm acknowledged and accepted that he may be subject to U.S. federal civilian criminal jurisdiction under MEJA (Military Extraterritorial Jurisdiction Act – passed in 2000 MEJA allows for the prosecution of civilians accompanying American troops overseas), by virtue of the fact that he was accompanying the U.S. Armed Forces outside the United States.

b) Brehm pleaded guilty in Federal District Court in the Eastern District of Virginia to assault resulting in serious bodily injury. In exchange he was allowed to challenge, through appeal, the jurisdictional basis of the indictment. On appeal Brehm argued: 1) The indictment's reliance on MEJA was misplaced, in that the statute cannot be applied to him in a manner consistent with the Constitution, and 2) there lacked a sufficient nexus between himself and the United States to support the exercise of criminal jurisdiction. The court rejected Brehm's arguments and affirmed the district court conviction.

7. *United States v. Santiago*, 987 F. Supp. 2d 465 (S.D.N.Y. 2013)

a) Defendant was a Marine corporal who had a reputation for playing quick-draw with his weapon and who shot a Navy Corpsman serving with him while on active duty in Iraq in 2008. Agents from NCIS identified him as the shooter by obtaining statements from an Iraqi interpreter who witnessed the shooting and eventually obtaining a confession. The Marine Corps never initiated court-martial proceedings against him, and he was allowed to leave the service. In 2013, the United States Attorney's Office in New York initiated a prosecution against him under MEJA. By that time, the interpreter had disappeared. The interpreter had denied that the defendant had been playing with his weapon prior to the shooting and made other statements favorable to the defendant.

b) The District Judge hearing the case dismissed a count of reckless assault for the shooting based on a due process violation, and allowed to false statement counts to proceed. The prejudice was the loss of the interpreter's testimony, which was favorable to the defendant. The Judge faulted the Marine Corps for recklessly delaying the case, In a previous order, *United States v. Santiago*, 966 F. Supp. 2d 247 (S.D.N.Y. 2013), she discussed how her research revealed very few MEJA cases against former military members, and this one appeared to be the only one where the military was aware of the misconduct and could have court-martialed the defendant. The Judge did not find that the Marine Corps intentionally delayed the case to avoid potential problems Article 31 might cause for the prosecution, and admitted the statements that would have likely been inadmissible under Article 31 because they were not inadmissible under Miranda. The Judge expressed deep concern, however, that the case was allowed to languish with such obviously time-sensitive issues given the draw-down in Iraq, the significance of the interpreter's testimony, and the defendant's looming EAS date.

8. *United States v. Bello Murillo*, 826 F.3d 152 (4th Cir. 2016)

a) The court employed the Brehm test to uphold the extraterritorial prosecution of a Colombian taxi driver who killed a DEA agent as part of a conspiracy among taxi drivers to rob affluent passengers. The due process inquiry for extraterritorial prosecutions from Brehm is similar to that in other circuits: whether there is a sufficient nexus between the defendant and the United States so that applying a particular statute to an accused would not be arbitrary or unfair. It is not arbitrary to prosecute a defendant in the United States if his actions

affected significant American interests regardless of the defendant's intent. The court relied on Brehm for the proposition that a prosecution was not fundamentally unfair even if the accused did not know that his victim was an American; the accused must only be on notice that his conduct was criminal and would subject him to prosecution somewhere.

b) An accused has less of a due process concern where his conduct – like the kidnapping and murder in Bello Murillo – is self-evidently criminal, according to Brehm. The relevant treaty afforded Bello Murillo sufficient notice to satisfy due process, for where a treaty provides "global notice" that certain generally-condemned acts could be prosecuted by any party to the treaty it satisfies due process.

B. Patriot Act. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107–56.

One reason there was a jurisdictional gap prior to MEJA was that the definition of "special maritime and territorial jurisdiction of the United States," (SMTJ) was interpreted as excluding U.S. military installations overseas. *See United States v. Gatlin*, 216 F. 3d 207 (2d Cir. 2000). In 2001, the Patriot Act amended the definition to include military installations overseas, however the definition excludes anyone already covered by the MEJA. *See* 18 U.S.C. § 7.

C. Court-martial Jurisdiction under Amended Article 2(a)(10), UCMJ.

1. The 2007 National Defense Authorization Act amended Article 2(a)(10) as follows:

a) OLD: In time of war, persons serving with or accompanying an armed force in the field.

b) NEW: In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.

2. "Contingency Operation," 10 U.S.C. Sec. 101(a)(13): The term "contingency operation" means a military operation that-

a) is designated by the SECDEF as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

b) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.

c) Current operations in Afghanistan and Iraq clearly meet the definition of "contingency operation" above.

3. The only significant guidance to date on implementation of the amended Article 2(a)(10), UCMJ, is contained in a SECDEF Memorandum dated 10 March 2008. This memo reserves the authority to prefer charges or initiate NJP against a civilian to the GCMCA level, however each case must be sent up to SECDEF and over to DOJ first, for a decision on whether to prosecute under the MEJA rather than under the UCMJ. *See* Memorandum from the Secretary of Defense to the Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Undersecretaries of Defense and Commanders of the Combatant Commands, subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (10 Mar. 2008).

4. *United States v. Ali*, 70 M.J. 514 (Army Ct. Crim. App. 2011)

a) There has been one civilian tried by court-martial using Article 2(a)(10) jurisdiction. The accused, a Canadian/Iraqi citizen, pled guilty to three specifications involving possessing, hiding, and lying about a knife (the original charge was aggravated assault for stabbing another interpreter in the chest), and was sentenced to five months confinement (time already served in PTC). The Judge Advocate General of the Army directed the Army Court of Criminal Appeals to review the case of *United States v. Ali* pursuant Article 69(d), UCMJ. TJAG requested that the court give attention to two issues: a) whether the court-martial had jurisdiction over the accused pursuant to Article 2(a)(10), UCMJ; and b) whether the court-martial had subject matter jurisdiction over the offenses. First, the Court held that appellant and his conduct fit within the statutory jurisdictional framework of the UCMJ. The Court found the offense and trial occurred during a "contingency operation," finding that the offense and court-martial occurred during Operation Iraqi Freedom, a military operation that meets the definition of "contingency operation. The Court also found that appellant served "with or accompanied and armed force, finding that appellant had moved with a military operation and his presence was not merely incidental but directly connected with or dependent upon the activities of the armed force or its personnel. Article 2(a)(10), UCMJ is specifically drafted to limit military jurisdiction over civilians by requiring either a formal declaration of war by Congress or to the existence of "contingency operations" as defined by section 101(a)(13), Title 10. Moreover, jurisdiction over civilians is limited to only those civilians who are "serving with or accompanying an armed force" and that the civilian be "in the field." (Practitioner's note: It would seem that the commander would lose jurisdiction of this case by transferring it to the rear or the cessation of hostilities. Potentially, even transferring the case to a peaceful portion of Iraq would be fatal to the case.)

b) In July of 2012 CAAF ruled that the court-martial had jurisdiction over Ali under the provisions of Article 2(a)(10), and that the application of 2(a)(10) to Ali did not violate the Constitution *"under the circumstances of this case."* *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012). Significant to the CAAF's resolution of the constitutional issues were the facts that Ali was not an American citizen, his crime occurred overseas, and his prosecution occurred overseas.

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CHAPTER 4
PROFESSIONAL RESPONSIBILITY

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I. INTRODUCTION

A. Scope and Governing Standards

1. Regulatory Standards Imposed by the Army.

a. The Rules of Professional Conduct For Lawyers [hereinafter referred to as Army Rules] apply to:

(1) All Army judge advocates;

(2) Civilian attorneys employed by Department of the Army;

(3) Non-Department of Defense civilian lawyers representing individuals in matters including, but not limited to, courts-martial, administrative separation boards, boards of inquiry, and disability evaluation proceedings.

(4) Local national lawyers employed by the Department of the Army, to the extent these Rules are not inconsistent with their domestic law and professional standards, and

(5) Army legal support personnel (i.e. 27Ds, interns, paralegals).

2. Attorneys must adhere to both the letter and the spirit of the rule.

3. Rules state a standard to be followed.

a. Provide a basis for taking action should a lawyer fail to comply or meet the standard. Does not provide a basis for civil cause of action against either the Army or an attorney.

b. Comments are non-binding guidance.

B. State Rules**.** "Every lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities." (Comment, Army Rule 8.5).

C. Key Resources:

1. Primary

a. Army Regulation 27-26, *Rules of Professional Conduct For Lawyers*.

b. The ABA Standards for Criminal Justice.

c. The ABA Code of Judicial Conduct.

d. The Army Code of Judicial Conduct.

2. Secondary

a. AR 27-1, *Judge Advocate Legal Service*.

b. AR 27-3, *The Army Legal Assistance Program*.

c. AR 27-10, *Military Justice*.

d. American Bar Association Model Rules of Professional Conduct.

e. American Bar Association Model Code of Professional Responsibility.

f. ABA/BNA Lawyers' Manual of Professional Conduct.

g. The Legislative History of the Model Rules of Professional Conduct, ABA.

h. The Annotated Model Rules of Professional Conduct, ABA.

3. Websites

a. State ethics rules: http://www.abanet.org/cpr/links.html#States

b. ABA Professional Conduct material: http://www.abanet.org/cpr/pubs/ethicopinions.html

II. CONFLICTS BETWEEN THE APPLICABLE RULES

A. Army Rule 8.5 provides that if there is a conflict with state rules, the lawyer should seek assistance from his or her supervisory lawyer. If not resolved, then:

1. Army Rules supersede rules of licensing jurisdiction in the performance of official duties.

2. The rules of the appropriate licensing authority will govern the conduct of the lawyer in the private practice of law unrelated to the lawyer's official responsibilities.

B. ABA Model Rule 8.5. Disciplinary authority must make a choice of law:

1. For conduct in connection with a court action, apply the rules of the jurisdiction where the court sits.

2. For other conduct, apply the rules of the jurisdiction in which the lawyer principally practices.

III. RESOLVING CONFLICTS

A. Judge advocates should follow the most restrictive standard. If a course of conduct is permitted under one standard and mandatory under another, follow the mandatory standard.

B. Employ practical alternatives, examples include:

1. Find the client new counsel.

2. Obtain exception from state bar. See, e.g., Oregon Informal Ethics Opinion 88-19, which provides that military lawyers will not be subject to discipline in Oregon as long as their conduct is not unethical under the applicable military code of ethics. NOTE: Discuss this option with your technical supervisory chain, to include the Professional Responsibility Branch, if necessary.

IV. THE LAWYER-CLIENT RELATIONSHIP

A. Scope of Representation (Army Rule 1.2).

1. A client's decisions concerning the objectives of representation are controlling on counsel. Counsel shall consult with the client as to the means by which these decisions are to be pursued. A lawyer may, however, limit the objectives of the representation with the client's consent.

2. Example: Representation by Defense Counsel.

a. Client decides --

(1) Choice of counsel.

(2) What plea to enter.

(3) Selection of trial forum.

(4) Whether to enter into pretrial agreement.

(5) Whether to testify.

b. Defense counsel decides --

(1) What motions to make.

(2) Which court members to select.

(3) Which witnesses to call.

(4) How cross-examination will be conducted.

(5) General strategic and tactical decisions.

c. Comment to Army Rule 1.2; see also Standards for Criminal Justice 4-5.2(b).

3. A lawyer should assume responsibility for technical and legal tactical issues.

4. A lawyer shall not counsel a client to engage in conduct the lawyer knows is criminal. (Army Rule 1.2(d)).

B. The Army as the Client (Army Rule 1.13).

1. A judge advocate or other Army lawyer represents the Army acting through its authorized officials (e.g. commanders).

2. The lawyer-client relationship exists between the lawyer and the Army.

3. Regulations may authorize representation of individual clients. For example, legal assistance attorneys and defense counsel are authorized to represent individual clients, not the Army. (AR 27-3, para. 2-3a).

4. If not authorized to form an attorney-client relationship with the client, an Army lawyer *must* advise the individual that no such relationship exists between them. (Army Rule 1.13(b)).

5. While an attorney may be permitted by law or regulation to form an attorney-client relationship, situations may arise in which doing so may lead to a conflict. Army attorneys should exercise considerable discretion in handling the personal legal problems of Army officials, and receiving client confidences, when the Army attorney is not assigned to a client service organization such as Legal Assistance or Trial Defense Service.

6. Illegal Acts: If an official of the Army (e.g., a commander) is acting illegally or intends to act illegally, and the action might be imputed to the Army, the lawyer shall--

   a. Proceed as is reasonably necessary in the best interest of the Army.

   b. Consider utilizing the following measures:

      (1) Asking the official to reconsider.

      (2) Advising the official to get a separate legal opinion.

      (3) Advising the official that his or her personal legal interests are at risk and he or she should consult counsel.

      (4) Advising the official that counsel is ethically bound to serve Army interests and must discuss the matter with supervisory lawyers.

      (5) Referring the matter to or seeking guidance from higher authority in the technical chain of supervision.

   c. If unsuccessful, the lawyer may terminate representation with respect to the matter in question.

C. Competence (Army Rule 1.1).

1. Competence requires legal knowledge, skill, thoroughness, and preparation to the extent reasonably necessary for representation.

   a. The required proficiency is that generally afforded to clients in similar matters.

   b. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

   c. Supervisor makes the initial determination as to competence for a particular assignment.

   d. *United States v. Hanson*, 24 M.J. 377 (C.M.A. 1987). Judge believed defense counsel incompetent; properly appointed another detailed counsel without severing existing attorney-client relationship.

   e. *United States v. Weathersby*, 48 M.J. 668 (Army Ct. Crim. App. 1998). Lack of defense sentencing case.

   f. *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998). Lack of defense sentencing case in capital case.

2. Principles

   a. Know the law.

   b. Know the consequences of conviction.

      (1) *United States v. Denedo*, 2010 WL 996432 (UNPUBLISHED) (N.M.Ct.Crim.App.). A civilian defense counsel's bad advice on immigration consequences of guilty plea did not render plea involuntary. *But see: U.S. v. Miller* (duty to warn of sex registration

offenses) and *U.S. v. Rose* (duty to answer questions about sex registration) *infra*.

(2) *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). Padilla is a U.S. permanent resident of forty years who served in the U.S. military during Vietnam. He was charged with felony drug trafficking, among other things. He asked his attorney if a guilty plea would impact his immigration status, and his attorney told him he "did not have to worry about immigration status since he has been in the country so long." Padilla's attorney's advice was incorrect and but for his appeal that he pled guilty in reliance on his attorney's advice, he would have been deported. While the Supreme Court did not decide the ultimate issue of whether there was prejudice in this case, they did grant a new entitlement under the Sixth Amendment that Justice Scalia in his dissent terms a "Padilla warning" that now requires that where the law "is truly clear," as the court found in this case, "the duty to give correct advice is equally clear." *See also: United States v. Vargaspuentes*, 70 M.J. 501 (A.C.C.A. 2011) addressing the need to properly advise in an immigration case. Because the court resolved the case on other grounds, it did not substantively address counsel's duty to investigate when a Soldier's birthplace is listed as outside the U.S. on the ERB, but noted the point in passing.

c. Conceding guilt on lesser charge. *United States v. Larson*, 66 M.J. 212 (C.A.A.F. 2008). A defense counsel may concede guilt on lesser charges to gain credibility on the main charge despite an accused's NG plea.

d. Understanding privileges. *United States v. Paaluhi*, 54 M.J. 181 (C.A.A.F. 2000). Trial Defense Counsel erroneously interpreted possible psychotherapist-patient privilege in the military. The CAAF reversed lower court's judgment and set-aside appellant's conviction and sentence, because defense counsel rendered ineffective assistance in improperly evaluating military privilege law. The resulting confession secured Paaluhi's conviction. Without his confession there might have been reasonable doubt as to his guilt.

3. A lawyer can provide adequate representation in a wholly novel field through necessary study or consultation with a lawyer of established competence in the field in question.

4. If a lawyer becomes involved in representing a client whose needs exceed either the lawyer's competence or authority to act, the lawyer should refer the matter to another lawyer.

5. Lawyers may give advice and assistance even if they do not have skill ordinarily required if referral or consultation with another lawyer is impractical.

D. Diligence (Army Rule 1.3).

1. Lawyers must act with reasonable diligence and promptness.

a. *United States v. Gibson*, 51 M.J. 198 (C.A.A.F. 1999). Civilian defense counsel found ineffective where the CDC failed to pursue leads contained in the CID report that was provided by the trial counsel. The accused was

charged with rape and adultery. The undeveloped information in the CID report included summarized interviews with teachers and students at the 15 year old victim's school, that she may have alleged rape to distract school officials from her behavior, that she had a record of exaggerating her sexual experience, that she related conflicting versions of the alleged rape, and that she did not enjoy a good reputation for truthfulness.

b. *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009). Attorney required to perform adequate background investigation and present evidence in sentencing even if client not helpful. Defendant's status as a veteran and his struggles with posttraumatic stress disorder and subsequent substance, as well as his impaired mental capacity and abusive childhood is highly relevant mitigation evidence.

c. *United States v. Boone*, 42 M.J. 308 (Army Ct. Crim. App. 1996), *rev'd* 49 M.J. 187 (1998). In cases where the client has retained civilian defense counsel, military defense counsel must not be lulled into inactivity and complete deference to their civilian counterparts; military defense counsel are not relieved of professional or ethical obligations to the client.

d. *United States v. Sorbera*, 43 M.J. 818 (A.F. Ct. Crim. App. 1996). Civilian defense counsel whose advice to accused led to an additional charge provided incompetent pretrial representation.

e. *United States v. McDuffie*, 43 M.J. 646 (A.F. Ct. Crim. App. 1995); *see also* ABA Standard for Criminal Justice 4-4.3(b). Defense counsel has no professional obligation as part of trial preparation to discuss pertinent evidentiary rules with a witness.

2. Post-trial submissions.

a. *United States v. Johnston*, 51 M.J. 227 (C.A.A.F. 1999). The record of trial was returned to the convening authority for a new recommendation and action. The new post-trial recommendation was served on the accused's defense counsel, who was then a civilian. Substitute counsel was not appointed. The new recommendation was not served on the accused, nor did the defense counsel contact the accused. No matters were submitted by the accused or counsel. The court found the accused was not represented at a critical point in the proceedings against him in violation of Article 27 (b).

b. *United States v. Wean*, 45 M.J. 461 (C.A.A.F. 1997). After post-trial 39a hearing, MJ concluded, "the collective failings and inactions . . . resulted in representation of the appellant that was lacking in legal knowledge, skill, thoroughness, and preparation."

c. *United States v. Fordyce*, 69 M.J. 501 (Army Ct. Crim. App. 2010). DC neglected to advise on waiver and Post Trial and Appellate Rights (PTAR) form did not cover it. The court has found this to be an ongoing problem and their "patience is at a limit." There was also a question whether the client consulted on clemency submissions. Court highly encourages an accused co-sign R.C.M. 1105 and 1106 submissions, as well as putting it on the record the client has fully been advised of the post-trial submission process. Court did not find counsel ineffective but found error in the post-trial handling of the case because the court was not convinced the appellant was "afforded a

full opportunity to present matters to the convening authority." Consequently, the court set aside the action and returned it for a new one.

3. Qualifications of Counsel. *United States v. Williams*, 51 M.J. 592 (N.M.Ct.Crim.App. 1999). Appellant contended that his civilian defense counsel was ineffective *per se* because he was on "inactive status" with respect to his admissions to practice law in three states. The Navy-Marine Court disagreed and found nothing in R.C.M. 502(d)(3)(A) requiring the practitioner to be able to practice in the home state. 51 M.J. at 597. Counsel had submitted to the trial court various related documents to include one affirming that he was a "lawyer in good standing" in the state of Iowa. *See also U.S. v. Morris*, 54 MJ 898 (N.M.Ct.Crim.App. 2001). DC's inactive status with his state bar does not make him per se ineffective or deprive the appellant of the right to counsel; *U.S. v. Steele*, 53 M.J. 274 (2000). CDC's inactive status with his state bar does not make him per se ineffective or deprive the appellant of the right to counsel.

4. Notification of requirement to register. *United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006). Appellant averred he was never told that pleading to an offense of possessing child pornography would require him to register as a TX sex offender. His failure to register led him to be incarcerated in TX. The court failed to find IAC for failure to inform the accused. The court did specify for cases tried after November 2006 that counsel must notify accused that any qualifying offense under DODI 1325.7 (sex + violence or minor) requires sex offender registration.

5. Obligation to answer reasonable questions. *United States v. Rose*, 71 M.J. 138 (C.A.A.F. 2012). IAC where defendant's reasonable request for information regarding sex offender registration went unanswered which resulted in accused pleading guilty when he otherwise would not have if he had known the answer to his question.

6. Lawyers must consult with clients as often as necessary.

7. A lawyer should carry through to conclusion all matters undertaken for a client.

E. The Lawyer as Advisor.

1. A lawyer may refer to moral, economic, social, and political factors when rendering advice to clients (Army Rule 2.1).

   a. Purely technical legal advice may sometimes be inadequate.

   b. For a discussion of some ways such "beyond the law" topics can be integrated into client counseling, see these articles by CPT Evan Seamone: *Attorney as First Responder: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veterans' Legal Decision-Making Process* (202 Mil. L. Rev., 144-184 (2009)), *Veterans' Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans With Posttraumatic Stress Disorder* (202 Mil. L. Rev., 185-257 (2009)), and *Divine Intervention: The Ethics of Religion, Spirituality, and Clergy Collaboration in Legal Counseling* (29 Quinnipiac L. Rev., 289-373 (2011)).

2. Lawyers must exercise independent judgment when advising a client (Army Rule 5.4).

a. Rule explicitly allows for individual representation when detailed or assigned.

b. Unfettered loyalty & professional independence to the same extent as lawyers in private practice when assigned individual client.

F. Communication (Army Rule 1.4).

1. Lawyers have a duty to keep clients reasonably informed about the status of a matter and to comply with client requests for information.

2. Lawyers also must explain matters to clients to permit them to make "informed decisions."

G. Confidentiality (Army Rule 1.6).

1. General rule. A lawyer shall not reveal any information relating to the representation of a client.

a. Applies to all sources of information, not just that which comes from the client.

b. Applies to information obtained prior to formation of attorney-client relationship.

c. The duty of confidentiality continues after the lawyer-client relationship has terminated.

d. The duty also applies to Army legal support personnel.

2. Exceptions to confidentiality.

a. A client may consent to disclosure of confidences (Army Rule 1.6(a)).

b. Disclosure may be impliedly authorized in order to carry out the representation (Army Rule 1.6(a)). (See, *e.g. United States v. Province*, 45 M.J. 359 (C.A.A.F. 1997).

c. Disclosure is permitted to establish a claim or defense in a controversy with a client (Army Rule 1.6(b)).

d. A lawyer *shall* reveal:

(1) Information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(a) To prevent reasonably certain death or substantial bodily harm;

(b) To prevent the client from committing a criminal act that the lawyer believes is likely to result in the significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(2) There is no authority for revealing information of other potential offenses or past crimes under the Army Rules. Example: no obligation to reveal the whereabouts of a fugitive nor to disclose the location of contraband. This conforms to the ABA Rules; see ABA Formal Opinion 84-349 (1984).

e. Compare to Mil. R. Evid. 502 - Lawyer-Client Privilege.

(1) Protects against disclosure of privileged communication between attorney and client.

(2) Does not protect against other disclosures (e.g., information gained from sources other than the client).

(3) More narrow than Rule 1.6.

H. Terminating the Relationship. (Army Rule 1.16)

1. Notwithstanding any other provision of the rule, a lawyer shall continue the representation when ordered to do so by a tribunal or other competent authority.

2. A lawyer *shall* seek withdrawal (or not commence representation) if -

a. the representation will violate the rules;

b. the lawyer's physical or mental condition materially impairs her ability to represent the client; OR

c. the lawyer is dismissed by the client.

3. A lawyer *may* seek withdrawal if it can be accomplished without material adverse impact to the client's interests or -

a. the client persists in a course of action which the lawyer reasonably believes to be criminal or fraudulent;

b. the client has used the lawyer's services to perpetrate a crime or a fraud;

c. the client persists in pursuing an objective which the lawyer considers repugnant or imprudent; OR

d. other good cause for withdrawal exists.

4. A lawyer must take reasonable steps to protect a client's interests upon termination of the relationship (Army Rule 1.16).

5. Steps should include giving notice to the client, allowing time for employment of other counsel, and surrendering all papers and property.

6. *United States v. Spriggs*, 52 M.J. 235 (C.A.A.F. 2000). TDS counsel represented Spriggs at a prior court-martial resulting in an acquittal. After additional charges were preferred, including perjury charges from his first court-martial, appellant made an IMC request for his first DC. DC had left active duty. The CAAF ruled that release of the TDS counsel from active duty constituted good cause for severance of the attorney-client relationship. Additionally, appellant did not establish that there was an ongoing attorney-client relationship. *But see United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). Court faulted the judge for not establishing reason for DC withdraw prior to DC resigning from military service after being part of the trial defense team for a year. The court found there was not a knowing release and allowing the DC to EAS (ETS in the Army) because he had completed his commitment did not constitute "good cause." Unlike NMCCA, however, CAAF was unwilling to presume prejudice and did not set aside the findings or approved sentence. CAAF has further opined, in the matter of Frank D. Wuterich, Appellant CCA 200800183, that in the event of a termination, particularly where there is a conflict involved, the military judge should ensure there is a verbatim transcript that reflects the facts, nature, type, and source of the conflict.

I. Fees and Self-Referral (Army Rule 1.5).

1. A lawyer shall not accept a gratuity, salary, or other compensation from a client for services performed as an officer of the U.S. Army.

2. A lawyer shall not receive compensation for making a referral of a client to a private practitioner.

3. A legal assistance attorney shall not receive any actual or constructive compensation or benefit for referring to a private-practitioner (including himself) a matter the lawyer first became involved with in a military legal assistance capacity. Comment to Army Rule 1.5; see also AR 27-3, para. 4-7d & d(1).

a. Does not subsequently prohibit a reserve component lawyer from representing military personnel or dependents in a private capacity so long as the representation does not concern the "same general matter" that the attorney provided legal assistance on. AR 27-3, para. 4-7d(2) & (3) "Same general matter" means

(1) One or more types of cases within any one of the ten categories of legal assistance; or

(2) Which arises out of the same factual situation or course of events.

b. Prohibits lawyer from using official position to solicit or obtain clients for private practice.

J. Conflicts of Interest (Army Rules 1.7, 1.8 & 1.9).

1. Directly adverse to the current client. A lawyer shall not represent a client if the representation of the client will be directly adverse to another client unless:

a. The lawyer reasonably believes the representation will not adversely affect the other relationship, and

b. Each client gives conformed consent in writing after consultation (Army Rule 1.7(a)).

c. If a conflict develops after representation has been undertaken, the attorney must seek to withdraw. The Army Rules adopt an objective approach. Relevant factors in determining whether multiple representation should be undertaken include:

(1) duration and intimacy of the lawyer's relationship with the clients involved,

(2) likelihood actual conflict will arise, and

(3) likely prejudice to the client if conflict does arise.

d. Potential conflicts in legal assistance:

(1) Estate planning.

(2) Debtor-creditor and seller-purchaser. *Compare Atlantic Richfield Co. v. Sybert*, 456 A.2d 20 (1983) (no conflict) *with Hill v. Okay Construction Co.*, 252 N.W. 2d 107 (1977) (conflict).

(3) Domestic relations. *Coulson v. Coulson*, 448 N.E.2d 809 (1983); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

e. Potential conflict in criminal practice -- representing multiple accused.

(1) Ordinarily a lawyer should refuse to act for more than one of several co-defendants (Comment to Army Rule 1.7). See Standards for Criminal Justice 4-3.5(b).

(2) Consult Army Regulation 27-10 and US Army Trial Defense Service Standard Operating Procedures before handling a co-accused situation. Generally:

(a) Co-accused will initially be contacted by separate defense counsel.

(b) Co-accused may submit request for the same individual military counsel.

(c) Chief, USATDS decides whether to grant the request. No request will be granted unless each co-accused has signed a statement reflecting informed consent to multiple representation and it is clearly shown that a conflict of interest is not likely to develop.

2. Representation materially limited. A lawyer is also precluded from representing a client if the representation would be materially limited by the lawyer's responsibility to another client, a third party, or by the lawyer's own interests (Army Rule 1.7(b)). Example: Defense counsel materially limited by loyalty to Army. *United States v. Bryant*, 35 M.J. 739 (A.C.M.R. 1992).

a. A possible conflict does not preclude representation.

b. Representation is permitted if the lawyer reasonably believes that it will not be adversely affected by the interest and the client consents after consultation.

3. Business transactions. A lawyer shall not enter into a business transaction with a client (Army Rule 1.8).

4. Former client. A lawyer who has represented a former client shall not thereafter represent another person in the same matter or use information to the disadvantage of a former client (Army Rule 1.9).

K. Imputed Disqualification (Army Rule 1.10).

1. Lawyers working in the same military law office are not automatically disqualified from representing clients with conflicting interests. A functional analysis is required (Army Rule 1.10. Compare ABA Model Rule 1.10.)

2. Army policy may discourage representation of both parties in certain instances, e.g. AR 27-3, para. 4-9c. (Representation of both parties in a domestic dispute discouraged).

V. THE LAWYER AS AN ADVOCATE

A. Disclosure of Adverse Legal Authority (Army Rule 3.3).

1. A lawyer shall not knowingly fail to disclose to the tribunal, legal authority in the controlling jurisdiction, known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

2. A lawyer should disclose authority from a collateral jurisdiction if the judge "would reasonably consider it important to resolving the issue being litigated." (Comment to Army Rule 3.3). ABA Formal Opinion 280 (1949); ABA Informal Opinion 84-1505 (March 1984).

B. Trial Publicity (Army Rule 3.6).

1. A lawyer shall not make public statements that will have a substantial likelihood of prejudicing a proceeding. *See Gentile v. Nevada State Bar*, 111 S. Ct. 2720 (1991). Public statements include comments made through social media.

2. Other publicity considerations.

a. TJAG Memorandum on Relations with News Media - OSJA attorneys must get approval from their SJA before any information is released to the media.

b. USATDS SOP - Defense counsel must consult with their Regional Defense Counsel and the Office of the Chief, TDS, prior to release. The ultimate decision to release information rests with the defense counsel, however.

c. Special Victims' Counsel Handbook – Whenever possible, SVCs will coordinate media communications with their SJA. In cases where the client does not consent to the SVC informing the SJA, SVCs are required to consult the Special Victim Counsel Office of the Program Manager.

C. *Ex Parte* Discussions with Military Judge and Panel Members (Army Rule 3.5).

1. A lawyer shall not communicate *ex parte* with a judge or juror except as permitted by law. *See United States v. Copening*, 34 M.J. 28 (C.M.A. 1992); *United States v. Hamilton*, 41 M.J. 22 (C.M.A. 1994).

2. It is unprofessional conduct for a prosecutor to engage in unauthorized *ex parte* discussions with or submission of material to a judge relating to a particular case that is or may come before the judge (Standards for Criminal Justice 3-2.8(c)).

D. Prosecutorial Disclosure (Army Rule 3.8(d)).

1. A lawyer prosecuting a criminal case shall make timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigation information known to the lawyer.

2. This is commonly referred to as "Brady" material and failure to turn it over is a "Brady Violation" after the case *Brady v. Maryland*, 373 U.S. 83 (1963).

E. Handling Evidence or Contraband (Army Rule 3.4(a)).

1. If the client informs the lawyer of the existence of the evidence but does not relinquish possession.

a. Lawyer should inform the client of the lawyer's legal and ethical obligations regarding the evidence.

b. Lawyer should refrain from either taking possession or advising the client what to do regarding the evidence.

2. If the lawyer receives the evidence or contraband.

   a. A lawyer shall not --

      (1) Unlawfully obstruct another party's access to evidence;

      (2) Unlawfully alter, destroy or conceal a document or other material having potential evidentiary value; or

      (3) Assist another person to do so.

   b. A lawyer who receives an item of physical evidence implicating the client in criminal conduct shall disclose the location of or shall deliver that item to proper authorities when required by law or court order (Comment, Army Rule 3.4(a)). *United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991) (defense counsel have a duty to surrender evidence which implicates their clients to prosecution). But see also *United States v. Province*, 45 M.J. 359 (1997) (no duty where Government has equal access to evidence).

   c. If a lawyer receives contraband, the lawyer has no legal right to possess it and must always surrender it to lawful authorities (Comment, Army Rule 3.4).

   d. If a lawyer receives stolen property, the lawyer must surrender it to the owner or lawful authority to avoid violating the law (Comment, Army Rule 3.4).

   e. Concealment, destruction, alteration, etc. could be a violation of UCMJ art. 134, Obstruction of Justice.

3. If the lawyer discloses the location of or delivers an item of physical evidence to proper authorities, it should be done in a way designed to protect the client's interests, including -

   a. Client's identity.

   b. Client's words concerning the item.

   c. Client's privilege against self-incrimination.

   d. Other confidential information.

4. Advice on handling evidence or contraband:

   a. Do not accept the item.

   b. Advise the client of the consequences of continued possession and voluntary turn-in. Do not advise the client of what to do regarding the evidence. Also advise the client of the lawyer's obligations regarding the evidence.

   c. If possession cannot be avoided, turn it over to the proper authorities.

      (1) Do not dispose of it or conceal it.

      (2) Do not destroy or alter the evidentiary quality.

      (3) Upon turn-in, refuse to disclose client identity and circumstances of your possession to the extent permitted by applicable case law.

F. Client Perjury (Army Rule 3.3; ABA Formal Opinion 87-353 (1987)).

1. A lawyer who knows that his client intends to testify falsely must

a. Advise the client not to do so and explain the consequences of doing so, including the lawyer's duty to disclose.

b. Attempt to withdraw (if the lawyer's efforts to dissuade the client from testifying falsely are unsuccessful).

c. Limit examination to truthful areas.

d. If not possible, disclose to the tribunal the client's intention to commit perjury.

2. *United States v. Baker*, 65 MJ 691 (C.A.A.F. 2007). Provides additional nonbinding guidance on how defense counsel and military trial judges should handle issues of client perjury at trial. Counsel should:

a. Conduct an investigation into all evidence prior to taking any action with regard to the alleged perjury.

b. Ethical obligations only exist if you have a “firm factual basis” to conclude that client has committed perjury.

c. Review potential consequences with client.

d. Request an on the record ex-parte discussion with the Military Judge to notify the military judge that the client will testify in narrative form without benefit of counsel *without* expressing why.

e. Refrain from using the perjured testimony in any way (i.e. in argument, cross or direct of other witnesses.)

3. Special Victim Counsel. A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. The obligations in Army Rule 3.3 apply to counsel for witnesses and victims, including Special Victim Counsel. (Comment, Army Rule 3.3)

G. Witness Perjury (Army Rule 3.3).

1. Avoiding the use of perjured testimony.

a. When evidence that a lawyer <u>knows</u> to be false is provided by a person who is not the client, the lawyer <u>must</u> refuse to offer it regardless of the client's wishes (Army Rule 3.3).

b. "A lawyer <u>may</u> refuse to offer evidence that the lawyer <u>reasonably</u> <u>believes</u> is false." (Army Rule 3.3(c)).

2. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures (Army Rule 3.3(a)(3)). This obligation ends at the conclusion of the proceeding. (Comment—*Duration of Obligation*).

H. Prosecutorial Conduct.

1. The duty of the prosecutor is to seek justice, not merely to convict. ABA Standard 3-1.2c.

a. A lawyer prosecuting a criminal case shall recommend to the convening authority that any charge or specification not warranted by probable cause be withdrawn. Military Rule 3.8(a).

b. A prosecutor should not intentionally avoid pursuit of evidence because he believes it will damage the prosecution's case or aid the accused. ABA Standard 3-3.11c.

c. Trial counsel should: report to the convening authority any substantial irregularity in the convening orders, charges, or allied papers . . . and bring to the attention of the convening authority any case in which trial counsel finds trial inadvisable for lack of evidence or other reasons (R.C.M. 502(d)(5) (Discussion)).

2. The use of social media in trial preparation could implicate ethical obligations. Before using social media when conducting case investigation, discovery, or trial preparation, attorneys should analyze, at minimum, whether their conduct would violate Rule 1.6 (Confidentiality of Information), Rule 4.1 (Truthfulness of Statements to Others), Rule 5.3 (Responsibility Regarding Nonlawyer Assistants), or Rule 8.4 (Misconduct).

a. As of the date of this deskbook, the American Bar Association has not issued a formal ethics opinion on trial practitioner's use of social media, and the Army Rules of Professional Conduct fall silent on the issue as well. ABA Formal Opinion 462 provides the ABA's stance on judicial use of social media.

b. Some state ethics committees have addressed whether attorneys may use social media in trial preparation. As a general rule, attorneys may access and review the public portions of a party's social-networking pages without facing repercussions. *State ex. Rel. State Farm Fire & Cas. Co. v. Madden*. Unless your state ethics committee holds differently, attorneys should consider information as not "public" if the attorney needs to send a request to a third party, like a Facebook "friend request", in order to access it.

3. Cross-examination of a truthful witness. ABA Standard 3-5.7.

a. Fair and objective cross-examination is permitted.

b. Unnecessary intimidation and humiliation of witness on cross-examination is prohibited.

c. If the prosecutor *believes* that the witness is truthful.

(1) Cross-examination is not precluded.

(2) But manner and tenor ought to be restricted.

d. If the prosecutor *knows* that the witness is truthful, cross-examination may not be used to discredit or undermine the truth.

4. It is unprofessional conduct for a prosecutor to knowingly make false statements or representations in the course of plea discussions. ABA Standard 3-4.1c.

5. A prosecutor may argue to the jury all reasonable inferences from the evidence in the record, but it is unprofessional conduct for the prosecutor to intentionally misstate the evidence or mislead the jury as to the inferences it may draw. Rule 3.4(e); ABA Standard 3-5.8(a).

6. It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. Rule 3.4(e); ABA Standard 3-5.8(b).

a. *United States v. Sewell*, 76 M.J. 14 (C.A.A.F. 2017). Trial counsel used the term "we" a multitude of times, often in the context of allying himself with the panel. The CAAF held it was improper to include the use of personal pronouns in connection with assertions that a witness was correct or to be believed.

b. *United States v. Fletcher. 62 MJ 175 (*C.A.A.F. 2005). Trial counsel repeatedly vouched for the credibility of the Government's witnesses and evidence. For example, after discussing the testing methods and cut-off levels, she concluded, "we know that that was from an amount that's consistent with recreational use, having fun and partying with drugs." She referred to another exhibit, the drug test results, personally characterizing the exhibit as "a perfect litigation package."

7. Prosecutors should not:

a. Make arguments calculated to inflame the passions or prejudices of the jury. ABA Standard 3-5.8c. *United States v. Diffoot*, 54 M.J. 149 (2000). Comments made by the trial counsel during closing argument regarding accused's ethnicity and urging a conviction based on guilt by association amounted to plain error and materially prejudiced appellant's substantial rights.

b. Make arguments that would divert the jury from its duty to decide the case on the evidence. ABA Standard 3-5.8d. *United States v. Baer*, 53 M.J. 235 (C.A.A.F. 2000). (The CAAF held that golden rule arguments asking the members to put themselves in the victim's place are improper and impermissible in the military justice system. However, they did recognize the validity of an argument asking the members to imagine the victim's fear, pain, terror and anguish. When improper argument is made, it must be looked at in context to determine whether it substantially impacted on the right of the accused to a fair and impartial trial. The CAAF held no such impact here and affirmed the case.)

c. Ask the defendant during cross-examination to comment on the truthfulness of other witnesses. *United States v. Harrison*, 585 F.3d 1155 (9th Cir. 2009) (where the SAUSA asked the defendant to comment on the truthfulness of the MP's he allegedly assaulted.)

8. Threaten Criminal Prosecution.

a. Under ABA Code DR 7-105, lawyers could not present, participate in presenting, or threaten to present criminal charges "solely to gain an advantage in a civil matter." *See Iowa State Bar v. Michelson*, 345 N.W.2d 112 (Iowa 1984); TJAG Opinions, *The Army Lawyer*, March 1993 and May 1977. *See also United States v. Edmond*, 63 M.J. 343 (C.A.A.F. 2006) where a trial counsel threatened a civilian witness (former Soldier) with prosecution by the SAUSA if he testified and then had the SAUSA reiterate the threat of prosecution.

b. There is no parallel provision in the Army Rules (or ABA Model Rules). Threatening or filing criminal charges may, however, violate more narrow provisions of Rules 3.1, 3.3, 3.4, 3.5, 3.8, 4.4, 8.4(b), or 8.4(e).

c. Attorneys should exercise caution when writing to collect support payments or debts on behalf of clients. *See Iowa State Bar v. Michelson*, 345 N.W.2d 112 (Iowa 1984); OTJAG Ethics Opinions, *The Army Lawyer*, March 1993, September 1978, and May 1977.

9. Prosecutors may refer to or argue facts outside the record only if the facts are matters of common public knowledge based on ordinary human experience. ABA Standard 3-5.9.

10. Vindictive Prosecution. To support a claim of vindictive prosecution, one must show that (1) "others similarly situated" were not charged; (2) "he has been singled out for prosecution"; and (3) "his 'selection . . . for prosecution' was 'invidious or in bad faith, *i.e.*, based on such impermissible considerations such as race, religion, or the desire to prevent his exercise of constitutional rights.'" Failure to show any of the three prongs of the test must result in the failure of a claim of vindictive prosecution. Because the burden to establish a claim of vindictive prosecution falls on the moving party, challenging a case on grounds of vindictive prosecution can be difficult. See *Unites States v. Martinez*, 2009 WL 1508451 (A.F. Ct. Crim. App. 2009). Air Force Captain alleged that he had "identified problems with operating procedures, equipment and standard of care," which he claimed irritated the SJA, convening authority, the Article 32 IO, the judge, TC, DC, "and a myriad of others."

I. Lawyer as a Witness (Army Rule 3.7).

1. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

a. The testimony relates to an uncontested issue;

b. The testimony relates to the nature and quality of legal services rendered in the case; or

c. Disqualification of the lawyer would work a substantial hardship on the client.

2. Unless the lawyer for the accused is prepared to forego impeachment of a witness by the lawyer's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the presence of a third person. Standards for Criminal Justice 4-4.3(d).

VI. OBLIGATIONS TO THIRD PARTIES

A. Truthfulness in Statements to Others.

1. A lawyer shall not make a false statement of law or fact to third parties (Army Rule 4.1(a)).

a. Knowledge of falsity generally required.

b. Misrepresentations can occur if a lawyer affirms a false statement of another person.

2. A lawyer shall not fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act, unless disclosure is prohibited by Rule 1.6 (Army Rule 4.1(b)).

3. A lawyer also has an obligation to disclose prior misstatements.

B. Respect for the Rights of Third Parties (Army Rule 4.4).

1. A lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third party or use methods of obtaining evidence that violate the rights of third parties (Army Rule 4.4).

2. Other obligations to third parties:

a. A lawyer has a duty of candor when dealing with third parties. *People v Berge*, 620 P.2d 23 (Colo. 1980).

b. A lawyer is forbidden from engaging in illegal, dishonest, and fraudulent conduct. *Office of Disciplinary Counsel v Kissel*, 442 A.2d 217 (Pa. 1982).

c. Lawyers must not make derogatory remarks about opposing counsel or opposing parties. Professional Responsibility, *The Army Lawyer* (Sept. 1978) ("lowly, dishonest, welsher"). *See also State v Turner*, 538 P.2d 966 (Kan. 1975).

d. If a lawyer receives a document or electronically stored information (including metadata) relating to the representations of the lawyer's client and the lawyer knows or reasonably should know the document or information was sent inadvertently, he or she must promptly notify the sender.

C. Communications with Opposing Parties.

1. A lawyer shall not discuss a case with another party who is represented by an attorney (Army Rule 4.2). *See also* ABA Code DR 7-104.

a. A lawyer may not accomplish communication indirectly through an agent or encourage clients to contact opposing parties. *United States v. Meek*, 44 M.J. 1 (C.A.A.F. 1996).) Trial counsel, following on the heels of military defense counsel, barged into a meeting between civilian defense counsel and accused. Trial counsel proceeded to tell the accused that his civilian lawyer had not interviewed witnesses and was ineffective. This was inappropriate contact with the accused.

b. Communication with a party concerning matters outside the representation is permissible.

c. A lawyer may communicate with the commander of an opposing party even if the party is represented by counsel.

2. A lawyer is not precluded from communicating with an unrepresented party (Army Rule 4.3).

a. Lawyers may not state or imply that they are disinterested.

b. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

c. Lawyers should refrain from giving advice to unrepresented persons (Comment to Army Rule 4.3). *See also* ABA Code DR 7-104(A)(2).

VII. DUTIES OF SUBORDINATES AND SUPERVISORS

A. Responsibilities of Supervisory Attorneys (Army Rule 5.1).

1. Supervisors must make reasonable efforts to ensure subordinates comply with Rules (Army Rule 5.1). Includes nonlawyers under supervision (Army Rule 5.3).
2. A supervisor assumes imputed responsibility for acts of subordinates if:
   a. The lawyer orders or ratifies a subordinate's violation, or
   b. The lawyer knows of and fails to take remedial action to avoid or mitigate the consequences of a violation.

B. Responsibilities of Subordinate Attorneys (Army Rule 5.2).

1. A subordinate is bound by the Rules of Professional Conduct even if he or she acts at the direction of another.
2. Subordinate attorneys may rely on ethical judgment of a supervisor if the issue is subject to question. If the ethical question can be answered only one way, the subordinate must comply with the Rules.

C. Unauthorized Practice of Law (Army Rule 5.5). A lawyer shall not engage in the practice of law outside the Department of the Army without receiving prior and proper written authorization from the appropriate Senior Counsel.

D. Responsibilities Regarding Non-Law and Law-Related Duties (Army Rule 5.7). An Army lawyer, military or civilian, shall also be subject to these Rules with respect to non-law but official, and law-related but official, duties performed as an Army Lawyer. Examples of law related official duties include:

1. Article 32 preliminary hearing officer.
2. Law instructor/trainer.

VIII. PROFESSIONAL RESPONSIBILITY COMPLAINTS

A. Professional Misconduct (Army Rule 8.4).

1. It is professional misconduct for a lawyer to violate or attempt to violate these rules, to do so through the acts of others, or to knowingly assist another in violating the rules.
2. A lawyer is professionally answerable for criminal acts that indicate lack of a characteristic relevant to the practice of law. Examples include offenses involving violence, dishonesty, breach of trust, or interference with justice.
3. A lawyer also commits professional misconduct by engaging in conduct (even if not criminal) involving dishonesty, fraud, deceit, or misrepresentation, or that is prejudicial to the administration of justice.

B. Professional misconduct distinguished from personal misconduct.

1. Cases normally in the scope of AR 27-1.
   a. Dishonesty – false claims, shoplifting, obtaining false official orders, firearms violations, or illegal surveillance.
   b. Crimes of a sexual nature.
   c. Dealing with Subordinates – mismanaging by having personal business transactions with subordinates or imposing on subordinates for personal favors.

d. A pattern of repeated offenses, even ones of minor significance when considered separately, can also indicate indifference to ethical and/or legal obligations

2. Cases normally not normally in scope of AR 27-1.

a. Discretionary Administrative Action – OERs, NCOERs, award recommendations, pass, or leave actions.

b. DWIs or minor traffic offenses.

c. Insulting Behavior – rudeness and name-calling unless directed toward judges or investigating officers.

C. Reporting Misconduct (Army Rule 8.3).

1. A lawyer with knowledge of a violation of a Rule of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer, must report the violation.

2. Minor or inadvertent violations need not be reported.

3. Disclosure of information protected under Rule 1.6 is not required.

4. There is no requirement to confront a violator.

5. Army system implemented in AR 27-1.

a. Allegations are reviewed by several supervisory JAs up to and including DJAG before a formal preliminary screening inquiry (PSI) is ordered.

b. Increased due process protections for the accused attorney.

c. Designed to protect the interests of both the Army and the attorney.

d. OTJAG determines whether to report violation to state bar.

D. Self-Reporting Requirement (AR 27-1).

1. AR 27-1, para 11-10a. A JA is required to self-report to OTJAG (Professional Responsibility Branch) when he is first notified that he is being investigated by his licensing authority under circumstances that could result in being disciplined as an attorney or a judge.

2. If claiming lack of notification as a defense for not self-reporting, TJAG could still, at his discretion, decide that he has lost faith and trust in the JA and could then discipline the JA IAW R.C.M. 109(a) of the UCMJ and under 10 USC 3037.

E. Advisory Opinions (AR 27-1, para. 11-7).

1. Requests should be forwarded through technical channels to OTJAG, ATTN: Chief, Professional Responsibility Branch.

2. Opinions will be rendered only for important issues of general applicability to the JAG Corps.

F. Determining Ineffective Assistance of Counsel (IAC).

1. The Supreme Court has recognized that simply providing counsel is insufficient to meet the burden imposed by the Sixth Amendment of the U.S. Constitution. "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. An accused is entitled to be

assisted by an attorney… who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

2. The test for determining whether counsel's conduct has fallen below the acceptable line is measured in a two-part test. First, the court evaluates whether counsel's performance was deficient compared to what is expected of reasonably competent counsel, without the benefit of hindsight and using the standards in place at the time. Second, the court examines whether appellant was harmed by the deficiency, assuming there was one. If either prong of the test fails, then the court will not find IAC.

3. In *Harrington v. Richter*, 562 U.S. 86 (2011), and *Premo v. Moore*, 562 U.S. 115 (2011), the Supreme Court used this analysis in examining whether defense counsel was deficient for not calling a blood spatter expert or failing to attempt to suppress an admission before entering into a guilty plea.

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CHAPTER 5
NONJUDICIAL PUNISHMENT

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I. REFERENCES

A. UCMJ art. 15.

B. Manual for Courts-Martial, United States pt. V (2016) [hereinafter MCM].

C. U.S. Dep't of Army, Reg. 27-10, Legal Services: Military Justice chs. 3, 4, 21 (11 May 2016) [hereinafter AR 27-10]. **NOTE: all references to AR 27-10 in this version of the Criminal Law Deskbook cite to the 11 May 2016 edition of the regulation.**

II. INTRODUCTION

A. Purpose. Nonjudicial punishment (NJP) provides commanders with a prompt means of maintaining good order and discipline and promotes positive behavior changes in Servicemembers without the stigma of a court-martial. MCM pt. V, para. 1c.

B. Proceedings under Art. 15 are not criminal prosecutions. *United States v. M*ack, 9 M.J. 300, 312 (C.M.A. 1980); *Cf. Middendorf v. Henry*, 96 S.Ct. 1281 (1976)

C. For samples of the forms used in the Army (DA Form 2627) and how to properly complete them, *see* AR 27-10, current version.

III. AUTHORITY TO IMPOSE NONJUDICIAL PUNISHMENT

A. Who may impose?

1. Commanders.

a) "Commanders" are commissioned or warrant officers who exercise primary command authority over an organization; is the person looked to by superior authorities as the individual chiefly responsible for maintaining discipline in the organization. AR 27-10, para. 3-7a.

b) Can include detachment commanders and commanders of provisional units. Whether an officer is a commander is determined by the duties he or she performs, not necessarily by the title of the position occupied. AR 27-10, para. 3-7a.

2. Joint Commanders. *See* AR 27-10, para. 3-7b.

B. Can Article 15 authority be delegated? AR 27-10, para. 3-7c.

1. Article 15 authority may *not* be delegated.

2. Exception: General court-martial convening authorities and commanding generals can delegate Article 15 authority to a deputy or assistant commander or to chief of staff (if general officer or frocked to general officer rank). Delegation must be written.

C. Can Article 15 Authority Be Limited? *Yes*.

1. Permissible limitations. AR 27-10, para. 3-4c & 3-7d.

a) Superior commander may *totally* withhold.

b) Superior commander may *partially* withhold (e.g., over categories of personnel, offenses, or individual cases).

(1) No requirement that limitations be written but probably a good idea (e.g., write a memorandum or publish in post regulation).

2. Impermissible limitations. MCM pt. V, para. 1d(2); AR 27-10, para. 3-4b.

a) Superior commander cannot direct a subordinate commander to impose an Article 15.

b) Superior commander cannot issue regulations, orders, or "guides" that either directly or indirectly suggest to subordinate commanders that --

(1) Certain categories of offenders or offenses are to be disposed of under Article 15.

(2) Predetermined kinds or amounts of punishment are to be imposed for certain categories of offenders or offenses.

IV. WHO CAN RECEIVE NONJUDICIAL PUNISHMENT

A. Military Personnel of a Commander's Command. AR 27-10, para. 3-8.

1. Assigned.

2. Affiliated, attached, or detailed.

3. The "Beans and Bullets" Rule. AR 27-10, para. 3-8a(3)(b).

B. Personnel of Other Armed Forces (services). AR 27-10, para. 3-8c.

1. An Army commander is not prohibited from imposing NJP on members of his or her command that are from other services. However, if an Army commander imposes NJP on members of another service, he or she may only do so under the circumstances and procedures outlined for imposing NJP prescribed by that member's parent service.

V. HOW TO DECIDE WHAT OFFENSES ARE APPROPRIATE FOR NJP

A. Relationship to administrative corrective measures.

1. NJP should be used when administrative corrective measures (for example, denial of pass privileges, counseling, extra training, administrative reductions in grade, administrative reprimands) are inadequate due to the nature of the minor offense or because of the Servicemember's service record. MCM pt. V, para. 1d(1).

2. NJP is imposed to correct misconduct in violation of the UCMJ. Such conduct may result from intentional disregard of, or failure to comply with, prescribed standards of military conduct. Nonpunitive measures usually deal with misconduct resulting from simple neglect, forgetfulness, laziness, inattention to instructions, sloppy habits, immaturity, difficulty in adjusting to disciplined military life, and similar deficiencies.AR 27-10, para. 3-3a.

3. Commanders and supervisors need to ensure that extra training does not become extra duty (punishment) that was given without following NJP procedures. Extra training must relate directly to the deficiency observed and must be oriented to correct that particular deficiency, although extra training can occur after duty hours. AR 27-10, para. 3-3c.

B. NJP may be imposed for *minor* offenses. MCM pt. V, para. 1e; AR 27-10, para. 3-9.

1. Whether an offense is minor depends on several factors:

a) The nature of the offense and the circumstances surrounding its commission;

b) The offender's age, rank, duty assignment, record and experience;

c) The maximum sentence imposable for the offense if tried by a general court-martial.

2. A minor offense is one that does not authorize the imposition of a dishonorable discharge or confinement in excess of one year if tried at a general court-martial. MCM pt. V, para. 1e. However, the maximum punishment authorized for an offense is not controlling. *United States v. Pate*, 54 M.J. 501, 506 (Army Ct. Crim. App. 2000).

3. Determining what is a minor offense versus a major offense is within the discretion of the imposing commander. MCM pt. V, para. 1e.

C. Limitations.

1. Double punishment prohibited.

a) Once Article 15 punishment is imposed, cannot impose another Article 15 for same offense or substantially same misconduct. MCM pt. V, para. 1f(1); AR 27-10, para. 3-10. However, punishment imposed for a non-minor offense is NOT "a bar to trial by court-martial for the same offense." MCM pt. V, para. 1e, AR 27-10, para. 3-10.

b) Commanders need to bring all known offenses that are determined to be appropriate for disposition by NJP and that are ready to be considered at that time. This includes all offenses arising from a single incident or course of conduct. MCM pt. V, para. 1f(3); AR 27-10, para. 3-10.

2. Statute of limitations. Except as provided Art. 43(d), UCMJ, NJP may not be used for offenses which were committed more than 2 years before the date of imposition. MCM pt. V, para. 1f(4); AR 27-10, para. 3-12.

3. Civilian courts. NJP may not be used for an offense that has been tried by a federal court. NJP may not be used for an offense that has been tried by a state court unless AR 27-10, ch. 4 has been complied with. MCM pt. V, para. 1f(5).

4. NJP should not be used when it is clear that only a court-martial will meet the needs of justice and discipline. MCM pt. V, para. 1d(1).

D. Preliminary inquiry.

1. Commanders need to conduct a preliminary inquiry using the procedures in R.C.M. 303 and Chapter 4, AR 15-6.

2. The inquiry should cover whether an offense was committed; whether the Soldier was involved; and the character and military record of the accused. AR 27-10, para. 3-14. Note that for purposes of R.C.M. 306, Executive Order 13699 (implementing the 2014 NDAA amendments) amended the discussion to R.C.M. 306(b) to remove the character and military service of the accused as one of the factors for a commander to consider in the initial disposition decision.

E. Decision to impose NJP.

1. Having conducted an investigation and considering the above, the commander should decide whether to impose NJP by considering:

a) The nature of the offense;

b) The record of the Servicemember;

c) The needs for good order and discipline;

d) The effect of NJP on the Servicemember and the Servicemember's record. MCM pt. V, para. 1d(1).

2. The commander needs to determine that the Soldier *probably* committed the offense and that NJP procedure is appropriate. AR 27-10, para. 3-14.

3. NJP should be conducted at the lowest level of command commensurate with the needs of discipline. AR 27-10, para. 3-5a.

4. If the commander believes that his or her authority is insufficient to impose proper NJP, then he or she should send the case to a superior using DA Form 5109. AR 27-10, para. 3-5.

5. A superior commander may also return a case to a subordinate commander for appropriate disposition. AR 27-10, para. 3-4c.

VI. TYPES OF ARTICLE 15S AND PUNISHMENTS

A. Summarized Article 15. AR 27-10, para. 3-16.

1. Only available for enlisted Servicemembers.

2. Punishment cannot exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.

3. Can be imposed by company or field grade officers.

4. Recorded on DA Form 2627-1.

B. Formal Article 15. AR 27-10, para. 3-17.

1. Appropriate if:

a) Soldier is an officer, or

b) Punishment (for any soldier) might exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.

2. Classified as company grade Article 15s, field grade Article 15s, and general officer Article 15s. Technically, "general officer Article 15s" are intended only for officers (general officers can impose greater punishments on officers than other commanders can). General officers can impose Article 15s on enlisted personnel, too, but the available punishments are the same as those available to field grade officers.

3. Recorded on DA Form 2627.

C. The maximum available punishment is based on rank of imposing commander (company grade, field grade, or for officer offenders, general officer) and the rank of the soldier receiving the punishment. AR 27-10, para. 3-19, tbl. 3-1. Usually, *commanding generals withhold authority over officer misconduct using the local AR 27-10*. Company grade or field grade NJP over another officer is very rare.

ENLISTED PUNISHMENTS

Summarized	Company Grade	Field Grade
14 days extra duty	14 days extra duty	45 days extra duty
14 days restriction	14 days restriction	60 days restriction (45, if with extra duty)
	7 days correctional custody (E1-E3)	30 days correctional custody (E1-E3)
	1 grade reduction (E1-E4)	1 or more grade reduction (E1-E4) 1 grade reduction (E5-E6)
	7 days' forfeiture	Forfeiture of ½ of 1 month's pay for 2 months
Oral reprimand/ admonition	Oral reprimand/ admonition	Oral/written reprimand/ admonition

OFFICER PUNISHMENTS

Company Grade	Field Grade	General Officer
Written reprimand/admonition	Written reprimand/admonition	Written reprimand/admonition
30 days restriction	30 days restriction	60 days restriction, or
		30 days arrest in quarters
		Forfeiture of ½ of 1 month's pay for 2 months

D. Reduction in grade.

1. In general, a commander who can promote to a certain grade can also reduce from that grade.

2. Officers and enlisted soldiers above the grade of E-6 cannot be reduced at an Article 15.

E. Forfeiture of pay.

1. Forfeitures are based on grade to which reduced, whether or not reduction is suspended.

2. Forfeitures may be applied against a soldier's retired pay. AR 27-10, para. 3-19b(7)(b).

F. Admonition and reprimand.

1. Officer admonitions and reprimands must be in writing. Enlisted admonitions and reprimands can be oral or in writing. MCM pt. V, para. 5c(1); AR 27-10, para. 3-19b(9)(d).

2. Admonitions and reprimands imposed under NJP should state clearly that they were imposed as punishment under Art. 15. This is to contrast them with admonitions and reprimands given as an administrative matter, which have different procedures. *See* AR 600-37.

3. Written admonitions and reprimands are prepared in memorandum format and attached to the DA Form 2627. AR 27-10, para. 3-19b(9)(d).

G. Combination of punishments. AR 27-10, para. 3-19b(7)

1. Commanders can combine punishments.

2. No two or more punishments involving the deprivation of liberty may be combined to run either consecutively or concurrently, except that restriction and extra duty may be combined but not to run for a period in excess of the maximum duration allowed for extra duty.

3. For officers, arrest in quarters may not be imposed in combination with restriction. MCM pt. V, para. 5d(1).

H. Punishment generally begins on the day imposed. AR 27-10, para. 3-21. Unsuspended punishments of reduction and forfeiture take effect on the day imposed. Commanders can delay other punishments for up to 30 days for legitimate reasons (quarters, TDY, brief field problem). However, once commenced, deprivation of liberty punishments will run continuously unless the Soldier is at fault or is incapacitated (cannot pause deprivation of liberty once it has commenced because of a field problem). AR 27-10, para. 3-19b(7).

I. The MJA 2016 eliminated bread and water as a valid punishment. The revised version of AR 27-10 will reflect this change.

VII. NOTICE REQUIREMENTS (THE "FIRST READING")

A. Soldier must be notified of the following (AR 27-10, paras. 3-16*b* and 3-18):

1. Commander's intention to dispose of the matter under Article 15.

2. Offense suspected of.

3. Maximum punishment that the commander could impose under Article 15.

4. Soldier's rights under Article 15.

B. Delegating the notice responsibility. AR 27-10, para. 3-18a.

1. Commander may delegate the notice responsibility to any subordinate who is a SFC or above (if senior to soldier being notified). The commander still needs to personally sign the DA Form 2627 or 2627-1.

2. Good way to involve first sergeant or command sergeant major.

C. For a script that can be used during the first reading, *see* AR 27-10, app. B.

VIII. SOLDIER'S RIGHTS

A. Formal. AR 27-10, para. 3-18.

1. A copy of DA Form 2627 with items 1 and 2 completed so defense counsel may review and properly advise soldier.

2. Reasonable decision period and to consult with counsel (usually 48 hours).

a) Determined by the complexity of the case and the availability of counsel.

b) Soldier can request a delay, the commander can grant for good cause.

3. Right to remain silent.

4. Demand trial by court-martial (unless attached to or embarked on a vessel).

5. Request an open or closed hearing. AR 27-10, para. 3-18(g)(2).

a) Ordinarily, hearings are open. An open hearing usually takes place in the commander's office with the public allowed to attend.

b) The commander should consider all facts and circumstances when deciding whether the hearing will be open or closed.

6. Request a spokesperson.

a) Need not be a lawyer.

b) Soldier may retain a lawyer at own expense.

7. Examine available evidence.

8. Present evidence and call witnesses. AR 27-10, para. 3-18i.

a) The commander determines if the witness is reasonably available, considering that witness and transportation fees are not available

b) Reasonably available witnesses will ordinarily only be those at the installation concerned and others whose attendance will not unnecessarily delay the proceedings.

9. Appeal.

B. Summarized

1. Reasonable decision period (normally 24 hours).

2. Demand trial by court-martial.

3. Remain silent.

4. Hearing.

5. Present matters in defense, extenuation, and mitigation.

6. Confront witnesses.

7. Appeal.

IX. HEARING

A. The hearing is non-adversarial. AR 27-10, para. 3-18g(2). Neither the Soldier nor spokesperson (or retained lawyer) may examine or cross-examine witnesses unless allowed by the commander; however, the Soldier or spokesperson or lawyer can indicate to the imposing commander the relevant issues or questions that they would like to be explored or asked.

B. In the commander's presence unless extraordinary circumstances. AR 27-10, para. 3-18g(1).

C. Rules of evidence. MCM, pt. V, para. 4c(3); AR 27-10, para. 3-18j.

1. Commander is not bound by the formal rules of evidence, except for the rules pertaining to privileges.

2. May consider any matter the commander believes relevant (including, e.g. unsworn statements and hearsay).

3. But beware that if the Soldier turns down the Art. 15, the Military Rules of Evidence will apply at a court-martial.

D. Proof beyond a reasonable doubt required. AR 27-10, para. 3-18l.

X. CLEMENCY

A. The imposing commander, a successor in command, or the next superior authority may grant clemency. AR 27-10, para. 3-23.

B. Suspension. AR 27-10, para. 3-24.

1. The execution of a punishment of reduction or forfeiture may be suspended for no more than four months. Other punishments may be suspended for no more than six months. For summary Art. 15s, suspensions are for no more than three months.

2. Automatically remitted if no misconduct during the suspension period.

3. Vacation. AR 27-10, para. 3-25.

a) If the Solder violates a punitive article of the UCMJ (or other stated condition) during the suspension period, the commander may vacate the suspension.

b) If the vacation involves a condition on liberty, reduction in rank, or forfeiture of pay, the commander should hold a hearing as outlined in AR 27-10, para. 3-25. For the vacation of other punishments, the Soldier should be given notice and an opportunity to respond. If the Soldier is absent without leave when the commander proposes vacation, special rules apply.

c) The conduct that led to the vacation can serve as a separate basis for a new NJP action.

d) No appeal is authorized from the vacation of a suspended sentence. AR 27-10, para. 3-29b.

C. Mitigation. The commander can reduce the quantity or quality of the punishment. AR 27-10, para. 3-26.

D. Remission. The commander can cancel any portion of the unexecuted punishment. AR 27-10, para. 3-27.

E. Setting aside and restoration. AR 27-10, para. 3-28

1. Commanders can set aside any part or amount of a punishment, whether executed or unexecuted, and restore whatever rights, privileges or property that was affected are restored.

2. Should only be done when there was "clear injustice," defined as an unwaived legal or factual error that clearly and affirmatively injured the substantial rights of the Soldier.

3. Should generally occur within four months from the date that punishment was imposed.

XI. FILING

A. Summarized Article 15. AR 27-10, para. 3-16f.

1. DA Form 2627-1 filed locally.

2. Destroyed two years after imposition or upon transfer from the unit.

B. Formal Article 15. AR 27-10, paras. 3-6, 3-37.

1. Specialist/Corporal (E-4) and below.

a) Original DA Form 2627 filed locally in unit nonjudicial punishment or unit personnel files, unless the Soldier has been found guilty of a sex-related offense, in which case, the document must be filed in the performance portion in the Soldier's AMHRR. (Pending update in AR 27-10).

b) Locally filed DA Form 2627 shall be destroyed two years after imposition or upon transfer to another general court-martial convening authority.

2. All other soldiers.

a) Performance portion or restricted portion of AMHRR. (Pending update in AR 27-10).

(1) Any record of nonjudicial punishment which includes a finding of guilty for having committed a sex-related offense will be filed as a sex-related offense in the performance portion of the Soldier's AMHRR.

(2) Performance portion is routinely used by career managers and selection boards for the purpose of assignment, promotion, and schooling selection.

(3) Restricted portion contains information not normally viewed by career managers or selection boards. *See* AR 600-8-104.

b) A commander's decision where to file is as important as the decision relating to the imposition of NJP itself. AR 27-10, para. 3-6a. Commanders should consider:

(1) Interests of the Soldier's career.

(2) Soldier's age, grade, total service, whether Soldier has prior NJP, recent performance.

(3) Army's interest in advancing only the most qualified personnel for positions of leadership, trust, and responsibility.

(4) Whether the conduct reflects unmitigated moral turpitude or lack of integrity, patterns of misconduct, evidence of serious character deficiency, or substantial breach of military discipline.

c) Imposing commander's filing decision is subject to review by superior authority.

d) Records directed for filing in the restricted portion will be redirected to the performance portion if the soldier already has an Article 15 received while he was a sergeant (E-5) or above, filed in his restricted fiche. AR 27-10, para. 3-6c.

e) Superior commander cannot withhold subordinate commander's filing determination authority.

XII. APPEALS

A. Soldier only has right to one appeal under Article 15. AR 27-10, para. 3-29.

B. Time limits to appeal.

1. Reasonable time.

2. After five calendar days, appeal presumed untimely and may be rejected.

C. Who acts on an appeal? AR 27-10, para. 3-30.

1. Successor in command or imposing commander can take action on appeal, and if he or she resolves the issue, may not have to forward.

2. The next superior commander generally handles the appeal.

3. Should act on appeal within five calendar days (three calendar days for summarized proceedings). While the punishment generally runs during the appeals period, if the command takes longer than the designated period, and the Soldier requests, the punishments involving deprivation of liberty will be interrupted until the appeal is completed. AR 27-10, para. 3-21b.

D. Procedure for submitting appeal.

1. Submission of additional matters optional.

2. Submitted through imposing commander.

E. Action by appellate authority.

1. May conduct independent inquiry. May take appellate action even if soldier does not appeal. AR 27-10, paras. 3-33, 3-35.

2. Legal review. AR 27-10, para. 3-34.

a) Must refer certain appeals to the SJA office for a legal review *before* taking appellate action. UCMJ art. 15(e); DA Form 2627, note 9 (on reverse of form).

(1) Reduction in one or more pay grades from E4 or higher, or

(2) More than 7 days arrest in quarters, 7 days correctional custody, 7 days forfeiture of pay, or 14 days of either extra duty or restriction

b) May refer an Article 15 for legal review in any case, regardless of punishment imposed.

c) The JA rendering the advice should be the JA providing advice to the officer taking action on the appeal. AR 27-10, para. 3-34d.

(1) Must review the appropriateness of the punishment and whether the proceedings were conducted under law and regulations.

(2) Not limited to the written matters in the record; may make additional inquiries.

3. Matters considered. May consider the record of the proceedings, any matters submitted by the Servicemember, any matters considered during the legal review, and any other appropriate

matters. MCM pt. V, para. 7f. The rules do not require that the Servicemember be given notice and an opportunity to respond to any additional matters considered.

4. Options. AR 27-10, paras. 3-23 through 3-33.

a) Approve punishment.

b) Suspend.

c) Mitigate.

d) Remit.

e) Set Aside.

F. Petition to the Department of the Army Suitability Evaluation Board (DASEB). AR 27-10, para. 3-43; AR 600-37.

1. Sergeants (E-5) and above may petition to have DA Form 2627 transferred from the performance to the restricted portion.

2. Soldier must present evidence that the Article 15 has served its purpose and transfer would be in the best interest of the Army.

3. Soldiers can petition for removal of the Article 15. AR 600-37, ch. 7.

4. Petition normally not considered until at least one year after imposition of punishment.

XIII. PUBLICIZING ARTICLE 15S

A. Permissible, but must delete social security number of the soldier and relevant privacy information. AR 27-10, para. 3-22.

B. Timing. At next unit formation after punishment is imposed, or, if appealed, after the decision on appeal. Can post on the unit bulletin board.

C. Commander considerations. Avoid inconsistent or arbitrary policy. Before publishing the punishments of sergeants and above, consider:

1. The nature of the offense.

2. The individual's military record and duty position.

3. The deterrent effect.

4. The impact on unit morale or mission.

5. The impact on the victim.

6. The impact on the leadership effectiveness of the individual concerned.

XIV. SUPPLEMENTARY ACTION

A. Any action taken by an appropriate authority to suspend, vacate, mitigate, remit, or set aside a punishment under formal Art. 15 proceedings after action has been taken on an appeal or the DA Form 2627 has been distributed to agencies outside the unit (personnel, finance) must be recorded on a DA Form 2627-2. AR 27-10, para. 3-38.

XV. THE RELATIONSHIP BETWEEN ARTICLE 15S AND COURTS-MARTIAL

A. Double jeopardy.

1. Absent bad faith by the government, Soldiers can be court-martialed for a serious offense that has been the subject of NJP. Art. 15(f), UCMJ; *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989). *See also* AR 27-10, para. 3-10.

2. The defense can move to dismiss specifications for minor offenses if the accused was previously punished under Article 15 for that offense. R.C.M. 907(b)(2)(D)(iii).

a) When an Article 15 involves several offenses, if one of the offenses is a major offense, then the whole incident could be considered major offense and it might not be error to fail to dismiss the other minor offenses. If at trial, the court acquits on the major offense and all that is left are minor offenses, then the findings should not be approved. *United States v. Bond*, 69 M.J. 701 (C.G. Ct. Crim. App. 2010).

B. The defense serves as the gatekeeper for the admission in the presentencing proceeding of evidence of prior Article 15s where the NJP and the court-martial involve the same offense. *Pierce*, 27 M.J. 367.

1. The defense can allow the factfinder to see the Art. 15 as mitigation to show the factfinder that he or she has been previously punished. UCMJ art. 15(f); *United States v. Gammons*, 51 M.J. 169 (1999).

2. The defense can also ask the military judge to give sentencing credit based on the Art. 15 without having the panel become aware of the Art. 15. The accused is entitled to "*complete* credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe." *Pierce*, 27 M.J. at 369; *Gammons*, 51 M.J. 169. *See* U.S. Dep't of Army, Pam 27-9, Military Judges' Benchbook para. 2-7-21 (10 Sep. 2014) for the Table of Equivalent Punishments that is used to calculate "day-for-day, dollar-for-dollar, stripe-for stripe." This is generally the option chosen.

3. The defense can also ask for the panel members to consider the previous Art. 15 for mitigation, and have the military judge instruct on the specific credit that will be applied. U.S. Dep't of Army, Pam 27-9, Military Judges' Benchbook para. 2-7-21 (10 Sep. 2014).

C. Admitting nonrelated (other past misconduct) formal Article 15s during the presentencing proceeding.

1. Admissible at trial by court-martial during presentencing as a record from "personnel records." R.C.M. 1001(b)(2).

2. The record needs to be properly completed and properly maintained. Possible objections to the admissibility of records of nonjudicial punishment include:

a) Record of nonjudicial punishment is incomplete. *E.g., United States v. Rimmer*, 39 M.J. 1083 (A.C.M.R. 1994) (holding that record inadmissible because the form had no indication whether soldier appealed). *See also United States v. Godden*, 44 M.J. 716 (A.F. Ct. Crim. App. 1996) (holding that administrative errors on record did not affect any procedural due process rights of appellant and record admissible).

b) Record not maintained in accordance with regulation. *E.g., United States v. Weatherspoon*, 39 M.J. 762 (A.C.M.R. 1994) (finding that record maintained in Investigative Records Repository was not a personnel record maintained in accordance with regulation

because regulation specifically stated that records of courts-martial or nonjudicial punishment would not be maintained under its authority).

c) Record does not indicate that the accused had the opportunity to consult with counsel and the accused waived his/her right to demand trial by court-martial. *United States v. Booker*, 5 M.J. 238 (C.M.A. 1978); *United States v. Kelley*, 45 M.J. 259 (1996).

d) Record does not have discernible signatures. *United States. v. Dyke*, 16 M.J. 426 (C.M.A. 1983).

e) Appeal incomplete. *United States v. Yarbough*, 33 M.J. 122 (C.M.A. 1991).

f) Irregular procedure. *United States v. Haynes*, 10 M.J. 694 (A.C.M.R. 1981).

3. May be considered in administrative proceedings.

D. Summarized Article 15 (DA Form 2627-1).

1. Not admissible at trial by court-martial. AR 27-10, para. 5-36.

2. May be considered in administrative proceedings.

XVI. PRACTICE POINTS

A. NJP is the business of paralegals, trial counsel, and defense counsel. Chiefs of Justice and Staff Judge Advocates rarely get involved other than for general officer Article 15s. Watch for practices that might damage the system like having commanders offer waiver of counsel forms to Soldiers during the first reading.

B. Trial counsel should review formal Article 15s. Remember, if the Soldier turns down the Article 15, you will own the problem. A few minutes up front can save days of trial preparation later.

C. Soldiers turn down Article 15s for lots of reasons. The key for defense counsel is to communicate with the trial counsel right away. Hold on to the file and call the trial counsel to avoid the natural response by the commander to what might seem like a challenge to his or her authority. A few minutes up front can save days of trial preparation later and prevent the parties from becoming entrenched in their positions.

D. One of the major reasons that Soldiers turn down Article 15s is that they do not trust this particular commander to fairly hear their case. Often, the Soldier will be charged with offenses that arose out of a conflict with the commander who now wants to impose the Article 15, and the Soldier may understandably feel that the commander will not give them a fair shake. If you are the Government, this may be a reason to be more involved than you might otherwise be with a company-grade Article 15 and/or consider having the Trial Counsel attend the actual proceeding. If you are the defense, this is likely a good reason for appeal, if it appears the commander was not evaluating the evidence objectively or awarding punishment that appears commensurate with the offense.

E. As a general matter, if the government elects to charge offenses at a court-martial that were the subject of earlier NJP – the Soldier will likely receive sentencing credit for any punishment given by the NJP authority. Likewise, defense counsel should normally seek *Pierce* credit for previous Art. 15s rather than seeking dismissal under R.C.M. 907(b)(2)(D)(iii).

F. If trial counsel ensure that the record is properly completed and your office performs proper records maintenance, you should be able to admit the record of a previous Art. 15 (not related to current offenses) under R.C.M. 1001(a)(2). Defense counsel should nit-pick prior Art. 15s – almost any mistake in the record or in the maintenance of the record will keep it out of evidence. Most importantly, a deployment, even if with the same unit, will likely involve the transfer to a different

GCMCA, which means no Article 15 conducted at home station prior to deployment should be admissible at a deployed court-martial

G. For general officer Article 15s, defense counsel should consider requesting to attend, especially if the SJA or DSJA will be present.

H. Beware of Soldiers seeking personal appearance as part of an Article 15 appeal. There is no regulatory basis to demand such, and it can create issues for your commander if he or she allows one Soldier to appear, and denies the request by another. It is a point to consider when advising commanders on crafting and using open door policies as well.

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CHAPTER 6
SUMMARY COURTS-MARTIAL

I. Introduction
II. Summary Court-Martial Convening Authority
III. Referral to a Summary Court-Martial
IV. The Summary Court-Martial Process

I. INTRODUCTION

A. Overview. A summary court-martial (SCM) is the least formal of the three types of courts-martial and the least protective of a soldier's rights. The SCM is a streamlined trial process involving only one officer who theoretically performs the prosecutorial, defense counsel, judicial, and panel member (juror) functions. The purpose of this type of court-martial is to dispose promptly of relatively minor offenses. The one officer assigned to perform the various roles incumbent on the SCM must inquire thoroughly and impartially into the matter concerned to ensure that both the United States and the accused receive a fair hearing. Since the SCM is a streamlined procedure providing fewer protections and rights, the maximum possible punishment is very limited. Furthermore, it may try only enlisted personnel and only those who consent to be tried by SCM.

B. Key References.

1. Army Regulation (AR) 27-10, Military Justice
2. Department of Army (DA) Pamphlet (PAM) 27-7, Summary Court-Martial Officer's Guide
3. Uniform Code of Military Justice (UCMJ), Articles 20 and 24
4. Manual for Courts-Martial (MCM) Provisions
   a) Rules for Courts-Martial (R.C.M.) 1301 – 1306.
   b) Military Rule of Evidence (M.R.E.) 101 – applying the rules of evidence to SCMs.
   c) Appendix 4 – Charge sheet.
   d) Appendix 9 – Guide for SCM (script)
   e) Appendix 15 – Record of Trial by SCM
5. DA PAM 27-17, Military Judges' Benchbook

C. Unique to the Military.

1. The SCM has no civilian equivalent. It is strictly a creature of statute within the military system.

2. Although it is a proceeding at which the technical rules of evidence apply, and at which a finding of guilty can result in loss of liberty and property, there is no constitutional right to representation by counsel. *Middendorf v. Henry*, 425 U.S. 25 (1976) (citing *Toth v. Quarles*, 350 U.S. 11 (1955)).

3. The MJA 2016 amendment to Art. 20 includes a new provision which makes explicit that a summary court-martial is a non-criminal forum. A finding of guilty at a summary court-martial does not constitute a criminal conviction. *See also Middendorf*, 425 U.S. at 38; *cf. Argersinger v.*

Hamlin, 407 U.S. 25 (1972); *See generally Weiss v. United States*, 510 U.S. 163 (1994); *United States v. Booker*, 5 M.J. 238(C.A.A.F. 1977).

II. SUMMARY COURT-MARTIAL CONVENING AUTHORITY

A. Authority to Convene. A SCM is convened (created) by an individual authorized by law to convene SCMs. Article 24, of the Uniform Code of Military Justice (UCMJ) and R.C.M. 1302(a), specify those persons who have the power to convene an SCM.

B. Commanding officers authorized to convene a General Court-Martial (GCM) or Special Court-Martial (SPCM) are also empowered to convene a SCM. Thus, the commanding officer of an installation and commanding officers of brigades have this authority. Additionally, unless withheld by a superior competent authority, a field grade officer in command of a battalion or squadron may convene a SCM. Finally, the MCM states that a commanding officer of a detached company or other detachment of the Army also has the authority to convene a SCM.

1. Court-Martial Convening Authority Generally

a) Battalion/Squadron commander (Lieutenant Colonel): summary court-martial convening authority (SCMCA).

b) Brigade commander (Colonel): special court-martial convening authority (SPCMCA).

c) Division commander (Major General): general court-martial convening authority (GCMCA).

2. Options of SCMCA [Articles 20 and 24 UCMJ]

a) Dismiss charges. Dismissal does not bar subsequent action under R.C.M. 306(c) [R.C.M. 403(b)(1)].

b) Alternative disposition. The SCMCA could handle the matter with a Field Grade Article 15.

c) Return to subordinate commander. The SCMCA may return to a subordinate commander for independent discretion on how the case should be handled. No recommendation may be made by the SCMCA [R.C.M. 401(c)(2)(B) and 403(b)(2)].

d) Forward to superior commander with recommendation [R.C.M. 403(b)(3)]. Recording the receipt of charges on charge sheet, discussed *infra*; tolls statute of limitations [R.C.M. 403(a)].

e) Refer to a SCM [R.C.M. 403(b)(4)].

f) Direct an Article 32 investigation [R.C.M. 403(b)(5)]

C. Mechanics of convening. Before any case can be brought before a SCM, the court must be properly convened (created). It is created by the order of the convening authority detailing the SCM officer to the court. R.C.M. 504(d)(2) requires that the convening order specify that it is a SCM and designate the SCM officer. Additionally, the convening order may designate where the court-martial will meet.

D. SCM officer. A SCM is a one-officer court-martial. As a jurisdictional prerequisite, this officer must be a commissioned officer, on active duty, and hold the rank of CPT (O-3), or higher.

1. As a practice point, to borrow from the standard in Art. 25, UCMJ, the SCM should be best qualified by reason of age, education, experience, and judicial temperament as his performance will have a direct impact upon the morale and discipline of the command.

2. Where more than one commissioned officer is present within the command or unit, the convening authority may not serve as SCM. When the convening authority is the only commissioned officer in the unit, however, he or she may serve as SCM officer and this fact should be noted in the convening order attached to the record of trial. R.C.M. 1301(a). In such a situation, however, the better practice would be to appoint a SCM officer from outside the command, as the SCM officer need not be from the same command as the accused.

3. The SCM officer assumes the burden of prosecution, defense, judge, and jury as she must thoroughly and impartially inquire into both sides of the matter and ensure that the interests of both the government and the accused are safeguarded and that justice is done. While he or she may seek advice from the legal advisor on questions of law, he or she may not seek advice from anyone on questions of fact, since she has an independent duty to make these determinations. R.C.M. 1301(b).

E. Jurisdictional limitations.

1. Over the Person. Art. 20, UCMJ, and R.C.M. 1301(c) provide that a SCM has the power (jurisdiction) to try only those enlisted persons who consent to trial by SCM. The right of an enlisted accused to refuse trial by SCM is absolute. No commissioned officer, warrant officer, cadet, or person not subject to the UCMJ (Art. 2, UCMJ) may be tried by SCM. The accused must be subject to the UCMJ at the time of the offense and at the time of trial; otherwise, the court-martial lacks jurisdiction over the person of the accused.

2. Over the Offense. A SCM has the power to try all offenses described in the UCMJ except those for which a mandatory punishment beyond the maximum imposable at a SCM is prescribed by the UCMJ. Cases for which the maximum penalty is death are capital offenses and cannot be tried by SCM. See R.C.M. 1004 for a discussion of capital offenses. Pursuant to the 2014 NDAA, R.C.M. 1301(c) was amended to reflect the changes to other portions of the MCM which limited jurisdiction over offenses under Arts. 120(a), 120(b), 120b(a), 120b(b), forcible sodomy under Art. 125 (which will be deleted as part of the MJA 2016), and attempts thereof under Art. 80 to general courts-martial.

a) Any minor offense can be disposed of by SCM. For a discussion of what constitutes a minor offense, refer to Part V, MCM under Section 1(e).

b) In 1977, the United States Court of Military Appeals ruled that the jurisdiction of SCMs is limited to "disciplinary actions concerned solely with minor military offenses unknown in the civilian society." *United States v. Booker*, 3 M.J. 443 (C.M.A. 1977). Read literally, this would have precluded SCMs from trying civilian crimes such as assault, larceny, drug offenses, etc. Following a reconsideration of that decision, the court rescinded that ruling and affirmed that "with the exception of capital crimes, nothing whatever precludes the exercise of summary court-martial jurisdiction over serious offenses in violation of the Uniform Code of Military Justice." *United States v. Booker*, 5 M.J. 246 (C.M.A. 1978).

III. REFERRAL TO A SUMMARY COURT-MARTIAL

A. Preliminary inquiry. R.C.M. 303 imposes upon the officer exercising immediate authority over the accused the duty to make, or cause to be made, a preliminary inquiry into the charges or suspected offenses. Where the basis for a potential summary court-martial comes from a law enforcement report, it is reasonable for a commander to fulfill this responsibility by reviewing the law enforcement report and discussing with his or her servicing judge advocate whether additional investigation is in fact necessary. Also, a commander must keep in mind the requirements and limitations contained

within AR 15-6, Chapter 4, when conducting or considering the conduct of a preliminary inquiry under R.C.M. 303.

B. Preferral of charges. R.C.M. 307. Charges are formally made against an accused when signed and sworn to by a person subject to the UCMJ (known as "the accuser"). This procedure is called "preferral of charges." Charges are preferred by executing the appropriate portions of the charge sheet. MCM, Appendix 4.

1. Personal data. Block I of page 1 of the charge sheet should be completed first. The information relating to personal data can be found in pertinent portions of the accused's service record or other administrative records.

2. The charges. Block II of page 1 of the charge sheet is then completed to indicate the precise misconduct involved in the case. Each punitive article found in Part IV, MCM, contains sample specifications. A detailed treatment of pleading offenses is contained in the Criminal Law Deskbook, Volume II, Crimes and Defenses.

3. Accuser. The accuser is a person subject to the UCMJ who signs item 11d in block III at the bottom of page 1 of the charge sheet. The accuser should swear to the truth of the charges and have the affidavit executed before an officer authorized to administer oaths.

4. Oath. The oath must be administered to the accuser and the affidavit so indicating must be executed by a person with proper authority. Art. 136, UCMJ, authorizes all judge advocates, summary courts-martial officers, all adjutants, and legal officers to administer oaths for this purpose. No one can be ordered to prefer charges to which she cannot truthfully swear. Often, the trial counsel will administer the oath. When the charges are signed and sworn to, they are "preferred" against the accused. This step also starts the speedy trial clock.

5. Informing the accused. After formal charges have been signed and sworn to, the preferral process is completed when the charges are submitted to the accused's immediate commanding officer. The first step which must be taken is to inform the accused of the charges against him. The purpose of this requirement is to provide an accused with reasonable notice of impending criminal prosecution in compliance with criminal due process of law standards. R.C.M. 308 requires the immediate commander of the accused to have the accused informed as soon as practicable of the charges preferred against him, the name of the person who preferred them, and the person who ordered them to be preferred. The important aspect of this requirement is that notice must be given through official sources. The accused should appear before the immediate commander or other designated person giving notice and should be told of the existence of formal charges, the general nature of the charges, and the name of the person who signed the charges as accuser. A copy of the charges should also be given to the accused. After notice has been given, the person who gave notice to the accused will execute item 12 at the top of page 2 of the charge sheet. If not the immediate commander of the accused, the person signing on the "signature" line should state their rank, component, and authority.

6. Formal receipt of charges. R.C.M. 403(a). Item 13 in block IV on page 2 of the charge sheet records the formal receipt of sworn charges by the officer exercising SCMCA. Often this receipt certification and the notice certification will be executed at the same time, although it is not unusual for the notice certification to be executed prior to the receipt certification. The purpose of the receipt certification is to establish that sworn charges were preferred before the statute of limitations operated to bar prosecution. Art. 43, UCMJ, sets forth time limitations for the prosecution of various offenses. If sworn charges are not received by an officer exercising SCM jurisdiction over the accused within the time period applicable to the offense charged, then prosecution for that offense is barred by Art. 43, UCMJ. The time period begins on the date the

offense was committed and ends on the date appropriate to that offense. Where the accused is absent without leave at the time charges are sworn, it is permissible and proper to execute the receipt certification even though the accused has not been advised of the existence of the charges. In such cases, a statement indicating the reason for the lack of notice should be attached to the case file. When the accused returns to military control, notice should then be given to him. The receipt certification need not be executed personally by the SCM convening authority and is often completed for her by the adjutant.

C. Referral of Charges. Once the charge sheet and supporting materials are presented to the SCMCA and she makes her decision to refer the case to a SCM the case is referred. The procedure to accomplish referral is by completing item 14 in block V on page 2 of the charge sheet. The referral is executed personally by the SCMCA.

1. The referral should explicitly detail the type of court to which the case is being referred. Thus, the referral might read "referred for trial to the summary court-martial convened by my summary court-martial convening order XX dated 15 January 201X." This language precisely identifies a particular kind of court-martial and the particular SCM to try the case.

2. In addition, the referral on page 2 of the charge sheet should indicate any particular instructions applicable to the case such as "confinement at hard labor is not an authorized punishment in this case" or other instructions desired by the convening authority. If no instructions are applicable to the case, the referral should so indicate by use of the word "none" in the appropriate blank. Once the referral is properly executed, the case is "referred" to trial and the case file forwarded to the proper SCM officer.

IV. THE SUMMARY COURT-MARTIAL PROCESS

A. The summary court martial process is governed primarily by DA PAM 27-7 ICW the applicable R.C.M.s. The following is notes and highlights from the procedures outlined therein.

B. Pretrial Preparation.

1. General. After charges have been referred to trial by SCM, all case materials are forwarded to the proper SCM officer, who is responsible for thoroughly preparing the case for trial.

2. Preliminary Preparation. Upon receipt of the charges and accompanying papers, the SCM officer should begin preparation for trial. The charge sheet should be carefully examined, and all obvious administrative, clerical, and typographical errors corrected. *See* R.C.M. 1304. The SCM officer should initial each correction she makes on the charge sheet.

a) If the errors are so numerous as to require preparation of a new charge sheet, re-swearing of the charges and re-referral is required. *See generally* R.C.M. 603.

b) If the SCM officer changes an existing specification to include any new person, offense, or matter not fairly included in the original specification, R.C.M. 603 requires the new specification to be re-sworn and re-referred. The SCM officer should continue his or her examination of the charge sheet to determine the correctness and completeness of the information on the charge sheet.

c) The SCM officer, with his or her legal advisor, should review the charge(s) and specification(s). The SCM officer should check for proper form and determine the elements of the offense. "Elements" are facts which must be proved in order to find the accused guilty of any offense. Part IV, MCM, contains some guidance in this respect, but for more detailed guidance consult the Military Judges' Benchbook, DA PAM 27-9. The SCM officer should also review the evidence relating to the charges.

d) Importantly, the SCM officer is responsible for identifying and securing the attendance of military witnesses for trial. DA PAM 27-7, para. 2-4*a*. Although a paralegal may be detailed to assist with this process, the DA PAM states that paralegals are "not typically detailed to provide clerical support." Para. 1-3*f*.

e) Finally, although the SCM officer is tasked with reviewing the entire casefile, it is only for the purpose of preparing for trial, that is, to determine the order of witnesses and the questions the SCM is going to ask them, and for certain other limited purposes (as, for example, the impeachment of the testimony of a witness at trial by previous inconsistent statements (Mil. R. Evid. 613(a), (b); 801(d)). The SCM officer may not use the CID or MP report as a substitute for live witnesses except to the extent the accused consents after being advised that he need not do so, and that he is entitled to have witnesses present. DA PAM 27-7, para. 3-1*c*.

3. Initial session. This should be conducted IAW Appendix 9, MCM, with the appropriate portions of DD Form 2329 completed. R.C.M. 1304(b) and DA PAM 27-7, para. 4-1 contain a detailed list of the matters of which the Accused must be advised and his or her rights in the process.

a) If the accused refuses the SCM, the convening authority may take steps to dismiss the case or refer it to trial by special or general court-martial, or dispose of the case at NJP. If the decision is to dismiss charges, and reprefer to a different forum, this should not implicate the speedy trial clock, if done properly. *See* Deskbook, Chapter 10.

b) The jurisdictional maximums for a SCM are as follows:

(1) E-4 and below.

(a) Reduction to the lowest pay grade (E-1);

(b) Forfeiture of two-thirds of one-month's pay;

(c) Confinement not to exceed one month or hard labor without confinement for forty-five days (in lieu of confinement) or restriction to specified limits for two months. If confinement is adjudged with either hard labor without confinement or restriction in the same case, the rules concerning apportionment found in R.C.M. 1003 (b)(6) and (7) must be followed. Given this requirement, it is unusual for a SCM officer to adjudge a combination of confinement and hard labor or restriction.

(2) E-5 and above.

(a) Reduction to the next lower pay grade;

(b) Restriction to specified limits for two months (cannot adjudge confinement);

(c) Forfeiture of two-thirds of one month's pay.

(3) The effective date of restriction and/or extra duties is the date the convening authority (CA) approves the sentence and orders it executed. This means that the CA can neither impose not require immediate service of such punishment on the date it is adjudged by the SCM officer unless the member waives the seven day period to submit clemency matters and the CA takes his/her action immediately. *See* R.C.M. 1105(c)(2).. The MJA 2016 will not change this. R.C.M. 1106(d)(2) (MJA 2016). Ordinary confinement, however, begins to run from the date the sentence was adjudged by the SCM officer. However, the accused may request that the CA defer confinement until action or as part of a clemency request. *See* R.C.M. 1306(a).

(4) Maximum Punishment Chart.

PUNISHMENT	E5 AND ABOVE	E4 AND BELOW
Confinement for 1 month or less.		X
Hard labor without confinement for 45 days or less.		X
Restriction for two months or less.	X	X
Forfeiture of 2/3 pay per month for one month or less.	X	X
Reduction to the lowest enlisted grade.	One grade only	X

4. Rights to Counsel.

a) In 1972, the Supreme Court held, with respect to "criminal prosecutions," that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at this trial." *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

b) The Supreme Court, in *Middendorf v. Henry*, 425 U.S. 25 (1976), held that a SCM was not a "criminal prosecution" within the meaning of the Sixth Amendment, reasoning that the possibility of loss of liberty does not, in and of itself, create a proceeding at which counsel must be afforded. Rather, it reasoned that a SCM was a brief, nonadversarial proceeding, the nature of which would be wholly changed by the presence of counsel. It found no factors that were so extraordinarily weighty as to invalidate the balance of expediency that has been struck by Congress.

c) In *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977), *reconsidered at* 5 M.J. 246 (C.M.A. 1978), the C.M.A. considered the Supreme Court's decision in *Middendorf* and concluded that there existed no right to counsel at a SCM. *See also United States v. Kahmann*, 59 M.J. 309, 315 (C.A.A.F. 2004)

d) While the MCM created no statutory right to detailed military defense counsel at a SCM, the convening authority may still permit the presence of such counsel if the accused is able to obtain such counsel. The Manual has created a limited right to civilian defense counsel at SCM, however. R.C.M. 1301(e) provides that the accused has a right to hire a civilian lawyer and have that lawyer appear at trial, if such appearance will not unnecessarily delay the proceedings and if military exigencies do not preclude it. The accused must, however, bear the expense involved. If the accused wishes to retain civilian counsel, the SCM officer should allow him a reasonable time to do so.

e) *Booker* Warnings - although holding that an accused had no right to counsel at a SCM, the C.M.A. ruled in *Booker*, *supra*, that if an accused was not given an opportunity to consult with independent counsel before accepting a SCM, the SCM will be inadmissible at a subsequent trial by court-martial. The term "independent counsel" has been interpreted to mean a lawyer qualified in the sense of Article 27(b), UCMJ, who, in the course of regular duties, does not act as the principal legal advisor to the convening authority. Under the *Booker* Rule, the Government needs to show that the accused either exercised his right to confer with counsel or made a voluntary, knowing, and intelligent waiver of this right. Without such a showing, a SCM will not be considered a "criminal conviction" and will not be admissible as a prior conviction under R.C.M. 1001(b)(3), nor for purposes of impeachment under M.R.E. 609, MCM. *See United States v. Booker*, 3 M.J. 443, 448 (C.M.A. 1977). *See also United States v. Kelly*, 45 M.J. 259 (C.A.A.F. 1996). While these cases would seem to allow a prior SCM's use as a "conviction" to trigger the increased punishment provisions of R.C.M. 1003(d) if the accused had been <u>actually</u> represented by

counsel or had rejected the services of counsel provided to him, the discussion following R.C.M. 1003(d) opines that convictions by SCM may not be used for this purpose. As the discussion and analysis sections of the MCM, it has no binding effect and represents only the drafters' opinions. Thus, this issue remains unresolved.

5. Additional considerations.

a) Orderly proceeding. The SCM officer is responsible for planning an orderly trial procedure that includes the logical presentation of evidence. DA PAM 27-7, para. 3-2*c*. The SCM officer is permitted to contact potential witnesses to determine their knowledge of the case and whether they have any further admissible evidence, to include documents. *Id.* Because of the Military Rules of Evidence apply, the SCM officer may need to call witness to provide proper foundations for the admission of evidence. Such technical questions may be addressed to the SCM officer's legal advisor. The accused may request additional witnesses, beyond those identified by the SCM officer, to testify on his behalf. DA PAM 27-7, para. 3-3*c*. Importantly, the SCM officer may not take the testimony of any witness by telephone at trial over the accused's consent. DA PAM 27-7, para. 3-2c(2).

b) Subpoena power. The SCM officer is authorized by Article 46, UCMJ, and R.C.M. 703(e)(2)(C) and 1301(f) to issue subpoenas to compel the appearance at trial of civilian witnesses. DA PAM 27-7, para. 2-4*b*. In such a case, the SCM officer will follow the same procedure detailed for a SPCM or GCM trial counsel in R.C.M. 703(c). Appendix 7 of the MCM contains an illustration of a completed subpoena. While the power of SCMs to obtain evidence under R.C.M. 703 has not changed with the MJA 2016, R.C.M. 703 will change dramatically with the introduction of the investigative subpoena. Even so, because of the nature of the proceeding, it is unlikely the changes to R.C.M. 703 will have much impact on the conduct of SCMs.

c) Motions. The SCM officer is responsible for ruling on all motions. These may come in the form of oral motions from the accused or written motions. The DA PAM specifically discusses motions to suppress and recommends consultation with the legal advisor prior to ruling. Para. 2-3*d*.

C. Trial Procedure. *See* Appendix 9, MCM and DA PAM 27-7.

1. Practical considerations.

a) No federal conviction. The main benefit of a SCM proceeding is that it is not considered a federal conviction. Depending upon the offense(s) charged, this fact alone may provide the basis for an accused to consent to trial by SCM. This is often why an accused will offer to plead guilty at a summary court-martial as part of a deal commonly known as a "summary OTH" wherein a case preferred with a recommendation for trial at a SPCM empowered to adjudge a BCD is referred to a SCM where the accused agrees to plead guilty, followed by a waiver of his or her right to an administrative board proceeding.

b) Victim's rights. One of the changes as part of the MJA 2016 is the addition of subsection (4) to 1304(a), which explicitly incorporates Article 6b victim's rights into the SCM. Because the majority of Art. 120 offenses are not triable at SCM, victim's rights in the context of a SCM will be potentially different than in the type of case we normally associate with Art. 6b rights.

c) Sentencing changes. Under the current rules, the SCM was only required to follow the procedures in R.C.M. 1001, while applying the "principles" in the remainder of Chapter 10, to include R.C.M. 1001A. As part of the revisions pursuant to the MJA 2016, the SCM will

now have the explicit requirement to following procedures during sentencing the include a victim's right to heard.

d) Technical considerations. The usual lack of counsel at the SCM combined with the potential for evidentiary and witness issues makes a contested SCM a highly unpredictable proceeding. The lack of trained legal personnel at the actual hearing can create multiple difficulties, especially if the SCM officer does not adequately prepare or fully comprehend the mechanics of ruling on motions and admitting evidence.

D. Post-Trial responsibilities of the SCM. After the SCM officer has deliberated and announced findings and, where appropriate, the sentence, he or she must then fulfill certain post-trial duties. The nature and extent of these post-trial responsibilities depend upon the findings.

1. Accused acquitted on all charges. In cases in which the accused has been found not guilty as to all charges and specifications, the SCM must:

a) Announce the findings to the accused in open session (R.C.M. 1304(b)(2)(F)(i));

b) Inform the CA as soon as practicable of the findings (R.C.M. 1304(b)(2)(F)(v));

c) Prepare the record of trial in accordance with R.C.M. 1305;

d) Cause one copy of the record of trial to be served upon the accused (R.C.M. 1305(d)(1)), and secure the accused's receipt; and

e) Forward the original and one copy of the record of trial to the CA for action (R.C.M. 1305(d)(2)).

f) The basic mechanics of this will not change under the MJA 2016. The nomenclature used for SCM records will reflect the changes to the post trial procedures for others types of courts-martial (certification as opposed to authentication).

2. Accused convicted on some or all of the charges. In cases in which the accused has been found guilty of one or more of the charges and specifications, the SCM must:

a) Announce the findings and sentence to the accused in open session [R.C.M. 1304(b)(2)(F)(i) and (ii)];

b) Advise the accused of his or her appellate rights:

(1) The accused has the right to submit post-trial matters and to request appellate review. Currently, there is only one rule which covers post trial submissions and post-trial review (R.C.M. 1306). With the MJA 2016 changes, there will be two separate rules; one governing post trial procedures and another governing post-trial review.

(a) R.C.M. 1105 is the current rule covering an accused's post-trial submissions. Under the MJA 2016, the new rule will be R.C.M. 1106. The timeline, substance, the powers of the convening authority will not change under the MJA 2016. The rights of crime victims to submit matters will also remain unchanged under the new rules.

(b) For post-trial review by a JA, the MJA 2016 will include the particulars of that review in the SCM rules, as opposed to referring back to rules governing all types of CM proceedings.

(c) For post-trial review by TJAG, the MJA 2016 will change the timeline from 2 years to 1 year for the suspense for application for review. Otherwise, the substance and mechanics of the review remain the same.

c) If the sentence includes confinement, inform the accused of his right to apply to the CA for deferment of confinement (R.C.M. 1304(b)(2)(F)(iii));

d) Inform the CA of the results of trial as soon as practicable. Such information should include the findings, sentence, recommendations for suspension of the sentence, and any deferment request (R.C.M. 1304(b)(2)(F)(v));

e) Prepare the record of trial in accordance with R.C.M. 1305;

(1) The MJA 2016 will include what to do in the case of a lost, defective, or otherwise incorrect record (R.C.M. 1305(e)).

f) Cause one copy of the record of trial to be served upon the accused (R.C.M. 1305(e)(1)), and secure the accused's receipt; and

g) Forward the original and one copy of the record of trial to the CA for action (R.C.M. 1305(e)(2)).

(1) The MJA 2016 will include CA clemency powers within the SCM rules, as opposed to referring back to the rules governing other types of CMs (R.C.M. 1306(b)).

h) As noted above, the basic mechanics of this will not change under the MJA 2016. The nomenclature used for SCM records will reflect the changes to the post trial procedures for others types of courts-martial (certification as opposed to authentication). Furthermore, as with other types of CMs, the requirement for a promulgating order will disappear.

E. After Action Review. Under the current rules, Article 64, UCMJ, and R.C.M. 1112 require that all summary courts-martial be reviewed by a judge advocate who has not been disqualified by acting in the same case as an accuser, investigating officer, member of the court-martial, military judge, or counsel, or has otherwise acted on behalf of the prosecution or defense. The MJA 2016 will not change the substance of this review. Rather, it will contain the requirements in different rules (R.C.M.s 1307 and 1201).

1. Under both current and new rules, no review is required if the accused has not been found guilty of an offense or if the convening authority disapproved all findings of guilty.

2. The judge advocate's review is a written document containing the following:

a) A conclusion as to whether the court-martial had jurisdiction over the accused and over each offense for which there is a finding of guilty which has not been disapproved by the convening authority;

b) A conclusion as to whether each specification, for which there is a finding of guilty which has not been disapproved by the convening authority, stated an offense;

c) A conclusion as to whether the sentence was legal; and

d) A response to each allegation of error made in writing by the accused.

3. Under current rules, after the judge advocate has completed the review, most cases will have reached the end of mandatory review and will be considered final within the meaning of Article 76, UCMJ. If this is the case, the judge advocate review will be attached to the original record of trial and a copy forwarded to the accused.

4. The review is not final, however, and a further step is required if the judge advocate recommends corrective action. If this is the case, it will require the Staff Judge Advocate (SJA) to forward the record of trial to the GCMCA. With the SJA's review in hand, the GCMCA will take action on the record of trial in a document similar to CA's action. He will promulgate it in a

similar fashion as well. He may disapprove or approve the findings or sentence in whole or in part; remit, commute, or suspend the sentence in whole or in part; order a rehearing on the findings or sentence or both; or dismiss the charges.

5. If, in his or her review, the judge advocate stated that corrective action was required as a matter of law, and the GCMCA did not take action that was at least as favorable to the accused as that recommended by the judge advocate, the record of trial must be sent to the Office of The Judge Advocate General (OTJAG) for resolution. In all other cases, however, the review is now final within the meaning of Article 76, UCMJ.

6. Under the MJA 2016, the accused will have expanded appellate rights. This will include the option to request review by TJAG, in addition to the explicit right to request review by the CCA. Also, with the changes to the authority for ordering post-trial proceedings in other types of CMs, the new rules will explicitly spell out the powers of the CA with regard to post-trial corrective action for SCMs.

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CHAPTER 7
PRETRIAL RESTRAINT AND CONFINEMENT

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I. REFERENCES

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B. Rule for Courts-Martial 302

C. Rule for Courts-Martial 304

D. Rule for Courts-Martial 305

E. Army Regulation 27-10

F. US Army Trial Judiciary SOP for Military Magistrates

II. PRETRIAL RESTRAINT

A. Types of pretrial restraint: "Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses." RCM 304(a). There are four types of pretrial restraint: conditions on liberty; restriction in lieu of arrest; arrest; and pretrial confinement.

1. Conditions on liberty: "[O]rders directing a person to do or refrain from doing specified acts." These can include orders to report periodically to a certain official (commander, staff duty, etc.), orders not to go to certain places, or orders not to associate with certain persons (victims, witnesses, etc.). The order can be oral or written. RCM 304(a) discussion.

a. Conditions on liberty is the only form of pretrial restraint that does not trigger the RCM 707 120-day speedy trial clock. RCM 707(a)(2).

b. Any conditions imposed must be reasonable in order to avoid interfering with the defense's pretrial preparation. Furthermore, the more onerous the conditions are, the more likely it is that the court will determine that the conditions actually amount to restriction, which triggers the 120-day speedy trial clock under RCM 707:

(1) *United States v. Wilkinson*, 27 M.J. 645 (A.C.M.R. 1988), petition denied, 28 M.J. 230 (C.M.A. 1989): Denial of off-post pass that left the accused free access to the entire installation with all its support and recreational facilities was at most a condition on liberty that did not affect speedy trial clock. "[The lack of pass privileges] will, in the usual case, have no impact on rules relating to speedy trial."

(2) *But see United States v. Wagner*, 39 M.J. 832 (A.C.M.R. 1994): In dicta, court questioned Wilkinson's application to married Soldier living off post, especially in foreign country. Court should consider extent and duration of disruption of spousal and parental responsibilities.

(3) *United States v. Melvin*, 2009 WL 613883 (A.F. Ct. Crim. App. 2009): Maj. Melvin was an Air Force ROTC instructor. He was charged with providing underage cadets in his detachment with alcohol, had sexual intercourse with a female cadet, and encouraged cadets to lie

to investigating officers. He was adjudged a dismissal and six months confinement. One issue on appeal was the trial judge's decision to start the 120 day speedy trial clock at preferral of charges. Maj. Melvin asserted it should have started when he received a no contact order with the cadets and was sent TDY away from the university area and more significantly, his family that lived there. Maj. Melvin contended that since he was forced away from his family and could not return home without taking leave, this equated to restriction and pretrial restraint under RCM 304(a)(2)-(3). Alternatively, Maj. Melvin argued that his extension on active duty was a second triggering date before preferral. The appellate court agreed with the trial judge that neither of these positions contained merit.

2. Restriction in lieu of arrest: "[O]ral or written orders directing the person to remain within specified limits." Restricted person normally performs full military duties. RCM 304(a)(2).

a. Restriction v. arrest. *United States v. Schuber*, 70 M.J. 181 (C.A.A.F. 2011): Schuber was subject to restriction not tantamount to arrest during the period following his 71 days in pretrial confinement, where he was restricted to base rather than to quarters, and although he was required to provide weekly urine samples, he was permitted to use all usual base activities, was given a three-day pass upon the death of his grandfather, was not placed under guard or escort during his base restriction or travel, and was not suspended from performing normal military duties. The court held, "there are gradations of restriction. Whether a particular restriction amounts to arrest for the purposes of Article 10, UCMJ, will depend on a contextual analysis . . . including consideration of such factors as the geographic limits of constraint, the extent of sign-in requirements, whether restriction is performed with or without escort, and whether regular military duties are performed." In doing so, the court made it easier for defense counsel to argue that an accused is under arrest and thus protected by Article 10. The accused could be performing military duties but still be under arrest because of narrow geographic limits of constraint, sign-in requirements, and escort requirements.

b. Additional conditions of restriction: Servicemember may be lawfully ordered to abstain from alcohol as a condition of pretrial restriction. *United States v. Blye*, 37 M.J. 92 (C.M.A. 1993).

3. Arrest: "[R]estraint of a person by oral or written order . . . directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties . . . . " A person under arrest can still be directed "to do ordinary cleaning or policing, or to take part in routine training and duties," but cannot perform command or supervisory duties, serve as a guard, or bear arms. RCM 304(a)(3).

a. Note that what is usually considered "arrest" in the civilian context is called apprehension in military practice. RCM 302. Apprehension is not a form of pretrial restraint and does not trigger speedy trial protections under RCM 707 or Article 10.

4. Pretrial confinement: "Pretrial confinement is physical restraint" and is discussed in detail in Section III. RCM 304(a)(4), 305.

5. Restriction in lieu of arrest, arrest, and pretrial confinement trigger the RCM 707 120-day speedy trial clock. Arrest and confinement trigger the more stringent Article 10 speedy trial protections.

B. When a person may be restrained. UCMJ art. 9(d); RCM 304.

1. A person may be placed under pretrial restraint when there is probable cause, which RCM 304(c) defines as a reasonable belief that:

a. An offense triable by court-martial has been committed;

b. The person to be restrained committed it; and

c. The restraint ordered is "required by the circumstances." RCM 304(c).

2. Restraint is not required in every case and should be no more rigorous than required to ensure the person's presence at trial or to prevent foreseeable serious criminal misconduct. RCM 304(c) discussion. The person ordering restraint should consider the factors listed in the discussion of RCM 305(h)(2)(B) before ordering restraint. These factors further elaborate on when restraint may be "required by the circumstances" because it is foreseeable that:

a. The person will not appear at trial, pretrial hearing, or investigation, or;

b. The person will engage in serious criminal misconduct, and;

c. Lesser forms of restraint are inadequate.

3. "An accused pending charges should ordinarily continue the performance of normal duties within the accused's organization while awaiting trial." AR 27-10, para. 5-15a (11 May 2016).

a. Mental condition as a factor: While an accused's mental condition is an appropriate consideration in deciding whether to place or maintain an accused in pretrial confinement (PTC), a Soldier should not be placed in PTC solely to protect against the risk that an accused might kill himself. *United States v. Doane*, 54 M.J. 978 (A.F. Ct. Crim. App. 2001).

C. Who may order pretrial restraint? UCMJ art. 9(b), (c); RCM 304(b).

1. Of officers and civilians: "Only a commanding officer to whose authority the civilian or officer is subject." This authority may not be delegated.

2. Of enlisted personnel: "Any commissioned officer." Authority may be delegated by a commanding officer to warrant, petty, and noncommissioned officers of his/her command to order pretrial restraint of enlisted persons in that commanding officer's command.

3. Authority for subordinates to order restraint may be withheld by a superior competent authority.

4. Release. "[A] person may be released from pretrial restraint by a person authorized to impose it." RCM 304(g).

D. Procedures for ordering pretrial restraint. UCMJ art. 9(b), (c); RCM 304(d).

1. Confinement is "imposed pursuant to orders by a competent authority by the delivery of a person to a place of confinement." *See* Section III *infra*.

2. Other types of pretrial restraint are "imposed by notifying the person orally or in writing of the restraint, including its terms or limits." RCM 304(d).

3. A person placed under restraint "shall be informed of the nature of the offense which is the basis for such restraint." RCM 304(e).

4. Any form of pretrial restriction imposed on a Soldier must be disclosed on the DD Form 458 Charge Sheet, blocks 8 and 9.

E. Pretrial restraint is not punishment: Persons restrained pending trial may not be punished for the offense that is the basis of the restraint. Prohibitions include "punitive duty hours or training," "punitive labor," or "special uniforms prescribed only for post-trial prisoners." RCM 304(f). The remedy for a violation of this rule is "meaningful sentence relief." RCM 304(f) analysis (MCM 2016 ed.).

III. PRETRIAL CONFINEMENT

A. Basis for pretrial confinement: Any person subject to trial by court-martial may be ordered into confinement by those persons listed in Section II.C *supra* upon a determination that there is probable cause (reasonable belief) that:

1. An offense triable by a court-martial has been committed (note that in accordance with UCMJ art. 10, an accused normally should not be placed into confinement when charged only with an offense normally tried by summary court-martial);

2. The person confined committed it; and

3. Confinement is required by the circumstances. Consider the factors in RCM 305(h)(2)(B) discussion in determining whether it is reasonably foreseeable that the person:

a. Will not appear at trial, pretrial hearing, or investigation, or;

b. Will engage in serious criminal misconduct, and;

c. Lesser forms of restraint are inadequate. RCM 305(d), (h).

B. Regulatory requirements: "In any case of pretrial confinement, the SJA concerned, or that officer's designee, will be notified prior to the accused's entry into confinement or as soon as practicable afterwards." AR 27-10, paragraph 5-15a (11 May 2016). Also consider the requirements of local policies/regulations (for example, a local policy may prohibit placing a Soldier into pretrial confinement without the concurrence of the SJA, or withhold the authority to order a Soldier into confinement to that Soldier's commander).

C. Advice to accused upon confinement: "Each person confined shall be promptly informed of:

(1) The nature of the offenses for which held;

(2) The right to remain silent and that any statement made by the person may be used against the person;

(3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and

(4) The procedures by which pretrial confinement will be reviewed." RCM 305(e).

D. Military counsel.

1. The RCM requires that a confinee must request military counsel and the request must be known to military authorities. Counsel is to be made available prior to RCM 305(i) review, or within 72 hours of request, whichever occurs earlier. RCM 305(f).

a. BUT: AR 27-10, para. 5-15b (11 May 2016) imposes a duty on the SJA to request TDS appointment of counsel. If no TDS counsel available within 72 hours of entry into confinement, the SJA may appoint government counsel for this limited purpose.

b. "Consultation between the accused and counsel preferably will be accomplished before the accused's entry into confinement." If not possible, every effort will be made to have consultation within 72 hours of accused's entry into confinement. AR 27-10, para. 5-15b (11 May 2016).

2. No right to military counsel of the confinee's own selection. Counsel "may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred." RCM 305(f).

E. RCM 305(i)(1) 48-hour probable cause determination:

1. Embodiment of the Constitutional review from *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991) and *United States v. Rexroat*, 38 M.J. 292 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 1296 (1994).

a. History of the Requirement:

(1) *Gerstein v. Pugh*, 420 U.S. 103 (1975). Fourth Amendment ("right of the people to be secure in their persons . . . against unreasonable . . . seizures") requires a "prompt" judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. *Gerstein* is binding upon the military. *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976).

(2) What is prompt? "Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991).

2. Who conducts the 48-hour Review? Review of the adequacy of probable cause to continue pretrial confinement must be made within 48 hours of imposition of confinement under military control by a "neutral and detached officer," e.g. an "independent" commander/officer, a military magistrate, or a military judge. RCM 305(i)(1). The accused's commander may do the review if truly neutral and detached. RCM 305(h)(2)(A).

a. *United States v. McLeod*, 39 M.J. 278 (C.M.A. 1994): Both the brigade commander's and SJA's review of company commander's initial decision to impose pretrial confinement were neutral and detached. Neither was directly or particularly involved in the command's law enforcement function.

b. *United States v. Bell*, 44 M.J. 677 (N-M Ct. Crim. App. 1996): A ship's command duty officer can be neutral and detached, and constitutionally qualified to make a judicial probable cause determination which satisfies *Rexroat.*

3. The substance of the review is a probable cause review by a neutral and detached officer based on the requirements of RCM 305(h)(2)(B). There must be reasonable grounds that:

a. An offense triable by a court-martial has been committed;

b. The confinee committed it; and

c. Confinement is necessary because it is foreseeable that:

(1) The confinee will not appear at a trial, pretrial hearing, preliminary hearing, or investigation, or

(2) The confinee will engage in serious criminal misconduct; and

(3) Less severe forms of restraint are inadequate.

F. Commander's 72-hour review. UCMJ art. 11; RCM 305(h).

1. Report of confinement to confinee's commander is required within 24 hours if confinement was initially ordered by someone other than the commander. RCM 305(h)(1).

2. Commander shall review confinement not later than 72 hours after ordering confinement, or receiving notice of confinement, and shall order release "unless the commander believes upon ... reasonable grounds, that:

(i) An offense triable by a court-martial has been committed;

(ii) The confinee committed it; and

(iii) Confinement is necessary because it is foreseeable that:

(a) The confinee will not appear at a trial, pretrial hearing, or preliminary hearing, or

(b) The confinee will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate." RCM 305(h).

3. What constitutes serious criminal misconduct?

a. Serious criminal misconduct: "includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States." RCM 305(h)(2)(B)(iv).

b. "[T]he 'quitter' who disobeys orders and refuses to perform duties" can have an "immensely adverse effect on morale and discipline, which, while intangible, can be more dangerous to a military unit than physical violence." "[A]lthough the 'pain in the neck' [Soldier]... may not be confined before trial solely on that basis, the accused whose behavior is not merely an irritant to the commander, but is rather an infection in the unit may be so confined." Analysis of Rule for Courts-Martial 305, MCM, p. A21-18 (MCM 2016 ed.).

(1) *United States v. Rosato*, 29 M.J. 1052 (A.F.C.M.R. 1990), *rev'd in part*, 32 M.J. 93 (C.M.A. 1991): Accused who was willfully disobedient and disrespectful to superiors in the presence of 10-15 members of a student squadron was properly placed in pretrial confinement "to protect the unit's discipline and morale from the accused's disruptive behavior." Unit consisted of new, junior personnel, accused had a history of disciplinary problems, student representatives complained about him, and the accused ignored first sergeant's admonitions.

c. *United States v. Savoy*, 65 M.J. 854 (A.F. Ct. Crim. App. 2008): While suicide prevention is an improper basis for continued pretrial confinement, a detainee's status as a suicide risk may be considered in evaluating the detainee's likelihood to be a flight risk or commit other serious misconduct.

4. Procedure:

a. Can be completed immediately after ordering PTC, and can satisfy the RCM 305(i)(1) 48-hour probable cause determination if the commander is a neutral and detached officer and acts within 48 hours of the imposition of confinement under military control. RCM 305(h)(2)(A).

b. "If continued pretrial confinement is approved, the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement . . . have been met. This memorandum may include hearsay and may incorporate by reference other documents, such as witness statements, investigative reports, or official records." Memorandum is forwarded to a reviewing officer (military magistrate). RCM 305(h)(2)(C); AR 27-10, para. 8-5b(2) (11 May 2016).

c. "Except in extraordinary cases, charges against the person confined should be preferred within seven (7) days of confinement." AR 27-10, para 8-5b(2) (11 May 2016).

G. RCM 305(i)(2) 7-day review. AR 27-10, Chapter 8 (Military Magistrate Program).

1. Review of the "probable cause determination and necessity for continued pretrial confinement" by a "neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned" within 7 days of imposition of confinement. In the Army, the 7-day review is conducted by a military magistrate. AR 27-10, para. 8-5a(1) (11 May 2016). If an Army magistrate is unable to conduct the review, the review will be governed by the

military magistrate regulations of the military service with jurisdiction over the place of confinement. AR 27-10, para. 8-5a(3) (11 May 2016). Time can be extended by the military magistrate to 10 days for good cause. Method for calculating the total number of days of pretrial confinement: count both the initial date of confinement and date of magistrate review. The standard of proof at the 7-day review is a preponderance of the evidence and the government bears the burden. RCM 305(i)(2).

2. Accused and counsel "shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable." The accused can choose not to attend the 7-day review, but cannot waive the 7-day review altogether (i.e., even if accused chooses not to attend, the hearing must still be held). Representative of command may appear to make a statement. RCM 305(i)(2)(A)(i).

a. *United States v. Bell*, 25 M.J. 676 (A.C.M.R. 1987), *petition denied*, 27 M.J. 161 (C.M.A. 1988): Ex parte discussion by magistrate with prisoner's commander and trial counsel held not prohibited, at least when defense counsel was given access to all the information and an opportunity to respond.

b. *United States v. Fisher*, 37 M.J. 812 (N.M.C.M.R. 1993). Magistrate (and commander) should utilize a "totality-of-the-circumstances" test in determining whether pretrial confinement is warranted.

3. Victim rights: "A victim of an alleged offense committed by the confinee has the right to reasonable, accurate, and timely notice of the 7-day review; the right to confer with the representative of the command and counsel for the government, if any; and the right to be reasonably heard during the review. . . . [T]he hearing may not be unduly delayed for this purpose." The right to be heard can be accomplished through counsel. RCM 305(i)(2)(A)(iv).

4. Military magistrate should review and consider: the confinement order, DA Form 5112, charge sheet, 48-hour review memorandum, 72-hour review memorandum, and any matters submitted by the government or the accused. Military Magistrate SOP.

a. Note that AR 27-10 requires the commander to provide the military magistrate with a completed DA Form 5112 (including a statement of the basis for the decision to confine the Soldier) no later than 36 hours after imposition of confinement. AR 27-10, para. 8-5b(2) (11 May 2016).

5. The Military Magistrate SOP provides detailed guidance on how the military magistrate should conduct the review.

a. Military Rules of Evidence do not apply except for Section V (Privileges), MRE 302 and MRE 305. RCM 305(i)(2)(A)(ii).

b. This is a review and not an adversarial hearing; the military magistrate should have full control of the scope of the review. The government and accused should generally not be allowed to call witnesses. The military magistrate and trial counsel should not question the accused although the accused can make a statement before the military magistrate.

6. Military magistrate "shall approve continued confinement or order immediate release." If the military magistrate orders release, a victim of an offense allegedly committed by the confinee has the right to reasonable, accurate, and timely notice of the release. RCM 305(i)(2)(C). The military magistrate shall make a written memorandum of factual findings and conclusions, and shall state whether the victim's rights to notification, opportunity to confer, and opportunity to be heard were provided. The memorandum and all documents considered must be available to parties on request. RCM 305(i)(2)(D). Note that AR 27-10, para. 8-5b(1) and 8-5b(5) (11 May

2016), requires the magistrate to serve a copy of the memorandum upon the SJA and the accused/defense counsel.

a. Failure to serve copy of military magistrate's memo after defense request violates RCM 305(i). *United States v. McCants*, 39 M.J. 91 (C.M.A. 1994).

b. Specificity of memorandum. *United States v. Williams*, 29 M.J. 570 (A.F.C.M.R. 1989), *petition denied*, 30 M.J. 106 (C.M.A. 1990): "[T]here is no specified format for the contents [of the reviewing officer's memorandum] other than it must state the reviewing officer's conclusions and the factual findings on which they are based." Failure to precisely state the reasons for continued pretrial confinement is not an abuse of discretion requiring additional credit.

7. Military magistrate shall, after notice to parties, reconsider the decision to approve continued confinement, upon request, based upon any significant information not previously considered. RCM 305(i)(2)(E).

8. US Army Trial Judiciary Rules of Practice Before Army Courts-Martial disclosure requirements:

a. Rule 1.1: trial counsel must inform the military judge in the EDR if Accused is in pretrial confinement.

b. Rule 28.1: Record of Trial must contain original DA Form 5112 and military magistrate's memorandum approving or disapproving pretrial confinement.

H. Review by military judge.

1. Once charges are referred, military judge may review propriety of confinement on motion for appropriate relief.

a. "Upon a motion for release from pretrial confinement, a victim of an alleged offense committed by the accused has the right to reasonable, accurate, and timely notice of the motion and any hearing, the right to confer with counsel, and the right to be reasonably heard. Inability to reasonably afford a victim these rights shall not delay the proceedings. The right to be heard under this rule includes the right to be heard through counsel." RCM 905(b)(8).

2. Military judge may order release only if:

a. Military magistrate's decision was an abuse of discretion and there is not sufficient information presented to the military judge justifying confinement;

b. Information not presented to the military magistrate establishes that confinee should be released; or

c. There has been no initial review and the military judge determines that the requirements for confinement have not been met. RCM 305(j).

3. The military judge can order day-for-day administrative credit for any pretrial confinement served as a result of failure to comply with RCM 305(f), (h), (i) or (j). RCM 305(k). The military judge may order additional credit for any pretrial confinement that involves abuse of discretion or unusually harsh circumstances. When simultaneous noncompliance with multiple provisions of RCM 305 occurs, only day-for-day credit will be applied. In other words, a pretrial confinee is not entitled to additional days of credit when multiple provisions of RCM 305 are violated on one day or over the same period. *United States v. Plowman*, 53 M.J. 511, 514 (N-M Ct. Crim. App. 2000); *United States v. Huey*, 57 M.J. 504 (N-M. Ct. Crim. App. 2002).

I. Who may direct release. RCM 305(g):

1. Any commander of the confinee. The following commanders may review pretrial confinement and direct the accused's release: the accused's immediate and higher unit commander, or the commander of the installation on which the confinement facility is located.

2. Officer appointed to review confinement (military magistrate).

3. The detailed military judge, once charges have been referred.

J. Confinement after release. RCM 305(1): Once release from confinement is directed by a commander, a military magistrate, or a military judge, the accused may not be confined again before completion of trial "except upon discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other evidence, justifies confinement."

1. The military magistrate must be immediately notified if an accused is returned to confinement and the reasons therefore. AR 27-10, para 8-5b(3) (11 May 2016).

2. After a Soldier has been released from pretrial confinement, a commander can order any lesser forms of pretrial restraint he/she feel necessary under the circumstances. AR 27-10, para 8-5b(3) (11 May 2016).

IV. SENTENCE CREDIT

A. Allen credit. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984): Day for day credit for military pretrial confinement for the crimes for which the confinee was later convicted. "[A]ny part of a day in pretrial confinement must be calculated as a full day for purposes of pretrial confinement credit . . . except where a day of pretrial confinement is also the day the sentence is imposed." *United States v. DeLeon*, 53 M.J. 658, 660 (Army Ct. Crim. App. 2000).

1. What about civilian confinement? The CAAF has never squarely addressed the issue of *Allen* credit for time spent in civilian confinement. While the Army Court intimated that such credit "must be given ... for time spent in pretrial confinement in state or federal civilian confinement facilities," *United States v. Ballesteros*, 25 M.J. 891 (A.C.M.R. 1988), *aff'd*, 29 M.J. 14 (C.M.A. 1989), the Court of Military Appeals decided the case on other grounds.

2. Civilian confinement on behalf of the military. *United States v. Chaney*, 53 M.J. 621 (N-M Ct. Crim. App. 2000): Appellant was apprehended by civilian police based on information that he was a deserter from the Marine Corps. Marijuana was found on him during the apprehension. The appellant was placed in confinement based on offenses for which he later received a sentence at a court-martial (marijuana possession and unauthorized absence). The pending state charges against him were dismissed and he was then transferred to military authorities. He was not given Allen credit at trial for the 40 days he spent in pretrial confinement imposed by civilian authorities. Ultimately, the accused never received any credit for the 40 days. The appellate court concluded that he was entitled to 40 days credit because "[h]e was placed in official detention prior to the date his court-martial sentence commenced as a result of the offense for which the sentence was imposed and due to another charge for which he was arrested after the commission of the offense for which the sentence was imposed."

3. Civilian confinement for unrelated offenses. *United States v. Harris*, 78 M.J. 521, 522–23 (Army Ct. Crim. App. 2018): The court ruled that the military judge did not err when he denied the appellant's request for 291 days of Allen credit for civilian confinement where the State of Florida had confined the appellant pursuant to state charges of failing to appear at a pretrial hearing on state child pornography charges. The appellant was arrested on the failure to appear charge after the crimes for which the appellant was ultimately convicted at court-martial. The appellant had been turned over to military control after fleeing to Cambodia, and federal authorities then turned him over to Florida state authorities. The military did not request that Florida confine the appellant. After he pleaded guilty to military desertion and child pornography

charges, the appellant argued that he was entitled to 291 days of Allen credit for the time he spent in pretrial confinement in Florida that was in excess of his 364 day state sentence for a failure to appear charge. The trial judge denied the request after finding that the additional 291 days of pretrial confinement by the State of Florida stemmed solely from his failure to appear to answer the state child pornography charges.

B. Mason credit. *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985): Day-for-day credit given for "pretrial restriction equivalent to confinement." The calculation for Mason credit includes any partial day of restriction tantamount to confinement. *United States v. Chapa*, 53 M.J. 769 (Army Ct. Crim. App. 2000).

1. The test. *United States v. Smith*, 20 M.J. 528 (A.C.M.R. 1985), *petition denied*, 21 M.J. 169 (C.M.A. 1985): "The determination whether the conditions of restriction are tantamount to confinement must be based on the totality of the conditions imposed." Factors to be considered include: limits of the restricted area; physical restraints; escort requirements (occasional v. constant and armed v. unarmed); sign-in requirements; circumstances of duty; assigned duties; degree of privacy enjoyed; location of sleeping accommodations; access to visitors, telephones, recreational, religious, medical, and educational facilities, entertainment, civilian clothing, personal property, etc. *See also United States v. King*, 58 M.J. 110 (C.A.A.F. 2003).

2. Restriction deemed by courts to be tantamount to confinement:

a. *United States v. Smith*, 20 M.J. 528 (A.C.M.R. 1985), *petition denied*, 21 M.J. 169 (C.M.A. 1985): 56 days of "restriction" found tantamount to confinement and credit given. Accused was restricted to barracks building and was prohibited, among other things, from performing normal duties and leaving the building without permission and an escort; required to sign in every 30 minutes during non-duty hours and to remain in room after 2200 hours.

b. *United States v. Regan*, 62 M.J. 299 (C.A.A.F. 2006): Officer who repeatedly tested positive for cocaine was offered inpatient drug treatment or pretrial confinement. She opted for inpatient treatment. The court awarded 21 days of Mason credit because the conditions of inpatient treatment constituted significant restriction and it was suffered upon threat of being confined.

3. Restriction deemed by courts to not be tantamount to confinement.

a. *Washington v. Greenwald*, 20 M.J. 699 (A.C.M.R. 1985) *pet. denied* 20 M.J. 324 (C.M.A. 1985): 88 days of pretrial restriction found not tantamount to confinement. Washington was restricted to company area, place of duty, dining facility, and chaplain's office; he performed normal duties; was restricted to room after 2200 hours; signed in every hour at CQ when not at work; could travel to any place on post he needed to go during duty hours without an escort if he obtained permission and during non-duty hours with an escort.

b. *United States v. Delano*, 2008 WL 5333565 (A.F. Ct. Crim. App. 2008): Servicemember's pretrial restriction was not tantamount to confinement but was implemented to maintain good order and discipline and not imposed as punishment for the Airman in the Transition Flight. The court held that, "while strict, the restrictions were not equivalent to confinement and were not punishment under *Article 13, UCMJ*."

4. Waiver and Forfeiture.

a. NOTE: Although the cases discussed below state that failure to raise the issue of credit is waived if not raised at trial, the Military Justice Act of 2016 amended RCM 905(e) to state that failure to raise timely motions before the court-martial is adjourned "shall constitute forfeiture, absent an affirmative waiver." RCM 905(e)(2). The previous version of RCM 905

in effect before 1 January 2019 stated that failure to do so "shall constitute waiver." RCM 905(e) (MCM 2016 ed.).

b. *United States v. King*, 58 M.J. 110 (C.A.A.F. 2003): If the issue is not raised at trial, it is waived and cannot be raised at the appellate level. Note particularly Judge Baker's concurrence in which he advises military judges to ask on the record whether the accused seeks any pretrial confinement credit beyond simple Allen credit.

c. *United States v. Barrett*, 2009 WL 295012 (A.F. Ct. Crim. App. 2009): Barrett explicitly waived his right to raise the issue that his treatment was tantamount to confinement at trial and on appeal as part of his plea agreement. Thus, the appellate court held the issue is waived.

C. RCM 305(k) credit: Remedy for noncompliance with RCM 305(f), (h), (i) or (j) is administrative credit (day-for-day) against the sentence adjudged for any confinement served as the result of the noncompliance. If no confinement adjudged or if confinement is insufficient to offset all other credit accused is entitled to, the credit will be applied to hard labor without confinement, restriction, fine, and forfeiture (in that order). Military judge may also award additional credit (not limited to day-for-day) if the pretrial confinement involves abuse of discretion or unusually harsh circumstances. Applies in addition to Allen or Mason credit. However, when simultaneous non-compliance with multiple provisions of RCM 305 occurs, only day-for-day credit will be applied. *United States v. Plowman*, 53 M.J. 511, 514 (N-M Ct. Crim. App. 2000).

1. Application of RCM 305(k) credit in cases of restriction tantamount to confinement.

a. *United States v. Gregory*, 21 M.J. 952 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition): When restriction is tantamount to confinement, the procedures for pretrial confinement in RCM 305 apply, and when they are not complied with, day-for-day credit under RCM 305(k) is required in addition to Allen and Mason credit.

b. *United States v. Rendon*, 58 M.J. 221 (C.A.A.F. 2003): CAAF "clarified" *Gregory* in that RCM 305 is only implicated by restriction tantamount to confinement in which actual physical restraint is imposed. The court did not offer a definition or give many useful examples.

2. *Rexroat* violations. *United States v. Stuart*, 36 M.J. 747 (A.C.M.R. 1993): Accused entitled to day-for-day credit under RCM 305(k) for lack of 48-hour probable cause review.

3. Civilian confinement.

a. "If the confinee was apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the confinee under military control in a timely fashion" RCM 305(i)(1).

b. RCM 305(k) credit provisions only apply to a Soldier in civilian confinement if the Soldier is in confinement: a) solely for a military offense; and b) his confinement is with notice and approval of military authorities. Burden is on the accused to allege that RCM 305 applies and that the civilian authorities did not conduct the required 48-hour probable cause review. *United States v. Lamb*, 47 M.J. 384 (C.A.A.F. 1998).

c. *United States v. Durbin*, 2008 CCA LEXIS 486 (A.F. Ct. Crim. App. 2008): "[C]onfinement in violation of AFI 31-205 (Air Force Instruction on confinement requiring pretrial detainees in civilian confinement be treated in a manner consistent with a presumption of innocence standard) does not create for the appellant a per se right to sentencing credit; it only provides the military judge with the discretion to award additional sentencing credit for abuse of discretion by pretrial confinement authorities."

4. Confinement after release. *United States v. Williams*, 47 M.J. 621 (Army Ct. Crim. App. 1997): Even though a violation of RCM 305(l) is not listed as a basis for awarding RCM 305(k) credit, a violation of RCM 305(l) and *Keaton v. Marsh*, 43 M.J. 757 (Army Ct. Crim. App. 1996), results in additional credit under RCM 305(k).

5. Waiver and Forfeiture.

a. NOTE: Although the case discussed below states that failure to raise the issue of credit is waived if not raised at trial, the Military Justice Act of 2016 amended RCM 905(e) to state that failure to raise timely motions before the court-martial is adjourned "shall constitute forfeiture, absent an affirmative waiver." RCM 905(e)(2). The previous version of RCM 905 in effect before 1 January 2019 stated that failure to do so "shall constitute waiver." RCM 905(e) (MCM 2016 ed.).

b. *United States v. Chapa III*, 57 M.J. 140 (C.A.A.F. 2002): At trial, accused was awarded 136 days sentence credit due to a violation of Article 13, UCMJ. On appeal, appellant alleged for the first time an entitlement to additional credit for the Government's failure to comply with RCM 305(h) and (i) (i.e., the 72-hour and 48-hour pretrial confinement review requirements respectively). ACCA held that the appellant failed to properly raise the issue at trial and therefore waived any entitlement to credit. CAAF held appellant waived any issue regarding credit and no plain error by the MJ for failing, sua sponte, to award RCM 305(k) credit.

D. Article 13 credit: "No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence." UCMJ art. 13. Bottom line: Article 13 credit can be given for "unduly harsh circumstances" or for pretrial punishment. The amount of credit given is within the discretion of the court and will be determined based on the severity of the violation (i.e., not limited to day-for-day).

1. Unduly harsh circumstances of pretrial confinement: "The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances." RCM 305(k); *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983). Note that Article 13 does allow the accused to be "subjected to minor punishment during [confinement] for infractions of discipline."

a. *United States v. Avila*, 53 M.J. 99 (C.A.A.F. 2000): By brig policy, based solely on the serious nature of his pending charges, appellant was housed in windowless cell; not allowed to communicate with other pretrial confinees; given only one hour of daily recreation; made to wear shackles outside of his cell; and only allowed to see visitors separated by a window. The court agreed with the lower court's holding that the brig policy of assigning all pretrial confinees facing a possible sentence of 5 or more years to maximum (solitary) confinement was unreasonable. Appellant was given an additional 140 days credit for the period of pretrial confinement he already served. However, the court found that these conditions did not amount to cruel and unusual punishment under the 8th Amendment. *But see United States v. James*, 28 M.J. 214 (C.M.A. 1989) (finding no Article 13 violation for accused who was confined with sentenced prisoners, wore an orange jumpsuit instead of uniform and rank, enjoyed limited recreational facilities, and had visitation privileges narrower than those required by AR 190-47).

b. *United States v. Gilchrist*, 61 M.J. 785 (Army Ct. Crim. App. 2005): Gilchrist was placed in pretrial confinement (PTC) prior to his plea of guilty for various offenses. The government transported Gilchrist from Fort Knox where he was in PTC to his Article 32 at Fort Bliss. The detention cell was full at Fort Bliss so the command shackled him to a cot in "The Ice House" overnight to prevent him from fleeing. Article 13 credit was denied at trial

for the cot incident. ACCA determined the shackling of Gilchrist was not per se unduly harsh. However, they awarded Article 13 credit because other methods could have been used to ensure Gilchrist's presence at trial.

c. *United States v. Yunk*, 53 M.J. 145 (C.A.A.F. 2000): Reviewing the same unreasonable brig policy in *Avila*, the court commented that the appropriate time to raise matters of illegal pretrial confinement is with the magistrate considering the imposition of pretrial confinement. However, the court refused to find waiver of the issue when it is raised for the first time on appeal.

d. *United States v. King*, 61 M.J. 225 (C.A.A.F. 2005): King was placed in pretrial confinement and classified as a "maximum security" prisoner. He was placed in a double occupancy cell with another pretrial confinee. The following conditions governed King's pretrial confinement: remain in the cell with the exception of appointments or emergencies; eat all meals in the cell (meals were delivered to the cell); no library or gym privileges (books and gym equipment were delivered to the cell); no sleeping during duty hours; must wear a yellow jumpsuit and shackles when released for appointments; must have two escorts, one of whom was armed, when King was moved to appointments; and may only watch a TV placed outside the cell. King's cellmate was subsequently convicted at a court-martial and for some time, the two continued to reside in the same cell. For administration purposes (overcrowding and prohibition on mixing pre- and post-trial confinees), King spent fifteen days by himself in a windowless segregation cell. At trial, the military judge denied Article 13 relief, finding that "[t]he conditions were based on legitimate non-punitive reasons. The conditions of [King's] confinement were not more rigorous than necessary." The CAAF awarded Article 13 credit for his time spent in the segregated cell. However, no credit was given for the conditions of his pretrial confinement prior to being segregated. The CAAF stated it was "reluctant to second-guess the security determinations of confinement officials."

e. *United States v. Crawford*, 62 M.J. 411 (C.A.A.F. 2006): Marine officer accused was segregated for a week of observation and then retained as a "maximum custody" prisoner for almost nine months, the entire time he was in pretrial confinement. This did not establish that he was confined in conditions more rigorous than those required to assure his presence at trial in violation of pretrial confinement regulations. The court considered that there were serious charges pending against the accused, there was a potential for lengthy confinement, the accused had made threats and had an apparent ability to execute those threats, his access to unknown quantities of weapons and explosives, and his professed willingness to resort to violent means against what he viewed as government oppression provided sufficient reason to classify the accused as a high-risk inmate.

f. *United States v. Adcock*, 65 M.J. 18 (C.A.A.F. 2007): 1LT Adcock received credit under RCM 305(k) for "abuse of discretion" when she was housed in a civilian confinement facility that did not conform to USAF Regulations (AFI 31-205 forbids pretrial detainees from being commingled with post-trial inmates and mandates that detainees retain rank insignia, conditions violated by the civilian jail in Solano County, CA.).

g. *United States v. Gomez*, 66 M.J. 663 (C.G. Ct. Crim. App. 2008): The Coast Guard court declined to give relief to an accused who wasn't visited regularly by his chain of command, despite Coast Guard regulation requiring regular visits.

h. *United States v. Williams*, 68 M.J. 252 (C.A.A.F. 2010): Accused, who was placed on suicide watch when he was confined prior to trial, received sentencing credit for the entire period, but did not receive additional credit based on conditions of confinement. (He was denied books, radio, and CD player, subjected to 24 hour lighting, and required to wear a suicide gown.) This is because there was a non-punitive objective—suicide watch status.

2. Pretrial punishment:

a. Does NOT require the Soldier being in pretrial confinement. *United States v. Combs*, 47 M.J. 330 (C.A.A.F. 1997): Air Force E-6, whose conviction for homicide was overturned on appeal, was required to serve 20 months on active duty as an E-1. CAAF held that reduction is a punishment and rejected the Government argument that Article 13 only applies in pretrial confinement situations.

b. *United States v. Smith*, 53 M.J. 168 (C.A.A.F. 2000): Reviewing previous cases dealing with pretrial punishment, the court identified the following factors to assist in determining whether pretrial restraint amounts to pretrial punishment:

(1) Similarities between sentenced persons and those awaiting disciplinary disposition in daily routine, work assignments, clothing, and other restraints and control conditions;

(2) Relevance of those similarities to customary and traditional military command and control measures;

(3) Relation of requirements and procedures to command and control needs; and

(4) If there was an intent to punish or stigmatize the person pending disciplinary action.

c. *United States v. Mosby*, 56 M.J. 309 (C.A.A.F. 2002): Appellant was convicted of involuntary manslaughter of his five-week old son and sentenced to reduction to E-1, nine years confinement and a BCD. Prior to trial, appellant was placed in solitary confinement at the Marine Corps Base Brig at Camp Lejeune, North Carolina. At trial, the military judge denied a defense Article 13 motion for additional sentence credit based on illegal pretrial punishment finding that there was no intent to punish appellant by placing him in solitary confinement; the conditions were not "unduly rigorous" or "so excessive as to constitute punishment"; and the conditions were "reasonably related to legitimate governmental objectives." CAAF held the military judge's findings of no intent to punish were not clearly erroneous; appellant was NOT entitled to additional sentence credit. *See also United States v. Fulton*, 55 M.J. 88 (C.A.A.F. 2001); *United States v. Coreteguera, Jr.*, 56 M.J. 330 (C.A.A.F. 2002).

d. *United States v. Fischer*, 61 M.J. 415 (C.A.A.F. 2005): Fischer was placed in pretrial confinement on 4 May 2001. On 29 June 2001 his pay and benefits were terminated based on him reaching his end of obligated service (ETS or EAS). The defense counsel tried unsuccessfully to have his pay continued past his ETS date. On appeal, Fischer argued that the government violated Article 13 when it refused to pay him past his ETS. CAAF disagreed. In refusing to award Article 13 credit, CAAF stated there was a neutral non-punitive policy that allowed for refusing to pay a pretrial confinee who has reached his ETS and is not performing duties.

3. Pre-trial punishment: Public humiliation or degradation.

a. *United States v. Starr*, 53 M.J. 380 (C.A.A.F. 2000): While under investigation, appellant, a member of the Security Forces (SF) Squadron, was ordered by his First Sergeant to surrender his SF beret. The First Sergeant also assigned appellant to "X Flight," a group of other SF personnel who, for a variety of reasons, were not authorized to bear arms or to perform other normal SF duties. Members of X Flight could not wear berets but those members assigned there for medical reasons could wear their berets to other squadron functions. According to the First Sergeant, custom in the SF career field prohibits one unable to perform SF work from wearing the beret. For 275 days the appellant wore no beret and remained in X Flight. The court found no intent to punish or stigmatize him while

disciplinary action was pending and that the limitations were imposed for legitimate, operational and military purposes.

b. *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987): Cruz and about 40 other Soldiers suspected of drug offenses were called out of a mass formation, escorted before the DIVARTY commander who did not return their salute, called "criminals" by the commander, searched and handcuffed, billeted separately pending trial, and assembled into what become known as the "Peyote Platoon." The court held "public denunciation by the commander and subsequent military degradation before the troops prior to courts-martial constitute[d] unlawful pretrial punishment prohibited by Article 13."

c. *United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994): Company commander's disparaging remarks to accused such as "don't go out stealing car stereos this weekend" and "getting any five-finger discounts lately, Stamper?" constituted pretrial punishment.

d. *United States v. McLean*, 70 M.J. 573 (A.F. Ct. Crim. App. 2011): Air Force NCO was convicted of aggravated assault on his child. Prior to trial, he was ordered to live in enlisted quarters and share their latrine and laundry facilities. The court found the issue was waived because not raised at trial, but even if not waived, it was not analogous to the "shaming ritual" in *Cruz.*

4. Other examples.

a. "Incorrective" training. *United States v. Hoover*, 24 M.J. 874 (A.C.M.R. 1987), *petition denied*, 25 M.J. 437 (C.M.A. 1987): After damaging his barracks room, Hoover was required to sleep in a pup tent for 3 weeks between 2200 and 0400 hours. The court held there was an Article 13 violation; "corrective or extra training" must be "directly related to the deficiency" and "oriented to improve . . . performance in the problem area." *See also United States v. Fitzsimmons*, 33 M.J. 710 (A.C.M.R. 1991) (court set aside BCD as a consequence of "pup tent" pretrial punishment).

b. Violating the Order of the Military Judge. *United States v. Tilghman*, 44 M.J. 493 (C.A.A.F. 1996): Accused was convicted at the end of the day and the government sought to put him in confinement until sentencing hearing the next day. The military judge determined there was insufficient basis for confinement. Commander nevertheless ordered accused into pretrial confinement. Military judge ordered an additional 10 day credit for each day of illegal pretrial confinement. At the post-trial 39a session, the Chief Judge awarded an additional 18 months credit.

c. Constitutional Deprivation. *United States v. Mack*, 65 M.J. 108 (C.A.A.F. 2007): While the appellate case does not address this issue directly and faulted the trial judge in other areas, CAAF seemed to support trial judge's decision to award credit for Constitutional violations. These included the accused's commanding officer ordering him to have no unsupervised visits with his wife, even though she had no involvement with the case, something the judge found "not directly linked to a valid, governmental purpose and intruded on the sanctity of his marriage, a right which is often protected under a number of rights in the Constitution of the United States." The judge also took exception that the accused's telephone conversations to his counsel were monitored which "chilled his ability and freedom to speak in a protected environment under the attorney/client relationship, intruding upon [Appellant's] ... Fifth and Sixth Amendment rights to counsel." Accordingly, the trial judge found these restrictions were violations of his constitutional rights and warranted day for day credit.

5. Waiver and Forfeiture

a. NOTE: Although the cases discussed below state that failure to raise the issue of credit is waived if not raised at trial, the Military Justice Act of 2016 amended RCM 905(e) to state

that failure to raise timely motions before the court-martial is adjourned "shall constitute forfeiture, absent an affirmative waiver." RCM 905(e)(2). The previous version of RCM 905 in effect before 1 January 2019 stated that failure to do so "shall constitute waiver." RCM 905(e) (MCM 2016 ed.).

b. In *United States v. Inong*, 58 M.J. 460 (2003), CAAF held that an accused must raise illegal pretrial punishment at trial, or the issue will be waived for appellate purposes, absent plain error. In doing so it specifically overruled *United States v. Huffman*, 40 M.J. 11 (C.M.A. 1994, as well as the "tantamount to affirmative waiver" rule established by *United States v. Tanksley*, 54 M.J. 169 (2000) and *United States v. Southwick*, 53 M.J. 412 (2000).

(1) The accused can waive Article 13 credit in a plea agreement.

(2) Absent affirmative waiver of unlawful pretrial punishment at trial, appellate courts have considered violations of Article 13 for the first time on appeal. *United States v. Fricke*, 53 M.J. 149 (C.A.A.F. 2000).

E. Applying credits

1. Adjudged v. Approved sentence: Pretrial confinement credit applies to the approved sentence. Originally, CAAF held that pretrial confinement credit applies to adjudged sentence, unless there is a PTA that provides for lesser sentence, in which case it applies to lesser sentence. *United States v. Rock*, 52 M.J. 154 (C.A.A.F. 1999). However, in *United States v. Spaustat*, 57 M.J. 256 (C.A.A.F. 2002), the court confirmed its ruling in *Rock* and clarified it by stating: "this court will require the convening authority to direct application of all confinement credits for violation of Article 13 or RCM 305 and all Allen credit against the approved sentence; i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement."

2. Pierce credit: When a Soldier is tried after receiving NJP for the same offense, the Soldier must get complete credit for any prior punishment, "day-for-day, dollar-for-dollar, stripe-for-stripe," according to *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989), which in footnote 5 lays out a method to reconcile punishments that do not directly convert. Pierce credit must only be granted where the court-martial offense for which an accused is sentenced is substantially identical to the offense for which the accused received an Article 15. *United States v. Bracey*, 56 M.J. 387, 389 (C.A.A.F. 2002). The Military Judges' Benchbook provides detail on how Pierce credit is determined (i.e., by military judge or the panel) and has sample equivalency tables.

3. Applying Article 13 credit against discharges. *United States v. Zarbatany*, 70 M.J. 169 (C.A.A.F. 2011): CAAF determined that Article 13 relief can range from dismissal of the charges, to confinement credit, to setting aside a punitive discharge. Soldier received 119 days of Allen credit plus an additional 476 days for unusually harsh PTC conditions. With adjudged confinement of only six months, Zarbatany was released at the conclusion of the trial. CAAF held that Article 13 confinement credit can be applied toward a punitive discharge. While the court noted that "conversion of confinement credit to forms of punishment other than those found in R.C.M. 305(k) is generally inapt," it can be done, potentially allowing the conversion of a discharge. It also noted, however, that while "meaningful relief" is required, it must not come where it would be "disproportionate to the harm suffered." *See also United States v. Fulton*, 55 M.J. 88 (C.A.A.F. 2001) (stating where no other remedy is appropriate, the military judge may, in the interests of justice, dismiss charges because of unlawful pretrial punishment).

F. Litigating issues related to pretrial restraint.

1. Pretrial.

a. Violation of Article 13. *United States v. McFayden*, 51 M.J. 289 (C.A.A.F. 1999): CAAF specified the issue of whether a pretrial agreement requiring the accused to waive his right to challenge a violation of Article 13 violates public policy. The court held that RCM 705(c)(1)(B) does not specifically prohibit an accused from waiving his right to make such a deal. However, as this can be done only with the accused's full knowledge of the implications of the waiver, the military judge should inquire into the facts and circumstances of the pretrial punishment as well as the voluntariness and understanding of the accused of the waiver before accepting the plea.

b. Judicial review: Whenever reviewing the legality of confinement *already served*, the military judge should apply an abuse of discretion standard and limit the examination to the evidence previously considered by the magistrate at the RCM 305(i) hearing. RCM 305(j)(1)(A). When determining whether to release the prisoner, the military judge should hold a *de novo* hearing. *United States v. Gaither*, 45 M.J. 349 (C.A.A.F. 1996).

2. At trial.

a. "Trial counsel shall inform the court-martial of the data on the charge sheet relating to . . . the duration and nature of any pretrial restraint. . . . If the defense objects to the data as being materially inaccurate or incomplete . . . the military judge shall determine the issue. Objections not asserted are forfeited." RCM 1001(b)(1).

b. Waiver and Forfeiture

(1) NOTE: Although the cases discussed below state that failure to raise the issue of credit is waived if not raised at trial, the Military Justice Act of 2016 amended RCM 905(e) to state that failure to raise timely motions before the court-martial is adjourned "shall constitute forfeiture, absent an affirmative waiver." RCM 905(e)(2). The previous version of RCM 905 in effect before 1 January 2019 stated that failure to do so "shall constitute waiver." RCM 905(e) (MCM 2016 ed.).

(2) *Mason* credit. Failure by defense counsel to raise the issue of administrative credit for restriction tantamount to confinement by timely and specific objection to the presentation of data at trial concerning the nature of such restraint will waive consideration of the issue on appeal. *United States v. Ecoffey*, 23 M.J. 629 (A.C.M.R. 1986). *But see United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989) (where Court considered request for *Mason* credit made for first time on appeal, but rejected claim).

(3) RCM 305(k)/*Rexroat* credit. *United States v. Rollins*, 36 M.J. 795 (A.C.M.R. 1993). Failure to raise *Rexroat*/48-hour review issue at trial constitutes waiver. *See also United States v. Sanders*, 36 M.J. 1013 (A.C.M.R. 1993).

3. Informing the Panel. When the defense opts to introduce evidence of pretrial government action that resulted in administrative credit, the military judge has an obligation to instruct the members of the administrative credit awarded for them to consider during sentence deliberation. The instruction, however, should be general in nature and not "expressly or by inference invite the members to award extra confinement time to compensate for the administrative confinement credit awarded by the military judge. *United States v. Barnett*, 70 M.J. 568 (A.F. Ct. Crim. App. 2011), affirmed in, *United States v. Barnett*, 71 M.J. 248 (C.A.A.F. 2012).

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I. OVERVIEW

A. This chapter focuses on how the theoretical issues of military criminal law become tangible concerns with which practitioners must contend regularly. The chapter first discusses the charging decision: the point at which concepts and theory become reality via a charge sheet (hence the chapter title "substance to form"). The chapter then addresses those issues that must be considered at the time of charging because they generally flow directly from the charging decision – pleadings, multiplicity, unreasonable multiplication of charges, lesser included offenses, instructions, and findings.

II. THE CHARGING DECISION

A. One Method for Making the Charging Decision.

1. Prosecutorial Discretion. Even in the absence of any formal limitations, it is important to remember that there is no ethical or legal obligation to plead all possible charges that the evidence might support. Compare ABA Standards, Standard 3-3.9(b) (listing factors properly considered in exercise of prosecutorial discretion) with R.C.M. 306(b) discussion (listing factors to be considered by commanders in making an initial disposition of offenses) and MCM Appendix 2.1 (Non-Binding Disposition Guidance).

2. How To Make the Charging Decision: A Method.

a) Review all the evidence.

b) Develop a theory of the case.

c) List possible charging options.

d) Conduct elements/proof analysis of each charge.

e) Consider ethical and legal limitations.

f) Consider prudential/tactical factors.

(1) Theory of the case.

(2) Nature and degree of harm.

(3) Panel's perception and sense of fairness.

(4) Exigencies of proof and intentional multiplicity.

(5) Use of "mega-specs".

(6) Preservation of LIOs.

(7) Maximum punishments.

(8) Uncharged misconduct / M.R.E. 404(b) issues.

(9) Cooperation of accused.

(10) Improper motives of witnesses or victims.

(11) Reluctance of victim to testify.

g) Draft the Charges. Consider these basic principles:

(1) Charge the most serious offense consistent with the evidence. *See United States v. Foster*, 40 M.J. 140, 144 n. 4 (C.M.A. 1994) ("[T]here is prosecutorial discretion to charge the accused for the offense(s) which most accurately describe the misconduct and most appropriately punish the transgression(s).").

(2) Err on the side of liberal charging and be prepared to dismiss/withdraw as the case develops. *See* R.C.M. 401(c) and R.C.M. 604 concerning dismissal and withdrawal of charges and specifications.

(3) *United States v. Leahr*, 73 M.J. 364 (C.A.A.F. 2014). Convening authority properly dismissed charges in order to investigate new misconduct and refer all known charges to the same court-martial. Doing so did not violate the accused's speedy trial rights and was not an improper withdrawal of the charges.

(4) If charging conspiracy, ensure that it is important/necessary for your theory of the case.

(5) The facts alleged in the specification define the entire universe of facts that the government can use to establish the accused's criminality. Findings by exceptions and substitutions can render a specification defective if it is drafted too sparsely. Consider *United States v. Plant*, 74 M.J. 297 (C.A.A.F. 2015), where the accused was charged with child endangerment "by using alcohol and cocaine." The panel excepted the words "and cocaine," and the CAAF held that the only basis for establishing the accused's endangerment of his thirteen-month-old son was his drinking alcohol while responsible for his care. The CAAF also held it could not consider whether the accused endangered his son by having a party at his off-post quarters, allegedly using cocaine during the party, inviting virtual strangers into his home while his son was there, or by sexually assaulting two young women in his quarters while his son was sleeping there. The CAAF

found the evidence legally insufficient to sustain the specification because the accused's intoxication did not cause a reasonable probability that the child would be harmed.

B. Ethical and Legal Limitations.

1. Ethical Limitations.

a) Charges must be warranted by the evidence.

(1) Army Reg. 27-26, Rule 3.8(a), provides that a trial counsel shall "recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn."

(2) ABA Standards, Standard 3-3.9(a), provides that "a prosecutor should not . . . cause to be instituted, or permit the continued pendency of criminal charges" in two circumstances:

(a) When the prosecutor knows that the charges are not supported by probable cause, or

(b) In the absence of sufficient admissible evidence to support a conviction.

b) A supervising prosecutor cannot compel a subordinate to prosecute an offense about which the supervisor has a reasonable doubt as to the guilt of the accused. ABA Standards, Standard 3-3.9(c). *Cf.* R.C.M. 307(a) discussion.

c) Charges should not be unreasonably multiplied.

(1) Nature of Charges. What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person. R.C.M. 307(c)(4). *Cf.* ABA Standards, Standard 3-3.9(f) (A prosecutor should not "seek charges greater in number or degree . . . than are necessary to fairly reflect the gravity of the offense").

(2) Prosecutorial Motive. A prosecutor should not "pile on" charges to "unduly leverage an accused to forego his or her right to trial." ABA Standards, Standard 3-3.9 commentary.

2. Constitutional Limitations.

a) A prosecutor cannot *selectively* prosecute an individual because of "race, religion, or other arbitrary classification." *Wayte v. United States*, 470 U.S. 598 (1985). Accused must show more than a mere possibility of selective prosecution, he must show discriminatory intent. *United States v. Hagen*, 25 M.J. 78 (C.M.A. 1987).

b) A prosecutor cannot *vindictively* prosecute to penalize an individual's exercise of constitutional or statutory rights. *Blackledge v. Perry*, 417 U.S. 21 (1974).

3. Policy Limitations.

a) *See* MCM Appendix 2.1, Section 2.7 (Inappropriate Considerations).

C. The Defense Response to the Charging Decision.

1. Motions to dismiss.

a) Lack of jurisdiction. R.C.M. 907(b)(1)

b) Statute of limitations. R.C.M. 907(b)(2)(B).

c) Defective or misleading specifications. R.C.M. 907(b)(3)(A).

d) Multiplicity. R.C.M. 907(b)(3)(B).

2. Motions for appropriate relief.

a) Unreasonable Multiplication of Charges. R.C.M. 906(b)(12).

b) Bill of particulars. R.C.M. 906(b)(6).

c) Severance of duplicitous specifications. R.C.M. 906(b)(5).

d) Severance of offenses. R.C.M. 906(b)(10).

e) Vindictive or selective prosecution. Fifth Amendment; *United States v. Hagen*, 25 M.J. 78 (C.M.A. 1987).

III. PLEADINGS GENERALLY

A. Introduction.

1. Military pleadings follow the format of charge and specification. R.C.M. 307(c)(1).

2. Charge: The article of the UCMJ, law of war, or local penal law of an occupied territory which the accused is alleged to have violated. R.C.M. 307(c)(2).

3. Specification: plain, concise, and definite statement of the essential facts constituting the offense charged. R.C.M. 307(c)(3).

B. Charges and Specifications.

1. Charges. Generally R.C.M. 307(c)(2).

a) A single charge is not numbered ("The Charge:").

b) If more than one charge, use Roman numerals ("Charge I:" "Charge II:").

c) Additional charges follow the same format and may be added until arraignment.

d) Error in, or omission of, the designation of the charge shall not be a ground for dismissal of a charge or reversal of a conviction unless the error prejudicially misleads the accused. R.C.M. 307(d); *see United States v. Bluitt*, 50 C.M.R. 675 (A.C.M.R. 1975).

2. Specifications. R.C.M. 307(c)(3) and discussion.

a) Numbering.

(1) A single specification is not numbered ("The Specification:").

(2) Multiple specifications use Arabic numbers ("Specification 1:" "Specification 2:").

b) Drafting the Language.

(1) Model specifications may be found in either:

(a) MCM, part IV; or,

(b) Dep't of Army, Pam. 27-9, *Military Judges' Benchbook*, Chapter 3 (Sep 2014). Note: Be sure to check for approved interim updates found on the Trial Judiciary page on JAGCNET.

(2) Legally Sufficient Specifications. *See infra* Chapter 7, Appendix A; *see also* R.C.M. 907(b)(1), and R.C.M. 307(c)(3).

(3) Describe the accused.

(a) Name and rank.

(b) Armed force.

(c) Social security number of accused should not be stated in specification.

(4) Place of offense. "At or near . . ."

(5) Date and time of offense. "On or about . . . "

c) Novel Specifications.

(1) Counsel are unlikely to have novel specifications for most offenses. However, counsel may have to draft novel specifications for general disorders or service-discrediting conduct that are charged as violations of UCMJ art. 134, or for many forms of conduct unbecoming that are charged as violations of UCMJ art. 133.

(2) Designing a novel specification. *See United States v. Sell*, 11 C.M.R. 202 (C.M.A 1953).

(a) Identify and expressly plead the elements of the offense.

(i) Consult civilian case law or pattern jury instructions for the elements of crimes and offenses, not capital, integrated from federal law or assimilated from state law.

(ii) Conduct prejudicial to good order and discipline and service discrediting conduct not specifically listed as crimes by the President are more problematic.

(iii) The MCM provides that there are only two elements to such offenses: act or omission by accused, and a prejudicial or discrediting effect. MCM, pt. IV, para. 91.b(1) and 91.b(2), respectively.

(iv) Words of Criminality. If the act alleged is not *inherently* criminal, but is made an offense only by operation of custom, statute, or regulation, the specification must include words of criminality appropriate to the facts of the case, e.g., "without authority," "wrongfully," or "unlawfully." *See* R.C.M. 307(c)(3) discussion.

(b) Describe the offense with sufficient specificity to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused from subsequent re-prosecution for the same offense. Notice pleading, nevertheless, remains the rule.

(c) Allege in the specification only those facts that make the accused's conduct a crime.

(d) Evidence supporting the allegation should ordinarily not be included in the specification.

C. General Rules of Pleading

1. Principals. All principals are charged as if they were the perpetrator. R.C.M. 307(c)(3) discussion at (H)(i). For a thorough discussion of principals, see UCMJ art. 77; MCM, pt. IV, ¶ 1; and Chapter 20 of the Criminal Law Deskbook. The theory of liability does not need to be specified. *See United States v. Vidal*, 23 M.J. 319 (C.M.A. 1987)

2. Duplicity.

a) General. Duplicity is the practice of charging two or more offenses in one specification. Distinguish this from multiplicity, which is the practice of charging one offense in two or more separate charges or specifications.

b) Rule. Each specification shall state only one offense. R.C.M. 307(c)(4). If an accused is found guilty of a duplicitous specification, his maximum punishment is that for a single specification of the offense. *Exception*: "mega-specs;" see below.

c) Remedy. The sole remedy for duplicity is severance into separate specifications. R.C.M. 906(b)(5). *United States v. Hiatt*, 27 M.J. 818 (A.C.M.R. 1988) (conspiracy specification that alleged both conspiracy to commit larceny and to receive stolen property was duplicitous, but failure at trial to move to sever or strike constituted waiver). As a practical matter, severance is rarely requested, because it exposes the accused to multiple punishments.

d) Applications.

(1) "Mega-specs." The CAAF has held that the maximum punishment for some duplicitous specifications may be calculated as if each offense alleged in a duplicitous specification had been charged separately.

(a) Bad checks. *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995) (holding that maximum punishment in a bad-check case is calculated by the number and amount of checks as if they had been charged separately, regardless of whether Government joined multiple offenses in one specification).

(b) Check forgery. *United States v. Dawkins*, 51 M.J. 601 (A. Ct. Crim. App. 1999) (extending the *Mincey* rule to check forgery).

(2) Larceny.

(a) See pleading principles for value *infra* at Part II.C.4.

(b) *United States v. Rupert*, 25 M.J. 531 (A.C.M.R. 1987) (accused charged under one specification for larceny of different items "on divers occasions" over a 17-month period having a combined value of over $100). To be convicted of larceny over $100 either:

(i) One item must have that value, or

(ii) Several items taken at the same time and place must have that aggregate value.

Note: With the 2002 MCM Amendments, the threshold for increased punishment was raised to $500.

3. Matters in aggravation (i.e., punishment enhancers).

a) Must be alleged and proven beyond a reasonable doubt. R.C.M. 307(c)(3).

b) Examples.

(1) Over 30 grams of marijuana. MCM, pt. IV, ¶ 50d(1).

(2) Value over $1000; military property. MCM, pt. IV, ¶ 64d(1).

(3) Use of a dangerous weapon. MCM, pt. IV, ¶ 67d(1).

(4) Age of the victim. MCM, pt. IV, ¶ 77d(2)(f).

4. Value.

a) Pleading value. ("of a value greater than . . .," "of a value not less than . . .," "of some value").

b) Proving value. Value is a question of fact to be determined by all of the evidence admitted. MCM, pt. IV, ¶64c(1)(g).

(1) Government property. Listed in official publications.

(2) Other property. Legitimate market value.

(3) *United States v. Trisler*, 25 M.J. 611 (A.C.M.R. 1987) (hearsay testimony admissible to show value of stereo equalizer and two speakers *absent defense objection*).

c) Value in larceny cases.

(1) Multiple items taken at substantially the same time and place are a single larceny, even if the items belonged to more than one victim. In such cases, a single specification is used to allege theft of all items, and the values of the items are combined to determine the maximum punishment. *See* MCM, pt. IV, ¶64c(1)(h)(ii). The specification should state the value of each item followed by a statement of the aggregate value. R.C.M. 307(c)(3) discussion at (H)(iv).

(2) Cannot combine or aggregate values of items stolen from different places or on different dates.

(3) To be convicted of larceny over $500 either:

(a) One item must have that value (over $500.00), or

(b) Several items taken at the same time and place must have that aggregate value. *See* MCM, pt. IV, ¶64c(1)(h)(ii).

5. Joinder of offenses.

a) All offenses against an accused *may* be referred to the same court-martial for trial. R.C.M. 601(e)(2).

b) The military judge may sever offenses "only to prevent manifest injustice." R.C.M. 906(b)(10); *United States v. Duncan*, 53 M.J. 494 (C.A.A.F. 2000); *see also United States v. Simpson*, 56 M.J. 462 (C.A.A.F. 2002).

c) Joinder of perjury charges resulting from accused's testimony at previous trial. *United States v. Giles*, 59 M.J. 374 (C.A.A.F. 2004) (holding the military judge abused his discretion by failing to sever the perjury charge from the attempted use and distribution charges at retrial; the instructions given were insufficient to prevent a manifest injustice).

d) After arraignment, charges cannot be added without the consent of the accused. R.C.M. 601(e)(2).

D. Amendments. R.C.M. 603.

1. Types of changes. R.C.M. 603(b).

a) Major change. Adds a party, offense, or substantial matter not fairly included in those previously preferred, or which is likely to mislead the accused.

b) Minor changes. All other changes.

2. Making minor changes.

a) Before arraignment. Any person forwarding, acting upon, or prosecuting the charges can make minor changes before arraignment. R.C.M. 603(a).

b) After arraignment. After arraignment, the military judge may, upon motion, permit minor changes any time before findings. R.C.M. 603(e).

3. Making Major Changes.

a) Changes other than minor changes may **never** be made over the objection of the accused *unless* the charge or specification is preferred anew. R.C.M. 603(d).

b) Applications.

(1) Conspiracy. *United States v. Moreno*, 46 M.J. 216 (C.A.A.F. 1997) (holding that accused's ability to prepare a defense was not prejudiced by a change to conspiracy specification the day before trial despite major change).

(2) Matters in aggravation. *United States v. Smith*, 49 M.J. 269 (C.A.A.F. 1998) (holding that amendment to larceny specification adding "military property" was a major change, but error was not prejudicial).

(3) Disobedience. *United States v. Longmire*, 39 M.J. 536 (A.C.M.R. 1994) (change to person issuing order and document used to issue order was major change).

(4) General Article. *United States v. Sullivan*, 42 M.J. 360 (C.A.A.F. 1995) (change from clause three to clause two offense on day of trial was a minor change).

E. Variance. R.C.M. 918(a)(1)

1. A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge. *United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999).

2. Findings by exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it. R.C.M. 918(a)(1).

3. The specification and the findings may differ, provided the accused is not prejudiced. *United States v. Collier*, 14 M.J. 377 (C.M.A. 1983).

4. Test for prejudice. *United States v. Lee*, 1 M.J. 15 (C.M.A. 1975); *United States v. Wray*, 17 M.J. 375 (C.M.A. 1984).

a) The variance misled the accused to the extent that he was unable to adequately prepare for trial; or

b) The variance puts accused at risk of another prosecution for the same offense; or

c) The variance changes the nature or identity of the offense and the accused has been denied the opportunity to defend against the charge.

5. Applications.

a) Substantially different offense. *United States v. Lovett*, 59 M.J. 230 (C.A.A.F. 2004) (holding variance was fatal when finding of guilt for solicitation to obstruct justice was substantially different from the charged solicitation to murder).

b) Different date. *United States v. Parker*, 59 M.J. 195 (C.A.A.F. 2003) (holding two-year variance in date of rape fatal); *United States v. Wray*, 17 M.J. 375 (C.M.A. 1984) (holding variance in date of larceny fatal). *But see United States v. Hunt*, 37 M.J. 344 (C.M.A. 1993) *cert. denied*, 114 S. Ct. 1052 (1993) (holding three-week variance in date of rape not fatal).

c) Different victim. *United States v. Marshall*, 67 M.J. 418 (C.A.A.F. 2009) (holding variance fatal in an Art. 95 prosecution when specification alleged that the accused escaped from the custody of "CPT Kreitman" and military judge entered findings by exceptions and substitutions convicting the accused of escaping the custody of "SSG Fleming").

d) Different injury. *United States v. Dailey*, 37 M.J. 1078 (N.M.C.M.R. 1993) (holding variance not fatal).

e) Different unit. *United States v. Atkinson*, 39 M.J. 462 (C.M.A. 1994) (holding variance in alleging unit of assignment rather than temporary place of duty not fatal).

f) Violation of different paragraph of general order. *United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003) (holding variance fatal where accused was charged with violating a lawful general order by providing alcohol to a recruit but convicted of violating of a different paragraph of the same order by engaging in a personal relationship with the recruit).

g) Statute of limitations—divers occasions. *United States v. Rollins*, 61 M.J. 338 (C.A.A.F. 2005). Appellant was charged with numerous offenses including attempted rape on divers occasions and indecent acts on divers occasions. The panel found appellant not guilty of attempted rape, but guilty of indecent assault on divers occasions, and guilty of the divers occasions indecent act specification. Both of these specifications included periods which would later be time-barred by the holding in *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000). The convening authority modified the findings to include only the dates not affected by the statute of limitations. *HELD*: The military judge erred by not providing the panel with instructions that focused their attention on the period not barred by the statute of limitations. The convening authority's action did not cure this prejudice and the affected findings were set aside. *See also United States v. Thompson*, 59 M.J. 432 (C.A.A.F. 2004).

6. Continuing course of conduct "on divers occasions."

a) On findings, when the phrase "on divers occasions" is removed from a specification, the effect is that the accused has been found guilty of misconduct on a single occasion and not guilty of the remaining occasions. *See United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010); *United States v. Augsberger*, 62 M.J. 189 (C.A.A.F. 2005).

b) Where the findings do not disclose the single occasion on which the conviction is based, appellate courts cannot conduct a factual sufficiency review or affirm findings because it cannot determine which occasion the Servicemember was acquitted of. *See United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010); *United States v. Augsberger*, 62 M.J. 189 (C.A.A.F. 2005).

c) "Both trial practitioners and military judges need to be aware of the potential for ambiguous findings . . . and take appropriate steps through instruction and pre-announcement review of findings to ensure no ambiguity occurs." *United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010).

d) While a Court of Criminal Appeals may not review the record to determine which incident *most likely* formed the basis for the conviction, the court "may review the record to determine if there was *only a single possible incident* that met 'all the details of the specification' for which the [accused] was convicted. *United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010); *United States v. Ross*, 68 M.J. 415 (C.A.A.F. 2010). However, Government may prevail on appeal if legal sufficiency review reveals only one occasion that is legally sufficient. "Under those circumstances, . . . the verdict would be unambiguous." *See United States v. Ross*, 68 M.J. 415 (C.A.A.F. 2010).

e) Applications. *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003) (holding variance fatal where specification alleged wrongful drug use on "divers occasions" and findings by exceptions and substitutions removed the "divers occasions" language; the substituted language must clearly reflect the specific instance of conduct upon which the modified findings are based); s*ee also United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010) (accused

charged with indecent acts upon a child on divers occasions, military judge convicted of assault consummated by battery on one occasion without clarification, ambiguous findings); *United States v. Ross*, 68 M.J. 415 (C.A.A.F. 2010) (charged with possession of child pornography on divers occasions, military judge excepted words "on divers occasions" without additional comment," ambiguous findings); *United States v. Wilson*, 67 M.J. 423 (C.A.A.F. 2009) (error for military judge to fail to identify the specific instance of conduct forming the basis for the conviction); *United States v. Seider*, 60 M.J. 36 (C.A.A.F. 2004) (fatal variance); *United States v. Augspurger*, 61 M.J. 189 (C.A.A.F. 2005) (fatal variance); and *United States v. Scheurer*, 62 M.J. 100 (C.A.A.F. 2005) (partially affirmed and partially set aside).

IV. MULTIPLICITY

A. Defined: "[T]he practice of charging the commission of a single offense in several counts." Black's Law Dictionary 1016 (6th ed. 1990).

B. The doctrine of Multiplicity rests on a Constitutional Basis.

1. "No person shall . . . be subject, for the same offense, to be twice put in jeopardy of life and limb." U.S. Const. amend. V.

2. This prohibition extends to multiple punishments for the same offense at a single criminal trial. *Ohio v. Johnson*, 467 U.S. 493 (1984); *Ball v. United States*, 470 U.S. 856 (1985).

C. The Fundamental Rule. *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993).

1. An accused may not be convicted of multiple offenses arising out of a single criminal transaction unless there is a clear expression of legislative intent to the contrary.

2. Legislative intent to allow multiple convictions for offenses arising out of a single criminal transaction may be inferred if each offense requires proof of a fact that the other does not. The determination that each offense requires proof of a unique fact is made by comparing the elements of the offenses. *See United States v. Dillon*, 61 M.J. 221 (C.A.A.F. 2005) (holding that separate specifications for different controlled substances used at the same time not multiplicious; Congress clearly intended separate specifications for each controlled substance and this complies with the statutory elements test under *Teters*.).

3. "[T]hose elements required to be alleged in the specification, along with the statutory elements, constitute the elements of the offense for the purpose of the elements test." *United States v. Weymouth*, 43 M.J. 329, 340 (C.A.A.F. 1995).

4. The inference of legislative intent to allow separate convictions may be overcome if there are indications of contrary legislative intent. See, e.g., UCMJ art. 120(b) (prior to 1 Oct. 2007) (2008 MCM, App. 27) (limiting carnal knowledge to "circumstances not amounting to rape").

5. Offenses found to be "separate" under this analysis may be considered separate for all purposes, including sentencing. *United States v. Morrison*, 41 M.J. 482 (1995).

6. Charges reflecting both an offense and a lesser included offense are impermissibly multiplicious. *United States v. Hudson*, 59 M.J. 357 (C.A.A.F. 2004); *United States v. Savage*, 50 M.J. 244 (C.A.A.F. 1999).

D. Multiplicity does not apply to sentencing. If an offense is multiplicious for sentencing, then it is necessarily multiplicious for findings. *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012) (eliminating the doctrine of multiplicity for sentencing, but affirming the application of unreasonable multiplication of charges for sentencing).

E. Multiplicity and Waiver.

1. Absent plain error, an unconditional guilty plea waives a multiplicity claim. *United States v. Lloyd*, 46 M.J. 19 (C.A.A.F. 1997). However, if two specifications are facially duplicative, i.e., "factually the same," then they are multiplicious, and it is plain error not to dismiss one of them. *United States v. Hudson*, 59 M.J. 357 (C.A.A.F. 2004) (holding, under the facts, that breaking restriction and AWOL are not factually the same, so the military judge did not commit plain error by not dismissing the AWOL charge as a lesser included offense).

2. Failing to object to charges as multiplicious waives the issue absent plain error. *See United States v. Britton*, 47 M.J. 195 (C.A.A.F. 1997); *United States v. Savage*, 50 M.J. 244 (C.A.A.F. 1999); *but see United States v. Hanks*, 74 M.J. 556 (A. Ct. Crim. App. 2014) (addressing multiplicity without plain error analysis despite accused's not raising it at trial; rejecting government concession that maiming and aggravated assault by intentionally inflicting grievous bodily harm specifications were multiplicious, holding that the aggravated assault offense was not a lesser included offense of maiming despite the MCM listing it as such and disagreeing with a case from the Navy-Marine Corps Court of Criminal Appeals holding that it was).

F. Suggested References for Multiplicity. Articles that may assist in understanding these principles include: Captain Gary E. Felicetti, Surviving the Multiplicity/LIO Family Vortex, Army L., Feb. 2011, 46; Major Christopher S. Morgan, Multiplicity: Reconciling the Manual for Courts-Martial, 63 A. F. L. Rev. 23 (2009); Lieutenant Colonel Michael Breslin & Lieutenant Colonel LeEllen Coacher, Multiplicity and Unreasonable Multiplication of Charges: A Guide to the Perplexed, 45 A. F. L. Rev. 99 (1998); Major William T. Barto, Alexander the Great, the Gordian Knot, and the Problem of Multiplicity in the Military Justice System, 152 Mil. L. Rev. 1 (1996).

V. UNREASONABLE MULTIPLICATION OF CHARGES (UMC)

A. General. Even if offenses are not multiplicious, courts may apply the doctrine of unreasonable multiplication of charges (UMC).

1. "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4); see also R.C.M. 1003(c)(1)(C). Cf. R.C.M. 906(b)(12).

2. Military judges must ensure that prosecutors do not needlessly "pile on" charges against a military accused. *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994).

B. The Doctrine. *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001).

1. Multiplicity and UMC are founded on distinct legal principles. The prohibition against multiplicity complies with the constitutional and statutory restrictions against double jeopardy. The prohibition against UMC addresses features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion. After considering these factors, if the court finds the "piling on" of charges to be unreasonable, it will fashion an appropriate remedy on a case by case basis.

2. In *Quiroz*, the CAAF endorsed the N-MCCA's non-exclusive list of factors to consider in weighing a claim of UMC: 1) Did accused object at trial? 2) Is each charge and specification aimed at a distinctly separate act? 3) Does the number of charges misrepresent or exaggerate accused's criminality? 4) Is there any evidence of prosecutorial overreaching in drafting? 5) Does number of charges and specifications unreasonably increase accused's punitive exposure?

C. Trial Judges may dismiss unreasonably multiplied charges on findings. *United States v. Roderick*, 62 M.J. 425 (C.A.A.F. 2006).

D. Service courts may consider UMC claims waived or forfeited if not raised at trial. *United States v. Butcher*, 56 M.J. 87 (C.A.A.F. 2001).

E. On appeal, service courts may disapprove findings, even if they are correct in law and fact, in order to remedy what it finds to be an unreasonable multiplication of charges. *United States v. Bond*, 69 M.J. 701 (C.G. Ct. Crim. App. 2010).

F. Unreasonable multiplication of charges can occur across multiple prosecutions. *See United States v. Raynor*, 66 M.J. 693 (A.F. Ct. Crim. App. 2008) (after the AFCCA ordered a rehearing on two charges, the government added charges for indecent liberties, sodomy, assault, and enticing minors to engage in sexually explicit conduct under 18 U.S.C. § 2251, which arose from the same conduct at issue at the first trial; held: not an unreasonable multiplication of charges).

G. Applications.

1. Although CAAF eliminated the doctrine of multiplicity for sentencing, courts may still apply the unreasonable multiplication of charges test during sentencing. *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012).

2. *United States v. Mazer*, 58 M.J. 691 (N-M. Ct. Crim. App. 2003). A commissioned officer exchanged sexually suggestive and explicit e-mail and "chat" messages with a 14-year-old girl. Four specifications of an Article 133 charge was not UMC, because they did not reflect the same act or transaction. Each specification identified a discrete and unique communication.

3. *United States v. Esposito*, 57 M.J. 608 (C.G. Ct. Crim. App. 2002). Appellant made a false statement about the source of injuries sustained in a fight and asked a fellow crewmember to do the same. Charging appellant with false official statement and obstructing justice by making the same false statement was UMC. Also, charging appellant with soliciting a false official statement and obstructing justice by that same solicitation was UMC.

4. *United States v. Clarke*, 74 M.J. 627 (A. Ct. Crim. App. 2015). Assault under Article 128, UCMJ, is a continuous course-of-conduct offense such that each blow in an altercation should not be the basis for a separate finding of guilty. Separate aggravated assault convictions for the accused's hitting his wife in the head with a metal stool – causing grievous bodily harm – and in the elbow with a means likely to cause death or grievous bodily harm, to wit: the same metal stool (during the same beating) was unreasonable.

5. *United States v. Elespru*, 73 M.J. 326 (C.A.A.F. 2014). Accused was charged in the alternative with abusive sexual contact and wrongful sexual contact based on exigencies of proof. The panel convicted him of both offenses, and the MJ combined them for sentencing. The CAAF held that the military judge should have dismissed the wrongful sexual contact specification, but the error did not prejudice the sentence.

a) The appellate courts recognize that Article 120 cases often lend themselves to charging in the alternative. *See United States v. Elespru*, 73 M.J. 326 (C.A.A.F. 2014). Military judges should ordinarily dismiss one of the charges based on the principle of unreasonable multiplication of charges only after findings have been reached. *Id.* Practitioners are advised to request the military judge to conditionally dismiss until such time as appellate review has been completed. *See, e.g., United States v. Hines*, 2016 CCA LEXIS 439 (A. Ct. Crim. App. July 27, 2016) fn 4 (MJ "should clearly state that the dismissal of the one specification is conditioned on a second specification surviving appellate review."). *See also United States v. Thomas*, 74 M.J. 563 (N-M. Ct. Crim. App. 2014), *United States v. Parker*, 2016 CCA LEXIS 83 (N-M.Ct.Crim.App. Feb. 18, 2016). Consolidation of specifications may also be appropriate as an alternative to dismissal. *See United States v. Nelms*, 2016 CCA LEXIS 227 83 (N-M.Ct.Crim.App. Apr. 14, 2016).

6. *United States v. Chandler*, 74 M.J. 674 (A. Ct. Crim. App. 2015). Where there is only one agreement, there is only one conspiracy. Charging two conspiracies for one agreement (here one conspiracy to steal military property and one to sell military property from the same agreement and course of events) is an unreasonable multiplication of charges.

VI. INSTRUCTIONS GENERALLY

A. Three essential presumptions underlie the use of instructions at trial:

1. The panel or jury hears and listens to the instructions. *United States v. Smith*, 25 C.M.R. 86 (C.M.A. 1958).

2. The panel or jury understands the instructions. *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001).

3. The panel or jury follows the instructions. *Quintanilla*, 56 M.J. at 83.

B. Instructions should be written in plain language that is easy for lay people to understand. See Carolyn G. Robbins, Jury Instructions: Plainer is Better, Trial, Apr. 1996, at 32.

C. Instructions should be carefully tailored to the specific facts in each case. *United States v. Harrison*, 41 C.M.R. 179 (C.M.A. 1970).

D. Instructions must provide meaningful legal principles for the courts-martial's consideration. *United States v. Dearing*, 63 M.J. 478, 483 (C.A.A.F. 2006).

E. Instructions must be given orally on the record in the presence of all parties and members. Written copies of the instructions or, unless a party objects, portions of them may also be given to the members for their use during deliberation. R.C.M. 920(d).

F. Further readings.

1. Colonel R. Peter Masterton, "Instructions: A Primer for Counsel" Army Law., Oct. 2007, at 85.

2. The Army Trial Judiciary publishes an annual update on instructions in The Army Lawyer. See, e.g., Colonel Timothy Grammel and Lieutenant Colonel Kwasi L. Hawks, Annual Review of Developments in Instructions, Army Law, Feb. 2010, at 52.

VII. COUNSEL'S ROLE IN DRAFTING INSTRUCTIONS

A. "Although judges have the responsibility for giving proper instructions, counsel may request specific instructions, and, indeed, subject to ethical considerations, competent counsel should always seek to do so unless the applicable standard instruction is at least as favorable as any reasonable proposed instruction would be." 22 Francis A. Gilligan & Fredric I. Lederer, Court-Martial Practice § 31.00 (3d ed. 2006).

B. At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. R.C.M. 920(c).

C. A military judge is required to give requested instructions "as may be necessary and which are properly requested by a party." R.C.M. 920(e)(7); *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993). Requested instructions are necessary when:

1. The issue is reasonably raised;

a) A matter is "in issue" when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose. R.C.M. 920(e) discussion; *United States v. Terry*, 64 M.J. 295, 299 (C.A.A.F. 2007).

b) Whether an issue is raised is a matter for the judge to decide; the judge should not permit the court members to decide if the issue was raised. *United States v. Jones*, 7 M.J. 441 (C.M.A. 1979).

2. The issue is not adequately covered elsewhere in anticipated instructions; and

a) *See United States v. Briggs*, 42 M.J. 367 (C.A.A.F. 1995); *United States v. Carruthers*, 64 M.J. 340 (C.A.A.F. 2007); *see also* R.C.M. 920(c) discussion (the military judge is not required to give the specific instruction requested by the counsel as long as the issue is adequately covered in the instructions).

3. The proposed instruction accurately states the law concerning facts in the case.

D. When counsel draft instructions or request instructions that are not required, the standard of review on appeal is abuse of discretion. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993); *United States v. Acosta-Zapata*, 65 M.J. 811 (A. Ct. Crim. App. 2007).

1. However, if the instruction is otherwise required, the fact that the defense submitted a proposed but erroneous instruction does not excuse the military judge from his duty to instruct correctly. *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006). In those cases, use the standard of review for required instructions. See section IX.C below.

2. Waiver of error (R.C.M. 920(f)) does not really apply. Here, the defense counsel is active.

VIII. PROCEDURAL INSTRUCTIONS

A. The military judge may make such preliminary instructions as may be appropriate. R.C.M. 913(a).

1. These instructions are generally found in Chapter 2 of U.S. Dep't of Army, Pam 27-9, Military Judges' Benchbook (Sep 2014) [hereinafter Benchbook].

B. Mixed plea cases.

1. The military judge should ordinarily defer informing the members of the offenses to which the accused pled guilty until after the findings on the remaining contested offenses have been entered. R.C.M. 913(a).

2. Exceptions to this rule include when the accused requests otherwise and when the accused's plea was to lesser-included-offense and the prosecution intends to prove the greater offense. See R.C.M. 913(a) discussion.

C. Required instructions. Art. 51(c), R.C.M. 920(e)(4)-(6).

1. Only matter properly before the court-martial may be considered.

2. The accused is presumed innocent.

3. If there is reasonable doubt, the accused must be acquitted.

4. If there is a lesser included offense and there is reasonable doubt as to the greater offense, the finding must be to an offense to where there is not reasonable doubt.

5. The burden of proof is on the government (except for certain defenses).

6. Instructions on deliberations and voting.

IX. ELEMENTS OF THE OFFENSES

A. Instructions on findings shall be given before or after arguments by counsel, or at both times. R.C.M. 920(b).

1. Chapter 3 of the Benchbook contains the instructions on the elements of the offense.

2. The timing is within the sole discretion of the military judge. R.C.M. 920(b) discussion.

B. Required instructions. Art. 51(c), R.C.M. 920(e)(1) and (2).

1. Charged offenses. A description of the elements of each offense charged (unless the accused pled guilty to that offense).

2. Lesser included offenses. A description of the elements of each lesser included offense, unless trial on the lesser included offenses is barred by the statute of limitations.

a) The military judge has a *sua sponte* duty to instruct on all lesser-included-offenses reasonably raised by the evidence. *United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000); *United States v Griffin*, 50 M.J. 480 (C.A.A.F. 1999); *United States v. Wells*, 52 M.J. 126 (C.A.A.F. 1999).

b) Whether an issue is raised is a matter for the judge to decide; the judge should not permit the court members to decide if the issue was raised. *United States v. Jones*, 7 M.J. 441 (C.M.A. 1979).

c) A matter is "in issue" when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose. R.C.M. 920(e) discussion. *See United States v. Hibbard*, 58 M.J. 2003 (C.A.A.F. 2003) (contains a thorough analysis of this problem done in the context of a defense instruction).

d) Any doubt about whether the evidence is sufficient to raise the need to instruct on a lesser included offense must be resolved in favor of the accused. *United States v. Gillenwater*, 43 M.J. 10 (C.A.A.F. 1995); *United States v. Rodwell*, 20 M.J. 264 (C.M.A. 1985). *But see United States v. Vasquez*, 48 M.J. 426 (C.A.A.F. 1998) (the court appears to weigh the evidence on one aspect of the defense of duress).

e) The defense may affirmatively waive instruction on lesser included offenses. *United States v. Strachan*, 35 M.J. 362 (C.M.A. 1992).

f) However, the defense does not have an "all or nothing" option. If the prosecution (or the military judge) wants the instruction on the lesser included offense, the military judge can read that instruction.

(1) Either party may request a lesser included offense instruction. *United States v. Miergrimando*, 66 M.J.34 (C.A.A.F. 2008).

(2) The military judge can instruct on a lesser included offense even over defense objection. *United States v. Emmons*, 31 M.J. 108 (C.M.A. 1990)(the prosecution should not be denied of a conviction of the lesser included offense if the prosecution has met its burden on that lesser offense). *See also United States v. Toy*, 60 M.J. 598 (N-M. Ct. Crim. App. 2004); *United States v. Miergrimando*, 66 M.J.34 (C.A.A.F. 2008) (no error when military judge gave lesser included offense instruction and defense planned to use an "all or nothing" strategy, and military judge gave the defense an option to continue the case to remedy defense's mistaken strategy).

g) Lesser included offenses include attempts. *United States v. Brown*, 63 M.J. 735 (A. Ct. Crim. App. 2006) (error not to instruct on attempted murder when the evidence showed that the victim may have already been dead when shot).

h) The military judge may instruct on lesser included offenses in order of severity of punishment or severity of the elements of the offenses. *United States v. Emmons*, 31 M.J. 108 (C.M.A. 1990).

i) A service court may, after disapproving a conviction for an offense due to an error, approve a conviction for the lesser included offense whose instruction was not considered nor instructed upon at the trial and in fact had been waived by both parties. The court's authority comes from Article 66(c), UCMJ which allows the court to consider the entire record. *United States v. Upham*, 66 M.J. 83 (C.A.A.F. 2008).

j) Where some LIOs may be time-barred by the statute of limitations, the military judge has an affirmative duty to personally discuss the issue with the accused, and if not waived by the accused, to modify the instructions to include only the period of time for those LIOs that are not time-barred by the statute of limitations. *United States v. Thompson*, 59 M.J. 432 (C.A.A.F. 2004).

C. Standard of review for required instructions.

1. "The propriety of the instructions given by a military judge is reviewed de novo." *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001); *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006).

2. Erroneous instructions and lack of proper instructions are reviewed for prejudice. Art. 59(a).

a) When the erroneous instruction is of a constitutional dimension (undermines the fundamental trial structure), the test for prejudice is harmless beyond a reasonable doubt. *United States v. Cowan*, 42 M.J. 475 (C.A.A.F. 1995).

(1) If the military judge omits an element *entirely*, the error is *per se* prejudicial. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

(2) However, if the judge adequately identifies the element but gives an *erroneous* instruction on it, that error *may* be tested for prejudice, with the prejudice test being determined by whether the error was of a constitutional dimension or not. *Mance*, 26 M.J. 244; *United States v. Cowan*, 42 M.J. 475 (C.A.A.F. 1995).

b) When the erroneous instruction is not of a constitutional dimension, the test for prejudice is harmless error. *United States v. Cowan*, 42 M.J. 475 (C.A.A.F. 1995).

c) Effect of failure to object to erroneous instructions or to request certain instructions.

(1) R.C.M. 920(f) states that failure to object to an instruction or to the omission before the members close to deliberate constitutes waiver of the objection in the absence of plain error.

(2) However, in *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988), the court restricted that language to only those instructions that relate to R.C.M. 920(e)(7) ("such other" instructions). The court held that this rule does not apply to required instructions, such as those on elements, defenses, and due process principles. *See also United States v. Wolford*, 62 M.J. 418 (C.A.A.F. 2006); *United States v. Smith*, 50 M.J. 451 (C.A.A.F. 1999) (failure to object to erroneous instructions given by the military judge does not waive appellate review of the instructions given; affirmative waiver on the record is required).

(3) Failure to object does not result in plain error analysis; rather, the test for error is *de novo* and the test for prejudice is determined by whether the error was of a constitutional dimension or not. *United States v. Cowan*, 42 M.J. 475 (C.A.A.F. 1995).

(4) However, failure to give an amplifying instruction on the element (fully defining "wrongfulness," for example) is tested for plain error if the defense counsel does not request that instruction or fails to object to an incorrect amplifying instruction. *United States v. Glover*, 50 M.J 476 (C.A.A.F. 1999); *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003); *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005).

X. INSTRUCTIONS ON DEFENSES

A. Instructions on findings shall be given before or after arguments by counsel, or at both times. R.C.M. 920(b).

1. Chapter 5 of the Benchbook contains the instructions on special and other defenses. Chapter 6 contains the instructions for lack of mental responsibility and partial mental responsibility.

2. The timing is within the sole discretion of the military judge. R.C.M. 920(b) discussion.

B. Required instructions. Art. 51(c), R.C.M. 920(e)(3).

1. A description of any special defense under R.C.M. 916 in issue.

a) Special defenses are those defenses that, while not denying that the accused committed the acts charged, seek to deny criminal responsibility for those acts. R.C.M. 916(a).

b) Alibi and good character are not special defenses; rather, they are failure of proof offenses. R.C.M. 916(a) discussion.

c) Partial mental responsibility (Instruction 6-5) and evidence that negates *mens rea* (Instruction 5-17) are failure of proof defenses but the military judge has a sua sponte duty to instruct on them. The partial mental responsibility instruction is only read if the evidence has raised a lack of mental responsibility defense *and* there is evidence that tends to negate *mens rea*. Note that both instructions will be read. If the evidence has not raised the lack of mental responsibility defense, use Instruction 5-17.

d) Voluntary intoxication is considered a special defense for purposes of requiring an instruction. *United States v. Hearn*, 66 M.J. 770 (A. Ct. Crim. App. 2008). The court found that some evidence of *severe* intoxication is required to trigger an instruction. The court developed a three-prong test to determine whether a voluntary intoxication is required:

(1) The crime charged includes a mental state;

(2) There is evidence of impairment do to the ingestion of alcohol or drugs;

(3) There is evidence that the impairment affected the defendant's ability to form the required intent or mental state.

e) The description must adequately cover the concepts of the defense so that the panel can fairly consider the defense theory. *United States v. Dearing*, 63 M.J. 478, 483 (C.A.A.F. 2006).

2. The military judge has a sua sponte duty to instruct on special defenses reasonably raised by the evidence.

a) Whether an issue is raised is a matter for the judge to decide; the judge should not permit the court members to decide if the issue was raised. *United States v. Jones*, 7 M.J. 441 (C.M.A. 1979).

b) The test for whether a special defense is reasonably raised is whether the record contains some evidence to which the court members may attach credit if they so desire. *United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000); *United States v. Hibbard*, 58 M.J. 71 (C.A.A.F. 2003) (applying a thorough analysis and using a totality of the circumstances approach when finding that an instruction was not required).

c) In determining whether to give a requested instruction on a defense, the judge may *not* weigh the credibility of the defense evidence. *United States v. Brooks*, 25 M.J. 175 (C.M.A. 1987).

d) The military judge also has the sua sponte duty to read the instruction on the defense of lack of mental responsibility if some evidence has raised the defense. Benchbook para. 6-4. Preliminary instructions may be read when the evidence is introduced so that the panel can put the evidence in context. Benchbook para. 6-3.

3. Defense counsel may affirmatively waive an affirmative defense instruction. *United States v. Gutierrez*, 64 M.J. 374 (C.A.A.F. 2007).

C. Failure of proof defenses.

1. The military judge ordinarily has no sua sponte duty to instruct on defenses which deny the accused's commission of the acts charged. *United States v. Stafford*, 22 M.J. 825 (N.M.C.M.R. 1986).

2. Alibi and good character are not special defenses; rather, they are "failure of proof" defenses. R.C.M. 916(a) discussion.

a) The Benchbook contains an instruction on alibi (Benchbook, para. 5-13). *See also United States v. Jones*, 7 M.J. 441 (C.M.A. 1979) (instruction that defense of alibi "may or may not" have been raised was improper; military judge must determine if defense has been raised and instruct accordingly).

b) The Benchbook also contains direction to the military judge on good character defenses. *See* Benchbook, para. 5-14.

c) The Benchbook contains instructions on other "failure of proof" defenses. *See* Benchbook, para. 5-17.

3. For a discussion of voluntary intoxication as a failure of proof defense, *See United States v. Hensler*, 44 M.J. 184, 187 (C.A.A.F. 1996); *United States v. Hearn*, 66 M.J. 770 (A. Ct. Crim. App. 2008) (voluntary intoxication is a required instruction).

D. Standard of review.

1. The analysis for the standard of review is the same as that for instructions on the elements of the offense. *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006). *See generally, United States v. Gillenwater*, 43 M.J. 10 (C.A.A.F. 1995); *United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000).

2. For that analysis, go to section IX.C, above.

3. Failure of proof defenses fall under R.C.M. 920(e)(7) and are subject to the forfeiture rules of R.C.M. 920(f).

XI. EVIDENTIARY INSTRUCTIONS

A. Duty to provide instructions.

1. The military judge ordinarily has no sua sponte duty to give these instructions. (Exceptions to this rule are found below).

2. However, when the evidence relates to a central issue at trial, in some cases it may be plain error for the military judge not to give a sua sponte evidentiary instruction. *See United States v. Kasper*, 58 M.J. 314 (C.A.A.F. 2003) (when the government introduced "human lie detector" testimony through an OSI agent, it was plain error for the judge not to give a sua sponte curative instruction, even though defense counsel did not request one because the testimony involved a central issue at trial -- the appellant's credibility).

3. Evidentiary instructions are found in chapter 7 of the Benchbook.

B. Summarizing the evidence. R.C.M. 920(e) discussion.

1. The military judge may summarize and comment upon evidence. However, the military judge should:

a) Present an accurate, fair, and dispassionate statement of what the evidence shows;

b) Not depart from an impartial role;

c) Not assume as true the existence or nonexistence of a fact in issue when the evidence is conflicting or disputed, or when there is no evidence to support the matter;

d) Make clear that the members must exercise independent judgment as to the facts.

2. *See generally United States v. Figura*, 44 M.J. 308 (C.A.A.F. 1996).

C. Standard of review.

1. The military judge's ruling to issue or not issue an instruction that is not required is tested for abuse of discretion. *United States v. Thompson*, 31 M.J. 125 (C.M.A. 1990); *United States v. Forbes*, 61 M.J. 354 (C.A.A.F. 2005).

2. Failure to object to an erroneous instruction or to request an omitted (non-mandatory) instruction constitutes forfeiture. R.C.M. 920(f). This triggers plain error analysis, *United States v. Kasper*, 58 M.J. 314 (C.A.A.F. 2003).

3. The test for prejudice depends on whether the error was of constitutional dimension. *See generally United States v. Forbes*, 61 M.J. 354 (C.A.A.F. 2005).

D. Judicial notice. Benchbook, para. 7-6.

1. The military judge shall give an instruction whenever he or she takes judicial notice of any matter. See Mil. R. Evid. 201 and 202.

E. Credibility of witnesses. Benchbook, para. 7-7.

1. This instruction should be given upon request or when appropriate and must be given when the credibility of a principal witness or witness for the prosecution has been assailed by the defense.

F. Failure to testify. Benchbook, para. 7-12.

1. General rule. When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice. Mil. R. Evid. 301(f)(3).

2. In *United States v. Forbes*, 61 M.J. 354 (C.A.A.F. 2005), the court adopted the following analysis. The military judge is bound by the defense election unless the judge performs a balancing test that weighs the defense concerns against the case-specific interests of justice. This is the same balancing test that is found in M.R.E. 403. Something more than just a generalized

fear that the panel will hold it against the accused must be present. If the military judge follows that analysis, she will be granted abuse of discretion on review. If she does not, the test will be de novo. If there is error, then the test for prejudice is: a presumption of prejudice, where the burden shifts to the government to prove by a preponderance of the evidence that no prejudice exists.

3. If the members ask a question that implicates the accused's silence, the military judge has an affirmative duty to give the instruction. *United States v. Jackson*, 6 M.J. 116 (C.M.A. 1979).

G. Uncharged misconduct. Benchbook, para. 7-13.

1. The military judge is required to instruct on the limited use of uncharged misconduct "on timely request." Mil. R. Evid. 105.

2. Instruction may be required even absent defense request. *United States v. Barrow*, 42 M.J. 655 (A.F. Ct. Crim. App. 1995) (despite defense request not to give limiting instruction regarding uncharged misconduct, one was required because "[n]o evidence can so fester in the minds of court members").

3. Timing of instruction. *United States v. Levitt*, 35 M.J. 114 (C.M.A. 1992). Instruction should be given immediately following introduction of evidence and repeated before deliberations.

H. Spill-over effect of charged misconduct. Benchbook, para. 7-17.

1. This instruction should be given, and might be required, whenever unrelated but similar offenses are tried at the same time. *See United States v. Myers*, 51 M.J. 570 (N-M. Ct. Crim. App. 1999) (failure to give requested spill-over instruction was of constitutional dimension).

I. Cross-racial identification (as it relates to Benchbook para. 7-7-2, eyewitness identification).

1. This instruction should be given if cross-racial identification is in issue. The mere fact that an eyewitness and the accused are of different races does not require instruction – cross-racial identification must be a "primary issue" in the case. *United States v. Thompson*, 31 M.J. 125 (C.M.A. 1990).

J. Variance. Benchbook, paras. 7-15 and 7-16.

1. This instruction should be given if the evidence indicates that the offense occurred but the time, place, amount, etc. is different than that charged.

a) *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003). The appellant was tried for wrongful use of ecstasy on "divers occasions." The government presented evidence of six uses, and after being instructed on variance, the panel found him guilty of use on "one occasion." The court reversed, holding that where a specification alleges wrongful acts on "divers occasions," any findings by exceptions and substitutions that remove the "divers occasions" language must specify the particular instances of conduct upon which the findings are based.

b) *See also United States v. Seider*, 60 M.J. 36 (C.A.A.F. 2004) (citing *Walters* and holding that the lower court could not conduct an Art. 66 review when the members excepted the words "divers occasions" from their findings and did not indicate which of the two instances the accused was guilty); *United States v. Augspurger* 61 M.J. 189 (C.A.A.F. 2005).

2. However, a factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of those means beyond a reasonable doubt. *United States v. Brown*, 65 M.J. 356 (C.A.A.F. 2007); *United States v. Hardy*, 46 M.J. 67, 73 (C.A.A.F. 1997).

XII. SENTENCING INSTRUCTIONS

A. Instructions on sentencing shall be given after arguments by counsel on sentencing and before the members close to deliberate. The military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time. Instructions must be given orally, but may, in addition, be in writing. R.C.M. 1005(b) and (d).

1. Chapter 2 of the Benchbook contains the sentencing instructions.

B. Required Instructions. R.C.M. 1005(e).

1. Maximum punishment and mandatory minimum punishment, if any.

a) Military judge must instruct on the correct maximum punishment, but not how the amount was reached (unitary sentencing). *United States v. Purdy*, 42 M.J. 666 (A. Ct. Crim. App. 1996). *See also United States v. Reyes*, 63 M.J. 265 (2006) (reversing where the military judge incorrectly instructed that a dishonorable discharge was available).

b) Punishments other than the maximum. The military judge has no *sua sponte* duty to instruct on other punishments. Instruction on the maximum punishment plus a proper sentence worksheet is sufficient. *United States v. Brandolini*, 13 M.J. 163 (C.M.A. 1982).

2. A statement of the effect any sentence announced that includes a punitive discharge and confinement, or confinement in excess of six months, will have on the accused's entitlement to pay and allowances.

3. Procedures for deliberations and voting.

a) Failure to give instruction that members are to begin voting with the lightest proposed sentence is not plain error. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986). However, in capital cases, this is error. *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997); *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1999).

b) Collecting and counting votes.

(1) *United States v. Truitt*, 32 M.J. 1010 (A.C.M.R. 1991). Failure to instruct that junior member collects and counts the votes and the president shall check the count was harmless in the absence of evidence that the panel actually voted incorrectly.

(2) *But see United States v. Harris*, 30 M.J. 1150 (A.C.M.R. 1990). Failure to give instructions that voting was to be by secret written ballot and that the junior member was to collect and count the ballots was error. The court declined to presume that the correct procedures were followed and reversed.

4. The members are solely responsible for selecting the sentence and they cannot rely upon mitigating action by the convening authority.

5. Members must consider all matters in extenuation, mitigation and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3), and (5). R.C.M. 1005(e)(5). If the accused states irrelevant matters in her unsworn statement, the military judge may give a *Friedmann* instruction (based on *United States v. Friedmann*, 53 M.J. 800 (A. F. Ct. Crim. App. 2000)); *see also United States v. Barrier*, 61 M.J. 482 (C.A.A.F. 2005).

6. Members shall consider the sentencing guidance set forth in R.C.M. 1002(f). R.C.M. 1005(e)(6)

7. Such other explanations, descriptions, or directions that the military judge determines to be necessary, whether properly requested by a party or determined by the military judge sua sponte. R.C.M. 1005(e)(7)

C. Requested instructions.

1. After presentation of matters relating to sentence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. R.C.M. 1005(c).

2. The analysis is the same as described in section VII above. *United States v. Simmons*, 48 M.J. 193 (C.A.A.F. 1998).

3. Often, defense requests relate to identifying certain things as being mitigating.

a) *United States v. Simmons*, 48 M.J. 193 (C.A.A.F. 1998). When there is a dispute as to whether the mitigator exists, the preferable method is for the judge to modify a requested instruction to say that the members can consider the matter in mitigation if they decided the mitigator exists.

b) *United States v. Perry*, 48 M.J. 197 (C.A.A.F. 1998). Accused convicted of forcible sodomy and other offenses. Defense wanted an instruction in sentencing about the fact that the accused dismissal may cause the accused to pay back his education. The judge refused to give the instruction, claiming that it was collateral and there were too many factors to know for certain whether the money would be taken back. CAAF agreed.

c) *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001) (holding that military judges are required to instruct on the impact of a punitive discharge on retirement benefits, "if there is an evidentiary predicate for the instruction and it is requested").

D. Standard of review.

1. Failure to object to an instruction or omission of instruction constitutes forfeiture of the objection in the absence of plain error. R.C.M. 1005(f); *United States v. Reyes*, 63 M.J. 265 (C.A.A.F. 2006).

2. The test for prejudice is whether the error materially prejudiced a substantial right. The question is whether the panel might have been substantially swayed by the error during the sentencing process. *United States v. Reyes*, 63 M.J. 265 (C.A.A.F. 2006).

XIII. GENERAL FINDINGS IN THE MILITARY – R.C.M. 918(A)

A. Guilty;

B. Not Guilty;

C. Guilty by Exceptions (with or without substitutions);

D. Guilty of Lesser Included Offense (LIO).

1. R.C.M. 918(a)(1) permits a plea of "not guilty to an offense as charged, but guilty of a named lesser included offense." What constitutes a "named lesser included offense" and whether this rule can be reliably applied is questionable in light of *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

2. When plea to an LIO is entered, defense counsel should provide a written revised specification. Revised specification should be an appellate exhibit.

3. *United States v. Fowler*, 74 M.J. 689 (A. Ct. Crim. App. 2015). Accused pled to absence without leave as LIO of desertion, and military judge mistakenly entered findings of guilty to the LIO and not guilty of the greater offense before the government had the opportunity to prove the greater offense. The finding of not guilty did not constitute an acquittal because a military judge

cannot foreclose the government's opportunity to present its case by entering a finding of not guilty before it has the opportunity to do so.

E. Not Guilty Only by Reason of Lack of Mental Responsibility.

XIV. WHAT MAY / MAY NOT BE CONSIDERED IN REACHING FINDINGS? R.C.M. 918(C)

A. Matters properly before the court (e.g., testimony of witnesses, real and documentary evidence). Does not include documents provided ex parte to the military judge. *But see United States v. McCarthy*, 37 M.J. 595 (A.F.C.M.R. 1993) (finding no prejudice when military judge "finds" missing performance evaluation report during deliberations and "adds" it to the record without explaining where he got it).

B. Specialized knowledge – i.e., gained by member from source outside court-martial – may not be considered.

1. *United States v. Davis*, 19 M.J. 689 (A.C.M.R. 1984). Improper for court member to visit the crime scene to determine quality of lighting. Convening authority should have ordered an evidentiary hearing to determine whether the accused was prejudiced.

2. *United States v. Johnson*, 23 M.J. 327 (C.M.A. 1987). During deliberations, demonstration by member with martial arts expertise did not constitute extraneous prejudicial information where the demonstration was merely an examination and evaluation of evidence already produced.

C. Member may not communicate with witnesses.

1. *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991). Blood expert witness had dinner with the members. Extensive *voir dire* established the lack of taint.

2. *United States v. White*, 36 M.J. 284 (C.M.A. 1993). Although any contact between witnesses and members gives rise to perceptions of unfairness, it is not automatically disqualifying. In this case the *voir dire* disclosed in full the innocuous nature of the contact.

D. Members may not seek information that is not available in open court. *United States v. Knight*, 41 M.J. 867 (Army Ct. Crim. App. 1995). Three members repeatedly quizzed bailiff/driver about matters presented in court out of presence of members, and sought his medical opinion – he was also an EMT – about bruising, which was a key issue in sexual assault prosecution.

E. Split Plea. Unless the defense requests (or offenses stand in greater – LIO relationship), panel members may not consider, and should not be told, that the accused earlier plead guilty to some offenses. *United States v. Kaiser*, 58 M.J. 146 (2003).

F. Use of providence inquiry statements in mixed plea cases.

1. Admissions in a plea of guilty to one offense cannot be used as evidence to support a finding of guilty of an essential element of a separate and different offense, but the elements established by the guilty plea inquiry and stipulation of fact may be considered in trial on contested charges, if the pled to charge is LIO of the contested charge. *United States v. Abdullah*, 37 M.J. 692 (A.C.M.R. 1993) (relying on *United States v. Caszatt*, 29 C.M.R. 521, 522 (1960)). *See also United States v. Rivera*, 23 M.J. 89, 95 (C.M.A. 1986) (guilty plea to one offense can only be considered on findings when the plea is to a lesser included offense of the same specification as to which the plea is being offered into evidence).

2. Plea of guilty may be used to establish common facts and elements of a greater offense within the same specification but may not be used as proof of a separate offense. The elements of a LIO established by guilty plea (but not the accused's admissions made in support of that plea)

can be used to establish common elements of the greater offense. *United States v. Ramelb*, 44 M.J. 625 (Army Ct. Crim. App. 1996).

3. Admissions concerning the elements of the LIO made during providence inquiry can be considered insofar as the admissions relate to common elements of the greater offense, but it was error for the military judge to consider the accused's admissions that pertained to different elements of the greater offense. *United States v. Grijalva*, 55 M.J. 223 (2001).

G. Matters taken into the deliberation room may be considered. R.C.M. 921(b).

1. Notes of the court members.

2. Exhibits admitted into evidence.

3. Stipulations of fact are taken into the deliberation room so long as the military judge sufficiently ensures that the accused understood the effect of the stipulation of fact entered into with the Government. See *United States v. Resch*, 65 M.J. 233 (C.A.A.F. 2007).

4. Testimonial substitutes (depositions, stipulations of expected testimony) do not go into the deliberation room. *See United States v. Austin*, 35 M.J. 271 (C.M.A. 1992) (finding that a verbatim transcript of alleged victim's testimony at pretrial investigation was not an "exhibit" that members could take into the deliberation room).

H. Fact finder may not consider submitted Chapter 10. *United States v. Balagna*, 33 M.J. 54 (C.M.A. 1991). Character witness acknowledged (upon prodding in open court by MJ) that he could not vouch for accused because had seen a "report." When asked by the MJ what that report was, the witness responded "a request for Chapter 10." Court finds no "extraordinary circumstances" requiring the declaration of a mistrial since the "adverse impact can be neutralized by other means." *Id*. at 57. The MJ twice instructed the members that the evidence was inadmissible and prior to findings advised the members that it was to be "completely disregarded." *See also United States v. Vasquez*, 54 M.J. 303 (C.A.A.F. 2001).

I. Findings worksheet is used to assist members in putting findings in order. See Appendix 10, Manual for Courts-Martial, Forms of Findings.

XV. DELIBERATIONS AND VOTING ON FINDINGS. R.C.M. 921

A. Basic rules and procedures.

1. Deliberations. **R.C.M. 921(a) and (b)**.

2. Only members present. R.C.M. 921(a).

3. No superiority in rank used to influence other members. R.C.M. 921(a).

4. May request reopening of court to have record read back or for introduction of additional evidence. R.C.M. 921(b).

5. Voting. **R.C.M. 921(c)**.

6. By secret written ballot, with all members voting.

7. Guilty only if at least 3/4 vote for guilty.

8. Fewer than 3/4 vote for guilty, then finding of not guilty results.

9. Special procedure to find accused not guilty by reason of lack of mental responsibility.

10. Procedure. **R.C.M. 921(c)(6)**.

B. Straw polls.

1. *United States v. Fitzgerald*, 44 M.J. 434 (1996). Two specifications each alleged multiple discrete acts of sodomy and indecent acts. As to discrete acts alleged in specifications, MJ suggested straw vote on specification as charged, then treating individual discrete acts separately as lesser included offenses. Instructions likely inured to benefit of accused, and brought no objection from counsel. Court found waiver by defense, no plain error, and affirmed findings and sentence.

2. *United States v. Lawson*, 16 M.J. 38 (C.M.A. 1983). Straw polls, *i.e.*, informal non-binding votes, are not specifically prohibited, but are discouraged. Cannot be used directly or indirectly to allow superiority of rank to influence opinion.

XVI. INSTRUCTIONS ON FINDINGS. R.C.M. 920

A. *United States v. Hardy*, 46 M.J. 67 (1997). MJ cannot direct panel to accept findings of fact, or to return verdict of guilty. In non-capital case, panel returns only general verdict. In answering panel question regarding required finding, MJ refused trial counsel request to instruct that proof beyond reasonable doubt as to all elements meant panel must find accused guilty.

B. *United States v. Gibson*, 58 M.J. 1 (2003). MJ erred by failing to give defense requested accomplice instruction. Three prong test to determine if failure to give requested instruction is reversible error: (1) was requested instruction accurate; (2) was requested instruction substantially covered by the instructions given; and (3) if not substantially covered, was the instruction on such a vital point that it (failure to give) deprived the accused of a defense or seriously impaired its effective presentation. If (1) through (3) are met, the burden of persuasion shifts to the Government to show that the error was harmless, that is, failure to give the instruction did not have a "substantial influence on the findings." If it had a substantial influence or the court is left in "grave doubt" as to the validity of the findings, reversible error has occurred.

C. *United States v. Hibbard*, 58 M.J. 71 (2003). MJ did not err by failing to give mistake of fact instruction in rape case where defense theory throughout trial, to include cross examination of victim, was that no intercourse occurred.

D. *United States v. Lewis*, 65 M.J. 85 (2007). MJ erred by giving an incomplete instruction regarding self-defense by failing to instruct the members that a mutual combatant could regain the right to self-defense when the conflict is escalated or, is unable to withdraw in good faith. "When the instructional error raises constitutional implications, the error is tested for prejudice using a 'harmless beyond a reasonable doubt' standard." *United States v. Lewis*, 65 M.J. 85, __ (2007) citing *United States v. Wolford*, 62 M.J. 418, 420 (2006).

XVII. ANNOUNCEMENT OF FINDINGS. R.C.M. 922

A. *United States v. Jones*, 46 M.J. 815 (N-M. Ct. Crim. App. 1997). In mixed plea case, MJ failed to announce findings of guilty of offenses to which accused had pled guilty, and as to which MJ had conducted providence inquiry. Upon realizing failure to enter findings, MJ convened post-trial Article 39(a) hearing and entered findings consistent with pleas of accused. Though technical violation of R.C.M. 922(a) occurred, MJ commended for using post-trial session to remedy oversight.

B. *United States v. Perkins*, 56 M.J. 825 (Army Ct. Crim. App. 2002). MJ's failure to properly announce guilty finding as to Specification 3 of Charge II (MJ Announced Guilty to Specification 3 of Charge III) did not require court to set aside appellant's conviction of Specification 3 of Charge II when it was apparent from the record that the MJ merely misspoke and appellant had actually plead guilty to Specification 3 of Charge II. Court notes that a proceeding in revision under R.C.M. 1101 would have been an appropriate course of action had the MJ or SJA caught the mistake.

XVIII. RECONSIDERATION OF FINDINGS. UCMJ ART. 52, R.C.M. 924

A. Members may reconsider any finding before such finding is announced in open session. R.C.M. 924(a).

1. *United States v. Thomas*, 39 M.J. 626 (N.M.C.M.R. 1993), *rev'd in part* 46 M.J. 311 (1997). (CAAF affirmed the findings and reversed the sentence due to a sentencing instruction error). Accepted practice is to instruct prior to deliberation on findings that if any member desires to reconsider a finding, the MJ should be notified so that reconsideration instructions may be given in open court. Instruction on reconsideration is required **only** if a court member indicates desire to reconsider.

2. *United States v. Jones*, 31 M.J. 908 (A.F.C.M.R. 1990). Appellate court orders rehearing on sentence. Can the second panel reconsider findings? HELD: No. R.C.M. 924(a) states "Members may reconsider any finding reached by them." Also, the appellate court had already affirmed the findings of guilty. Once affirmed, "they are no longer subject to reconsideration."

B. Judge alone. MJ may reconsider guilty finding any time before announcement of sentence. R.C.M. 924(c).

XIX. DEFECTIVE FINDINGS

A. Concerns: Sufficient basis for court to base its judgment and protect against double prosecution.

1. Divers occasions.

a) *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003). Appellant charged with drug use on divers occasions. The evidence put on by the government alleged six separate periods. The panel returned a finding by exceptions and substitutions (excepting the words "divers occasions" and substituting the words "one occasion"), but did not specify the time frame. The CAAF held that the findings were ambiguous, setting aside the findings and sentence. The court noted that where a specification alleges acts on divers occasions, the members must be instructed that any findings by exceptions and substitutions must reflect the specific instance of conduct on which the modified findings are made.

1. *United States v. Wilson*, 67 M.J. 423 (C.A.A.F. 2009). Appellant charged with rape of a child on divers occasion. The testimony of the victim, and a sworn statement of the appellant admitted at trial, indicated that there were two possible occasions when a rape may have occurred. The military judge found the appellant guilty, excepting the words "on divers occasions," but did not indicate which occasion was the basis for the single rape conviction. The CAAF held that a court of criminal appeals did not even have the authority to review the case because the findings where ambiguous – the appeals court would not know which occasion the appellant was guilty of. The CAAF dismissed the rape charge with prejudice. The CAAF identified two methods to prevent such a drastic remedy in future cases. First, when "on divers occasions" is excepted out, the substituted findings must clearly identify which conduct served as a basis for the findings. Second, in a judge alone trial, a clear statement from the military judge on the record explaining which conduct formed the basis for the conviction.

2. *United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010). Appellant charged with indecent acts on divers occasions. Military judge finds him guilty of LIO of assault consummated by battery on a child under sixteen and excepts the words "divers occasions." Trial counsel asks military judge to clarify if the guilty finding was for "divers occasions as charged or is that just for—for one event or—will you clarify that

further for us?" The military judge replied "[i]t is on the one occasion." NMCCA found the findings "were not ambiguous when placed it in the context of the entire record." CAAF reversed the NMCCA, stating that NMCCA's "distinction between 'evaluat[ing] evidence' and 'consider[ing] the record as a whole to clarify the meaning and intent of the military judge's words' appears to be a distinction without a difference." CAAF finds findings "ambiguous" and unreviewable, and dismissed the charges with prejudice.

3. *United States v. Ross*, 68 M.J. 415 (C.A.A.F. 2010). Appellant found guilty by military judge alone of possession of child pornography, excepting the words "on divers occasions." CAAF holds findings are ambiguous and dismisses charge with prejudice. Even though possession of child pornography is a continuing offense and the words "on divers occasions" may be "surplusage," on these facts they were not because the images were on three different media. Because the images could have been on more than one form of storage media, charging "on divers occasions" was appropriate, and excepting that language without identifying which media the child pornography was on created an ambiguous finding.

4. *United States v. Saxman*, 69 M.J. 540 (N. M. Ct. Crim. App. 2010). Appellant charged with possession of twenty-two child pornography videos on a computer. Appellant was convicted by officer members by exceptions and substitutions of possessing only four of the charged twenty-two videos. The announced finding did not specify which four videos formed the basis of the guilty finding. NMCCA applies the *Walters* and *Wilson* logic to these facts and dismisses charge with prejudice. Members' finding meant the appellant was not guilty of possessing eighteen of the twenty-two videos. Without knowing exactly which eighteen videos were not child pornography, the findings are ambiguous.

B. Variance.

1. *United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003). Modification of a lawful general order charge from "wrongfully providing alcohol to [JK]" to "wrongfully [ ] engaging in and seeking [ ] a nonprofessional, personal relationship with [JK], a person enrolled in the Delayed-Entry Program" held to be a material variance; finding of guilty to the Charge and Specification set aside. Variance cannot change the nature of the offense or increase the seriousness of the offense or its maximum punishment.

2. *United States v. Pryor*, 57 M.J. 821 (N-M. Ct. Crim. App. 2003). MJ erred by not entering guilty findings by exceptions and substitutions when the evidence in the stipulation of fact and the accused's providence inquiry narrowed the period of the accused's criminality. By simply entering findings of guilty to the specifications as written, the appellant was prejudiced by a court-martial record that "indicates a pattern of criminal conduct occurring over a greater period of time than actually took place." The court provided relief by modifying the findings and reassessing the sentence based on the modified findings.

3. *United States v. Treat*, 73 M.J. 331 (C.A.A.F. 2014). MJ created a material variance in making a guilty finding by exceptions and substitutions. Trial counsel originally charged the accused with "missing the movement of Flight TA4B702," and the MJ found him guilty of "missing the movement of the flight dedicated to . . . transport Main Body 1 of 54th Engineer Battalion from Ramstein Air Base, Germany, to Manas Air Base, Kyrgyzstan." Witnesses at trial were unable to remember the flight number or had no memory of it. The variance was material because the government must prove that the accused missed the specific flight or ship in question, and the government had identified the flight by its flight number in the specification. The variance did not prejudice the accused because the accused, who raised a defense of

impossibility at trial, was not denied the opportunity to defend against the charge of which he was convicted.

C. Bill of particulars.

1. *United States v. Harman*, 66 M.J. 710 (Army Ct. Crim. App. 2008). MJ erred by accepting a verdict from the panel that specifically incorporated the bill of particulars. ACCA amended the specification and charge to implement the panel's clear intent.

D. Announcement of findings.

1. *United States v. Mantilla*, 36 M.J. 621 (A.C.M.R. 1992). After findings of guilty have been announced, MJ may seek clarification any time before adjournment, and error in announcement of findings may be corrected by new announcement before final adjournment of court-martial. Such correction is not reconsideration; accused, however, should be given opportunity to present additional matters on sentencing.

2. *United States v. Perez*, 40 M.J. 373 (C.M.A. 1994). President's disclosure of members' unanimous vote that overt act alleged in support of conspiracy specification had not been proven, during discussion of proposed findings as reflected on findings worksheet, was not announcement of finding of not guilty and had no legal effect. MJ had authority to direct reconsideration of the inconsistent verdict. Alternatively, MJ could have advised members that findings amounted to a finding of not guilty and advised them of their option to reconsider.

XX. IMPEACHMENT OF FINDINGS. R.C.M. 923

A. Strong policy against the impeachment of verdicts.

1. Promotes finality in court-martial proceedings.

2. Encourages members to fully and freely deliberate.

B. General rule: Deliberative privilege – court deliberations are privileged (M.R.E. 509).

C. Exceptions: Court members' testimony and affidavits cannot be used after the court-martial to impeach the verdict except in <u>three</u> limited situations. R.C.M. 923; M.R.E. 606. *See United States v. Loving*, 41 M.J. 213 (C.M.A. 1994).

1. Extraneous prejudicial information.

a) *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983). Improper court member visit to crime scene.

b) *United States v. Almeida*, 19 M.J. 874 (A.F.C.M.R. 1985). No prejudice where court member talked to witness about Thai cooking during a recess in the trial.

c) *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991). Blood expert witness had dinner with the members. Extensive *voir dire* established the lack of taint.

2. Unlawful command influence or other outside influence (*e.g.*, bribery, jury tampering).

a) *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984). Unlawful command control for president to order a re-vote after a finding of not guilty had been reached. MJ should build a factual record at a post-trial Article 39(a) session.

b) *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985). President of court can express opinions in strong terms and call for a vote when discussion is complete or further debate is pointless. It is improper, however, for the president to use superiority of rank to coerce a subordinate to vote in a particular manner.

3. A mistake was made in entering the finding or sentence on the finding or sentence forms.

4. Possible voting irregularity not enough. *United States v. Brooks*, 42 M.J. 384 (1995). Deliberative privilege precludes MJ from entering a finding of not guilty when he concludes that members may have come to guilty finding as a result of improperly computing their votes.

5. *United States v. Hardy*, 46 M.J. 67 (1997). "[T]he protection of the deliberative process outweigh[s] the consequences of an occasional disregard of the law by a court-martial panel." *Id*. at 74.

D. Discovery of impeachable information.

1. Polling of court members is prohibited. R.C.M. 922(e). May not impeach findings with post-trial member questionnaires. *See United States v. Heimer*, 34 M.J. 541 (A.F.C.M.R. 1991). M.R.E. 606 establishes the only three permissible circumstances to impeach a verdict. Post-trial questionnaires improperly "sought to impeach each panel member's subjective interpretation of the evidence – the precise material the rule seeks to protect." *Id*. at 546.

2. *United States v. Ovando-Moran*, 48 M.J. 300 (1998). Gathering information to impeach a verdict is not a proper basis for post-trial interviews by counsel of panel members. Information in counsel's post-trial affidavit that members improperly considered testimony and were impacted by military judge's comments during trial fell outside bounds of M.R.E. 606(b) to impeach findings of court-martial.

3. Additional cases involving impeachment: *United States v. Hance*, 10 M.J. 622 (A.C.M.R. 1980*); United States v. Higdon*, 2 M.J. 445 (A.C.M.R. 1975); *United States v. Harris*, 32 C.M.R. 878 (A.F.B.R. 1962).

E. Evidence introduced at sentencing for the sole purpose of impeaching the findings is inadmissible. *See infra United States v. Johnson*, 62 M.J. 31 (2005).

XXI. SPECIAL FINDINGS

A. Purpose. In a trial by court-martial composed of military judge alone, the military judge shall make special findings upon request by any party. Special findings may be requested only as to matters of fact reasonably in issue as to an offense and need be made only as to offenses of which the accused was found guilty. R.C.M. 918(b).

1. "Special findings enable the appellate court to determine the legal significance attributed to particular facts by the military judge, and to determine whether the judge correctly applied any presumption of law, or used appropriate findings." *United States v. Hussey*, 1 M.J. 804 (A.F.C.M.R. 1976).

a) "Special findings serve many of the same functions as do jury instructions in trials before a court of members." Captain Lee D. Schinasi, *Special Findings: Their Use at Trial and On Appeal*, 87 Mil. L. Rev.73, 74 (Winter, 1980). "Special findings are to a bench trial as instructions are to a trial before members. Such procedure is designed to preserve for appeal questions of law. It is the remedy designed to rectify misconceptions regarding: the significance of a particular fact; the application of any presumption; or the appropriate legal standard." *Id.* at 105 (quoting *United States v. Falin*, 43 C.M.R. 702 (A.C.M.R. 1971)). *See also United States v. Zambrano*, 2016 CCA LEXIS 19 (N-M. Ct. Crim. App. Jan 19, 2016)("special findings are to a bench trial as instructions are to a trial before members.") (internal citations omitted).

2. "Viewed together, special findings can make a record for appellant, or protect it for the government." *Schinasi* at 121.

3. Analogues (Specifically Mandated Occasions for Special Findings)

4. R.C.M. 905(d) - Motions: "Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record."

5. M.R.E. 304(f)(5) - Confessions and Admissions: "Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record."

6. M.R.E. 311(d)(7) - Evidence Obtained From Unlawful Searches and Seizures: "Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of facts on the record."

7. M.R.E. 321(d)(7) - Eyewitness Identification: "Where factual issues are involved in ruling upon such motion or objection, the military judge shall state his or her essential findings of fact on the record."

B. Trial Procedures

1. Who may request special findings:

a) Any party to the proceeding. R.C.M. 918(b). Whenever the government and the defendant in a criminal case waive a jury, they are entitled to not just a verdict one way or the other, but to the reasons behind it." *Schinasi* at 86 (citing *United States v. Clark*, 123 F.Supp.608 (S.D. Cal 1954)).

2. The military judge acting sua sponte. *Schinasi* at 81 (discussing *United States v. Figueroa*, 377 F.Supp. 645 (S.D.N.Y. 1970)).

3. What the party may request: Any party can request special findings on any facts reasonably related to an important issue, but may make only one set of requests per case. R.C.M. 918(b).

4. When to make such a request: At any time before general findings are announced. R.C.M. 918(b).

5. How to make the request: There is no specified format, and the rule allows for either verbal or written requests. However, the military judge has the authority to require any request be specific and in writing. R.C.M. 918(b).

6. What issues merit special findings:

7. "Not only findings on elements of the offense, but also on all factual questions reasonably in issue prior to findings as well as controverted issues of fact which are deemed relevant to the sentencing decision," including jurisdictional issues. *Schinasi* at 107 (citing *United States v. Falin*, 43 C.M.R. 702, 703 (A.C.M.R. 1971)). Also, the judge must ensure they are made whenever another rule requires “essential findings of fact.”

8. Issues which are irrelevant, immaterial, or so remote as to have no effect on the trial's outcome do not merit special findings. *Schinasi* at 107-108 (discussing *United States v. Burke*, 4 M.J. 530 (N.C.M.R. 1977)). Special findings are also not required when counsel desires to know what evidence was considered unimportant by the trial judge. *Schinasi* at 91 (citing *United States v. Peterson*, 338 F.2d 595 (7th Cir. 1964)).

9. How the military judge must issue special findings: Verbally on the record or in writing. R.C.M. 918(b).

10. When the military judge must enter findings: During or after the court-martial, but in any event before entry of judgment, as they must be included with the record of trial. R.C.M. 918(b); R.C.M. 1112(f)(1)(D).

C. Use by Defense Counsel

1. When creatively designed, special findings requests can ensure that the trial judge fully understands the defense position. *Schinasi* at 121. "Virtually all trial judges agree that special findings help clarify those determinations..." *Schinasi* at 88 (citing *United States v. Johnson*, 496 F.2d 1131 (5th Cir. 1974)).

2. If there is any inkling that the judge is laboring under any misapprehension of law or fact..." special findings may reveal that misapprehension, so the defense counsel can either resolve the issue at trial, or preserve it for appeal. *Schinasi* at 88. Convictions will be reversed for example, if "inconsistent special and general findings are returned." *Schinasi* at 95, citing *United States v. Maybury*, 274 F.2d 899 (2nd Cir. 1960).

3. When the judge takes a contrary position to that requested by the defense, special findings flush-out the operative conclusions the judge has relied upon. "Findings of fact in non-jury criminal cases primarily aid the defendant in preserving questions for appeal, and aid the appellate court in delineating the factual bases on which the trial court's decisions rested." *United States v Livingston*, 459 F.2d 797, 798 (3rd. Cir.1972) (en banc).

D. Use by trial counsel

1. Prosecutors can "protect the record from appellate intervention by requiring the trial judge to clearly establish the factual and legal predicate upon which conviction will be based." *Schinasi* at 102. Special findings can also "show that the judge decided the case correctly after all." *Schinasi* at 73.

2. To "ensure that conflicting and often confusing evidence is thoroughly evaluated by the trial court, and that the law is properly applied to the facts, protecting the record from inconsistent appellant review." *Schinasi* at 88. This may be particularly important in light of Article 66(c), which allows the military appellate courts the unique ability, unlike civilian appellate courts, to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact..." *Id.*

a) "Special findings provide a concise format for establishing what evidence was considered by the bench, and, more important, what legal theory was employed to support the ultimate decision. Used in this fashion, special findings prohibit an appellate court from 'discovering' variant interpretations or irregularities in the record which could be used to justify reversing conviction." *Schinasi* at 122.

E. Sua sponte use by court

1. The military judge must make all “essential findings of fact,” even if not requested. *See* M.R.E. 304(f)(5), M.R.E. 311(d)(7), M.R.E. 321(d)(7).

2. "Special findings justify themselves not only in averting an unjust act, but also in highlighting to the public, and the particular accused involved, that no injustice occurred." *Schinasi* at 80. "The existence of a rationale may not make the hurt pleasant,

or even just. But the absence, or refusal, of reason is a hallmark of injustice." *Schinasi* at 80.

F. Standard of Review

1. Virtually every military court" which has addressed the issue "recognizes that it [918(b)] is based upon [Federal] Rule [of Criminal Procedure] 23(c), and attempts, as best it can, to adopt the federal practice." *Schinasi* at 102.

2. Specific findings on an ultimate issue of guilt or innocence are subject to the same appellate review as a general finding of guilt, while other special findings are reviewed for clear error. *United States v. Jones*, 2009 WL 1508418, (A.F. Ct. Crim. App) (unpublished).

3. "The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F.2001); *United States v. Turner*, 25 M.J. 324 (C.M.A.1987); *United States v. Jones*, 2009 WL 1508418 at 3.

4. "The test for factual sufficiency is whether, after weighing the evidence in the record of trial and allowing for the fact that we did not personally see and hear the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. We review legal and factual sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)." *United States v. Jones*, 2009 WL 1508418 at 3.

G. Remedy for defective special findings. If the trial judge's mistake in rendering special findings is merely procedural, most appellate courts will return the case for compliance with statutory requirements. *Schinasi* at 117. "Where a trial judge's special findings disclose that he has misperceived, ignored, or confused the law or the facts, reversal will be the result." *Schinasi* at 118 (examining *United States v. People*, 45 C.M.R. 872 (N.C.M.R. 1971); *Haywood v. United States*, 393 F.2d 780 (5th Cir. 1968). *See also United States v. McMurrin*, 69 M.J. 591 (N.M. Ct. Crim. App. 2010) (setting aside findings when military judge's special findings omitted a critical element of the offense).

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CHAPTER 9
COURT-MARTIAL PERSONNEL

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I. INTRODUCTION

A. **2016 Military Justice Act (2016 MJA).** The 2016 MJA made significant revisions to court-martial panel requirements and other court-martial personnel. Because of the systemic nature of the changes, practitioners should review the new rules with an eye to how they will interact with rules that have not changed.

1. **Major Changes.** There were major changes to Article 16 (changed definition of courts-martial), Article 19 (changed types of special courts-martial), Article 25 (changed options and procedures for forum election), Article 26a (created office of a military magistrate), and Article 29 (added guidance for authorization of alternates). Counsel should also review Art 41 (challenges). Counsel should also be aware that the major implementing Rules for Courts-Martial have changed significantly. Counsel should review Rule 501 (composition of courts-martial, implementing Article 16), Rule 502 (establishing qualifications for members, alternates, judges, magistrates, and counsel), Rule 503 (detailing procedures for members and alternates, detailing requirements upon election of enlisted panel, and detailing of military judges and magistrates), Rule 504 (convening orders-no major changes), Rule 505 (changes of members-no major changes), Rule 912 (minor amendments to voir dire procedure), Rule 912A (major amendments to the method of determining members and alternates), and Rule 912B (major amendments to procedures to excuse and replace members after impanelment).

2. **Effective Dates.** The date of referral of charges and their specifications will govern rules concerning convening, assembly, and impaneling the court-martial. Cases referred on or after 1 January 2019 will use the new rules. Counsel should consult the sentencing chapter for a discussion of how the procedural options an accused has on sentencing are partly dependent upon the forum elections of the accused.

3. **Deskbook Revision Methodology**. This edition is a major change focused on the 2016 MJA. As of the date of publication, no appellate cases have been decided under the 2016 MJA. To the extent possible, this revision will discuss the likely application of cases contained herein under the 2016 MJA.

B. **The military justice process**. Congress enacted the Uniform Code of Military Justice (UCMJ) to provide a coherent, fair system of criminal justice within the military. The President was granted significant authority to craft rules of procedure for this system. Those rules are entitled Rules for Courts-Martial (RCM). The UCMJ and the RCMs are grouped together in the *Manual for Courts-Martial*.

C. **A Court-Martial**. A court-martial exists temporarily and then is permanently adjourned. The court is called into life, or "convened," by an officer who has been given such power by Congress, usually by virtue of position (e.g., a commander of an Army division is, under Article 22, UCMJ, authorized to convene a general court-martial). These commanders are "convening authorities" and they breathe life into these impermanent courts with a "convening order." The convening order details members to a court-martial. A "standing" court-martial panel may be convened for a certain period of time. Because courts-martial are temporary courts, a standing panel only springs to life to hear cases referred to it during the period for which the members are detailed. A panel might also be convened only to hear a specific case.

D. **LEVELS OF COURTS-MARTIAL**. Congress established three levels of courts-martial: General (GCM), Special (SPCM), and Summary (SCM). The levels of court differ according to the jurisdictional limitations on punishment they can impose. Punishments can include confinement, punitive discharge, forfeitures, reduction (enlisted only), hard labor without confinement (enlisted only), reprimand, a fine, and death for certain offenses. The characteristics of each type of court-martial are set out below:

1. ***Summary Courts-Martial*** (Arts. 20 and 24). This, the lowest level of court-martial, is accorded less procedural protection. Military judges do not preside over these proceedings, there is no right to defense counsel, and the "court" is composed of one officer, usually a non-lawyer. However, the accused can decline an SCM. Article 20b of the 2016 MJA clarifies that a SCM is a non-criminal forum and a conviction is not a criminal conviction. The maximum punishment allowed is 1 month confinement, hard labor without confinement for 45 days, restriction for 2 months, or forfeiture of 2/3 pay (a Soldier above the rank of SPC may not be confined or given hard labor without confinement, or reduced except to the next pay grade). *See* RCM 1301 *et seq.* and DA Pam 27-7 for procedures.

2. ***Special Courts-Martial*** (Arts. 19 and 23). Similar to a civilian "misdemeanor" court, the maximum punishment that can be adjudged at a SPCM is limited.

a. **Court with members.** A SPCM consists of four members and a military judge. The maximum sentence that may be adjudged is a bad conduct discharge, reduction to the lowest enlisted grade (E-1), confinement for one year, and forfeiture of two-thirds pay per month for one year.

b. **Court with military judge**

(1) **By election.** An accused may elect trial by military judge. Additionally, with consent of both parties, judge may appoint a magistrate to hear the case. The maximum sentence is the same as that which may be imposed by members.

(2) **By referral.** A convening authority may refer a case directly to a SPCM. In that event, the maximum punishment is further limited to confinement of no more than six months, and no more than 6 months of forfeiture of pay. No punitive discharge may be imposed. Other lawful punishments may be imposed.

3. ***General Courts-Martial*** (Arts. 18 and 22). Reserved for the more serious offenses, a GCM may adjudge the maximum punishment allowed for a particular offense (e.g., death for murder). A trial with panel members shall consist of eight members. If a member is excused after

impanelment, the court-martial may proceed with no fewer than six members. Only a GCM has jurisdiction to try an offense under Article 120(a), 120(b), 120a(a), 120b(b), 125, or attempts to commit one of the listed offenses. See Article 18, UCMJ.

E. **Selected Issues.**

1. *Forum Election Rights.* An enlisted accused has the right to elect the panel composition. The panel election right extends to a panel with all officer members, or a panel with at least 1/3 enlisted member representation. Absent the election of the accused, the panel will be composed of members as determined by the detailing of the convening authority, and the operation of the Rules.

2. ***Authorization of Alternates.*** In order to maintain the required numbers to proceed, a convening authority may authorize alternates who will hear the evidence. Alternates will not deliberate unless a member is excused.

3. ***Procedures for identification of members, alternates, and excusal of excess members.*** A convening authority must detail members in sufficient numbers to ensure that the court-martial may be impaneled with the required numbers, plus any authorized alternate. Members that remain in excess of the required numbers must be excused. Rules 912 and 912A provide procedures for random numbering to identify the members, any alternates, and excusal of excess members. Additionally, Rule 912A provides procedures to identify the enlisted members, in the event the accused elects enlisted representation.

II. CONVENING AUTHORITY

A. **General.** The power to convene a court-martial is the power to designate panel members for the purpose of hearing cases properly brought before it. Referral is the power to send preferred charges for trial before a court-martial convened for that purpose. *See Swaim v. United States*, 165 U.S. 553, 556–57 (1897), quoting *Runkle v. United States*, 19 Ct. Cl. 396, 409 (1884) ("[T]he convening of a court-martial is simply the giving of an order to certain officers to assemble as a court, and, when so assembled, to exercise certain powers conferred upon them by [statute].")

B. **Source of Power to Convene**.

1. **Constitutional**. The President has convening authority flowing from his constitutional role as commander in chief. *Runkle v. United States*, 19 Ct. Cl. 396, 409 (1884), *rev'd on other grounds*, 122 U.S. 543 (1887) (applying Article 65 of the Articles of War, 4 Stat. L., 417, ch. 179)("By the Constitution the President is the commander-in-chief of the armies of the United States. Courts-martial are the creatures of orders; the power to convene them being an attribute of command. As commander-in-chief the President is authorized to give orders to his subordinates, and the convening of a court-martial is simply the giving of an order to certain officers to assemble as a court, and, when so assembled, to exercise certain powers conferred upon them by the Articles of War.")

2. **Statutory**. Assignment to a position enumerated in Articles 22 through 24 gives the commander convening authority by operation of law. *See* Article 22, UCMJ (general courts-martial); Article 23, UCMJ (special courts-martial); and Article 24, UCMJ (summary courts-martial).

a. An officer assuming command of a unit possesses the convening authority inherent in the command position. In *United States v. Ross*, No. 36139, 2006 CCA LEXIS 358 (A.F. Ct. Crim. App. Dec. 13, 2006) (unpublished), an Air Force colonel (O-6) assumed command over the Third Air Force, which was a GCMCA. The assumption of command was in violation of applicable Air Force regulation, and there were two flag officers who could have

assumed command instead of the colonel. The colonel, acting as the GCMCA, referred the case to trial by general court-martial. The accused was arraigned, and the case was recessed for 20 days. During the recess, command of the Third Air Force passed to a major general. The new GCMCA replaced five of the nine panel members in the case. The accused was re-arraigned and tried. At no time did the accused object to the original referral. The AFCCA held that the court-martial was properly convened, reasoning that when an officer is in command, he may exercise the court-martial convening power that attaches to that command. Furthermore, although the appointment violated the Air Force regulation, jurisdiction still attached. "[A]ppellate courts are not justified in attaching jurisdictional significance to service regulations in the absence of their express characterization as such by Congress." Finally, any error in the referral was cured by the successor GCMCA who took action on the sentence. *See also United States v. Stamper*, No. 36191, 2006 CCA LEXIS 364 (A.F. Ct. Crim. App. Dec. 15, 2006) (unpublished).

3. By designation.

a. Under the Articles, the President or Secretary concerned may designate a convening authority. In *United States v. Smith*, 69 M.J. 613 (A. Ct. Crim. App. 2010), the acting Commander, Fort Lewis, referred charges against the accused to court-martial. On appeal, the defense argued the commander was not designated as a court-martial convening authority by the Secretary of the Army (SECARMY) and did not have jurisdiction to take action in this case. Although Article 22 does not give statutory authorization for an installation commander to serve as a GCMCA, it does allow for the applicable Service Secretary to designate other commanders as GCMCAs. In 1981, the SECARMY had issued two General Orders pertaining to Fort Lewis. In Gen. Order No. 10 (dated 9 April 1981), the Commander, "Fort Lewis" was designated a GCMCA; in Gen. Order No. 27 (dated 13 November 1981) the "Commander, I Corps and Fort Lewis" was designated a GCMCA. In reviewing these orders, the ACCA noted the SECARMY merely took action to "designate" GCMCAs, without replacing or otherwise affecting prior orders.

4. **Designation as a "separate" unit.** Articles 22 through 24 provide that smaller "separate" commands may have convening authority ordinarily reserved for larger units. *United States v. Hundley*, 56 M.J. 858 (N-M. Ct. Crim. App. 2002), dealt with a battalion command that had been designated as "separate" by the Secretary concerned. The court held that under Article 23(7), UCMJ, its commanding officer had authority to convene a special court-martial.

5. Revocation of authority to convene.

a. Presidential or secretarial designation as a convening authority may be revoked by proper authority. *United States v. Hardy*, 60 M.J. 620, illustrates this. In that case, the CA had been designated by the service Secretary. Between referral and the convening authority's (CA) action on the case, the Secretary of the Air Force issued an order which arguably revoked the CA's authority to convene courts-martial. AFCCA held, although the order was inartfully drafted, it did not revoke the CA's authority and, additionally, the Secretary of the Air Force issued a clarifying order proving his intent was to not revoke the CA's power. AFCCA held, in the alternative, even if the Secretary of the Air Force had intended to revoke the CA's authority, the commander still had statutory authority to convene courts-martial under Article 22(a)(7) as a commander of an air force: "No administrative action is required to effect convening authority on a commander once he or she is placed in a command position at a numbered air force." *United States v. Hardy*, 60 M.J. 620 (A.F. Ct. Crim. App. 2004).

C. **Decision of CA is personal to CA**.

1. Decision to refer is personal to the CA. *United States v. Guidi*, No. 200600493, 2007 CCA LEXIS 10 (N-M. Ct. Crim. App. Jan. 30, 2007) (unpublished). The signature on the referral portion of the accused's charge sheet was illegible, and noted next to the signature, in writing was "1st Sgt By direction." Typed next to the signature was "For the Commanding Officer." The additional charge sheet was executed in the same manner, except the notation "1st Sgt" was lacking. The court concluded that a Marine Corps First Sergeant must have signed the charge sheets. However, the court held that it is not a jurisdictional defect for the convening authority to allow another to sign on his behalf. The N-MCCA stated, "[p]rovided his actions are personally made, it is not necessary that he actually take hold of a pen."

D. **Power over a member of another command**

1. **Referral**. After allegations of an improper relationship with a midshipman at the Naval Academy, accused was reassigned. The new GCMCA preferred fraternization charges which the military judge dismissed for failure to state an offense. The Naval Academy SJA, on behalf of the old GCMCA, requested the new GCMCA refer charges anew based on additional misconduct. After further investigation, the new GCMCA did not re-refer charges but stated he would make the accused available if the old GCMCA desired to refer charges. The old GCMCA referred charges which the military judge dismissed without prejudice based on an improper referral. The N-MCCA held "a command other than the one to which the accused is attached may refer charges against the accused to a court-martial" (citing RCM 601(b)). *United States v. Jones*, 60 M.J. 917 (N-M. Ct. Crim. App. 2005).

2. **Transfer of convening authority after referral**. In general, authority over a referred case may be transferred to a parallel convening authority. See RCM 601(g). However, such transfer must follow the procedures specified in the rules. In *Brown*, the SJA prepared post-trial advice in a case for a convening authority other than the one that referred the case. The new (different) convening authority was a commander of an unrelated SPCMCA, and was not a successor in command. Action taken to approve the sentence by a different SPCMCA than the one who convened the accused's court-martial was error, because the action violated the terms of Article 60(c)(1), UCMJ, and RCM 1107(a). The court rejected the Government's argument that the accused needed to demonstrate material prejudice to obtain relief. The clemency stage was an accused's best opportunity to obtain sentence relief, and the Government was required to follow the statutory and regulatory scheme as written. *United States v. Brown*, 57 M.J. 623 (N-M. Ct. Crim. App. 2002).

E. **Adoption of court-martial panel members by acting Commanders/successors in command**. In general, the person in command of the relevant convening authority (as defined in Articles 22-24) may take any action on the case, without regard to whether that person is the commander who initially referred the case. However, Article 25(e)(2) requires that in the case of selection of panel members, the convening authority must select those members who are best qualified "in his opinion." Under the cases, adoption of a pre-existing panel is generally presumed where a successor in command refers a case to a pre-existing panel. While service regulations govern the selection process, violation of a regulation may not spell defeat for the Government.

1. **Identification of commander.** A court engages in a functional analysis looking to who *actually* was in command at the time the action was taken. *United States v. Yates*, 28 M.J. 60 (C.M.A. 1989). *United States v. Gait*, 25 M.J. 16 (C.M.A. 1987) (concern is for realities of command, not intricacies of service regulations). *See also United States v. Jette*, 25 M.J. 16 (C.M.A. 1987).

2. **Service Regulations**. Army, AR 600-20; Navy/U.S.M.C., JAGMAN - JAGINST 5800.7C; Air Force, AFR 35-34.

3. Panel adoption by successor in command. Adoption of the members can generally be presumed where a successor in command refers a case to a pre-existing panel. *United States v. Gilchrist*, 61 M.J. 785 (A. Ct. Crim. App. 2005). ACCA, in a published opinion, clarifies its position, stating "[a]bsent evidence to the contrary, adoption can be presumed from the convening authority's action in sending the charges to a court-martial whose members were selected by a predecessor in command." No requirement exists for a convening authority or an acting convening authority to expressly adopt panel members selected by his predecessor. *See also United States v. Starks*, No. 20020224 (A. Ct. Crim. App. Mar. 10, 2004) (unpub.) (concurring with NMCCA in *Brewick* that "while there is no explicit statement of adoption of the selection of court members by the successor-in-command, we are not aware of any authority that so requires.") *See also United States v. Brewick*, 47 M.J. 730 (N-M. Ct. Crim. App. 1997) (holding "[t]o the extent an 'adoption' is required [where a successor in command refers a case to a CMCO who members were selected by a predecessor] or helpful, we can presume as much from [the successor's] action in sending the charge to that court-martial, absent evidence to the contrary.").

4. **Best practices.** Judge advocates should have commanders make a formal adoption decision. Prior cases overruled by *Gilchrist* noted that the SJA could easily ensure that Article 25 requirements were met, and the rationale behind those cases is still sound reasoning, even if not the law. *See United States v. Meredith*, No. 20021184 (A. Ct. Crim. App. Jan. 27, 2005) (unpub.); *United States v. Jost*, No. 20030975 (A. Ct. Crim. App. Mar. 29, 2005) (unpub.). These cases held that a successor in command must expressly select members selected by the previous commander. "By the simple expedient of including and correctly referencing the predecessor's recommended CMCO in the referral document, the SJA can ensure that the codal responsibilities of the convening authority are clearly met."

F. **Limitations on Joint Commanders**. *United States v. Egan*, 53 M.J. 570 (A. Ct. Crim. App. 2000). In a special court-martial convened by Air Force colonel (commander of a EUCOM joint unit), the accused, an Army Soldier, was convicted of drug use and distribution. The SPCMCA approved the sentence, which included a BCD. ACCA held the SPCMCA did not have the authority under the applicable joint service directive to convene a special court-martial empowered to adjudge a BCD in the case of an Army soldier. BCD set aside; case further modified on other grounds.

G. **Limited Jurisdiction of a Special Court-Martial**

1. **Punishment limitations.** The 2016 MJA provides for different limitations than those under the legacy system.

a. **Legacy system.** A special court-martial could only impose the maximum of one year confinement, two-thirds forfeiture of pay per month for a period not exceeding a year, reduction to E-1, and a bad conduct discharge where a military judge and qualified defense counsel were detailed to the court-martial, and a verbatim record was prepared. Under the 2016 MJA, the law makes no provision for a COJ and the SJA to prepare a pretrial advice "following generally the format of RCM 406(b).") See also *United States v. Scott*, 59 M.J. 718 (A. Ct. Crim. App. 2004). ("[A]ll Army SPCMs are empowered to adjudge a BCD unless the convening authority expressly states that a particular SPCM is not so empowered.)

b. **2016 MJA.** A special court-martial may impose the maximum punishments authorized under Article 19 (the same punishments under the legacy system) so long as the case was referred to a court-martial composed of four members and a military judge. There is no option to refer a case to members only. If the case is referred for trial by judge alone, then the maximum punishment is further limited to confinement of no more than six months, and no more than 6 months of forfeiture of pay. No punitive discharge may be imposed. Other lawful punishments may be imposed.

2. Mandatory Minimums.

a. **Limited SPCMCA authority to refer a non-mandatory capital offense to SPCM.** *United States v. Henderson*, 59 M.J. 350 (C.A.A.F. 2004). SPCMCA referred alleged violation of Article 110(a), UCMJ (willfully hazarding a vessel, a nonmandatory capital offense). Article 19, UCMJ provides that a SPCM has jurisdiction over capital offenses "under such regulations as the President may prescribe." The President, in RCM 201(f)(2)(c), authorizes a SPCMCA to refer a nonmandatory capital offense only with the permission of the GCMCA. That permission was neither sought nor granted in this case. The CAAF held the referral was jurisdictional error. The CAAF rejected three Government arguments: first, that the so-called "evolution" in the law applicable to jurisdictional defects does not extend to this situation; second, that the PTA in the case was a functional equivalent of a referral of a noncapital offense; and third, that the referral of the nonmandatory capital offense was also an implicit referral of the noncapital lesser-included offense. Findings and sentence set aside.

b. **Limited SPCMCA authority to refer certain sex offenses.** Article 18 provides that a GCM has sole jurisdiction over certain sex offenses. Further, Article 53 specifies mandatory minimum of a dishonorable discharge for conviction of certain sex offenses. RCM(f)(2) implements the statute.

H. **When Convening Authority is Disqualified by Virtue of Accuser Status**

1. ***General Rule***. A convening authority must be reasonably impartial in order decide whether to refer a case. An "accuser" is not impartial. Under Article 1(9), UCMJ, "accuser" means a person who (1) signs and swears to charges; (2) directs that charges nominally be signed and sworn to by another; or (3) has an interest other than an official interest in the prosecution of the accused. *See also* RCM 601(c) discussion. If a convening authority is also the accuser in a case, then the convening authority has limited referral authority. The convening authority cannot refer charge(s) to a special or a general court-martial; however, he is not necessarily disqualified from convening a *summary* court-martial or initiating administrative measures (Article 15, memorandum of reprimand, Bar to Reenlistment, etc.). RCM 1302(b). If the convening authority has a personal (or other than official) interest in a case, there are additional limitations on what actions he may take.

2. **Statutory disqualification.** If a convening authority signs and swears to charges or directs another to do so, she is said to be statutorily disqualified. An accuser who is statutorily disqualified may not refer a case to a general or special court-martial but may appoint an Article 32 Investigating Officer or forward the case with a recommendation as to disposition as long as the disqualification is noted. A convening authority who becomes an accuser by virtue of preferring charges in an official capacity as a commander is not, *per se*, disqualified from appointing an Article 32 officer to investigate those charges. *See McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997).

3. **Personal disqualification.** A convening authority who has an "other than official interest" in the case is said to be personally disqualified. Besides being denied the power to refer a case for trial, she also may not appoint an Article 32 Investigating Officer or make a recommendation when forwarding the case for action.

a. Test: Whether a reasonable person could impute to the convening authority a personal interest or feeling in the outcome of the case. *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); *see also United States v. Gordon*, 2 C.M.R. 161 (1952); *United States v. Crossley*, 10 M.J. 376 (C.M.A. 1981); *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986) (listing examples of unofficial interests that disqualified CAs).

b. Examples.

(1) **Relationship to the accused.** SPCMCA forwarding the charges must disclose any potential personal interests, and if disqualified, forward without recommendation. *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994) (*DuBay* hearing ordered where special court-martial convening authority's (SPCMCA's) girlfriend (later spouse) and the accused shared relationship characterized by innuendo and sexual banter, and the record failed to establish that SPCMCA acted with proper motives.)

(2) **Accused and CA both members of the same Boy Scout organization.** *United States v. Dinges*, 55 M.J. 308 (C.A.A.F. 2001). A convening authority who becomes an accuser by virtue of having such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case is disqualified from taking further action as a convening authority. At a GCM the accused was convicted of sodomy arising out of his activities as an assistant scoutmaster with a local troop of the Boy Scouts. The Scout Executive terminated his status as an assistant, and contacted the CA (who was a district chairman of the Big Teepee District, Boy Scouts of America) about the matter. Prior to preferral of charges, the accused was assigned to the CA's wing (a special court-martial convening authority level command). The CAAF ordered a *DuBay* hearing to determine whether the convening authority had an other than official interest that would disqualify him under Article 1(9), UCMJ, and *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994). Based on facts gathered at the *DuBay* hearing, the CAAF held the SPCMCA did not become an accuser because he did not have such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case. As such, he was not disqualified from taking action as a CA.

(3) ***CAs suspected of similar offenses <u>may</u> be disqualified***. *United States v. Kroop*, 34 M.J. 628 (A.F.C.M.R. 1992), *aff'd*, 38 M.J. 470 (C.M.A. 1993). Officer charged with adultery. CA was suspected of similar, albeit unrelated, offenses. In an "abundance of caution over the need to preserve the appearance of propriety" court set aside prior action of CA (approved sentence) and remanded for new SJA's advice and action by different CA. *United States v. Anderson*, 36 M.J. 963 (A.F.C.M.R. 1993). ***Findings and sentence did not have to be set aside on grounds the CA was himself suspected of misconduct***. Conduct in question was unrelated to accused's misconduct. *United States v. Williams*, 35 M.J. 812 (A.F.C.M.R. 1992) *aff'd*, 41 M.J. 134 (C.A.A.F. 1994) (Accused convicted of three rapes, robbery, sodomy, and aggravated assault was not entitled to disqualification of CA where CA was himself suspected of sexual misconduct. Suspected misconduct of CA was of a non-violent nature. No danger of "psychological baggage" being carried over to prejudice the accused.)

(4) ***Disqualification and potential UCI***. *United States v. Haagenson*, 52 M.J. 34 (C.A.A.F. 1999). Accused, a CW2, was charged with fraternization and her case initially referred to a SPCM, convened by the SPCMCA who was also the accuser. The SPCMCA later withdrew the charge, on the basis of the TC's advice, and referred it to an Article 32 investigation, ultimately sending it forward with a recommendation for a GCM. Evidence revealed that the withdrawal from a SPCM may have been prompted by the XO of the Base Commander, the SPCMCA's superior, who reportedly yelled "I want [accused] out of the Marine Corps" at the SPCMCA. The military judge found that there was "no support" for the defense contention that command influence tainted the referral, but the CAAF disagreed, finding insufficient evidence to rule either for or against the defense because the record was not properly developed. Case remanded for a fact-finding proceeding on issue of whether SPCMCA became an accuser.

c. **Violations of orders of the convening authority.**

(1) ***General Rule***. Violation of CA orders does not give the CA a personal interest in the outcome of the case. *United States v. Tittel*, 53 M.J. 313 (C.A.A.F. 2000). The accused was convicted of shoplifting and several other offenses and processed for elimination when he was caught shoplifting again from the base PX. The SPCMCA signed an order barring the accused from entering any Navy PX, which the accused violated. The CAAF adopted the Navy court's reasoning that the order was a routine administrative directive and that the CA was not an "accuser" and that, in any event, the accused waived the issue.

(2) *United States v. Byers*, 34 M.J. 923 (A.C.M.R. 1992) *set aside and remanded*, 37 M.J. 73 (C.M.A. 1993), *rev'd as to sentence*, 40 M.J. 321 (C.M.A. 1994), *sent. aff'd. on remand* (A.C.M.R., 23 Jan. 1995) (unpub.). Accused charged under Article 90, UCMJ for violating commanding general's (CG) order not to operate privately owned vehicle on post. Same CG referred the charge to a GCM. CG was not an accuser and involvement was official and not personal.

(3) *See also United States v. Cox*, 37 M.J. 543 (N.M.C.M.R. 1993). Accused charged under Article 90, UCMJ for violating CA's restriction order. Imposition of pretrial restriction is an "official act" which does not connect the CA so closely with the offense that a reasonable person would conclude he had anything other than an official interest in the matter.

d. **Official involvement does not generally make CA an "accuser."**

(1) *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). Convening authority appointed another General Officer to conduct a command investigation board into an aircraft accident that killed 20 civilians riding a cable car in the Italian Alps. The accused was eventually court-martialed as the pilot of the aircraft. Convening authority closely monitored the investigation, calling the board on a daily basis and making recommendations about areas of further inquiry; charges were not preferred until the investigation was completed. CAAF held the convening authority not become an accuser based on his hands-on involvement in the investigation, noting the repeated contacts did not show a "personal rather than a professional interest."

(2) *United States v. Arindain*, 65 M.J. 726 (A.F. Ct. Crim. App. 2007). The convening authority, an Air Force GCMCA, referred charges of felony murder, rape, and forcible sodomy to a GCM; the accused was only convicted of unpremeditated murder. Three months after the trial, the convening authority wrote an e-mail to the SJA saying: "My opinion, tho: this was not a sexual assault case . . . we all think they had consensual sex and she expired during their rather abnormal acts." E-mail was disclosed to the defense and they submitted it as part of their clemency. On appeal, defense argued the convening authority committed prosecutorial misconduct by referring "charges for which he did not have reasonable grounds to believe that offenses triable by a court-martial had been committed." AFCCA affirmed, reasoning that the SJA provided pretrial advice that provided the GCMCA with an "analysis of the available evidence . . . , and advised him that the evidence supported the specifications and referral was warranted." Also, the Article 32 investigating officer concluded that reasonable grounds existed to believe the accused committed the offenses. "Sufficient information existed at the time of referral for the convening authority to make his decision, and while his choice of language . . . was regrettable, we do not find that [his e-mails] cast doubt on the propriety of the referral . . . ."

(3) *United States v. Diacont*, No. 200501425, 2007 CCA LEXIS 94 (N-M. Ct. Crim. App. Mar. 20, 2007) (unpublished). Convening authority was not personally disqualified when he visited the accused and several others in pretrial confinement and asked them "how they were doing, whether they had called their families recently, and what the command could have done to prevent the circumstances in which they found themselves."

(4) *United States v. Fisher*, 45 M.J. 159 (C.A.A.F. 1996). CA's mid-trial statements critical of defense counsel will not invalidate previous pretrial actions of selecting members and referring case to trial when CA's statements do not indicate that he was other than objective in processing court-martial. CA appeared as a Government witness on a MRE 313 motion to suppress a urinalysis. During the recess, the CA stated that "any lawyer that would try to get the results of the urinalysis suppressed was unethical." No taint attributed to selection process.

(5) ***CA testimony at trial***. *United States v. Gudmundson*, 57 M.J. 493 (C.A.A.F. 2002). Convening authority testified on dispositive suppression motion. Defense did not request that convening authority disqualify himself from taking post-trial action in the case but alleged on appeal that he should have disqualified himself. The CAAF held that the defense waived the issue by failing to raise it below, in light of the fact that the defense was fully aware of the ground for potential disqualification but chose not to raise it either at trial or in its post-trial submissions. In *dicta*, CAAF reviews law in area. "A convening authority's testimony at trial is not *per se* disqualifying, but it may result in disqualification if it indicates that the convening authority has a 'personal connection with the case.' However, 'if the [convening authority's] testimony is of an official or disinterested nature only,' the convening authority is not disqualified."

e. **Prosecutorial zeal *may* make the CA an "accuser."**

(1) General rule. A CA is an "accuser" when the convening authority is so closely connected to the offense that a reasonable person would conclude that the CA had a personal interest in the matter - that it would affect the CA's ego, family, or personal property, or that it demonstrates personal animosity beyond misguided zeal.

(2) *United States v. Voorhees*, 50 M.J. 494 (C.A.A.F. 1999). CA did not become an accuser even though he threatened to "burn" accused if he did not enter into pretrial agreement.

(3) *United States v. Ortiz*, NMCCA No. 20170330 (15 Feb 2018) (unpub.), available at http://www.jag.navy.mil/courts/documents/archive/2018/ORTIZ-201700330-UNPUB.pdf. A reasonable member of the public could conclude that the convening authority had a personal interest in the matter, and therefore was a type 3 accuser, where the convening authority forcefully and repeatedly stated that continued hazing within the unit was a personal affront (e.g., he had been "flipped the bird" by offenders) and that he would personally handle such cases, and had laid out several other extreme measures he would take to ensure that hazing stopped.

f. **CA as secondary victim does not make CA "accuser."** *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999). Accused who was critical of Operation Uphold Democracy in Haiti attempted to "inspect" a prison in order to draw attention to the plight of its inmates. Accused was charged with a variety of offenses, to include disrespect and being absent from his place of duty. He claimed at trial that the entire command was precluded from acting in the case because his behavior so directly challenged his command's actions that the CA, the commanders, and the members had a conflict of interest. CAAF held that the accused's

personal assertion of such a conflict was insufficient; he produced no evidence that the CA had anything other than an official interest in the case, that there was command influence under Article 37, UCMJ, or that the members were disqualified from serving.

4. Effect of Convening Authority disqualification

a. **Before trial**

If *statutorily* disqualified -	If *personally* disqualified -
MAY appoint preliminary hearing officer (PHO)	May NOT appoint PHO
MAY forward with recommendation as to disposition. Recommendation must note **statutory** disqualification.	May forward but MAY NOT make a recommendation as to disposition (must note **personal** disqualification)
May dismiss charges	
May dispose of case via other means	
May convene a SCM, but **NOT** a SPCM or a GCM	

b. **Waived if not raised.** Accuser issue is not jurisdictional. Failure to raise at trial may result in waiver. *United States v. Shiner*, 40 M.J. 155 (C.M.A. 1994) (assuming CA was an accuser, his failure to forward the charges to the next higher level of command was a nonjurisdictional error, which was waived by accused's failure to raise it at court-martial). *See also Tittel*; *United States v. Voorhees*, 50 M.J. 494 (C.A.A.F. 1999). CA did not become an accuser by threatening to "burn" accused if he did not enter into PTA; even if he did, accused affirmatively waived issue at trial.

c. ***The "Junior Accuser" Concept***. Commander who is subordinate to "accuser" may not convene a general or special court-martial. *See* RCM 504(c)(2) and Articles 22(b) and 23(b): "If . . . such an officer is an accuser, the court shall be convened by superior competent authority." *See also United States v. Corcoran*, 17 M.J. 137 (C.M.A. 1984).

5. Post-trial Implications

a. ***CA disqualification***. *United States v. Davis*, 58 M.J. 100 (C.A.A.F. 2003). Accused was convicted of wrongful drug use. In its RCM 1105 submission, the defense alleged that the convening authority publicly commented that "people caught using illegal drugs would be prosecuted to the fullest extent, and if they were convicted, they should not come crying to him about their situations or their families['']." Government did not dispute that the convening authority made the statements. After reviewing the law on disqualification of convening authorities to take post-trial action, and applying a *de novo* standard of review, the CAAF held that the statements displayed an inelastic attitude toward the performance of the convening authority's post-trial responsibilities that disqualified him from taking post-trial action on accused's case. The comments "lacked balance and transcended a legitimate command concern for crime or unlawful drugs." Action set aside, record returned to the Air Force TJAG for a new review and action before a different convening authority.

b. ***Legal officer disqualification***. *United States v. Edwards*, 45 M.J. 114 (C.A.A.F. 1996). An O-4 officer who served as the legal officer for the case in the pretrial and post-trial stages was disqualified from preparing the post-trial recommendation. Officer preferred 3 charges and 31 specifications of larceny, forgery, and false-identity offense against accused; conducted a videotaped interrogation of accused that resulted in a confession; acted as evidence custodian during the pretrial stages of the court-martial; and defense counsel only became aware of legal officer's involvement after trial and completion of post-trial recommendation.

III. PANEL SELECTION

A. ***In general***. Virtually any member of the Armed Forces is eligible to serve on a court-martial panel. However, the CA may only select those members who, in the CA's personal opinion, are "best qualified" in terms of criteria set out in Article 25, UCMJ**: *Age, Experience, Education, Training, Length of Service and Judicial Temperament*.** *United States v. Hodge*, 26 M.J. 596 (A.C.M.R. 1988), *aff'd*, 29 M.J. 304 (C.M.A. 1989) (holding cross sectional representation of military community on court-martial panel is not required by the Constitution); *see also United States v. Carter*, 25 M.J. 471 (C.M.A. 1988) (holding no Sixth Amendment right that membership reflect a representative cross-section of the military population).

B. **Challenges to Panel Selection Process**

1. Proving the use of inappropriate criteria or command influence in panel selection.

a. Traditional Approach.

(1) ***The burden***. The defense shoulders the burden of establishing the improper exclusion of qualified personnel from the selection process. Once the defense establishes such exclusion, the Government must show by competent evidence that no impropriety occurred when selecting the accused's court-martial members. *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000).

(2) ***The standard of proof***. Generally, the standard on both sides is a preponderance of the evidence. RCM 905(c)(1).

b. Emerging Trend

(1) ***The burden.*** Panel stacking cases will be evaluated using UCI as a framework to determine whether there was some evidence of improper selection. *Riesbeck* evaluated a panel selection issue under the prism of apparent UCI. In that case, the court found that it was important to the convening authority to have a large number of female panel members. The court evaluated whether the accused had raised the issue, after which the burden shifted to the government to prove beyond a reasonable doubt that there was a benign motive for the selection. *United States v. Riesbeck*, 77 MJ 154 (CAAF 2018). To raise an issue under Article 37, UCMJ, the accused must show "some evidence" (i.e., facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings). *United States v. Biagase,* 50 M.J. 143, 150 (C.A.A.F. 1999). Once the issue is raised at the trial level, the burden shifts to the Government, which may either show that there was no unlawful command influence or show that the unlawful command influence will not prejudice the proceedings. *Id.* The court must be persuaded beyond a reasonable doubt that the findings and sentence will not be affected by command influence. *Id.* at 151.

(2) Command influence is, generally, harder to establish, but, once established, it is harder for the Government to disprove prejudice to the accused. *United States v. Riesbeck*, 77 MJ 154 (CAAF 2018)

c. Two general methods of proof.

(1) **Counsel may attack the array.** *See, e.g., United States v. Nixon*, 33 M.J. 433 (C.M.A. 1991) (panel of E-8s and E-9s creates an appearance of evil). Second, counsel can mount statistical attacks on the array. *See, e.g., United States v. Bertie*, 50 M.J. 498 (C.A.A.F. 1999) (disproportionate number of high-ranking panel members did not create presumption of impropriety in selection). *See also United States v. Fenwrick*, 59 M.J. 737 (A.F. Ct. Crim. App. 2003) (holding "the military judge may rely upon statistical evidence to discern a 'subconscious' desire by the convening authority to improperly exclude certain grades, [but] such statistical evidence must clearly indicate such an exclusion").

(2) **Attacks on the nomination and selection memoranda**. *See United States v. Upshaw*, 49 M.J. 111 (C.A.A.F. 1998); *United States v. Roland*, 50 M.J. 66 (C.A.A.F. 1999); and *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000).

2. **The convening authority's responsibility to personally select members cannot be delegated**. *United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978); *United States v. McCall*, 26 M.J. 804 (A.C.M.R. 1988) (military judge said "it sounds like somebody has already selected a list of people to take in to the convening authority and have him just kind of stamp it;" ACMR agreed). *But see United States v. Benedict*, 55 M.J. 451 (C.A.A.F. 2001). The Chief of Staff (CoS) submitted a final list of members to the CA, who then personally signed the convening order without asking any questions or making any changes. Setting aside the decision of the Coast Guard Court of Criminal Appeals, the CAAF held that the CA personally selected the nine prospective members set forth by the CoS. See Judge Effron's dissent for a comprehensive discussion of the history of Article 25, UCMJ.

a. *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991). The division deputy adjutant general gathered a list of court member nominees who, in his opinion, supported a command policy of "hard discipline." Staff members can violate the provisions of Article 37, UCMJ. Their errors will likely spillover to the CA.

b. ***Interlopers as a jurisdictional defect***. *United States v. Peden*, 52 M.J. 622 (A. Ct. Crim. App. 1999). Where Member A was selected by CA but Member B was inadvertently placed on convening order, Member B was an "interloper" whose presence constituted jurisdictional error. Convening authority not permitted to ratify presence of Member B after the fact. Sentence set aside (accused had pleaded guilty).

3. **If members of another command are selected, they must also be personally selected by the convening authority**. *United States v. Gaspard*, 35 M.J. 678 (A.C.M.R. 1992) Accused was assigned to Fort Polk. Commanding General, Fort Polk, was disqualified after talking to victim's parents, so case convened by Commander, III Corps and Fort Hood, who referred case to a Fort Polk court-martial convening order (CMCO) with Fort Polk members. Issue on appeal was whether Corps CG personally selected the Fort Polk members. If not, court-martial was "fatally flawed." Case remanded for *DuBay* hearing. *But see* successor in command cases *supra*.

C. **Challenges to Panel Selection Criteria**

1. ***In general***. The CA must use the Article 25 criteria to select panel members. Article 25(d)(2) directs the convening authority to personally select members who are "best qualified" based on six criteria: "age, education, training, experience, length of service, and judicial

temperament." *United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008). Much litigation has revolved around the CA's supplementing the Article 25 criteria with other criteria. Some of these criteria are discussed below. Although *Bartlett* did not explicitly overrule any precedent regarding the use of non-Article 25 criteria for the purposes of either including or excluding panel members, practitioners should exercise extreme caution in supplementing the Article 25 criteria.

2. ***Cross-Sectional Representation***. The commander may seek to have the panel's membership reflect the military community. *See, e.g., United States v. Smith*, 27 M.J. 242, 249 (C.A.A.F. 1988). "[A] commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community – such as blacks, Hispanics, or women – be excluded from service on court-martial panels." CMA tacitly accepted as valid the CA's effort "to have a mix of court members with command or staff experience" to have "some female representation on the panel."

3. Inclusion Criteria

a. ***By Race***. Convening authority may include members based upon their race so long as the motivation is compatible with Article 25, UCMJ. *United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964) (as to black NCO, it is exclusion that is prohibited, not inclusion). *See also United States v Smith, infra*.

b. ***By Gender***. Permissible if for proper reason.

(1) *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988). CA may take gender (or race) into account in selecting court members if seeking in good faith to select that a court-martial panel that is representative of the military population. But, evidence indicated a hidden policy of ensuring two "hardcore" females were on all sexual assault cases based on their "unique experience."

(2) *United States v. Lewis*, 46 M.J. 338 (C.A.A.F. 1997). In a case involving attempted voluntary manslaughter and assault on the accused's wife, the convening authority did not "stack" the panel with female members when, in response to a defense request for enlisted members, two of original five female officers were relieved and one female enlisted member was added, resulting in a panel of five male and four female members. Original panel had ten members, five of whom were females.

(3) *United States v. Riesbeck*, 77 MJ 154 (CAAF 2018). Selection of a large number of females raised the appearance of court-martial stacking in a sexual assault case; once issue was raised, the government failed to rebut because it could introduce no evidence of a benign motive.

c. ***By Duty Position.*** Convening authority may select based upon duty position (e.g., commanders) in a good faith effort to comply with Article 25 criteria.

(1) *United States v. White*, 48 M.J. 251 (C.A.A.F. 1998). CA issued a memorandum directing subordinate commands to include commanders, deputies and first sergeants in the court member applicant pool. Eight of ten panel members for the accused's trial were in command positions. Court held CA did not engage in court packing absent evidence of improper motive or systematic exclusion of a class or group of candidates. Court noted "best qualified" selection for command is close to "best qualified" under Article 25. *See* Effron, J., and Sullivan, J., concurring in the result, but criticizing the majority's willingness to equate selection for command with selection for panel duty.

(2) *United States v. Cunningham*, 21 M.J. 585 (A.C.M.R. 1985) (holding preference for those in leadership positions is permissible where CA articulates Article 25 criteria; 6 commanders and 3 XOs who were 1 COL, 3 LTCs, 2 MAJs, 2 CPTs, 1 LT); *see also*

United States v. Lynch, 35 M.J. 579 (C.G.C.M.R. 1993), *rev'd on other grounds*, 39 M.J. 223 (C.M.A. 1994) (holding selection process that limited members to those "with significant seagoing experience" met the requirements of Article 25, specifically the "experience" criterion given the charged offenses).

d. **By Random.** *See United States v. Dowty*, 60 M.J. 163 (C.A.A.F. 2004). Accused contended that, by soliciting volunteers to serve as court members and then drafting a list of nominees for the CA's approval, the ASJA violated the letter and spirit of Article 25, UCMJ. Court upheld conviction in face of "potentially troubling" panel selection where CA personally selected members despite unorthodox nomination process. While it was error to nominate members based on an irrelevant variable, such as volunteering, the error did not prejudice the accused. Note: accused and counsel were "given full opportunity to question potential members in open court to develop any possible biases or preconceptions, and, through appropriate causal and peremptory challenges, removed any potential member who they had reason to believe would not be capable, fair, and impartial." Also, by time of accused's trial, only three "volunteers" remained on seven-member panel.

e. **By seniority.** *United States v. Melson*, No. 36523, 2007 CCA LEXIS 372 (A.F. Ct. Crim. App. Sep. 14, 2007) (unpublished). At his trial, the accused moved to dismiss the charges and specifications, alleging that the GCMCA improperly selected the panel by intentionally selecting senior members to serve. Five of the ten members were colonels (O-6s) and, although the case was tried at a different base, some of his staff were chosen as members. The GCMCA testified that he "wanted to pick members whom he knew had the best judgment and experience." He also said it "was the most serious case he had ever handled." Furthermore, he wanted to ensure that he had officers with the "requisite maturity and experience." The issue was addressed at length at trial and the military judge denied the motion, finding that the CA had properly applied Article 25. The AFCCA affirmed, stating that every panel is essentially "hand-picked." However, "[w]hat is impermissible is for the convening authority to select members with a view toward influencing the outcome of the case." The court found that the CA gave the panel selection in the case "a great deal of time and consideration . . . [and] did so in an attempt to ensure justice, not subvert it." Therefore, the accused did not satisfy his burden to show that the members were improperly selected.

4. Systematic exclusion of otherwise qualified personnel.

a. Motive. Generally, where the accused challenges the panel because the CA has allegedly excluded otherwise qualified people (e.g., she prefers to select only those who have command experience), we look to the *motivation* of the convening authority. If the motivation is compatible with Article 25, UCMJ, the selection may not be disturbed. Where the convening authority appoints members to achieve a particular result (e.g., to guarantee a conviction, or a harsh sentence), the CA has engaged in "court stacking" or "court packing." This is not a jurisdictional challenge *per se* but rather a species of command influence, in violation of Article 37. If the accused alleges the CA has engaged in court stacking, the court will look to the motivation and intent of the CA.

b. *United States v. Simpson*, 55 M.J. 674 (A. Ct. Crim. App. 2001). *aff'd*, 58 M.J. 368 (C.A.A.F. 2003). CA's deliberate exclusion of personnel assigned to the Army's Ordinance Center and School did not constitute unlawful "court packing" where the CA's motive was to find an unbiased and objective panel.

c. *United States v. Brocks*, 55 M.J. 614 (A.F. Ct. Crim. App. 2001). Base legal office intentionally excluded all officers from the Medical Group from the nominee list, because all four alleged conspirators and many of the witnesses were assigned to that unit. Citing *United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998), "[a]n element of unlawful court

stacking is improper motive. Thus, where the convening authority's motive is benign, systematic inclusion or exclusion may not be improper." Held: Exclusion of Medical Group officers did not constitute unlawful command influence. *But see United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008) (invalidating Army regulation that exempted certain special branches from court-martial duty, including medical personnel).

d. In *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991), the court found that the Government's dissatisfaction with the panel's unusual sentences actually meant dissatisfaction with findings of not guilty or lenient sentences. The court held the intentional manipulation of Article 25 criteria to achieve particular result in cases is a clear violation of Articles 25 and 37, UCMJ.

e. *United States v. Smith*, 27 M.J. 242 (CMA 1988) (legal office policy of placing "hardcore" female members on panel in sex cases to achieve a particular outcome was ruled inappropriate); *see also United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991) (court packing occurred where functionary prepared lists of panel members based upon notions of hard discipline).

f. **Special case of law enforcement personnel.** *United States v. Swagger*, 16 M.J. 759 (A.C.M.R. 1983) announced that "individuals assigned to military police duties should not be appointed as members of courts-martial. Those who are the principal law enforcement officers at an installation must not be." *Bartlett* invalidated an Army regulation prohibiting certain occupational specialties from serving as court-martial members, holding that Article 25 was the sole criteria for panel member selection. However, *Bartlett* did not explicitly overrule *Swagger*, and cases since *United States v. Bartlett* have not revisited this issue.

(1) *United States v. Dale*, 42 M.J. 384 (C.A.A.F. 1995). Accused charged with sexual offenses against a child. Member of panel (Air Force 0-3) was Deputy Chief of Security Police and had sat in on criminal activity briefings with base commander. Focus is on the perception and appearance of fairness. Member was intimately involved day-to-day law enforcement on the base; "the embodiment of law enforcement and crime prevention." MJ's denial of challenge for cause reversed and case set aside.

(2) *United States v. Fulton*, 44 M.J. 100 (C.A.A.F. 1996). Military judge did not abuse discretion by denying challenge for cause against member who was Chief of Security Police with Bachelor of Arts in criminal justice, where member only had contact with accused's commander on serious matters requiring high level decisions, and member had no prior knowledge of accused's misconduct. Cf. Dale, above.

(3) *United States v. Berry*, 34 M.J. 83 (C.M.A. 1992). Member was command duty investigator for NAS Alameda security and knew and worked with key Government witness. Military judge said, "I don't think he said anything that even remotely hints that he could not render a fair judgment in this case." Abuse of discretion in the face of mere naked disclaimers by member. Reversed. *But see United States v. McDavid*, 37 M.J. 861 (A.F.C.M.R. 1993) (no "per se" rule of exclusion for security policemen).

5. ***Inclusion or Exclusion by Rank.*** Rank is not a criterion listed under Article 25, UCMJ. The CA may not select members junior to an accused, but, aside from that one qualification, **the convening authority may not use rank as a device for deliberate and systematic exclusion or inclusion** of otherwise qualified court members. *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975) (policy of excluding all lieutenants and WOs); *but see United States v. Yager*, 7 M.J. 171 (C.M.A. 1979) (exclusion of persons in grades E-2 and E-1 permissible).

a. **Disproportionately senior panel.** Despite the cases holding that the composition of the panel can create an "appearance of evil," more recent cases have disallowed challenges to the

panel based solely on its composition at trial. *United States v. Bertie*, 50 M.J. 489 (C.A.A.F. 1999) (disproportionate number of high-ranking panel members did not create presumption of impropriety in selection).

b. **Administrative selection error.** *United States v. Upshaw*, 49 M.J. 111 (C.A.A.F. 1998) (good faith administrative error resulting in exclusion of otherwise eligible members (E6s) was not error). ***But see Kirkland***, below.

c. **Nominee solicitation.**

(1) *United States v. Roland*, 50 M.J. 66 (C.A.A.F. 1999) (SJA's memo soliciting nominees E-5 to O-6 was not error). ***But see Kirkland***, below.

(2) *United States v. Ruiz*, 46 M.J. 503 (A.F. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 340 (C.A.A.F. 1998). Convening authority did not improperly select members based on rank when, after rejecting certain senior nominees from consideration for valid reasons, he requested replacement nominees of similar ranks to keep the overall balance of nominee ranks relatively the same.

d. **Excluding junior NCOs and enlisted members.**

(1) *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000), *pet. for clarification denied*, 54 M.J. 211 (C.A.A.F. 2000). Despite evidence that CA understood and applied Article 25, sentence set aside where panel selection documents appeared to exclude NCOs below E-7. Panel selection documents may give rise to an appearance of impropriety where documents make it seem that rank was a criterion in panel selection.

(2) *United States v. Smith*, 37 M.J. 773 (A.C.M.R. 1993). In handwritten note, convening authority directed major subordinate commanders to provide "E7" and "E8" members for membership on court-martial panel. ACMR found that selection was based solely on rank in violation of Article 25, UCMJ, and that the improper selection deprived the court of jurisdiction. Findings and sentence set aside.

(3) *United States v. Nixon*, 33 M.J. 433 (C.M.A. 1991). A panel consisting of only E-8s and E-9s creates an appearance of evil and is probably contrary to Congressional intent. The CG's testimony, however, established that he had complied with Article 25 and did not use rank as a selection criterion. Court noted close correlation between the selection criteria for court-martial members in Article 25(d)(2), UCMJ and the grade of a commissioned or non-commissioned officer. "Indeed, because of that correlation, there is a danger that, in selecting court members, a convening authority may adopt the shortcut of simply choosing by grade." Resulting blanket exclusion of qualified officers or enlisted members in lower grades violates Congressional intent.

(4) *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998). An Air Force convening authority violated Article 25 when, after sending a memorandum to subordinate commands directing them to nominate "officers in all grades and NCOs in the grade of master sergeant or above for service as court-members," he failed to select members below the rank of master sergeant (E-7). The convening authority, while testifying that he had no intent to violate Article 25, also testified that he had never selected a member below the rank of E-7. The court held the CA violated Article 25 by systematically excluding ranks E-4 to E-6. The findings and sentence were set aside. *This case provides an excellent review of the case law interpreting Article 25, UCMJ, and court member selection.*

e. **Excluding Lieutenants**. *United States v. Fenwrick*, 59 M.J. 737 (A.F. Ct. Crim. App. 2003). Defense raised motion to dismiss for systematic and improper exclusion of lieutenants

from panel membership. The GCMCA testified on the motion regarding his selection of members IAW Article 25 criteria. The military judge, however, determined the GCMCA had systematically and improperly excluded lieutenants because in the thirteen courts-martial of the fiscal year only two lieutenants were selected and none served. The military judge granted defense's motion and ordered the GCMCA to select new panel members free from systematic exclusion of lieutenants. The GCMCA selected a new panel, without lieutenants, causing the military judge to dismiss the case with prejudice and the Government appealed. On appeal, AFCCA held "the military judge may rely upon statistical evidence to discern a 'subconscious' desire by the convening authority to improperly exclude certain grades, [but] such statistical evidence must clearly indicate such an exclusion." Such clear evidence was lacking in this case where lieutenants were not excluded from the nomination process, the GCMCA testified he applied the Article 25 criteria, and the GCMCA had previously selected six lieutenants in fifteen courts-martial in the prior fiscal year. The court recognized "it is not improper, during the selection process, for a convening authority to look first to officers and enlisted members senior in rank because they are more likely to be the best qualified under Article 25."

IV. PANEL CHARACTERISTICS

A. **Required Numbers.**

1. **2016 MJA.** 12 members for a capital case, 8 members for a GCM, 4 members for a SPCM.

2. **Legacy system.** Three members for SPCM, five members for GCM. *Ballew v. Georgia*, 435 U.S. 223 (1978). The legacy system called these numbers a "quorum."

3. **Constitutionality.** A "jury" of less than 6 is unconstitutional in the civilian context, but has been held constitutional in military courts. *United States v. Wolff*, 5 M.J. 923 (N.C.M.R. 1978), *pet. denied*, 6 M.J. 305 (C.M.A. 1979) (holding Sixth Amendment right to trial by "jury" does not apply to courts-martial); *United States v. Hutchinson*, 17 M.J. 156 (C.M.A. 1984).

4. **Capital cases.** Article 25a, UCMJ requires a minimum of twelve panel members in military capital cases, except in certain circumstances. The change was effective for offenses committed after 31 December 2002.

B. **Forum Election**

1. Options

a. **Officer panel.** Both officers and enlisted defendants may be tried by officer members; however, enlisted members are ineligible to serve as a member in the trial of an officer.

b. **Enlisted panel.** Enlisted members may elect to be tried by officer members, or by a panel with at least 1/3 enlisted members. In the event the accused fails to elect forum, the court-martial will be composed of the members the convening authority detailed to the court. Under the legacy system, the default was an officer system; however, the 2016 MJA contains no such default.

2. Request for trial by judge alone must be voluntary.

a. Article 25 contained a default to an officer panel in the event the accused did not elect another composition. This default right could be waived by the accused in a request for trial by judge alone. In *United States v. Follord*, No. 20020350 (A. Ct. Crim. App. Feb. 15, 2005) (unpub), the accused, a CW2, did not make a knowing and voluntary waiver of his statutory right to trial by five officer members because of the following errors: (1) his executed PTA erroneously listed one of his three forum options as a trial by one-third enlisted, (2) his

request for military judge alone stated that any trial composed of officers would be "not of his unit," and (3) military judge advised the accused that if he requested officer members at his general court-martial that the panel must comprise "at least three members." The court stated the host of errors "constitutes a lack of substantial compliance with Article 16, UCMJ." Findings and sentence set aside.

C. **Panel with Enlisted Representation**

1. **General**. An enlisted accused may request trial by a panel that includes enlisted members. Article 25 requires requests for enlisted court members to be made orally on the record or in writing.

2. **How requested.** The request should be written and signed by the accused, or made orally on the record. RCM 903(b)(1). Failure to make the request in writing or on the record is procedural, not jurisdictional and will be tested for prejudice. *United States v. Alexander*, 61 M.J. 266 (C.A.A.F. 2005). ("[The] right being addressed and protected in Article 25 is the right of an accused servicemember to select the forum[,] . . . [t]he underlying right is one of forum selection, not the ministerial nature of its recording.") See also *United States v. Morgan*, 57 M.J. 119 (C.A.A.F. 2002) (military judge erred by not obtaining on record defendant's personal request for enlisted members to serve on court-martial, but error was not jurisdictional, and under circumstances, it did not materially prejudice substantial rights of defendant); *United States v. Townes*, 52 M.J. 275 (C.A.A.F. 2000) (military judge had duty to obtain personal election from accused regarding the forum's composition, but where no coercion was alleged, the error did not materially prejudice the accused's substantial rights); *United States v. Andreozzi*, 60 M.J. 727 (A. Ct. Crim. App. 2004) (two *DuBay* hearings ordered to determine if the accused personally selected trial by one-third enlisted members, found substantial compliance with procedural rules where relevant circumstances included: the military judge telling the accused his forum rights, the defense counsel submitting trial by enlisted members paperwork to the military judge, the defense counsel's testimony that his SOP was to discuss and explain forum rights to the accused and to follow the accused's wishes, the accused's presence in the courtroom when the panel was assembled and voir dired, and the accused's active participation in his own defense.);

3. **Rejecting request for enlisted members**. *United States v. Summerset*, 37 M.J. 695 (A.C.M.R. 1993). Military judge abused his discretion when he denied as untimely accused's request for enlisted members made four days prior to trial. He made no findings of fact regarding unnecessary expense, unacceptable delay, or significant inconvenience. See RCM 903(a)(1) and (e).

4. Member Requirements

a. **At least one-third enlisted**. Failure to assemble court of at least one-third enlisted members is jurisdictional error necessitating setting aside panel-adjudged sentence. *United States v. Craven*, 2004 CCA LEXIS 19 (A.F. Ct. Crim. App. Jan 21, 2004) (unpub.) (following challenges for cause and peremptory strikes, enlisted members constituted only 28.6 percent (five officer and two enlisted) of membership of court).

b. **Same unit no longer required**. The 2016 MJA removed the requirement that an enlisted member not be from the same company-sized unit as the accused. Under the legacy system, Article 25(c)(1), UCMJ, required that enlisted members should not be from the same company-sized "unit" as the accused; however, it was not a jurisdictional defect. *United States v. Milam*, 33 M.J. 1020 (A.C.M.R. 1991) (findings and sentence set aside where two enlisted members of the panel were assigned to the same company-sized unit as accused where defense challenged for cause); *United States v. Wilson*, 21 M.J. 193 (C.M.A. 1986).

However, failure to object waives the issue. *United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991), review denied, 33 M.J. 185 (C.M.A. 1991).

c. **Seniority**. When it can be avoided, court members should not be junior in rank to the accused. Failure to object results in waiver. *United States v. McGee*, 15 M.J. 1004 (N.M.C.M.R. 1983); *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993) (Waiver where defense discovered court member was junior to accused during deliberations on findings and remained silent until the morning after findings were read in open court). *See also* RCM 503(a) discussion.

V. PANEL MEMBER EXCUSAL

A. **Excusal**.

1. Delegation of excusal authority. Prior to assembly, RCM 505(c)(1) allows delegation to staff judge advocate or convening authority's deputy authority to excuse up to one-third (⅓) of the members. See AR 27-10, para. 5-18c (11 May 2016). *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998). The excusal of more than one-third of the members of a panel by the convening authority's delegate rises to the level of reversible and jurisdictional error only if the defense objects to the excusals and substitutions of members at trial, and the record somehow indicates that the accused was deprived of a right to make causal or peremptory challenges. In *Cook*, the accused was convicted of violating a lawful general regulation and possession of marijuana with intent to distribute. Prior to trial, the SJA excused five of nine members who were detailed to sit as members. The accused suffered no prejudice because he failed to object to the excusals at trial.

2. Excusal after assembly. Excusal after assembly can occur only as the result of a challenge or by the military judge for good cause shown. *United States v. Latimer*, 30 M.J. 554 (A.C.M.R. 1990) (panel member's upcoming appointment for physical examination was not "good cause").

3. A sleeping member is good cause for excusal. *United States v. Boswell*, 36 M.J. 807 (A.C.M.R. 1993). Military judge could have rehabilitated member by reading portions of transcript. Not an abuse of discretion, however, to excuse. What if excusal dropped court below quorum? Mistrial? *See* RCM 806(d)(1).

VI. REPLACEMENT MEMBERS

A. ***Sloppy paper trails***. *United States v. Gebhart*, 34 M.J. 189 (C.M.A. 1992). "The administration of this court-martial...can best be described as slipshod." "Such a lack of attention to correct court-martial procedure cannot be condoned." The amended CMCO mistakenly removed member who actually sat on panel. Order also included member who was not present without explanation for the absence. The amending order also incorrectly referred to the original order by the wrong number. Held: errors were administrative and not jurisdictional. Issue was waived by defense failure to object. *See also United States v. Sargent*, 47 M.J. 367 (C.A.A.F. 1997) and *United States v. Larson*, 33 M.J. 715 (A.C.M.R. 1991).

B. ***Triggering mechanisms***. *United States v. Mack*, 58 M.J. 413 (C.A.A.F. 2003). SJA memorandum approved by convening authority concerning operation of convening order provided that, when accused requested panel of at least one-third enlisted members, alternate enlisted members would be automatically detailed without further action by the convening authority if, among other triggering mechanisms, "before trial, the number of enlisted members . . . falls below one-third plus two." Prior to trial, two officers and one enlisted member were excused, leaving five officer and four enlisted members (a total of nine members, of which one-third plus two, or five, were enlisted). At trial, two additional enlisted members sat, which appeared to be inconsistent with the above triggering

mechanism. The defense did not object. ACCA remanded on its own for a *DuBay* hearing concerning the presence of the additional two enlisted members. CAAF held that, "When a convening authority refers a case for trial before a panel identified in a specific convening order, and the convening order identifies particular members to be added to the panel upon a triggering event, the process of excusing primary members and adding the substitute members involves an administrative, not a jurisdictional matter. Absent objection, any alleged defects in the administrative process are tested for plain error." Here there was no error. Excusal of one officer and the one enlisted member prior to the excusal of the other officer would have reduced the panel to ten members, five of who were officers and five of whom were enlisted. This triggered the one-third plus two triggering event. Even if there was error in the triggering event, so long as the members were listed on the convening order and the panel met the one-third requirement, any error in the operation of the triggering mechanism was administrative, not jurisdictional.

C. ***Court-Martial Convening Orders and harmless error***. *United States v. Adams*, 66 M.J. 255 (C.A.A.F. 2008) (even though amending CMCO included plain language that a new court-martial was "hereby convened," court found mistake was a mere harmless administrative error).

VII. PANEL MEMBERS ROLE AT TRIAL

A. **Call witnesses and receive evidence.** Article 46, UCMJ; RCM 921(b); RCM 801(c) and discussion. *See also United States v. Story*, No. 20061014 (A. Ct. Crim. App. Dec. 2, 2009) (unpublished). During the accused's trial, the members were on a two-hour break after both sides had rested but before closing arguments and instructions. When the panel returned, a member asked to call an additional witness. The military judge responded, "The answer to that is, you've heard all the evidence in this case." The ACCA held the military judge erred.

1. RCM 801(c) similarly provides: "The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge." The Discussion to RCM 801(c) notes the members may request a witness be recalled or that a "new witness be summoned."

2. MRE 614(a) also notes the military judge may call (or recall) witnesses "at the request of the members."

B. **Reopen proceedings.** RCM 921(b) expressly allows the members to "request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced" though the rule grants the military judge latitude "in the exercise of discretion" to grant or deny such request.

C. **Standard to deny request.**

1. **Lampani factors.** In *United States v. Lampani*, 14 M.J. 22, 26 (C.M.A. 1982), the COMA provided a non-exclusive list of factors a military judge must consider before denying a member's request for additional evidence: "Difficulty in obtaining witnesses and concomitant delay; the materiality of the testimony that a witness could produce; the likelihood that the testimony sought might be subject to a claim of privilege; and the objections of the parties to reopening the evidence are among the factors trial judge must consider." In this case, the military judge did not consider these factors (or any other factors) on the record, which was an abuse of discretion.

2. *See also United States v. Lents*, 32 M.J. 636 (A.C.M.R. 1991). Court member questions were essentially a request to call witnesses. Court members may request witnesses be called or recalled. The military judge must weigh difficulty, delay, and materiality; consider whether a privilege exists; and whether the parties object; *United States v. Lampani*, 14 M.J. 22 (C.M.A. 1982) (even after deliberations have begun members may request additional evidence).

D. **Alternate members**

1. Alternate members are members of the court-martial and have all the same duties as members, except that they do not deliberate. RCM 502. Alternate members become members only if a member is excused.

VIII. IMPANELMENT

A. **General**

1. Article 29 provides a new process for impaneling a court-martial. Under the 2016 MJA, the additional step of impanelment is necessary to ensure that the membership of the court conforms to the elections of the accused and the numerical requirements of Article 16.

2. RCM 912A and 912B provide a random numbering scheme by which the court-martial is to determine the members and the alternates (if any). Any members not needed are then excused.

IX. MILITARY JUDGES

A. **General.**

1. Requirement for a military judge.

a. **Legacy system.** Article 26 requires that a military judge be detailed to each general court-martial. Article 19 imposes additional sentencing limitations at a special court-martial where no military judge has been detailed. Service regulations may have additional requirements. See, e.g., AR 27-10, Paragraph 5-28(a) (11 May 2016) (requiring detail of a military judge to all special courts-martial).

b. **2016 MJA**. The requirement for a military judge is baked in to the definition of what a court-martial is. No court-martial may proceed without a military judge.

2. **What constitutes "presence" at trial.** *United States v. Reynolds*, 44 M.J. 726 (A. Ct. Crim. App. 1996), *aff'd*, 49 M.J. 260 (C.A.A.F. 1998). The physical absence of the military judge at a pretrial proceeding does not deprive an accused of the structural due process protections created by Articles 26 and 39, UCMJ, and RCM 803, 804, and 805. The military judge held arraignment proceedings by speakerphone. The military judge was at Fort Stewart while the accused, DC and TC were in a courtroom at Fort Jackson. Military judge advised the accused of all rights and the accused consented to the speakerphone procedure. The military judge was not "present" but the accused's due process rights were not violated. The speakerphone procedure lasted for just twelve minutes of a seven hour trial and the judge was physically present for the remainder of the trial. Note, RCM 804(b) has since been amended to allow for "the use of audiovisual technology" for Article 39(a) sessions, subject to authorization by the applicable Service Secretary.

3. ***Accused's forum selection***. Trial before military judge alone.

a. ***Request***. RCM 903(b)(2). Trial by judge alone may be requested orally or in writing by the accused. *See also United States v. Wright*, 5 M.J. 106 (C.M.A. 1978). Accused may withdraw request for good cause.

(1) ***Doctrine of Substantial Compliance***. *United States v. Mayfield*, 45 M.J. 176 (C.A.A.F. 1996). The absence of a written or oral request for trial by military judge alone did not establish a substantial matter leading to jurisdictional error based on the dialogue at trial, the absence of a defense objection, and accused's post-trial Article 39(a) confirmations of his desire to be tried by judge alone. A post-trial session is permissible

to cure jurisdictional errors created by the failure to obtain an accused's request for trial by military judge alone. Conviction affirmed.

(2) *United States v. Turner*, 47 M.J. 348 (C.A.A.F. 1997). A written request for trial by military judge alone, which counsel made and submitted before trial, and then confirmed orally at an Article 39a session with the accused, present substantially complies with Article 16, UCMJ. While the military judge erred in failing to obtain an oral statement of selection of the forum from the accused, the error did not materially prejudice the accused.

(3) *United States v. Seward*, 49 M.J. 369 (C.A.A.F. 1998). An accused's forum request from a previous court-martial that was terminated by mistrial cannot be used to support a forum request at a subsequent court-martial. However, accused suffered no prejudice under Article 59 because his request for trial by military judge alone was apparent from the pretrial agreement (forum selection was a term), and there was a written request for the same even though offered after completion of the sentencing proceedings.

(4) *United States v. Alexander*, 61 M.J. 266 (C.A.A.F. 2005). Military judge advised the accused of his forum selection rights, which accused requested to defer. During a later proceeding, military judge stated that he was told an enlisted panel would be hearing the case and defense did not object. The accused, however, failed to state in writing or on the record his request for enlisted members in violation of Article 25, UCMJ and RCM 903(b)(1). The CAAF held that the error in the accused failing to personally select forum on the record is a procedural, as opposed to jurisdictional, issue. The court stated "[the] right being addressed and protected in Article 25 is the right of an accused servicemember to select the forum[,] . . . [t]he underlying right is one of forum selection, not the ministerial nature of its recording." The CAAF held that the record reflected that the accused selected court-martial by panel members and the accused failed to show that the error in recording his forum selection resulted in any prejudice.

(5) *United States v. Goodwin*, 60 M.J. 849 (N-M. Ct. Crim. App. 2005). Accused failed to state in writing or orally on the record his request for a judge alone trial as required by Article 16, UCMJ. Military judge failed to advise the accused of his forum rights and the only evidence of his intent existed was a single sentence in the pretrial agreement, to request trial by judge alone (a term the military judge failed to discuss with the accused). N-MCCA held the failure to advise the accused of his forum rights did not substantially comply with Article 16, UCMJ, and found the error was not harmless. Findings and sentence set aside.

(6) *United States v. Follord*, No. 20020350 (A. Ct. Crim. App. Feb. 15, 2005) (unpub). The accused, a CW2, did not make a knowing and voluntary waiver of his statutory right to trial by five officer members because of the following errors: (1) his executed PTA erroneously listed one of his three forum options as a trial by one-third enlisted, (2) his request for military judge alone stated that any trial composed of officers would be "not of his unit," and (3) military judge advised the accused that if he requested officer members at his general court-martial that the panel must comprise "at least three members." The court stated the host of errors "constitutes a lack of substantial compliance with Article 16, UCMJ." Findings and sentence set aside.

b. **Requests submitted after assembly of the court-martial allowed if justified by the circumstances.** *United States v. Jungbluth*, 48 M.J. 953 (N-M. Ct. Crim. App. 1998). Accused pled guilty to wrongful use of marijuana on divers occasions before a properly assemble court consisting of a panel of officer members. A military judge was forced to declare a recess after the TC became ill. At the next session of court the parties presented the

military judge with a PTA. Under the PTA, the military judge *dismissed the officer panel*, conducted a providence inquiry, entered findings, and adjudged a sentence. A military judge can lawfully approve a request for trial by military judge alone *after assembly* if justified by the circumstances. RCM 903 does not expressly prohibit approval of after assembly forum requests, and in this case, military judge approved the request under the terms of a pretrial agreement. The agreement was mutually beneficial to both sides and the accused suffered no prejudice.

4. A Right?

a. *United States v. Ward*, 3 M.J. 365 (C.M.A. 1977). There is no *right* to a judge alone trial. *But see United States v. Butler*, 14 M.J. 72 (C.M.A. 1982) (military judge must state reason for denial of judge alone request).

b. *United States v. Webster*, 24 M.J. 96 (C.M.A. 1987). Denial of a timely motion for trial by judge alone cannot be based on judge's desire to discipline counsel nor to provide court members with experience.

c. *United States v. Edwards*, 27 M.J. 504 (C.M.A. 1988). Once military judge ruled he was not disqualified from hearing case, he abused his discretion by denying accused right to trial by judge alone, as requested.

d. *United States v. Dodge*, 59 M.J. 821 (A.F. Ct. Crim. App. 2004), rev'd on other grounds, 60 M.J. 368 (C.A.A.F. 2004) (holding RCM 903(c)(2)(B) does not create a "concomitant absolute right" to be tried by military judge alone).

B. **Qualifications**.

1. ***Article 26, UCMJ***. Military judge shall be a commissioned officer who is a member of the bar of a Federal court or the highest court of a State and who is certified to be qualified for duty as a military judge by TJAG.

2. ***Member of a bar***. Military judge's "inactive status" with her state bar nevertheless equated to her being a "member of the Bar" of Pennsylvania as contemplated by Article 26(b). *United States v. Cloud*, ARMY 9800299 (A. Ct. Crim. App., Dec. 14, 2000) (unpub), *aff'd*, 55 M.J. 164 (C.A.A.F. 2001) (summary disposition); *United States v. Brown*, ARMY 9801503 (A. Ct. Crim. App. Dec. 11, 2000) (unpub), *aff'd*, 55 M.J. 366 (C.A.A.F. 2001) (summary disposition) (ACCA also considered fact that judge, although "inactive" in state bar, was a member in good standing of "this [the ACCA] Federal bar"). *See also United States v. Corona*, 55 M.J. 247 (C.A.A.F. 2001) (summary disposition).

3. ***Reserve Judges***. Change to MCM.

a. Change to RCM 502; Executive Order removed holdover provision concerning qualifications for military judges.

b. MCM had mandated that military judges be commissioned officers on active duty in the armed forces. The current RCM 502(c) deletes that requirement, enabling reserve military judges to try cases while on active duty, inactive duty training, or inactive duty training and travel.

c. Issue: Does this mean reservists can try GCM and SPCMs? Generally, no. Only military judges assigned directly to TJAG and TJAG's delegate (Trial Judiciary) may preside at GCMs. AR 27-10, paras. 8-1(c)(2), 8-2(a) (11 May 2016).

4. **Detailing**. Military judges are normally detailed according to the regulations of the "Secretary concerned."

a. Army. AR 27-10, para. 5-3 (11 May 2016) governs. Detailing is a ministerial function to be exercised by the Chief Trial Judge, U.S. Army Judiciary, or his or her delegate. The order detailing military judge must be in writing, included in the record of trial or announced orally on the record.

b. Detailing in a joint environment. In a joint environment, there is no "Secretary concerned." Therefore, detailing should be agreed upon by convening authority, SJA, and defense. See Captains William H. Walsh and Thomas A. Dukes, Jr., *The Joint Commander as Convening Authority: Analysis of a Test Case*, 46 A.F. L. Rev. 195 (1999).

5. **Replacement of military judges – RCM 505(e)(2).** *United States v. Kosek*, 46 M.J. 349 (C.A.A.F. 1997). The Air Force did not violate a CAAF remand order by substituting a new military judge at accused's court-martial after the CAAF ordered that the record be returned to the "military judge" for reconsideration.

6. Appellate Judges.

a. *United States v. Walker*, 60 M.J. 354 (C.A.A.F. 2004). In a capital case, the CAAF granted the accused's motion for extraordinary relief regarding the composition of judges on his N-MCCA panel. In 1995, the accused's case was assigned to the N-MCCA panel 3. Over the years the composition of panel 3 changed resulting in the presence of only one judge in the spring of 2004. Most N-MCCA judges, to include the Chief Judge, were disqualified in the case. Based on the Chief Judge's disqualification the TJAG under Article 66, UCMJ selected a new Chief Judge to handle the accused's case. Immediately prior to the TJAG's appointment, the original Chief Judge established a new court policy establishing "an order of precedence among judges on the court for the purpose of exercising the responsibility to make panel assignments in a particular case in the event of the absence or recusal of the chief judge." The problem at issue occurred when the substitute Chief Judge appointed by the TJAG retired requiring the appointment of another substitute Chief Judge to proceed over the accused's case. At that time the N-MCCA attempted to use the new policy letter to select a substitute Chief Judge with objection from the accused. The CAAF held because the N-MCCA did not use the policy to select the first substitute Chief Judge it was not appropriate to use the policy to select the second substitute Chief Judge and a substitute appointment by the TJAG was necessary.

b. *United States v. Lane*, 64 M.J. 1 (C.A.A.F. 2006). A Member of Congress may not serve as an appellate judge for a service court because of the Ineligibility and Incompatibility Clauses of the United States Constitution. The CAAF reasoned that no Person holding any office under the United States [i.e., a service court judicial position] should simultaneously serve as a Member of either House during his Continuance in Office. In the case, Senator Lindsey Graham, a reserve military judge on the AFCCA, was challenged.

7. Tenure/Fixed Term and Appointment.

a. Settled issue regarding appointment of civilians to Coast Guard Court of Criminal Appeals. *Edmond v. United States*, 520 U.S. 651 (1997), *aff'g United States v. Ryder*, 44 M.J. 9 (C.A.A.F. 1996) (holding that civilian judges on Coast Guard Court of Criminal Appeals are inferior officers and do not require additional presidential appointment; therefore, the Congressional delegation of appointment authority to Secretary of Transportation to appoint judges is consistent with Appointments Clause. *See also United States v. Graf*, 35 M.J. 450 (C.M.A. 1992); *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1993), *aff'd*, 510 U.S. 163 (1994). *United States v. Grindstaff*, 45 M.J. 634 (N-M. Ct. Crim. App. 1997) (judges of courts of criminal appeals, military judges, and convening authorities

are not principal officers under Appointments Clause and do not require a second appointment).

b. *United States v. Paulk*, 66 M.J. 641 (A.F. Ct. Crim. App. 2008). Accused, an Air Force officer, pled guilty to several offenses and was sentenced to confinement for 30 days and a dismissal. On appeal, the defense argued that the Equal Protection component of the Fifth Amendment's Due Process Clause was violated because the military judge and the appellate judges serve without a fixed term of office, while those in the Army and Coast Guard judiciary enjoy such protection by regulation. "Essentially, the appellant is saying that either all or none of the services should have fixed terms, but the mixed bag currently existing violates constitutional imperatives of equal protection." The court rejected the defense argument.

C. **Disqualification and Recusal**

1. **General**. Under RCM 902(a), "a military judge shall disqualify himself or herself in a proceeding in which that military judge's impartiality might reasonably be questioned." RCM 902(e) allows parties to waive any ground for challenge predicated on this subsection.

2. **Legal standard for recusal**. The Discussion to RCM 902(d)(1) directs a military judge to "broadly construe grounds for challenge" but not to "step down from a case unnecessarily." On appeal, a military judge's decision regarding recusal will be reviewed for an abuse of discretion.

3. **Non-waivable grounds for recusal**. Under RCM 902(b), five non-waivable (and rare) grounds are listed, directing that a military judge should be disqualified if he or she: (1) has a personal bias or prejudice about a party or personal knowledge of "disputed" facts in the case; (2) has acted as counsel, investigating officer legal officer, SJA, or convening authority for any of the offenses; (3) has been or will be a witness in the case, was the accuser, forwarded charges with recommendations, or expressed opinion about the accused's guilt; (4) is not qualified under RCM 502(c) or not detailed under RCM 503(b); or (5) is personally or has a family member who is a party to the proceeding, has a financial or other interest in the outcome of the proceeding, or likely to be a "material" witness.

4. **Appellate review – Liljeberg factors**. On appeal, courts apply the three factors from *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), to determine if reversal is warranted when a military judge should have been recused: (1) risk of injustice to the parties in the case, (2) risk that the denial of relief will result in injustice in other cases, and (3) the risk of undermining public confidence in the judicial process.

5. Disqualification Mechanics

a. **General**. RCM 902 governs disqualification of a judge.

b. **Personal attack on judge may create UCI.** *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). Trial counsel requested military judge's recusal based mainly on an alleged inappropriate professional and social relationship with the accused's civilian defense counsel (CDC). Military judge denied the Government's recusal motion and defense filed a UCI motion. During testimony on the UCI motion, the SJA alluded that the military judge lied regarding her relationship with the CDC and characterized "the [MJ] and [CDC] being seen leaving a theater together as a 'date.'" Without ruling on the UCI motion, military judge recused herself finding that there was no basis for recusal in fact or appearance but she was unable to remain impartial "following the Government's attack on her character." Another military judge was detailed who sua sponte recused himself because "he was so shocked and appalled by the unprofessional conduct of [the TC] and [the SJA] that he was not convinced he could remain objective." This required detailing two additional military judges to conduct

various proceedings which eventually lead to a guilty plea by the accused. On appeal, the N-MCCA held that the actions of the TC and SJA were unprofessional and constituted unlawful command influence but that their actions did not prejudice the accused's court-martial which was tried by two impartial military judges. The CAAF, however, ruled "since the appearance of unlawful influence was created by the Government, achieving its goal of removing [the MJ] without sanction, a rehearing before any [judge] other than [the detailed MJ] would simply perpetuate this perception of unfairness." Findings and sentence set aside and charges dismissed with prejudice.

6. Disqualification Standard

a. **Remote financial interest not enough.** *United States v. Reed*, 55 M.J. 719 (A. Ct. Crim. App. 2001). The accused pled guilty to conspiracy to commit larceny and to willfully and wrongfully damaging nonmilitary property in a scheme to defraud USAA automobile insurance company. During sentencing, a USAA claims handler talked about fraudulent claims and their effect on the company's policyholder members. The military judge (himself a policyholder member) immediately disclosed his affiliation with USAA and stated this would not affect his sentencing decision. The military judge allowed the defense an opportunity to voir dire, and the DC exercised it. The military judge also offered the defense the opportunity to challenge him for cause, but the defendant declined. The court, after *sua sponte* disclosing all judges of the ACCA are also policy holders of USAA, held there was nothing improper or erroneous in the judge's failure to disclose his policy holder status until a potential ground for his disqualification unfolded. Further, it found the military judge's financial interests were so remote and insubstantial as to be nonexistent. *See also* RCM 902(b)(5)(B) (non-waivable basis for recusal if military judge has financial interest that could be "substantially affected" by outcome of case).

b. **Potential disqualification based on previous victimization**. *United States v. Robbins*, 48 M.J. 745 (A.F. Ct. Crim. App. 1998). Military judge who was the victim of spousal abuse 13 years ago before presiding at a trial of an accused charged with battery of his pregnant wife (and intentionally inflicting grievous bodily harm on his wife and involuntary manslaughter by unlawfully causing termination of his wife's pregnancy) did not abuse her discretion in failing to recuse herself. The Air Force court directs military judges to apply a totality of the circumstances type test to resolve recusal matters involving military judges who are victims of the type of offense with which an accused is charged. The court emphasizes that our "national experience" supports a preference for "judges with real-life experiences."

c. **Military judge and accused members of same chain of command**. *United States v. Norfleet*, 53 M.J. 262 (C.A.A.F. 2000). Presence of military judge's superiors in SPCMCA chain of command did not require military judge's recusal under RCM 902. Accused was an Air Force paralegal, assigned to AF Legal Services Agency. Commander, AFLSA, served as director of Air Force judiciary and endorser on military judge's OER. Commander of AFLSA forwarded case (without recommendation) to Commander, 11th Wing (the SPCMCA), for disposition. CAAF held that this did not constitute a *per se* basis for disqualification. In light of military judge's superiors taking themselves out of the decision making process, the full disclosure by the military judge, and opportunity provided to defense to voir dire the military judge, the accused received a fair trial by an impartial judge.

d. **Knowledge of sentence limitation in a PTA.** *United States v. Phillipson*, 30 M.J. 1019 (A.F.C.M.R. 1990). Inadvertent exposure to sentence limitation does not require judge to recuse himself.

e. **Previous judicial exposure.**

(1) ***General rule***. *United States v. Soriano*, 20 M.J. 337 (C.M.A. 1985). If the military judge is accuser, witness for prosecution, or has acted as investigating officer or counsel, disqualification of military judge is automatic. But military judge need not recuse himself solely on basis of prior judicial exposure to the accused. *See also United States v. Proctor*, 34 M.J. 549 (A.F.C.M.R. 1992).

(2) ***Prior trial of same accused.*** *United States v. Howard*, 50 M.J. 469 (C.A.A.F. 1999). No prejudicial error occurred where military judge presided at prior case involving accused (who was tried twice, first for assault, then for AWOL). Military judge noted prior adjudication on the record and accused maintained he wished to proceed with the present judge. During the sentencing phase in the AWOL case, the defense introduced the accused's version of the events underlying the prior conviction; military judge interrupted defense counsel and stated that, although he had awarded the accused "an unusually light sentence for a fractured jaw," he found him guilty during that prior trial because he had kicked the victim in the head while he was on the ground. CAAF held that there was no error.

(3) ***Prior judicial rulings***. *Liteky v. United States*, 510 U.S. 540 (1994). Supreme Court (interpreting 28 U.S.C. § 455(b)(1)) indicates that prior judicial rulings against a moving party almost never constitute a basis for a bias or partiality recusal motion. Recusal not required except when prior rulings or admonishments evidence deep-seated favoritism or antagonism as would make a fair judgment impossible. *Cited in United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994).

(4) ***Contact with SJA/DSJA regarding companion cases***. Military judges should not communicate with the SJA office about pending cases. In *United States v. Greatting*, 66 M.J. 226 (C.A.A.F. 2008), the military judge presided over three companion cases before hearing the present case. The accused's defense counsel questioned the military judge about the other cases and the judge admitted to having ex parte communications with "the staff judge advocate and probably his deputy" about the companion cases. Specifically, the military judge remembered saying that, for one co-accused, Government "sold the case too low given his culpability." For the other two cases, he "questioned the appropriateness of their being at a special court-martial." The military judge also commented on the accused's level of culpability as one of the "two staff NCOs." By contrast, the military judge "questioned" (his word) whether the two junior Marines should have been sent to a special court-martial at all. Based on the military judge's communications with the SJA and "probably his deputy," trial defense counsel made a motion for the judge to recuse himself under RCM 902(a) for implied bias. The military judge denied the request. In reversing, the court noted the SJA was "the very individual responsible for advising the convening authority," and the military judge made ex parte comments while clemency matters in the other cases were pending and, likely, before the accused's pretrial agreement had been finalized.

f. ***Ex parte communication***

(1) In certain circumstances, ex parte contact with the military judge may be required. The 2016 MJA provides for a ex parte proceeding to issue certain warrants before referral. Practitioners should consult the relevant RCM, their service regulations, and their technical chain of command to ensure the communication is necessary and appropriately scoped.

(2) ***Contact with trial counsel***. *United States v. Butcher*, 56 M.J. 87 (C.A.A.F. 2001). The military judge, who was presiding over a contested trial, went to a party at the trial counsel's house and played tennis with the trial counsel. The CAAF reviewed whether

the military judge abused his discretion by denying a defense request that the judge recuse himself. The CAAF advised that under the circumstances the military judge should have recused himself. However, the Court held there was no need to reverse the case, because there was no need to send a message to the field, the social interaction took place after evidence and instructions on the merits, and public confidence was not in danger (the social contact was not extensive or intimate and came late in trial).

(3) ***Assisting trial counsel ex parte***. *United States v. Cornett*, 47 M.J. 128 (C.A.A.F. 1997). Military judge did not abuse discretion when he denied a defense recusal request based on an *ex parte* conversation between military judge trial counsel, wherein the judge stated, "Well, why would you need that evidence in aggravation, because I've never seen so many drug offenses? Why don't you consider holding that evidence in rebuttal and presenting it, if necessary, in rebuttal?" Military judge invited voir dire concerning any predisposition toward sentence; accused selected trial by judge alone pursuant to voluntary pretrial agreement term; counsel and accused were given a recess to confer about the challenge after the accused made his forum selection; and the military judge made full disclosure on the record and disclaimed any impact on him. RCM 902(a) requirements regarding recusal and disqualification were fully met.

g. **Presiding over a companion case**

(1) **General.** A military judge is not per se disqualified from presiding over companion cases. *See also United States v. Nave*, ACM 36851, 2008 WL 5192217 (A.F. Ct. Crim. App. Dec. 10, 2008) (unpublished) (military judge not required to recuse after presiding over three companion cases, even though two of those co-accused were set to testify in this case and the military judge had ruled in a companion case about an entrapment defense the accused planned on raising). The CAAF noted that sitting on companion cases, without more, does not mandate recusal. *United States v. McIlwain*, 66 M.J. 312 (C.A.A.F. 2008 (citing *United States v. Oakley*, 33 M.J. 27, 34 (C.M.A. 1991)). *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998) (military judge did not abuse his discretion in denying defense motion that he recuse himself based on the fact that he had ruled on a command influence issue similar to the accused's in a companion case, and that he had learned that accused had offered to plead guilty. The military judge ruled in the accused's favor on the UCI issue, and no incriminating evidence or admissions from the accused relating to the offer to plead guilty were disclosed during trial on the merits. There was no reasonable doubt about the fairness of accused's trial.); *United States v. Burris*, 25 M.J. 846 (A.F.C.M.R. 1988) (holding presiding over earlier trial involving same urinalysis inspection did not disqualify trial judge).

(2) **Bias raised when judge conceded her partiality could be questioned.** In *United States v. McIlwain*, 66 M.J. 312 (C.A.A.F. 2008), before the accused made forum election, the military judge stated on the record that she had presided over two companion cases (one a guilty plea and one a mixed plea). In the course of those companion cases, the military judge conducted providence inquiries and heard evidence that implicated the accused. The military judge advised defense counsel: "[I]f your client desires to go with a judge alone, then I would not sit; I would recuse myself. If your client decides to go with a panel of either all officers or officers and enlisted members, then I'm comfortable that I will be able to objectively instruct the members, rule on objections, and that sort of thing, because my role is different." The accused elected trial by member and challenged the military judge. In response, the military judge noted she had made decisions favorable to the accused regarding witness credibility in the companion cases, decisions that "would suggest to an impartial person looking in that I can't be impartial in this case" if serving as the fact finder; however, the military

judge reiterated that she would be comfortable presiding over a members case. The CAAF held the military judge abused her discretion in refusing the recusal request and set aside the findings and sentence. On the military judge's concession that an "impartial person" would have questioned her impartiality, the CAAF held the military judge abused her discretion in denying the recusal motion.

h. **Repeated sua sponte (and pro-Government) decisions may create appearance of partiality**. *United States v. Johnston*, 63 M.J. 666 (A.F. Ct. Crim. App. 2006). Military judge "abandoned his impartial role in th[e] case solely on the basis of his actions and rulings during the trial." The court noted the ruling was unusual because a specific ground for dismissal did not arise under RCM 902 but that after applying an objective test, based on the standpoint of a person watching the proceedings, the judge's rulings created the appearance of partiality in favor of the Government. The military judge twice sua sponte reversed a previous judge's ruling and admitted evidence regarding statements made by the accused's wife that were strongly pro-Government. The court stated that although no actual bias by the military judge was noted, the judge abused his discretion by not disqualifying himself under RCM 902. Findings and sentence reversed.

i. **Busted providence inquiry.**

(1) **General.** The military judge is not required, *per se*, to recuse himself from further proceedings in a trial unless his impartiality was reasonably in question. *United States v. Bray*, 49 M.J. 300 (C.A.A.F. 1998) (where judge has conducted a providence inquiry, reviewed a stipulation of fact, and entered findings of guilty to initial pleas but accused thereafter withdrew plea based on possible defense that came out during sentencing, military judge was able to preside over subsequent guilty plea unless he had formed an "intractable opinion as to the accused's guilt," and a reasonable person who knew the facts of the case would question the appearance of impurity and have doubts as to the military judge's impartiality).

(2) **Preference for recusal.**

(a) Army. The Army's preference is for the military judge to recuse himself after the withdrawal of a guilty plea. *United States v. Rhule*, 53 M.J. 647 (A. Ct. Crim. App. 2000)

(b) Air Force. Judge not disqualified simply based on participation in first providence inquiry. *United States v. Dodge*, 59 M.J. 821 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds*, 60 M.J. 368 (C.A.A.F. 2004). Accused completed the entire providence inquiry but prior to the announcement of findings the parties disagreed over the maximum punishment. The accused then requested to withdraw his plea and proceed to trial, which request the military judge granted, and the case was adjourned for sixty days. During forum selection for the now contested proceeding, the accused claimed his rights to forum were circumscribed by the continued presence of the military judge who heard his providence inquiry and that he had no practical option but to select a trial by members. Military judge allowed the accused to voir dire her regarding her potential bias and denied his challenge noting "she had not accepted [his] plea, had not formed an opinion concerning his guilt or innocence and everything she knew about the case was learned in her judicial capacity." Subsequently, accused pled guilty to the same specifications (except for one) that he attempted to plead guilty to in the first hearing. AFCCA held the accused's forum rights were not impinged citing RCM 903(c)(2)(B) and stated "there is no concomitant absolute right" to have a case tried by military judge alone. Further the court held the military judge is not disqualified "based simply on her participation in

the first providence inquiry." The court declined to adopt the Army's approach in this situation stating "We are aware of the [ACCA's] approach . . . expressing a preference for recusal after withdrawal of guilty pleas" (citing *Rhule*) but "this Court rejected that approach long ago."

(3) **Revalidation of request for trial by military judge encouraged.** *United States v. Winter*, 35 M.J. 93 (C.M.A. 1992). Military judge is not *per se* disqualified after conducting a providence inquiry and then rejecting accused's plea of guilty to a lesser included offense. Counsel and judges should determine whether the judge should ask the accused if accused wants to continue to be tried by judge alone when the judge has rejected the plea.

j. **Knowledge of witnesses.**

(1) ***Exposure to witnesses***. *United States v. Davis*, 27 M.J. 543 (C.M.A. 1988) (military judge must use special caution in cases where he has heard a witness' testimony against a co-actor at a prior trial); *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991) (exposure to motions and pleas at prior trial of co-actors did not require recusal of military judge in trial before members).

(2) ***Relationship to witness***. *United States v. Wright*, 52 M.J. 136 (C.A.A.F. 1999). Military judge announced at trial that he had a prior "close" association with NCIS agent stemming from a duty station at which the military judge, as a prosecutor, worked closely with the agent on several important criminal cases. Military judge said he felt the NCIS agent was an honest and trustworthy person and a very competent NCIS agent, but that the witness would not have a "leg up" over the credibility of other witnesses, particularly the accused. The judge said he gave all members of the Marine Corps a certain "credence." CAAF noted that military judges have broad experiences and a wide array of backgrounds that are likely to engender ties with other attorneys, law firms, and agencies. Here, military judge's full disclosure, sensitivity to public perceptions, and sound analysis objectively supported his decision not to recuse himself; these factors contribute to a perception of fairness.

k. **Consultation with other judges not improper.** *United States v. Baker*, 34 M.J. 559 (A.F.C.M.R. 1992) (holding that a military judge's consultations with another judge concerning issue in a case is not improper.)

l. ***Conduct outside of court***.

(1) ***Contact with civilian witness.*** *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001). The military judge became involved in verbal out-of-court confrontations with a civilian witness that included profanity and physical contact. The military judge also engaged in an *ex parte* discussion with the trial counsel on how to question this civilian witness about the scuffle. The CAAF held the military judge's failure to fully disclose the facts on the record deprived the parties of the ability to effectively evaluate the issue of judicial bias. As such, the court remanded the case for a *DuBay* hearing.

(2) ***Comments about accused outside of court***. *United States v. Miller*, 48 M.J. 790 (N-M. Ct. Crim. App. 1998). Assuming *arguendo* that military judge stated, upon hearing that the accused suffered a drug overdose and was medically evacuated to a hospital, that the accused was a "cocaine addict and a manipulator of the system" and that "perhaps the accused would die," such comments did not establish a personal bias or prejudice on part of the judge. Rather, the remarks indicated a high level of impatience and frustration with an unplanned delay in a scheduled court-martial proceeding. The test applied by the Navy court was whether the remarks reasonably suggests a "deep-seated and unequivocal

antagonism" towards the accused as to make fair judgment impossible. *See Liteky v. United States*, 510 U.S. 540 (1994).

m. **Conduct of trial & judicial advocacy.**

(1) ***Impartial and objective stance***. *United States v. Hardy*, 30 M.J. 757 (A.C.M.R. 1990). Military judge erred in *sua sponte* initiating discussion of appropriateness of defense counsel's sentencing argument and allowing trial counsel to introduce additional rebuttal.

(2) ***Praise***. *United States v. Carper*, 45 C.M.R. 809 (N.M.C.R. 1972). Improper for military judge to praise Government witness for his testimony.

(3) ***Examination***. Assess whether the judge's questions assist either side of the case. The number of questions is not a significant factor, but the tenor of those questions will be. *United States v. Johnson*, 36 M.J. 866 (A.C.M.R. 1993).

(a) *United States v. Foster*, 64 M.J. 331 (C.A.A.F. 2007). The accused, convicted of committing an indecent act against his daughter, argued on appeal that the military judge failed to remain impartial in his conduct toward their expert witness by: (1) limiting their expert's testimony, (2) questioning their expert, (3) failing to instruct the members that their expert was an expert and inaccurately summarizing her testimony, and (4) making inappropriate comments about their expert outside the panel's presence. The CAAF stated that a strong presumption exists that a military judge's trial conduct is impartial and "the test is whether, taken as a whole in the context of [the] trial, [the] court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." The court held that the military judge's conduct, especially in relation to the inappropriate comments, departed from judicial propriety but "a reasonable observer would conclude that in the context of the whole trial, his actions did not compromise the court-martial's legality, fairness, or impartiality."

(b) *United States v. Acosta*, 49 M.J. 14 (C.A.A.F. 1998). Accused was convicted of wrongful distribution and use of methamphetamine. Defense case was based on entrapment. Defense cross examination resulted in Government witness stating that he put undue pressure on the accused to purchase drugs. When trial counsel failed to elicit the entrapment-negating information, military judge asked the witness 89 questions about the accused's prior uncharged misconduct relating to a drug transaction that predated the drug offenses that were the basis of the court-martial. Held: no error. The law provides the military judge with wide latitude in asking questions of witnesses. The military judge has a right, equal to counsel's, to obtain evidence. Here, the information was clearly rebuttal evidence that was admissible once the defense raised the entrapment defense.

(c) *United States v. Sanford*, No. 200500993, 2006 CCA LEXIS 303 (N-M. Ct. Crim. App. Nov. 6, 2006) (unpublished). During a motion to suppress incriminating statements made to "Capt M," military judge did not have enough evidence to rule and notified the parties that he wanted to call three witnesses who had also given statements to Capt M in order to discern the procedures Capt M used to interview witnesses. The military judge questioned the witnesses and offered counsel an opportunity to question them. On appeal, the defense claimed that the military judge "abandon[ed] his neutral role in resolving the . . . motion to suppress." The court noted that under Article 46, UCMJ and MRE 614, the military judge is permitted to call or recall witnesses and has wide latitude in questioning witnesses. As such, the

military judge did not abandon his neutral role, as his efforts in calling the witnesses were an attempt to clarify the facts pertaining to the defense motion. The court concluded that "a reasonable person observing the . . . court-martial would not doubt its fairness or the impartiality of the military judge." *See also United States v. Johnson*, No. 36433, 2007 CCA LEXIS 127 (A.F. Ct. Crim. App. Mar. 29, 2007) (unpublished) (the military judge did not abandon his impartial role when he questioned a defense witness (also a co-actor) about what sentence the co-actor received in his own trial when the defense did not object and the answer favored the defense).

(d) *United States v. Hernandez*, No. 200501599, 2007 CCA LEXIS 183 (N-M. Ct. Crim. App. Jun. 12, 2007) (unpublished) (the military judge did not become a "partisan advocate when he 'ask[ed] clearly incredulous impeaching questions' of the appellant's mother who was a defense witness" because the defense did not object or move to disqualify the military judge and "a reasonable person . . . would not have doubted the military judge's impartiality or the legality or fairness of the trial.").

(e) *United States v. Paaluhi*, 50 M.J. 782 (N-M. Ct. Crim. App. 1999), *rev'd on other grounds*, 54 M.J. 181 (C.A.A.F. 2000). Military judge did not abandon his impartial role despite accused's claims that the judge detached role and became a partisan advocate when his questions laid the foundation for evidence to be admitted against the accused and when he instructed the accused to assist the Government to procure the presence of the prosecutrix.

(f) *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Military judge improperly limited defense voir dire and cross-examination, extensively questioned defense witnesses, limited number of defense witnesses, assisted TC in laying evidentiary foundations, and limited DC's sentencing argument.

(g) *United States v. Morgan*, 22 M.J. 959 (C.G.C.M.R. 1986). Military judge overstepped bounds of impartiality in cross-examining accused to obtain admission of knife, which trial counsel had been unsuccessful in obtaining admission. *But see United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990) (holding military judge's assistance in laying foundation for the admission of evidence was not error; actions did not make the judge a partisan advocate.).

(h) ***Outer limits?*** *United States v. Bouie*, 18 M.J. 529 (A.F.C.M.R. 1984) (no error on facts of case for military judge to ask 370 questions of accused).

(4) Judge demonstrated partiality where evidentiary ruling under MRE 412 prevented accused from providing an exculpatory answer to questions the military judge allowed to be asked. *United States v. Watt*, 50 M.J. 102 (C.A.A.F. 1999). The military judge abandoned his impartial role when he ruled the accused could not respond to a question from the members (he had been asked "What reason did you have to believe she would have sex with you?" His answer would have been that the complainant had a "reputation for being easy."). The military judge then repeatedly asked the accused the question, and allowed TC to badger him with similar questions. Accused repeatedly stated that he could not answer the question asked. Counsel then implied in closing that accused knew he had no reason to believe complainant would not have sex with him, as opposed to a simply inadmissible one. Accused "was left to defend himself without assistance" from defense or military judge.

(5) ***Intemperate comments from the bench concerning the case.*** Remarks that suggest the military judge will hold a party responsible for taking a legally sound and available

option (here, Article 62 appeal) undermine public confidence and should not be made. *United States v. Kirk*, No. Misc. 20100443 (A. Ct. Crim. App. July 28, 2010) (unpublished). The Government initially filed an Article 62 appeal, challenging the military judge's decision to suppress the accused's statements based on a violation of Article 31(b), UCMJ. The ACCA reversed the military judge's ruling on the suppression issue and then (on its own accord) commented on the possible recusal of the military judge from further proceedings in the case. In ruling on the motion to suppress, the military judge had noted the Government could appeal his decision but added, "I do not expect to get overturned on this issue." The military judge continued:

> [I]f this case does come, you know, back three or four months from now I will be the military judge in the case . . . that is going to hear the facts in the future including the [first sergeant]'s testimony if they believe the statements should be admissible. But if you want to appeal you are welcome to. Is that your final decision, Government? I just want to make sure.

The ACCA found that these "gratuitous comments" called into question the perception of fairness and impartiality of the military judge. The court noted that RCM 902(a) directs recusal when a military judge's "impartiality might ***reasonably*** be questioned" (emphasis added by the court). While ACCA did not actually determine the military judge should be recused, the court opined "his comments suggest he prejudged the Government's evidence, and intimated the futility of appealing his decision in light of his anticipated role as ultimate fact finder." The court concluded: "We find his comments intemperate, injudicious, and inconsistent with the impartial role he is to play in the court-martial, creating at least the perception of unfairness to the parties, potentially undermining public confidence in his judicial role."

(6) ***Intemperate remarks from the bench concerning witnesses, counsel, and panel members.*** While incivility is not condoned, the case will not be set aside where the inappropriate remarks did not call into question the legality, fairness, and impartiality of the court-martial. *United States v. Todd*, No. 200400513, 2007 CCA LEXIS 237 (N-M. Ct. Crim. App. Jul. 9, 2007) (unpublished). During the trial, the military judge made several "injudicious" comments to witnesses, counsel, and even potential panel members. The military judge even referred to the convening authority's conduct in the case as "imbecilic." The N-MCCA characterized his statements as "needless comments," "incessant sarcasm," and "pompous condescension." The N-MCCA cautioned that military judges should be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others . . . [and the court] will not tolerate incivility by a military judge toward any trial participant, and that includes counsel." However, the court concluded that "[w]hile we do not condone that inappropriate comments made by the military judge, in the context of the entire trial, the legality, fairness, and impartiality of the court-martial were not put in doubt." Affirmed.

n. **Assistance to a party.**

(1) *United States v. Felton*, 31 M.J. 526 (A.C.M.R. 1990). Military judge should not have advised trial counsel on the order of challenges during voir dire.

(2) *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Military judge improperly limited defense voir dire and cross-examination, extensively questioned defense witnesses, limited number of defense witnesses, assisted TC in laying evidentiary foundations, and limited DC's sentencing argument.

(3) *United States v. Hurst*, No. 200401383, 2007 CCA LEXIS 56 (N-M. Ct. Crim. App. Feb. 8, 2007) (unpublished) (holding that military judge did not abandon his impartial role by alerting the Government that they had failed to introduce evidence that two orders had been properly published, or by allowing Government to reopen the case over defense objection when the deficiency was a mere technical one and an earlier evidentiary ruling may have created confusion in the status of the evidence the military judge would consider).

(4) ***The outer limits?*** *United States v. Cooper*, 51 M.J. 247 (C.A.A.F. 1999). Military judge said in front of members that defense counsel had "thank[ed] [him] for helping perfect the government's case" through questions of a Government witness. Military judge also commented disparagingly on the poor quality of the defense counsel's evidence, a videotape made by the accused's wife. These comments did not plainly cause him to lose his impartiality or the appearance of his impartiality. Because the defense did not object to the comments, CAAF applied a plain error analysis, and found the judge's questions were not improper. Further the military judge explained to the members his neutral intent in asking questions and instructed the members to not construe his questions as favoring the Government. CAAF found the military judge's comments about his irritation with defense was inappropriate before the members, though not sufficient to divest him of the appearance of impartiality because his comments were couched within unequivocal instructions protecting the accused from prejudice. Finally, his comments upon the quality of defense evidence were not impermissible, because just the RCM 920(e)(7) discussion permits the military judge to comment on the evidence during instructions. While the military judge's comments "may have been improper," the trial's legality, fairness and impartiality were not put into doubt.

o. **Sentencing.**

(1) **Discussion of religious principles.** *United States v. Green*, 64 M.J. 289 (C.A.A.F. 2007). Prior to announcing the sentence, military judge provided the accused an explanation for the adjudged sentence. He referenced the Bible and other religious principles. On appeal, accused claimed that the military judge demonstrated an impermissible bias by interjecting his own religious views into the sentencing process. Claims of judicial bias are evaluated to determine, "in view of the sentencing proceeding as a whole, whether a reasonable person would doubt the court-martial's legality, fairness, and impartiality." The court found that if there was any error, it was harmless based on several factors. First, the sentence did not "reflect prejudicial consideration of extraneous factors." Second, the defense first introduced the subject of religion during sentencing. Third, the military judge expressly stated that "he would not consider the [accused's] fealty to his religious tenets as a sentencing factor." Fourth, the defense did not object to the military judge's remarks. Lastly, the remarks focused primarily on proper sentencing principles and only incidentally referenced religion. Therefore, military judge's remarks did not reflect any bias in this case.

(2) **Questioning of accused.** *United States v. Burton*, 52 M.J. 223 (C.A.A.F. 2000). Military judge's questions of the accused which revealed judicial sentencing philosophy did not reflect an inflexible predisposition where the military judge imposed only 30 days' confinement, well below the jurisdictional limit of the court-martial and the maximum punishment for the offense.

(3) **Summary of accused's statements during providence inquiry given to panel by military judge.** *United States v. Figura*, 44 M.J. 308 (C.A.A.F. 1996). Military judge did not become de facto witness for prosecution when during sentencing he gave

members summary of accused statements during providence inquiry. Defense and Government agreed to have military judge give summary, rather than introduce evidence through transcript or witness testimony.

(4) **Evidence of racial bias or prejudice not directed at accused.** *United States v. Ettinger*, 36 M.J. 1171 (N.M.C.M.R. 1993). Although remarks by military judge may demonstrate prejudice sufficient to constitute bias, accused must be a member of that class in order for comments to be disqualifying.

(5) **Military judge's inappropriate and intemperate remarks evaluated in light of whether they were so unreasonable as to indicate the judge abandoned his impartial role.** *United States v. Thompson*, 54 M.J. 26 (C.A.A.F. 2000). Military judge did not depart from his impartial role despite issuing numerous adverse rulings against defense, taking over questioning from counsel, shutting off presentations, expressions of impatience and exasperation with counsel, and the making of condescending or berating comments about counsels' performance. Defense counsel repeatedly alluded to being "ineffective" or being forced into providing ineffective representation. CDC requested that the military judge recuse himself under RCM 902(a), 902(b)(1), 905. Military defense counsel became tearful and complained she would think twice before raising an issue. Military judge countered "you need to investigate…a new line of work." While court noted much of the blame for breakdown between parties "stems from the military judge's inappropriate and intemperate remarks to counsel on the record," CAAF found military judge's actions were not so unreasonable that he abandoned his impartial role. Nevertheless, case returned to the Court of Criminal Appeals to order affidavits from both civilian and military defense counsel or to order a *DuBay* hearing on issue of ineffective assistance of counsel.

p. "**Bridging the gap" sessions.**

(1) **General.** Evidence of judicial bias or error revealed during a 'Bridging the Gap' session will generally be evaluated according to the same legal standard as bias or error revealed prior to or during trial.

(2) **Background**. The US Army Trial Judiciary Standard Operating Procedure encourages military judges to conduct a "post-trial critique" one-on-one with counsel after trial to improve trial skills. Judges should limit such discussions to trial advocacy tips. *See United States v. Copening*, 32 M.J. 512 (A.C.M.R. 1990) (suggesting "Bridging the Gap" may need reevaluation in light of issues arising concerning discussions by trial judges of legal issues that may come before them in future cases; *ex parte* discussions with counsel about the conduct of the trial; and discussions with counsel before the trial is final about rulings in the case).

(3) **Improper sentencing considerations revealed**. *United States v. McNutt*, 62 M.J. 16 (C.A.A.F. 2005). Military judge revealed during the "Bridging the Gap" session that he framed accused's sentence to take into account good time credit. Military judge sentenced the accused to seventy days with the idea that the accused would receive ten days good time credit and would serve sixty days of confinement. CAAF reversed the sentence, finding the military judge improperly considered the collateral administrative effect of good time credit. "[S]entence determinations should be based on the facts before the military judge and not on the possibility that [the accused] may serve less time than he was sentenced to based on the Army's policy."

(4) **Comments showing bias against homosexual conduct were improper where accused was charged with indecent acts with another male**. *United States v. Hayes*,

NMCCA 200600910, 2010 WL 4249518 (N-M. Ct. Crim. App. Oct. 28, 2010). Male accused pled guilty to indecent acts with another male in the barracks. Military judge made comments during a post-trial "bridging the gap" session with counsel that suggested a bias against homosexual conduct. In a unanimous decision, the N-MCCA found the military judge's comments created an appearance of bias that mandated disqualification; the court affirmed the findings and set aside the accused's sentence. Based on a *DuBay* hearing convened, the court found the following about the military judge's actions at trial and during "Bridging the Gap":

(5) ***Practical suggestions***. For military judges who elect to conduct "Bridging the Gap" sessions, consider the following:

(a) Never conduct an *ex parte* session.

(b) Provide feedback on technical aspects of counsel performance is ok (e.g., "You had trouble admitting the prior statement of the victim. Remember, the foundation for admitting a prior inconsistent statement consists of _____.")

(c) Avoid discussing the deliberative process or judicial philosophy (e.g., "The reason I found him guilty was ____.")

(d) Always bear in mind the trial may not be truly "over." *United States v. Holt*, 46 M.J. 853 (N-M. Ct. Crim. App. 1997), *aff'd*, 52 M.J. 173 (C.A.A.F. 1999) (suggesting that, where trial judge provides post-trial "practice pointers" to counsel prior to the cases being finalized, recusal would be mandated if the case were sent back for some sort of rehearing).

7. Actions when grounds for challenge exist

a. **Further actions void.** *United States v. Sherrod*, 26 M.J. 30 (C.M.A. 1988) (holding when a judge is disqualified, all further actions are void). *See also United States v. Howard*, 33 M.J. 596 (A.C.M.R. 1991) (holding when military judge becomes a witness for the prosecution, he is disqualified and all further actions, as in *Sherrod*, are void). *United States v. Wiggers*, 25 M.J. 587 (A.C.M.R. 1987) (holding when military judge recognized that his prior determination of witness' lack of credibility disqualified him from acting as fact finder, judge should have recused himself rather than direct a trial with members).

b. **Judge's sua sponte duty even after accused's waiver of disqualification under RCM 902(e)**. *United States v. Keyes*, 33 M.J. 567 (N.M.C.M.R. 1991). Military judge previously sat in a different case involving the accused. Defense had no challenge under RCM 902(b) and waived any challenge to the judge that might exist under RCM 902(a). Military judge properly recognized a *sua sponte* obligation to disqualify himself if warranted even with a defense waiver under 902(e). The military judge, however, found no basis for disqualification. Upheld by NMCMR.

c. **Improper for recused judge to select replacement**. *United States v. Roach*, 69 M.J. 17 (C.A.A.F. 2010). The accused's case was originally affirmed by an Air Force Court of Criminal Appeals panel that included the chief judge. The case went to CAAF and was remanded back to the AFCCA. While the initial CAAF review was pending, the AFCCA chief judge commented about the case at two public events. Following a motion by the defense, the chief judge recused himself from the case. The chief judge then sent an e-mail to the executive officer for the Air Force TJAG recommending that a specific judge be appointed to replace the chief judge on the case. The Air Force TJAG appointed this judge, who then convened the panel that considered the remanded case. CAAF vacated the AFCCA decision and remanded for new Article 66 review, finding the chief judge improperly took

action in the case after recusal when he recommended his replacement. CAAF noted, "[E]ither a military judge is recused or he is not." Once recused, a judge shall not take further action in a case. If a military judge deviates from this requirement, "no matter how minimally," it "may leave a wider audience to wonder whether the military judge lacks the same rigor when applying the law."

D. **Requirements of the Military Magistrate**

1. Article 26a of the 2016 MJA establishes the office of the military magistrate. The same statutory language is used to describe the qualifications of both military judges and military magistrates. It is likely that the case law will apply the same standards of conduct to military magistrates as it has to military judges.

X. EXPANDED JUDICIAL POWERS AND REMEDIAL ACTION

A. **Pre-referral proceedings**

1. Article 30a of the 2016 MJA provides judges limited authority to hear and rule on certain issues prior to trial.

2. Such proceedings will follow procedures set forth in RCM 309.

B. **Post-trial proceedings.**

1. 2016 MJA.

a. The military judge maintains control over the case once it is referred. The case is not returned to the convening authority, though the convening authority may still grant clemency during post-trial processing. The military judge loses jurisdiction over the case upon entry of judgment under Article 60c.

2. Legacy system. Due to wholesale revision of the post-trial process, the following case law applies to the legacy system *only.*

a. Under the legacy system, the authority over post-trial issues depended on whether the military judge had authenticated the record. Accordingly, case law focused on authentication as the most significant mile post in post-trial authority of a judge.

b. **Judges have power to order.** *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988). ("Consistent with our conclusion … that Congress intended for a military judge to have the power to conduct post-trial proceedings until authentication of the record has taken place, we are convinced that … before authenticating the record of trial … he may take remedial action on behalf of the accused without awaiting an order therefor by an appellate court."); *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989). (holding that Article 39(a) empowers judge to order a post-trial session to consider newly discovered evidence and to take remedial action, including, in proper cases, to set aside findings of guilt and sentence); *United States v. Mahoney*, 36 M.J. 679 (A.F.C.M.R. 1993) (holding military judge did not usurp power by ordering a post-trial session to inquire into possible improper command intervention after commander ordered accused into confinement, contrary to order of military judge after court-martial; further, that judge did not usurp power by reducing accused's sentence by 18 months as remedy for commander's intervention.)

c. **Responsibility to correct errors in trial proceedings.** *United States v. Pulido,* No. 20011043 (A. Ct. Crim. App. Mar. 19, 2004) (unpub.) Findings and sentence set aside due to lack of properly authenticated or approved findings of guilty. Prior to authenticating the record, the military judge determined that her originally announced findings were incorrect. She amended the findings without a post-trial session; however, the amended findings

neglected to reflect an announcement of guilt on a separate charge to which the accused had pled guilty. The court declared that "Article 53, UCMJ, and RCM 922(a) require that the court-martial announce its findings to the parties promptly, **in an open court**, after they have been determined." (emphasis in original). Because the verdict was ambiguous, there was material prejudice to the accused's substantial rights. Military judge's options included: reviewing tapes to determine whether she announced the reported findings; if record inaccurately reported findings, she should not have authenticated it; returning record of trial to trial counsel for further examination and correction; directing proceedings in revision to correct error, so long as accused suffered no material prejudice.

d. Abuse of discretion where exculpatory evidence was uncovered after trial and judge denied defense request for post-trial Article 39(a). *United States v. Meghdadi*, 60 M.J. 438 (C.A.A.F. 2005). Military judge denied defense request for a post-trial Article 39(a) based on newly discovered evidence, specifically an audiotape. Accused's conviction centered on distributing cocaine, based on testimony by CID agent and CID informant. Defense argued at trial that CID agent was trying to make several drug cases to advance his career and that the informant lied to obtain a sentencing deal offered by CID. After the accused's trial and during the CID informant's trial, an audiotape surfaced lending credence to the accused's defense theory. CAAF held the military judge abused his discretion by denying the Article 39(a) session which resulted in prejudice to the accused because of the failure "to afford [the accused] a forum in which to make his case." The CAAF stated "the [military judge] misapprehended the purpose of the Article 39(a) session, made factual findings that are not supported by the record, applied an erroneous legal standard, misperceived the evidentiary value of the audiotape, and made no record of any weighing of the new evidence against the evidence at trial, either on the merits or in sentencing."

e. **Judge should take remedial action where error identified.** *United States v. Lepage*, 59 M.J. 659 (N-M. Ct. Crim. App. 2003). Military judge committed plain error by admitting record of Article 15 into evidence. He determined that admitting the exhibit was erroneous in a post-trial 39(a) session, and that the erroneously-admitted exhibit was considered by the court in arriving at a sentence. However, military judge failed to take corrective action during that hearing, and recommended that the convening authority disapprove the Bad-Conduct Discharge; convening authority declined to follow recommendation. Held, "This case should not even be before us for review . . . the military judge had the authority under RCM 1102(b)(2) to take corrective action."

C. **Responsibility to manage post-trial preparation of the record.**

1. Judges had limited authority to manage post-trial processing under the legacy system. However, appellate courts did recognize such a judicial responsibility. Under the 2016 MJA, the responsibility of the judge for post-trial processing is much more direct, because the case never returns to convening authority control. The reasoning in *United States v. Chisholm*, 58 M.J. 733 (A. Ct. Crim. App. 2003), *aff'd*, 59 M.J. 151 (C.A.A.F. 2003), decided under the legacy system, is reproduced here. In that case, the court noted that military judges, as empowered by Congress and the President, have both a duty and a responsibility to take active roles in "directing" the timely and accurate completion of court-martial proceedings. After adjournment, but prior to authentication of the record of trial, military judge must ensure that Government is proceeding with due diligence to complete the record of trial as expeditiously as possible, given the totality of the circumstances of that accused's case. If the military judge determines that the record preparation is proceeding too slowly, he may take remedial action without awaiting an order from the intermediate appellate court. The exact nature of the remedial action is within the sound judgment and broad discretion of the military judge, but could include, among other things: (1) directing a date certain for completion of the record with confinement credit or other progressive

sentence relief for each day the record completion is late; (2) ordering the accused's release from confinement until the record of trial is completed and authenticated; or, (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing. Staff judge advocates and convening authorities who disregard such remedial orders do so at their peril.

XI. COUNSEL

A. **Counsel Qualifications.**

1. ***GCM* [changed in 2016 RCM]**. Article 27(b), UCMJ. "Trial counsel or defense counsel -

a. must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a federal court or of the highest court of a State . . . and

b. must be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member."

2. ***SPCM.*** Art 27(b). Defense counsel must be Article 27(b) certified unless physical conditions or military exigencies preclude availability. If the trial counsel meets either or both Article 27(b) criteria, then the defense counsel must as well. However, RCM 502(d) requires defense counsel to meet Article 27(b) criteria regardless of the level of court-martial.

3. Under RCM 502(d)(2), assistant trial counsel need only be commissioned officer. However, assistant defense counsel must meet Article 27(b) criteria.

4. Summary Court-Martial. *Middendorf v. Henry*, 425 U.S. 25 (1976). The Sixth Amendment right to counsel does not extend to SCM.

B. **Disqualification of Counsel.**

1. Defect in appointment or lack of qualifications tested for prejudice

a. *Wright v. United States*, 2 M.J. 9 (C.M.A. 1976). Defects in appointment or qualifications of trial counsel are matters of procedure to be tested for prejudice and have no jurisdictional significance.

b. *United States v. Harness*, 44 M.J. 593 (N-M. Ct. Crim. App. 1996). Presence of defense counsel who was neither graduate of accredited law school nor properly admitted to practice did not constitute ineffective assistance of counsel under Sixth Amendment. Performance of defense counsel measured by combined efforts of entire defense team. Note that *Harness* was decided under a previous version of RCM 502.

c. **Inactive status of civilian attorney.** *United States v. Steele*, 53 M.J. 274 (C.A.A.F. 2000). Inactive status of civilian attorney in states in which he is licensed to practice does not bar practice before military courts-martial.

d. **Assistant trial counsel not sworn.** *United States v. Roach*, No. S31143, 2007 CCA LEXIS 402 (A.F. Ct. Crim. App. Sep. 13, 2007) (unpublished). The assistant trial counsel in the case had not been sworn under Article 42(a), UCMJ, prior to serving on the court-martial. The defect was not caught until after trial. The lack of qualified counsel is not a jurisdictional defect requiring reversal, so the error was tested for prejudice. The defense did not object or raise the issue in clemency, and the accused's pleas were voluntary and provident. Therefore there was no prejudice.

2. **Due to potential disqualification as witness.** *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988). Although the accused is not fully and absolutely entitled to counsel of choice, he is

absolutely entitled to retain an established relationship with counsel absent demonstrated good cause.

3. **Due to incompetence.** *United States v. Galinato*, 28 M.J. 1049 (N.M.C.M.R. 1989). Military judge had discretion to remove accused's counsel of choice, and to appoint different counsel, where counsel of choice had effectively withdrawn from proceedings.

4. Due to conflict of interest.

a. **Test for disqualification.** *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990). Accused met with legal assistance attorney who later moved to the criminal law department. The counsel disclosed to the detailed trial counsel that he had represented the accused on an unrelated matter. Court adopted three-part test to determine if trial counsel disqualified: (1) was there former representation (2) was there a substantial relationship between subject matters, and (3) was there a subsequent proceeding. In this case, legal assistance attorney did not act as trial counsel, though he did appear with trial counsel at Article 32.

b. **Trial counsel's investigatory activities did not rise to the level of de facto Article 32 investigating officer.** *United States v. Strother*, 60 M.J. 476 (C.A.A.F. 2005). Trial counsel had served as the command SJA and, in that capacity, conducted interviews involving the accused's misconduct and discussed various aspects of the case, including procedural matters, substantive issues, and investigative options, with the officer ordered to conduct the preliminary inquiry. During this preliminary inquiry, a new SJA arrived and the trial counsel assumed other legal duties. Upon completion of the preliminary inquiry, charges were preferred and an Article 32 investigation directed. At this time, trial counsel was detailed to the case. At trial and on appeal, defense asserted that the trial counsel was disqualified as a matter of due process and because under Article 27(a)(2) he acted as an "investigating officer." Article 27(a)(2) states that no person who has acted as an investigating officer may later act as a trial counsel. While "investigating officer" is not defined in Article 27, the CAAF, after a thorough historical discussion on the "investigating officer" disqualification, interpreted the language to apply to an Article 32 investigating officer. The CAAF then held trial counsel's involvement did not interfere with the accused's due process rights and that the accused did not "demonstrate that the [TC's] activities so departed from the normal role of prosecutor as to make him a de facto Article 32 'investigating officer.'"

c. **Assistant trial counsel's representation of accused's wife on an unrelated legal assistance matter did not disqualify counsel where neither the time period of representation nor subject matter of representation coincided and the trial counsel gained no specific confidential information from the former representation.** *United States v. Humpherys*, 57 M.J. 83 (C.A.A.F. 2002). Assistant trial counsel (ATC) previously represented accused in legal assistance matter (child support issue). At trial, defense moved to disqualify ATC alleging that ATC used information from this prior representation while interviewing the accused's wife (a potential defense sentencing witness). Military judge denied motion to disqualify ATC because: (1) the charges did not relate to the period of time of the prior representation; (2) the subject matter of prior representation had no substantial relationship to any matter at issue in the court-martial; and (3) military judge accepted ATC's representation that she did not recall the specifics of the prior representation. When the defense called the wife as a witness, the ATC conducted cross-examination. In affirming, the court held the accused failed to demonstrate either (1) that the subject of the prior representation was substantially related to the pending court-martial charges (adultery, sodomy, violation of lawful general regulation, and false official statements); or (2) that specific confidential information gained by ATC during the prior representation might have been used to the disadvantage of the accused in the present case. Accused could have

requested military judge review legal assistance file, which still existed, or accused could have testified in closed hearing with sealed record as to the matters of prior representation. Accused's mere conclusory assertions were not sufficient.

d. **Romantic relationship between defense counsel and accused disqualified counsel from representing accused.** *United States v. Cain*, 59 M.J. 285 (C.A.A.F. 2004). Accused alleged that his lead trial defense counsel had a coerced, homosexual relationship with him that created an actual conflict of interest and deprived him of effective assistance of counsel. At *DuBay* hearing, the military judge found the relationship was consensual and that accused desired continued representation by his counsel, despite advice from two civilian counsel to fire him. ACCA held the accused did not meet the two-pronged test to establish IAC due to an actual conflict of interest in a guilty plea: (1) that there was an actual conflict of interest; and (2) that the conflict adversely affected the voluntary nature of the guilty plea. The CAAF reversed, finding that the "volatile mixture of sex and crime in the context of the military's treatment of fraternization and sodomy as criminal offenses" resulted in a "uniquely proscribed relationship" that was "inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant." The conflict resulted in ineffective assistance of counsel under the Sixth Amendment. Findings and sentence set aside.

e. **Civilian counsel required to withdraw where his firm also represented the estranged wife of the accused in the divorce proceedings.** *United States v. Beckley*, 55 M.J. 15 (C.A.A.F. 2001). At issue was the accused's right to retain civilian counsel whom the military judge determined to be disqualified because of the conflict of interest with the accused's estranged wife, who was represented by the lawyer's firm in a divorce action against the accused. After a detailed factual analysis, CAAF affirmed ACCA, holding that the civilian counsel had an actual conflict of interest and was required to withdraw.

f. **Representation of Servicemember in a companion case may be disqualifying.** *United States v. Smith*, 44 M.J. 459 (C.A.A.F. 1996). Defense counsel previously represented another airman in companion case for Article 15 proceedings. Former client did not testify at trial, but testimony presented via stipulation of expected testimony. Accused consented to representation. Court held that client could not make informed decision regarding representation, even after being advised by counsel, because counsel did not understand ramifications of conflict issue; former client was still subject to court-martial even though nonjudicial punishment had been imposed; and court was concerned that accused denied fair trial because of stipulation rather than cross-examination of important witness.

g. **Disagreement in strategy.** *United States v. McClain*, 50 M.J. 483 (C.A.A.F. 1999). Accused complained his lawyers were conspiring with the trial counsel. The accused also had several disagreements with his defense counsel, and told the military judge his counsel had lied to him. In response, one of his counsel told the military judge that the accused has told "lies here today in court." Nevertheless, the military judge denied counsel's request for release, and accused ultimately requested both counsel represent him. The court held the issue of a conflict of interest (because of a disagreement in strategy) was waived by the accused. The defense was entitled to respond to the accused's assertions.

h. **Complaint made against counsel.** *United States v. Thompson*, 51 M.J. 431 (C.A.A.F. 1999). A pretrial complaint against defense counsel, made by accused's wife, did not create a conflict of interest disqualifying him from participation in this case. Court also held that accused was not denied effective assistance of counsel when military defense counsel cautioned him about retaining civilian counsel and discouraged him from getting help from a psychologist.

i. **Military judge has a sua sponte duty to explore conflicts of interest where raised by the record.** *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998). The Government called accused's pretrial confinement cell mate as a witness against the accused. A member of the accused's defense team had previously represented the witness and had negotiated a favorable PTA in part based on information the witness had learned from the accused. After negotiation of the PTA, the counsel then withdrew from witness's case. Additionally, the military judge in the accused's case was the same judge who had presided over witness' guilty plea. At the accused's trial, the defense did not impeach the witness, even though he had been convicted of several crimes involving dishonesty and deceit. The court held the military judge had a sua sponte duty to resolve conflict questions on the record and defense had a duty to discuss potential or actual conflicts of interest with accused. Such multiple representation creates a presumption that a conflict of interest existed, one that can be rebutted by the actual facts. In this case, there was a clear conflict of interest.

j. **Trial counsel who acted as Accuser.** *United States v. Reist*, 50 M.J. 108 (C.A.A.F. 1999). Assistant TC signed charge sheet and was present in court, identified as "accuser" on the record, and argued at sentencing that accused's conduct was "cowardly criminal conduct of a sexual pervert." While ATC was accuser under Article 1(9), UCMJ, and clearly disqualified to act as ATC (RCM 504(d)(4)(A)), the court held defense waived the issue, and found no plain error.

k. **Due to prior duty on opposite side.** *United States v. Smith*, 26 M.J. 152 (C.M.A. 1988) (trial counsel who had been a member of the Trial Defense Service and acted as a sounding board for part of the defense case was not disqualified); *United States v. Sparks*, 29 M.J. 52 (C.M.A. 1989) (despite Article 27 violation, accused cannot complain when, "after full disclosure and inquiry by military judge," he gives informed consent to representation by defense counsel who previously acted for prosecution).

l. ***Based on bar status***. *United States v. Steele*, 53 M.J. 274 (C.A.A.F. 2000). No error where accused's civilian DC was carried "inactive" by all state bars of which he was member (and such status prohibited him from practicing law). RCM 502(d)(3)(A) requires that a CDC be a member of a bar of a federal court or bar of the highest court of the state, or a lawyer authorized by a recognized licensing authority to practice law (and determined by military judge qualified to represent the accused). CAAF looked to federal case law holding that neither suspension nor disbarment creates a *per se* rule that continued representation is constitutionally ineffective (CAAF also noted a Navy instruction permits military counsel to remain "in good standing" even though they are "inactive."). Counsel are presumed competent once licensed.

C. **Replacement Counsel**

1. **Severance of attorney-client relationship.** *United States v. Allred*, 50 M.J. 795 (N-M. Ct. Crim. App. 1999). A preexisting attorney-client relationship may be severed by Government only for good cause. "Good cause" did not exist where defense counsel had entered into relationship with accused concerning pending charges, charges were dismissed during the time accused was medically evacuated for evaluation of heart problems, and DC was told by SDC that, due to pending PCS, DC would not be detailed to case if charges re-preferred. Court found that DC's commander's finding of unavailability was abuse of discretion. Prejudice presumed and findings and sentence set aside.

2. **Duty to provide counsel.** *United States v. Johnston*, 51 M.J. 227 (C.A.A.F. 1999). Where detailed defense counsel left active duty prior to preparation of a new SJA recommendation, failure of the convening authority to detail substitute counsel for accused deprived him of his

opportunity for sentence relief with the convening authority and was prejudicial to accused's substantial rights.

XII. ACCUSED

A. **Accused's Forum Selection**.

1. Forum selection requests evaluated for substantial compliance with RCM 903(b)(2).

a. ***Request for trial by judge alone.*** *United States v. Turner*, 47 M.J. 348 (C.A.A.F. 1997). Where the military judge fully explained the accused's rights as to forum, and defense counsel stated at trial that the accused wished to be tried by military judge alone, it was error for the accused not to state his election either in writing or orally on the record. However, the facts of the case showed substantial compliance with Article 16, UCMJ, and no material prejudice to the substantial rights of the accused.

b. **Request for trial before members.** RCM 903(b)(1). *United States v. Alexander*, 61 M.J. 266 (C.A.A.F. 2005). Military judge advised the accused of his forum selection rights, which the accused requested to defer. During a later proceeding, the military judge stated that he was told an enlisted panel would be hearing the case and defense did not object to the judge's statement. The accused, however, failed to state in writing or on the record his request for enlisted members in violation of Article 25, UCMJ and RCM 903(b)(1). The CAAF held that the error in the accused failing to personally select forum on the record is a procedural, as opposed to jurisdictional, issue. The court stated, "[the] right being addressed and protected in Article 25 is the right of an accused servicemember to select the forum[,] . . . [t]he underlying right is one of forum selection, not the ministerial nature of its recording." The CAAF held that the record reflected that the accused selected court-martial by panel members and the accused failed to show that the error in recording his forum selection resulted in any prejudice.

c. *United States v. Morgan*, 57 M.J. 119 (C.A.A.F. 2002) (military judge erred by not obtaining on record defendant's personal request for enlisted members to serve on court-martial, but error was not jurisdictional, and under circumstances, it did not materially prejudice substantial rights of defendant)

d. *United States v. Daniels*, 50 M.J. 864 (A. Ct. Crim. App. 1999). Where accused was tried by enlisted members and there was no evidence on the record reflecting personal forum selection, jurisdiction was properly found by a military judge in an ACCA-ordered *DuBay* hearing, which established that accused had discussed her forum choices with her counsel, and that, prior to the assembly of the court, she had decided to elect trial by an enlisted panel, and that her counsel had then presented a document to TC stating that the accused requested an enlisted panel. Failure to elicit forum selection on the record was a technical defect in the application of Article 25, a defect that, as was clear from the *DuBay* hearing, did not prejudice the substantial rights of the accused.

e. *United States v. Lanier*, 50 M.J. 772 (A. Ct. Crim. App. 1999), *aff'd*, 53 M.J. 220 (C.A.A.F. 2000) (summary disposition). Counsel's consulting with the accused and announcing on the record, in response to judge's question, "We will have a court with enlisted" substantially complied with the terms of Article 25(c)(1).

f. *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). No error where accused, who had signed his request for enlisted members with words "Negative Reading," was directed by military judge to elect a forum and he subsequently signed his name above the words "Negative Reading;" any confusion the accused experienced concerned his name and not his forum choices.

B. **Trial in Absentia.** RCM 804(c).

1. The accused shall be considered to have waived the right to be present if after initially present he/she (1) voluntarily absents self after arraignment, or (2) is removed for disruption. For requirements of a valid arraignment, see RCM 904.

2. *United States v. Bass*, 40 M.J. 220 (C.M.A. 1994). Accused did not return for trial after being arraigned 23 days earlier (delay for sanity board).

3. **Inference of voluntary absence.** *United States v. Sharp*, 38 M.J. 33 (C.M.A. 1993). Notice to accused of exact trial date or that trial may continue in his absence, while desirable, is not a prerequisite to trial in absentia. Burden is on the defense to go forward and refute the inference of a voluntary absence. Military judge must balance public interest with right of accused to be present.

4. **Proper arraignment required.** *United States v. Price*, 43 M.J. 823 (A. Ct. Crim. App. 1996), rev'd, 48 M.J. 181 (C.A.A.F. 1998). Trial in absentia is not authorized when military judge fails to conduct a proper arraignment. Reversing the ACCA, the CAAF stated that when military judge asked accused whether charges should be read, but failed to call upon the accused to plead, this constituted a defective arraignment. Waiver by voluntary absence will not operate to authorize trial in absentia if arraignment is defective, particularly considering that military judge failed to also inform the accused that trial would proceed in accused's absence. See generally RCM 904 ("Arraignment . . . shall consist of reading the charges and specifications to the accused and calling on the accused to plead.").

5. **Accused sleeping during trial.** *United States v. Thrower*, 36 M.J. 613 (A.F.C.M.R. 1993). While giving unsworn statement during sentencing, accused succumbed to effects of sleeping pills he took earlier and remainder of statement given by defense counsel. Held to be a voluntary absence.

C. **Accused's Rights to counsel.**

1. Pro se representation. RCM 506(d).

a. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). Before approving accused's request to proceed pro se, RCM 506(d) requires a finding that the accused understands: (1) the disadvantages of self-representation and; (2) if the waiver of counsel was voluntary and knowing. Opinion includes an appendix of suggested questions.

b. *Cf. Iowa v. Tovar*, 541 U.S. 77 (2004). Prior to proceeding pro se at a guilty plea, the Sixth Amendment is satisfied if the trial court "informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." Warnings that: "(1) advise the defendant that waving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked; and (2) admonish[ing] the defendant that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty" are *not* required by the Sixth Amendment.

c. *Godinez v. Moran*, 509 U.S. 389 (1993). Supreme Court says the standard of competence to proceed pro se is no different than that required for an accused to stand trial. Military appellate courts appear to imply a higher level of competence for accused to waive counsel. *See also United States v. Freeman*, 28 M.J. 789 (N.M.C.M.R. 1989) ("[H]igher standard of competence must exist for an accused to waive counsel and conduct his own defense than would be required to merely assist in his own defense"). *United States v. Streater*, 32 M.J.

337 (C.M.A. 1991) (accused was competent to "represent himself and to actually defend himself").

2. ***Individual military counsel***. RCM 506(b); Article 38(b), UCMJ; AR 27-10, para 5-7 (11 May 2016); *United States v. Spriggs*, 52 M.J. 235 (C.A.A.F. 2000). If an individual military counsel request has been denied and the defense claims improper severance of attorney-client relationship, the defense bears the burden of demonstrating that the accused had a viable ongoing attorney-client relationship regarding the substance of the charges. Defense must demonstrate both an understanding as to the nature of future representation and active engagement by the attorney in preparation of the case. If the defense makes such showing, the burden shifts to the Government to demonstrate good cause for severance. If the defense cannot make such showing, the burden shifts to the Government to demonstrate that the judge advocate was not reasonably available under applicable criteria. If there was a prior attorney-client relationship that is no longer viable at the time of the request, the Government is not required to demonstrate good cause, but must demonstrate that the other criteria warrant disregarding the relationship under the circumstances. Absent Government misconduct, the routine separation of a judge advocate from active duty normally terminates any attorney-client relationship established on the basis of the attorney's military status, except when: (1) the attorney agrees to represent the client in his or her civilian capacity; or (2) the attorney enters the reserves and is ordered to represent the client to the extent permitted by applicable law based upon a determination by the appropriate official of reasonable availability.

3. Civilian Counsel.

a. **Delay to obtain civilian counsel.**

(1) *United States v. Wiest*, 59 M.J. 276 (C.A.A.F. 2004). Military judge abused his discretion in denying defense request for delay to obtain civilian counsel. "It should . . . be an unusual case, balancing all the factors involved, when a judge denies an initial and timely request for a continuance in order to obtain civilian counsel, particularly after the judge has criticized appointed military counsel." Applying the *Miller* factors, below, the court held that the judge erred and set aside findings and sentence.

(2) *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997). Military judge abused his discretion by denying request for delay in post-trial hearing in order for accused to obtain civilian counsel. While the right to retain civilian counsel is not absolute, "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." Factors used to determine whether military judge abused his discretion include: surprise, timeliness of the request, other continuance requests, good faith of moving party, and prior notice.

(3) ***Foreign counsel***. RCM 502(d)(3)(b); *Soriano v. Hosken*, 9 M.J. 221 (C.M.A. 1980). Military judge determines if individual foreign civilian counsel is qualified.

XIII. OTHER COURT-MARTIAL PERSONNEL

A. Staff Judge Advocates.

1. **General**. Article 6(a) governs assignment of staff judge advocates. Article 6(c) specifies who may not serve as the staff judge advocate or legal officer to the reviewing authority on a case. Previous participation as a "member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer" is disqualifying. Article 6, UCMJ. *See also* RCM 1106(b).

2. Disqualification Cases

a. **While a staff legal officer who merely gives general advice to prosecutors or investigators is not disqualified from participating in the post-trial process, when the same advisor becomes a participant in the prosecution, she is disqualified.** *United States v. Gutierrez*, 57 M.J. 148 (C.A.A.F. 2002). The accused pled guilty to multiple specifications of larceny, conspiracy to commit larceny, robbery, conspiracy to commit robbery and receiving stolen property. Prior to entry of pleas, the accused moved to dismiss all charges and specifications for lack of speedy trial. The Chief of Justice testified in opposition to the motion and the military judge denied the motion. Later, the COJ assumed duties as the SJA and prepared the post-trial recommendation (PTR) in the accused's case. DC responded to the PTR claiming that the COJ was disqualified from preparing the PTR because of her involvement in the case, specifically her testimony in opposition to the speedy trial motion. Since Government counsel assumed a prosecutorial role in accused's case prior to her appointment as SJA, she was disqualified from preparing the SJA post-trial recommendation which involved evaluating the prosecution.

b. **Where SJA imputes actions of TC to herself, the SJA is disqualified from participating in the post-trial process.** *United States v. Taylor*, 60 M.J. 190 (C.A.A.F. 2004). Eight days after the accused's court-martial, trial counsel published an article in the base newspaper warning commanders to properly prepare adverse personnel records. The article resulted from the trial counsel's inability to admit the accused's adverse personal records, because of numerous administrative errors, which the trial counsel characterized as a disservice to justice. Based on the article, the defense sought the disqualification of the SJA. The SJA, while stating the article could be imputed to him in an addendum recommendation, took action on the case. The CAAF held where a SJA imputes a disqualification to himself his participation in the post-trial review process is error, that the accused made a "colorable showing of prejudice," and returned the case for a new post-trial review.

c. **Performing trial counsel duties—even administrative ones—can effectively cause staff judge advocate to be "trial counsel."** *United States v. Stefan*, 69 M.J. 256 (C.A.A.F. 2010). Chief of Justice caused charges to be served on the accused (a duty reserved for detailed trial counsel under RCM 602) and then signed charge sheets as "Trial Counsel." The Chief of Justice later, in her capacity as Acting SJA, signed the addendum to the post-trial staff judge advocate's recommendation (SJAR), recommending the convening authority not grant clemency. Defense argued that under Article 6(c), no person who has acted as trial counsel may later act as SJA in the same case. CAAF held the Acting SJA was disqualified based on her limited administrative actions as trial counsel. However, the court affirmed, finding the error did not prejudice the accused.

d. ***Same individual cannot serve as SJA and military judge in same case.*** Under RCM 1106(b) and Article 6(c), UCMJ, a person cannot serve as the SJA and military judge in the "same case." RCM 1106(b) governs the post-trial SJA recommendation. Article 6(c) more broadly governs action an SJA assisting "any reviewing authority." *See United States v. Moorefield*, 66 M.J. 170 (C.A.A.F. 2008) (per curiam). The staff judge advocate (SJA) served as a military judge in a prior, unrelated, court-martial of the accused. On appeal, the defense argued the SJA should have been disqualified, citing RCM 1106 and Article 6, UCMJ. In a short per curiam opinion, the CAAF held the SJA was not disqualified. The two courts-martial were several years apart and involved different victims and evidence. The judge advocate properly acted as SJA and military judge in the two cases as they were "neither the same case for purposes of RCM 1106 or Article 6, UCMJ, nor the same matter, for purposes of [Navy professional responsibility rules]."

3. Other SJA powers

a. ***SJA has no authority to make 'de facto' denial of immunity request by refusing to process to the CA.*** *United States v. Ivey*, 55 M.J. 251 (C.A.A.F. 2001). At issue was whether Government failed to process the accused's requests for immunity for four civilian witnesses. Here, the CA did not deny the defense request for immunity until after trial and chose not to forward the request to Department of Justice. In addition, military judge denied the defense request to grant immunity or to abate the proceedings to wait for CA action. The CAAF held trial counsel and SJAs do not have the authority to *de facto* deny a request for immunity by withholding it from the convening authority. All requests for immunity, from either the Government or the defense, must be submitted to the CA for a decision; the CA does not have to forward an immunity request for a civilian to DOJ if the CA intends to deny that request; and all three prongs of RCM 704(e) must be met before a military judge may overrule a CA's decision to deny a request for immunity: (1) the witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; (2) Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and (3) the witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses. In this case, the military judge did not abuse his discretion by refusing to abate proceedings (to wait for CA action) where he found there had been no discriminatory use of immunity or Government overreaching, and proffered testimony was not clearly exculpatory.

b. **SJA's promise of immunity will be treated as de facto immunity even though RCM 704 is not met.** *United States v. Jones*, 52 M.J. 60 (C.A.A.F. 1999). Accused was charged with conspiracy to submit a false claim, larceny, and other offenses. His co-accused were offered punishment under Article 15 if they agreed to testify against the accused. When the co-conspirators invoked their rights and seemed hesitant to cooperate, the SJA called the RDC and said that the three soldiers would be court-martialed if they did not testify in accordance with their agreement. The CAAF said the informal agreements were tantamount to a grant of *de facto* immunity, that the President had not formulated rules governing such "informal immunity," but that there was no command influence and no material prejudice to the accused.

B. **Disqualification of Article 32 Investigating Officers**. *United States v. Holt*, 52 M.J. 173 (C.A.A.F. 1999). Article 32 investigating officer recommended accused's case be referred capital for his alleged murder of a fellow biker. After referral, the Article 32 investigating officer attended a forensic evidence course and, upon returning to the command, gave trial counsel the name and phone number of a forensic expert. Ultimately, this expert testified for Government that the spatter patterns on jeans seized from the accused were consistent with a stabbing. CAAF noted that an "investigating officer is disqualified" from acting subsequently "in the same case in any other capacity" under RCM 405(d)(1), and that his provision of information solely to the assigned prosecutor may have created at least the appearance of impropriety by providing trial counsel with information that was neither transmitted to the commander who ordered the investigation nor served on the accused. Nevertheless, the court found no prejudicial error that would warrant giving the accused a new trial; the decision to submit the jeans for testing and to call the expert witness were solely the decisions of the trial counsel.

C. **Court Reporters**. RCM 502(e). *See United States v. Yarbrough*, 22 M.J. 138 (C.M.A. 1986). Accuser improperly acted as court reporter but reversal not required where accuser only operated microphone system and did not transcribe proceedings or prepare the record of trial.

D. **Interpreter**. RCM 502(e). Must be qualified and sworn.

E. **Bailiff**. RCM 502(e). Cannot be a witness. *United States v. Martinez*, 40 M.J. 82 (C.M.A. 1994). Military judge committed prejudicial error when, during sentencing deliberations, he conducted an ex-parte communication with bailiff.

F. **Drivers.**

1. *United States v. Aue*, 37 M.J. 528 (A.C.M.R. 1993). Military judge's assigned driver told witnesses waiting to testify that the MJ told her that "he had already decided the case." Military judge addressed issue at post-trial Article 39(a) hearing as motion for mistrial and found that: (1) he had never made such a statement; and (2) that driver was trying to impress witnesses with her apparent "inside information." ACMR returns for *DuBay* hearing and indicates that MJ should have recused himself at the post-trial Article 39(a) session. Otherwise, no misconduct by military judge and no prejudice to accused.

2. *United States v. Knight*, 41 M.J. 867 (A. Ct. Crim. App. 1995). Three senior enlisted court members solicited daily information from driver about his opinions regarding witness veracity, medical testimony, and what transpired during Article 39(a) sessions. Defense motion for mistrial made during deliberations denied. CA grants immunity to members in post-trial Article 39(a) session. ACCA said SJA, CA, and military judge "were remiss" in failing to apply presumption of prejudice absent clear and positive showing by Government.

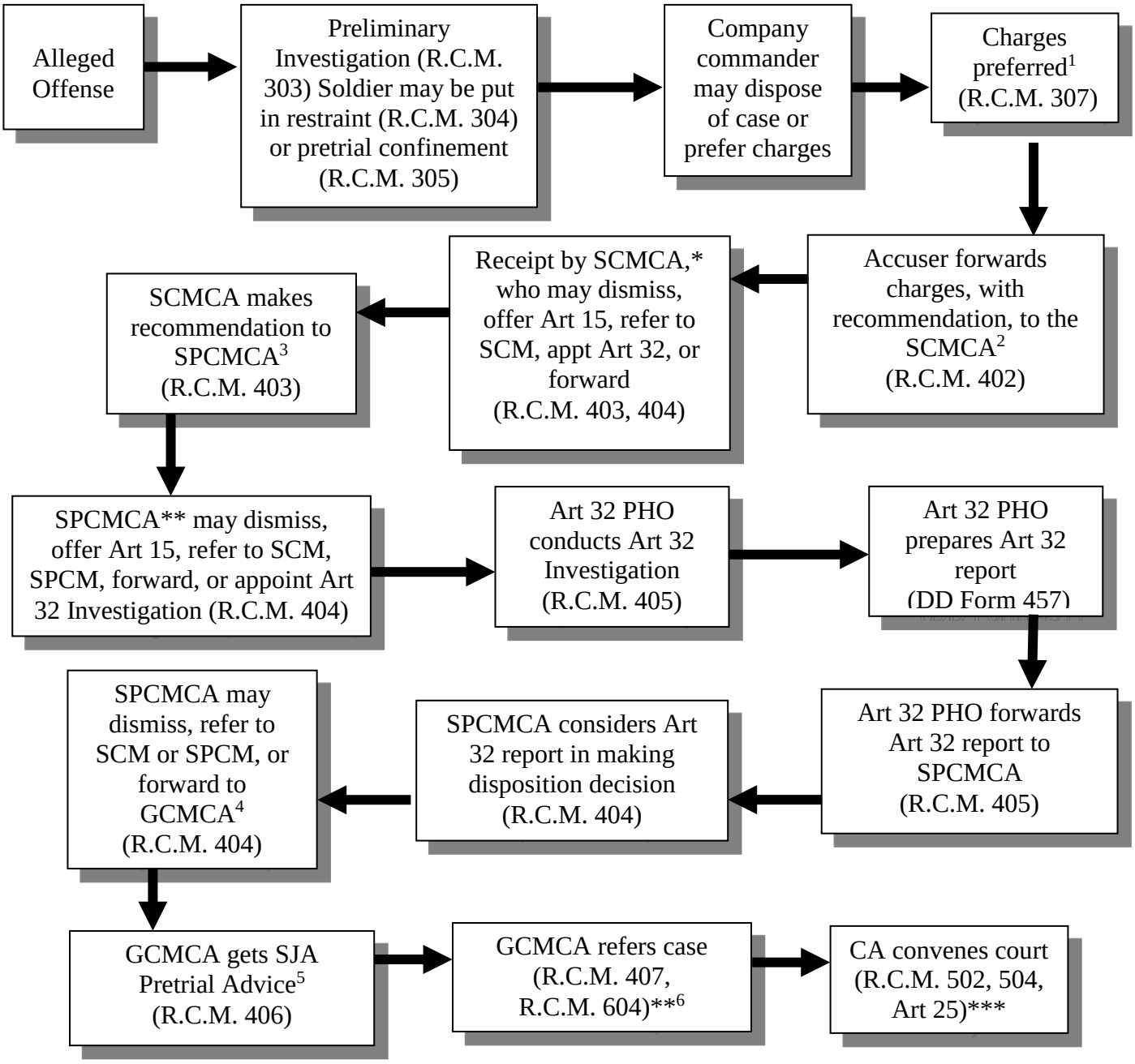
XIV. APPENDIX – COURT-MARTIAL PERSONNEL SUMMARY

MAJOR POINT SUMMARY

The Convening Authority	• A convening authority (CA) has **personal responsibility** to select members and refer cases to courts-martial. Article 25(d) and Article 1(9), UCMJ. When considering selection and referral issues, look at the practical effect of the action as well as the RCMs to ensure that this is an appropriate situation for application of the practical effects test. • A convening authority with a p**ersonal interest in a case** is disqualified from referring a case to trial and taking most other actions. A convening authority with a statutory disqualification is also disqualified from referring a case to a GCM or SPCM, but can appoint the Article 32 investigator and make a recommendation on the disposition of the case.
Accused's Rights: Counsel Qualifications and Pro Se Representation	• The accused is entitled to qualified counsel at trial. When confronted with issues regarding counsel qualifications, determine whether the defect results in prejudice to the accused. Such defects are, however, nonjurisdictional. • Regarding prior representation, determine on the record 1) whether there was former representation, 2) whether there was a substantial relationship between the subject matters, and 3) whether there was a subsequent proceeding. • An accused may proceed pro se if military judge makes the accused aware on the record of the disadvantages of self-representation and secures a voluntary and knowing waiver of counsel.
Court Members	• CA may violate the law if she uses anything other than the Article 25(d) criteria (age, experience, education, training, length of service, judicial temperament) to select members. Rank may not be a sole selection criterion. Gender or race may be a criterion if the CA is seeking to include members of these categories for purposes of fairness and cross-sectional representation; however, lack of evidence of a benign intent may be construed against the government. The CA's motive is crucial. • CA cannot systematically exclude otherwise qualified personnel. *See US v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008) • Enlisted members CAN be from the accused's company-size unit, but a military judge would likely grant a challenge against such a member.
The Military Judge	• A military judge must carefully consider motions for recusal. The standard is: a military judge should disqualify himself when his partiality might reasonably be questioned. To ensure that such motions are properly handled, the military judge should follow

	RCM 902 by making full disclosure on the record of the potentially disqualifying matter, and permit voir dire and challenge. When in doubt, the military judge should grant recusal. • The MJ must be careful not to engage in judicial advocacy. The MJ should not assist one side or the other through questioning witnesses or praising witnesses. • The MJ must be mindful not to discuss cases with other court personnel. Such contact or discussion may lead to situations where drivers, bailiffs and court reporters communicate to others their interpretation of MJ comments about findings or sentence, raising issues of partiality and unfairness. • If the MJ engages in a "Bridging the Gap" session, he should scrupulously keep the core of the deliberative process privileged.
Trial By Judge Alone or by a panel of ⅓ enlisted members	• Article 16 requires that the accused make a forum request in writing or orally on the record. To eliminate the possibility of error, the MJ should obtain an oral or written forum request on the record, especially in trials with multiple pretrial proceedings. Other means *might* substantially comply with Article 16 (counsel makes request in accused presence; request made after assembly). • The doctrine of substantial compliance applies to requests for trial by one-third enlisted members as well. Such requests are controlled by Article 25, UCMJ.
Trial In Absentia ▸ **Presence** ▸ ▸ ▸	• Trial in absentia is only possible after an effective arraignment. *The MJ must ensure that the accused is given an opportunity to have the charges read, and then call upon the accused to plead.* Arraignment does not include entry of the plea. *See* RCM 904 for requirements of arraignment. • The UCMJ and RCMs require that all parties to a trial be *physically* present in one occasion to conduct valid court-martial proceedings. This ensures that the MJ is able to preside over the trial, and evaluate whether the accused genuinely desires to proceed with a particular forum or waive or pursue rights under the Constitution and UCMJ.

XV. APPENDIX – PRETRIAL FLOWCHART



[1]Usually the company commander (the accused's immediate commander) prefers charges, becoming the Accuser; forwards charges (once forwarded, charges may be disposed of only by a convening authority (CA)).
[2]Summary Court-Martial Convening Authority
[3]Special Court-Martial Convening Authority
[4]General Court-Martial Convening Authority
[5]The SJA will normally "bundle" the subordinate commanders' recommendations with his Pretrial Advice.
[6]Review of non-referral decisions withheld to superior GCMCA(s).
*Disposition of certain sex offenses with withheld to O-6 Commander level.
**GCMCAs and SPCMCAs who are accusers may not act as CAs. Art 1(9), Art 22(b), Art 23(b). If statutorily disqualified (because she signed charge sheet), CA may dismiss, offer Art 15, appt Art 32, forward with rec. for GCM (must note disqualification). If personally disqualified (e.g., personal interest in case), may not appt Art 32, must forward with no rec. (only SCMCA may be accuser and a CA).
***Usually CA will have previously convened court, e.g., by creating a "standing panel."

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CHAPTER 10
SPEEDY TRIAL

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I. REFERENCES

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II. GENERAL

A. Note that there are four sources of speedy trial protections that may apply in the course of a court-martial, and each of these sources have their own triggers (i.e., what circumstance in the case makes that protection applicable) and tests to determine if the accused's speedy trial rights have been violated. One or more of these will be applicable in any given court-martial, depending on the circumstances of the case. *United States v. Wilder*, 75 M.J. 135 (C.A.A.F. 2016).

B. In general, RCM 707, the 5th Amendment, and the 6th Amendment speedy trial protections will apply in all cases in which charges are preferred. Article 10 speedy trial protections will only apply in cases in which the accused is placed in arrest or pretrial confinement.

C. Practitioners must understand the triggers and tests for all of these protections as courts will apply each applicable test to ensure that an accused's speedy trial rights are protected. Although practitioners usually think of the RCM 707 120-day clock when analyzing speedy trial concerns, RCM 707 is the only source of speedy trial protections that has a set number of days. The other sources of speedy trial protections have tests not defined by a set number of days, and therefore can be more difficult to analyze.

III. RCM 707: THE 120 DAY RULE

A. The Rule. "The accused shall be brought to trial within 120 days after the earlier of: (1) Preferral of charges; (2) The imposition of restraint under R.C.M. 304(a)(2)-(4) [restriction, arrest, confinement]; or (3) Entry on active duty under R.C.M. 204." RCM 707(a). For the purposes of RCM 707, the accused is brought to trial when he/she is arraigned; the date of the triggering event does not count towards the 120 days, but the date of arraignment does count. RCM 707(b)(1). Therefore, the government must ensure the accused is arraigned within 120 days after one of the triggering events listed in the rule.

1. "Conditions on liberty" (a moral restraint under RCM 304(a)(1)) is not a type of pretrial restraint that triggers RCM 707.

2. "Specified Limits": An individual must be required to remain within specified limits to constitute pretrial restriction. *See* RCM 304(a)(2)-(3).

a. *United States v. Wilkinson*, 27 M.J. 645 (A.C.M.R. 1988), *petition denied*, 28 M.J. 230 (C.M.A. 1989): Denial of off-post pass that left the accused free access to the entire installation with all its support and recreational facilities was at most a condition on liberty that did not affect speedy trial clock. "[The lack of pass privileges] will, in the usual case, have no impact on rules relating to speedy trial."

b. *But see United States v. Wagner*, 39 M.J. 832 (A.C.M.R. 1994): In dicta, court questioned *Wilkinson's* application to married Soldier living off post, especially in a foreign country. Court should consider extent and duration of disruption of spousal and parental responsibilities.

c. *See also United States v. Melvin*, 2009 WL 613883 (A.F. Ct. Crim. App. 2009): Maj. Melvin was an Air Force ROTC instructor. He was charged with providing underage cadets in his detachment with alcohol, had sexual intercourse with a female cadet, and encouraged cadets to lie to investigating officers. He was adjudged a dismissal and six months confinement. One issue on appeal was the trial judge's decision to start the 120 day clock at preferral of charges. Maj. Melvin asserted it should have started when he received a no contact order with the cadets and was sent TDY away from the university area and more significantly, his family that lived there. Maj. Melvin's contended that because he was forced away from his family and could not return home without taking leave, this equated to restriction and pretrial restraint under RCM 304(a)(2)-(3). Alternatively, Maj. Melvin argued that his extension on active duty was a second triggering date before preferral. The appellate court agreed with the trial judge that neither of these positions contained merit.

3. Administrative restraint: Administrative restraint imposed under RCM 304(h) "for operational or other military purposes independent of military justice, including administrative hold or medical reasons" is not pretrial restraint under RCM 304(a) and does not start the speedy trial clock.

a. "Primary Purpose" Test: If the primary purpose of restraint is administrative and not for military justice, the speedy trial clock is not triggered.

b. *United States v. Bradford*, 25 M.J. 181 (C.M.A. 1987): Denial of sailor's port liberty while sailor was a suspect of offense found to be "administrative restraint" under RCM 304(h). "[We] believe the <u>test</u> is . . . the <u>primary purpose</u>. . . ." "Where the evidence supports a conclusion that the primary purpose of the command . . . is related to an upcoming court-martial, R.C.M. 707 applies."

4. Multiple preferrals: When charges are preferred at different times, the 120-day clock begins as of the date of preferral, imposition of restraint, or entry on active duty, of each charge. RCM 707(b)(2); *see United States v. Robinson*, 26 M.J. 954 (A.C.M.R. 1988) aff'd, 28 M.J. 481 (C.M.A. 1989) ("We hold that, in order to commence the speedy trial clock, the imposition of restraint . . . must be 'in connection with' the specification being challenged.").

5. Accounting for days: Include the day of arraignment in the 120-day count; do not include the day of preferral, imposition of restraint, or entry on active duty. RCM 707(b)(1).

6. Termination: Accused is "brought to trial" for purposes of RCM 707 at arraignment. RCM 707(b)(1); *see United States v. Doty*, 51 M.J. 464 (C.A.A.F. 1999) (CAAF holds that arraignment at day 119 was not a "sham" to toll the speedy trial clock). For sentence rehearings, the clock

stops when the accused is first brought to the "bar" for resentencing, typically at the initial UCMJ art. 39(a) session. *United States v. Becker*, 53 M.J. 229, 232 (A.F. Ct. Crim. App. 2000); *United States v. Gammon*, 2009 CCA LEXIS 108 (N-M. Ct. Crim. App. 2009) (an unpublished case where, based on the dispersal of trial participants, the appellate court approved of the judge's decision to delay the arraignment until trial because of the "unjustifiable expense" in bringing everyone together and excluding the period of time from when the arraignment could have occurred but for the cost factor until when it actually did happen).

B. Restarting the clock at zero. RCM 707(b)(3).

1. First restart provision. If charges are dismissed or a mistrial is granted, 120-day speedy trial clock is reset to begin on: date of dismissal/mistrial in cases where accused remains in pretrial restraint under RCM 304(a)(2)-(4) at the time of dismissal/mistrial; or when accused is not under pretrial restraint at time of dismissal/mistrial, on the earliest of the date on which charges are preferred anew, the date on which restraint is imposed under RCM 304(a)(2)-(4), or the date of mistrial in cases in which charges are not dismissed or preferred anew. RCM 707(b)(3)(A).

a. Dismissal (RCM 401) or withdrawal (RCM 604)?

1) General Rule: Withdrawal does not reset or toll speedy trial clock. *United States v. Weatherspoon*, 39 M.J. 762 (A.C.M.R. 1994). Dismissal of charges does. RCM 707(b)(3)(A); *United States v. Bolado*, 34 M.J. 732 (N.M.C.M.R. 1991); aff'd, 36 M.J. 2 (C.M.A. 1992) (A commander can dismiss charges even if there is an intent to re-institute charges at a later date. Convening authority ordered charges dismissed since two NIS witnesses were deployed on Operation Desert Shield/Storm for an uncertain time period. Charges lined through, dismissal document executed, accused informed and allowed to go on leave, although not allowed to work in MOS. Charges were repreferred 9 months later following return of the witnesses); *see also United States v. Tippit*, 65 M.J. 69 (C.A.A.F. 2007) (Upon the SJA's advice the SPCMCA signed a withdrawal of charges (which were not referred). The Court honored the SPCMCA intent to dismiss the charges despite the misnomer and found no violation of RCM 707).

2) *United States v. Young*, 61 M.J. 501 (Army Ct. Crim. App. 2005): Young deserted his unit after he was found guilty of various offenses but prior to sentencing. The court sentenced him, in absentia, to confinement for life. After his initial trial, his command preferred a new charge for desertion in 1995. Young was apprehended six months later and began serving his life sentence. The desertion charge was not acted upon until the Chief of Staff at the USDB signed a DA Form 4833 stating, "the [prior] command and the USDB have declined prosecution of the desertion offense." The command decided to go forward on the desertion charge when the sentence from Young's initial trial was set aside on appeal. Believing the initial desertion charge had been dismissed, the command preferred the desertion charge anew in 1999. Young moved the trial court to dismiss the desertion charge because there had been no dismissal of the original desertion charge and therefore the speedy trial clock had run continuously since 1995. The trial court disagreed and found the DA Form 4833 equaled a dismissal. ACCA reversed the case finding that the government had violated Young's right to a speedy trial. The court noted that the DA Form 4833 was NOT a dismissal but rather a decision to take "no action."

b. Subterfuge: commands cannot dismiss and then reprefer charges for an improper purpose or as a subterfuge to avoid committing a 120-day speedy trial clock violation; in such cases, the 120-day clock will continue to run. RCM 707(b)(3)(A)(iii); *United States v. Hendrix*, 77 M.J. 454 (C.A.A.F. 2018).

1) *United States v. Leahr*, 73 M.J. 364 (C.A.A.F. 2014): No subterfuge where dismissal results from "a legitimate command reason which does not 'unfairly prejudice' an accused."

2) *United States v. Robison*, WL 6135093 (Army Ct. Crim. App. 2011): Dismissal of a DFR charge sheet 93 days after an Accused's return to military control was not a subterfuge and therefore not a violation of the Accused's right to a speedy trial under RCM 707. "A convening authority's dismissal of a charge is only a subterfuge when the sole purpose of the dismissal is to avoid the running of the 120–day speedy trial clock." The government preferred a new desertion charge with newly acquired information in an additional element.

3) *United States v. Robinson*, 47 M.J. 506 (N-M Ct. Crim. App. 1997): Dismissal of charges on day 115 and repreferral of substantially identical charges one week later, without any significant change in Accused's status held to be a subterfuge to avoid the 120-day speedy trial clock. Distinguishes *Bolado*, which held convening authority need not explain reasons for dismissal. Any other solution would allow CA to routinely violate spirit of RCM 707.

4) *United States v. Hendrix*, 77 M.J. 454 (C.A.A.F. 2018): Court rejects trial judge's conclusion that a convening authority's dismissal of charges with intent to reprefer implies subterfuge or an improper reason where there is no indication that the government was engaged in deception or dismissed with the intent of avoiding the 120-day clock. Dismissing charges due to a victim who declines to participate in the prosecution, and then repreferring the charges after the victim changes her mind is not a subterfuge.

5) Factors courts will consider to decide if subterfuge: convening authority intent, notice and documentation of action, restoration of rights and privileges of accused, prejudice to accused, amended or additional charges. *United States v. Anderson*, 50 M.J. 447 (C.A.A.F. 1999) (CAAF finds no subterfuge under the facts of the case and declares, contrary to the Government's concession, that the speedy trial clock was restarted on the date of dismissal).

2. Second restart provision. If the accused is released from pretrial restraint for a significant period, the 120-day clock shall run from the earliest of the date on which charges are preferred, restraint is re-instituted, or entry on active duty. RCM 707(b)(3)(B).

a. What is a significant period?

1) *United States v. Hulsey*, 21 M.J. 717 (A.F.C.M.R. 1985), *petition denied*, 22 M.J. 353 (C.M.A. 1986): 5 day release from pretrial restraint held a "significant period" and not a "subterfuge designed to circumvent R.C.M. 707;" clock restarted with reinstitution of restraint.

2) *United States v. Miller*, 26 M.J. 959 (A.C.M.R. 1988), *petition denied*, 28 M.J. 164 (C.M.A. 1989): 5 day release from pretrial restriction tantamount to confinement held to be a "significant period" even though accused was held in administrative restraint in the hospital for the 5 days. Factors considered by the court: (1) hospitalization for suicide attempt; (2) hospital, not command, imposed the administrative restraint; and (3) no showing of improper gamesmanship.

3) *United States v. Campbell*, 32 M.J. 564 (A.C.M.R. 1991): Thirteen day period of restriction imposed as punishment under Article 15 was a "significant period" of "release" from ongoing restriction that restarted the speedy trial clock. Article 15 was for

offenses that were unrelated to the court-martial charges and was not a subterfuge to avoid speedy trial issues.

4) *United States v. Reynolds*, 36 M.J. 1128 (A.C.M.R. 1993): 19 day period of conditions on liberty between release from 5 weeks of restriction and preferral of charges was a significant period. Speedy trial clock commenced running upon preferral.

b. Note: Time between release from pretrial restraint and preferral of charges need not be a "significant period" to stop the speedy trial clock if restraint is not re-imposed. *United States v. Ruffin*, 48 M.J. 211 (C.A.A.F. 1998): Charges preferred one day after two month restriction was lifted and restriction was never re-imposed. The requirement to wait a "significant period" of time only applies to cases involving re-imposition of restraint; it does not require the government to wait a significant period before preferring charges once released from confinement. Purpose of the rule is to avoid sham releases to stop and start the speedy trial clock. Here, because restriction was never re-imposed, release was for a "significant period" which restarted the speedy trial clock at preferral.

3. Third restart provision. The filing of a notice of government appeal under RCM 908 resets 120-day clock for all charges that did not go forward (i.e., were stayed) nor severed to the date of notice to the parties that the U.S. elects not to appeal (RCM 908(b)(8)) or notice to the parties of final decision on the appeal (RCM 908(c)(3)), unless it is determined that the appeal was filed solely for the purpose of delay with knowledge that it was frivolous and without merit. RCM 707(b)(3)(C).

4. Fourth restart provision. 120-day clock for rehearings ordered or authorized by an appellate court begin on date "responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing." RCM 707(b)(3)(D); *see United States v. Becker*, 53 M.J. 229 (C.A.A.F. 2000) (applying RCM 707 timing requirements to a *sentence* rehearing but finding that remedy of dismissal of charges too severe).

5. Fifth restart provision. Return of accused from the custody of the Attorney General for hospitalization due to lack of capacity to stand trial resets 120-day clock as of the date of return. RCM 707(b)(3)(E).

C. Excludable Delays. RCM 707(c). "All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded."

1. Approving authorities for excludable delay: Convening Authority (before referral) or the Military Judge (after referral) can exclude delay from the 120-day speedy trial clock. RCM 707(c)(1). The discussion following RCM 707(c)(1) indicates the CA's authority can be delegated to the Article 32 Preliminary Hearing Officer (PHO).

a. *United States v. Lazauskas*, 62 M.J. 39 (C.A.A.F. 2005): Lazauskas made a motion to dismiss the charges at his arraignment on the basis that the government had not brought him to trial within 120 days in accordance with RCM 707. The military judge denied the motion at trial. The AFCCA affirmed. CAAF affirmed as well. At issue were two delays in the proceedings totaling 11 days. The first delay was six days in order to secure witnesses for the Article 32. The CAAF held this time was excludable because the IO may grant reasonable delay requests (excludable in accordance with RCM 707(c)) if the convening authority had properly delegated delay authority. Furthermore, the delays are excludable unless there was an abuse of discretion by the person who granted the delay. The second delay was the five day statutory waiting period in accordance with Article 35, UCMJ. The CAAF held that

Article 35 provides a shield so that the accused is not brought to trial too quickly. Therefore, Article 35 may not be used as a sword for the accused to attack the government for not bringing him to trial sooner.

b. Pretrial delays should not be granted ex parte, and the decision granting the delay should be reduced to writing where practicable. RCM 707(c)(1) discussion.

2. Period between referral and arraignment: The U.S. Army Trial Judiciary's Rules of Practice Before Army Courts-Martial states that "Any period of delay from the judge's receipt of the referred charges until arraignment is considered pretrial delay approved by the judge per RCM 707(c), unless the judge specifies to the contrary." Rule 1.1.

3. Attribution of delay period: *United States v. McKnight*, 30 M.J. 205 (C.M.A. 1990) (Defense is not entitled to request a delay until a day certain and then insist the government proceed on that very day. Defense must accommodate government's scheduling needs and remains accountable for reasonable delays occasioned by initial request); *United States v. Torres*, 2014 CCA Lexis 180 (Army Ct. Crim. App. 2014) (Court found that SPCMCA acted properly in attributing 28-day delay to Defense while their IMC request was pending).

4. Approved delays subject to review on two grounds:

a. Abuse of discretion: "Granting a continuance is within the sound discretion of the military judge, and a denial will be reversed only for an abuse of discretion." *United States v. Sharp*, 38 M.J. 33, 37 (C.M.A. 1993).

b. Reasonableness of the period of delay: "Reasons to grant a delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause." RCM 707(c)(1) discussion.

5. Circumstances not requiring pre-approved delay:

a. *United States v. Dies*, 45 M.J. 376 (C.A.A.F. 1996): Accused's unauthorized absence is automatically excluded from government accountability even though government never secured a delay from competent authority to cover time. By his voluntary absence, an accused "waives" his speedy trial right as to that interim period.

b. *United States v. Thompson*, 46 M.J. 472 (C.A.A.F. 1997): After the fact approval of defense requested delay by the SPCMCA held excludable delay. Although purpose of revised rule was to obtain delays as you go, CAAF focused on fact the specific text of RCM 707(c) "does not require specifically that the delay be approved in advance for it to be excluded." But government runs risk that such post hoc determinations will be viewed with skepticism. CAAF avoided certified issue of whether quasi-judicial Article 32 PHO has power to exclude delays.

c. *United States v. Melvin*, 2009 CCA Lexis 82 (A.F. Ct. Crim. App. 2009): Maj. Melvin was an Air Force ROTC instructor. He was charged with providing underage cadets in his detachment with alcohol, had sexual intercourse with a female cadet, and encouraged cadets to lie to investigating officers. He was adjudged a dismissal and six months confinement. One issue on appeal was the trial judge's decision to exclude the time (158 days) it took to process the Servicemember's request for resignation in lieu of trial, determining that only seventy "countable" days had passed between preferral and arraignment. The Air Force

appellate court held that exclusion of this time was proper even though he had submitted a speedy trial request because there was no evidence he wanted to proceed to trial while the resignation request was pending.

d. Request for delay need not originate from either party; convening authority may initiate *sua sponte*. *United States v. Anderson*, 46 M.J. 540 (N-M Ct. Crim. App. 1997).

D. Remedy for violation is dismissal of charges (with or without prejudice) upon timely motion. RCM 707(d).

1. In dismissing with or without prejudice, the military judge considers these factors: "seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused . . . ." The dismissal must be with prejudice where the accused has been deprived of the Constitutional right to a speedy trial. RCM 707(d); *United States v. Bray*, 52 M.J. 659, 663 (A.F. Ct. Crim. App. 2000).

a. *United States v. Edmond*, 41 M.J. 419 (C.A.A.F. 1995): Dismissal without prejudice appropriate for 41 day violation of RCM 707. Sex crimes against inebriated victim were serious offenses; no government bad faith involved; dismissal with prejudice would not lead to better administration of justice; no indication accused suffered prejudice.

b. *United States v. Bolado*, 34 M.J. 732, 739 n.6 (N.M.C.M.R. 1991); *aff'd*, 36 M.J. 2 (C.M.A. 1992): "A commander's decision to reassign an accused to another duty assignment is not the kind of prejudice envisioned in R.C.M. 707(d)." Court also states "backwater of suspicion" following dismissal is no different than that existing pre-preferral and constitutes minimal prejudice.

c. *United States v. Dooley*, 61 M.J. 258 (C.A.A.F. 2005): In 1998, Dooley was convicted of various child pornography related offenses. In 2004, his conviction was set aside. The convening authority decided to retry Dooley on the charges but did not bring him off appellate leave and onto active duty and arraign him until 125 days after the convening authority received the record of trial. The military judge dismissed the case with prejudice. The NMCCA reversed the judge based on the fact that he had abused his discretion when ordering dismissal with prejudice. CAAF reversed the NMCCA and reinstated the trial court's dismissal with prejudice. Under the abuse of discretion standard, mere disagreement with the conclusion of the trial judge is not enough to warrant reversal. Here the NMCCA did not find that the trial judge's decisions were "clearly erroneous" but rather that it "did not concur" with the trial judge.

d. *United States v. McClain*, 65 M.J. 894 (Army Ct. Crim. App. 2008): Mistrial is not an appropriate remedy for a violation of RCM 707.

2. In a sentence-only rehearing, the military judge can award sentence relief for RCM 707 violations. RCM 707(d). In determining the amount of credit, the military judge should consider the length of the delay, reasons for the delay, accused's demand for speedy trial, and any prejudice to the accused resulting from the delay.

IV. ARTICLE 10, UCMJ

A. Article 10: "When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken (A) to inform the person of the specific offense of which the person is accused; and (B) to try the person or to dismiss the charges and release the person."

1. Unlike RCM 707, the more stringent protections of Article 10 are triggered only if the accused is placed in pretrial confinement or arrest.

B. The test for determining whether Article 10 has been violated:

1. OLD RULE. *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971) (pretrial confinement over 90 days created a presumptive speedy trial violation under Article 10; the government could overcome the presumption by demonstrating due diligence.).

2. CURRENT RULE. *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993): court rejected the *Burton* 90-day rule.

a. "Reasonable diligence" is the standard for measuring compliance with Article 10.

b. Article 10 may be violated where accused is tried in less than 120 days, or even in less than 90 days. Many circumstances, however, may justify delays beyond these traditional periods. "The touch stone . . . is not constant motion, but reasonable diligence in bringing the charges to trial. Brief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive."

c. Article 10 motion will lie when government "could readily have gone to trial . . . but negligently or spitefully chose not to."

3. Test. Factors from *Barker v. Wingo*, 407 U.S. 514 (1972): An analysis of Article 10 arguments includes a balancing of the four *Barker* factors. *United States v. Birge*, 52 M.J. 209 (C.A.A.F. 1999); *United States v. Cooper*, 58 M.J. 54 (C.A.A.F. 2003). The CAAF in the 2016 *Cooley* case (see *infra*) made clear that a balancing of the *Barker* factors is the predominant test for determining whether Article 10 speedy trial protections were violated.

a. The *Barker* factors include:

1) Length of delay: unless there is some delay that is presumptively prejudicial, there is no need to inquire into the other factors. The length of delay that will trigger the full analysis depends on the facts/complexity of the case (i.e., is the case about a simple PX theft that could be brought to trial fairly quickly or a more complex sexual assault case).

2) Reasonableness of delay: deliberate attempts to delay the trial in order to hamper the defense weigh heavily against the government. More neutral reasons such as busy dockets still weigh against the government, but not as heavily. Reasons such as missing witnesses and other matters outside of the government's control will typically not weigh against the government.

3) Accused's speedy trial demand: did the accused demand speedy trial?

4) Actual prejudice: courts will consider whether there was oppressive pretrial incarceration, high levels of anxiety or concern imposed on the accused, or impairment of the defense from a legal perspective.

b. *United States v. Cooley*, 75 M.J. 247 (C.A.A.F. 2016) application of the *Barker* factors: CAAF upheld the CGCCA's determination that Cooley's Article 10 speedy trial right was violated based on a balancing of the four *Barker* factors, noting the Government's lack of diligence in bringing Cooley to trial:

1) CAAF determined the 289 delay in bringing the case to trial was unreasonable and triggered a full Article 10 analysis.

2) CAAF determined that the government's purposed reason for additional delay (continued law enforcement investigation in a complex case) was insufficient because no additional investigation took place after the accused was placed in pretrial confinement, and the case was not particularly complex.

3) Defense met the third factor by demanding speedy trial for the client on five different occasions.

4) CAAF found actual prejudice existed because the defense was unable to present a complete sentencing case where the defense's requested expert consultant was provided only days before trial due to government gamesmanship.

4. Remedy for an Article 10 violation is dismissal with prejudice.

5. Arraignment does not necessarily terminate government's Article 10 speedy trial obligations. *United States v. Cooper*, 58 M.J. 54 (C.A.A.F. 2003): "We therefore hold that the Article 10 duty imposed on the Government immediately to try an accused who is placed in pretrial confinement does not terminate simply because the accused is arraigned." The court goes on to say that post arraignment, the MJ has much more control of the course of the trial, but the "affirmative obligation of reasonable diligence upon the government does not change."

C. Illustrative Historical Cases on the Application of the Reasonable Diligence Standard

1. *United States v. Hatfield*, 44 M.J. 22 (C.A.A.F 1996): Overall lack of forward motion toward resolving relatively simple case. CAAF particularly concerned with two month delay in appointing defense counsel due to incomplete paperwork.

2. *United States v. Collins*, 39 M.J. 739 (N.M.C.M.R. 1994): Six to eight phone calls by non-JAG attempting to obtain evidence of forged checks from an exchange on another installation is not proceeding with due diligence. Delays in requesting copy of service record and requesting legal services do not reflect due diligence.

3. *United States v. Laminman*, 41 M.J. 518 (C.G. Ct. Crim. App. 1994): Government failed to proceed with reasonable diligence when it brought the accused to trial 134 days after initial restraint (21 days attributed to defense delay.) Case provides detailed analysis of Article 10 and the government's burden of proof when confronted with motion to dismiss based on Article 10. Court found government's failure to provide evidence explaining several delays supported military judge's finding of lack of diligence.

4. *United States v. Calloway*, 47 M.J. 782 (N.M. Ct. Crim. App. 1998): Accused placed in pretrial confinement for 20 days before government took any action on his case. Another 7 days passed before magistrate review. The government took another 34 days to prefer charges, another 22 days to serve charges on the accused after referral, and another 18 days to arraign the accused. Accused was not provided with a TDS counsel until 66 days after pretrial confinement. Several other cases without pretrial confinement were tried before the accused's case. Military judge failed to make specific findings of fact and explanation for the delays, especially regarding (1) overall lack of forward motion, (2) delay in appointing DC. Judge also criticized for relying too much on RCM 707 type analysis.

5. *United States v. Mizgala*, 61 M.J. 217 (C.A.A.F. 2005): Mizgala was placed in pretrial confinement (PTC) for 117 days. His initial PTC began on 28 February. Based on various factors (i.e., waiting on a police report, moving the SJA office because of a fire) the government did not prefer charges until 14 May. On 16 April, Mizgala made a demand for a speedy trial. The Article 32 was held on 22 May; afterwards the charges were referred to trial on 20 June. At the arraignment, the military judge denied Mizgala's motion to dismiss for violating Article 10. The military judge used a "gross negligence" standard when deciding that the government had not violated Article 10. The CAAF affirmed the trial court decision that the government did not violate Mizgala's speedy trial rights but pointed out several errors that the military judge made when deciding the motion. First, the 120 day requirement of RCM 707 is irrelevant when determining whether there was an Article 10 violation. Second, reasonable diligence, not gross negligence, is the proper standard when analyzing Article 10 claims. Finally, Article 10 is more exacting than the 6th Amendment so the military judge should not have limited his consideration

to the *Barker v. Wingo* factors (see *infra*). The CAAF also held that an unconditional guilty plea does NOT waive consideration of an Article 10 claim on appeal.

6. *United States v. Simmons*, 2009 CCA LEXIS 301 (Army Ct. Crim. App. 2009): In an unpublished opinion, ACCA ruled that the government did not exhibit reasonable diligence in processing its case. Consequently, the court dismissed the case with prejudice, the remedy for a violation of Article 10. Simmons pled guilty at a general court-martial to AWOL, failure to be at his place of duty or follow orders, and disorderly conduct. While he was also arraigned on charges of rape, kidnapping, and multiple assaults, those charges were dismissed. The issue on appeal in this case was whether the judge erred by failing to dismiss the charges for violating Article 10. Simmons remained in PTC for 133 days before his trial, although he was arraigned on day 107. The events of this case took place in South Korea, where Simmons was assigned. The first delay of this case resulted from the government's errant belief that the SOFA gave primary jurisdiction to the Koreans and the U.S. military was barred from going forward with the case. In addition to mistakenly believing the SOFA prohibited them from moving forward, the government also cited a brigade training exercise in hindering their forward movement. The court noted that, "[w]hile operational considerations are relevant, they are not an absolute excuse." Ultimately, Simmons spent 134 days in PTC before being sentenced to 120 days of confinement, a BCD and reduction to E-1.

7. *United States v. Roberts II*, 2009 WL 613877 (A.F. Ct. Crim. App. 2009): The prosecution took 270 days from the time Roberts was placed into PTC until he was brought to trial. Based on the Record of Trial, the appellate court opined that the government "exercised reasonable diligence in accomplishing those tasks necessary to try him." As such, Roberts did not receive any credit for speedy trial violations despite the amount of time it took to get the case to trial.

8. *United States v. Thompson*, 68 M.J. 308 (C.A.A.F. 2010): Accused spent 145 days in PTC. Much of the delay centered on the handover of the off-post offenses from the civilian authorities to the military. Additional delay came from the TC attending a weeklong, out-of-town sexual assault course and then taking 4 days of leave, before being snowed in for an additional day. Further exacerbating the problem was a deployment that ultimately resulted in 3 different TCs handling the case. The trial judge found that there was a 37 day period where the government failed to act with reasonable diligence and dismissed all charges with prejudice for violating Thompson's Article 10 right to a speedy trial. Unlike the judge, ACCA found it reasonable that the TC resolve all of the jurisdictional issues with the civilian authorities before proceeding, as well as taking what ACCA termed "mandatory job-related training" and taking a short leave in conjunction with that duty. ACCA was also influenced by defense not making a speedy trial demand until Thompson had been in confinement for over 140 days, which was not during the 37 day period. ACCA was further impacted by a 39 day defense delay to prepare for the Art. 32 hearing, which came after the 37 day period the judge determined the defense did not proceed with reasonable diligence. ACCA returned the case to the judge for action not inconsistent with their opinion, after writing, "appellee does not allege, nor do we find, that she suffered any hindrance to the preparation of her case because of any delay." CAAF upheld ACCA based on the 37 days needed to determine who was going to prosecute the case.

9. *United States v. Schuber*, 70 M.J. 181 (C.A.A.F. 2011): Schuber was subject to restriction not tantamount to arrest during the period following his 71 days in pretrial confinement, where he was restricted to base rather than to quarters, and although he was required to provide weekly urine samples, he was permitted to use all usual base activities, was given a three-day pass upon the death of his grandfather, was not placed under guard or escort during his base restriction or travel, and was not suspended from performing normal military duties. The court held, "there are gradations of restriction. Whether a particular restriction amounts to arrest for the purposes of Article 10, UCMJ, will depend on a contextual analysis . . . including consideration of such

factors as the geographic limits of constraint, the extent of sign-in requirements, whether restriction is performed with or without escort, and whether regular military duties are performed." In doing so, the court made it easier for defense counsel to argue that an accused is under arrest and thus protected by Article 10. The accused could be performing military duties but still be under arrest because of narrow geographic limits of constraint, sign-in requirements, and escort requirements.

V. THE SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL

A. 6th Amendment speedy trial protections are triggered by preferral of charges. *United States v. Danylo*, 73 M.J. 183 (C.A.A.F. 2013); *United States v. Grom*, 21 M.J. 53 (C.M.A. 1985). Note that there is also some caselaw stating that 6th Amendment protections are also triggered by pretrial confinement, but if an accused is confined, the more stringent protections of Article 10 will apply anyway (although courts will apply the *Barker* factors to analyze both 6th Amendment and Article 10 arguments, the courts will typically be more stringent in the weighing of factors for purposes of Article 10 because the accused is in confinement).

B. Test: Balancing of the *Barker* Factors (see details on the *Barker* factors in Section IV *supra*).

1. Length of delay;
2. Reason for delay;
3. Assertion of the right to speedy trial; and
4. Prejudice to accused.

C. Applying *Barker v. Wingo*. *United States v. Edmond*, 41 M.J. 419 (C.A.A.F. 1995): In this case, the court determined there was no 6th Amendment violation under *Barker* test. Length of delay: 176 days from preferral to trial; the court determined this length of delay was sufficient to trigger a full analysis in the case. Reason for delay: witnesses unavailable due to homeport change and necessity of trying co-accused shipmates before granting immunity; the court determined that although these are legitimate reasons, this factor still weighs against the government. Assertion of right: Accused did demand speedy trial; court determined this factor did weigh against the government. Prejudice: only slight prejudice; accused's defense was not impaired; he was not restrained; he had not suffered abnormal anxiety because of charges. Accused had been paid and had been allowed to work in his rating, albeit only duties not requiring a security clearance. The court determined that based on this, the last *Barker* factor weighed against the defense. Held: balance weighed in favor of government.

D. Constitutional right to a speedy trial does not arise until after an indictment is filed or charges are preferred. *United States v. McGraner*, 13 M.J. 408 (C.M.A. 1982); *United States v. Vogan*, 35 M.J. 32 (C.M.A. 1992) (Accused committed mail fraud while serving a prior court-martial sentence. He was placed in administrative segregation pending year-long investigation. Held: 6th Amendment right to a speedy trial did not apply because of accused's post-trial restraint.).

E. Remedy for 6th Amendment speedy trial violation is dismissal with prejudice.

VI. THE FIFTH AMENDMENT RIGHT TO DUE PROCESS

A. 5th Amendment protections are triggered as soon as the crime is committed. They apply during the investigatory stage, prior to preferral.

B. Test: Defense has the burden of showing:

1. Egregious or intentional tactical delay by the Government; and

2. Actual prejudice to the accused or his case (there has to be actual prejudice, such as the loss of a witness or the substance of their testimony or loss of evidence, and that prejudice must be substantial enough to impact the accused's ability to get a fair trial; speculative prejudice is not enough). *United States v. Reed*, 41 M.J. 449 (C.A.A.F. 1995).

C. *United States v. Reed*, 41 M.J. 449 (C.A.A.F. 1995): Seventeen month delay between identification of accused as a suspect and preferral of charges did not violate due process. Appellant failed to meet his burden of proof to show an egregious or intentional tactical delay and actual prejudice. The Court also noted that when the accused is not confined, the statute of limitations is the "primary protection" against pre-accusation delay (see Article 43, UCMJ).

D. Remedy for a 5th Amendment speedy trial violation is dismissal with prejudice.

VII. LITIGATING SPEEDY TRIAL ISSUES

A. Accused raises issue at trial by a motion to dismiss. RCM 707(c)(2), 905, 907.

1. Once defense raises the issue, government has burden of persuasion to show no denial of speedy trial. RCM 905(c)(2)(B).

2. The government's burden of proof on any factual issue is by a preponderance of the evidence. RCM 905(c)(1); *United States v. Cummings*, 21 M.J. 987 (N.M.C.M.R. 1986).

3. Once raised, counsel must prepare a chronology of the case to be included in the appellate record. RCM 707(c)(2). Parties must put on evidence or agree to a stipulation of fact. *United States v. Cummings*, 21 M.J. 987 (N.M.C.M.R. 1986); *United States v. Thompson*, 29 C.M.R. 68 (C.M.A. 1960). The court is not permitted to consider matters in an offer of proof. A proffer is not evidence.

a. The U.S. Army Trial Judiciary's Rules of Practice Before Army Courts-Martial requires the parties to submit a stipulated chronology of dates and events to which the parties agree and, if needed, a separate chronology from each party for those dates and events as to which there is no agreement. Rule 3.2.

B. Waiver and Forfeiture

1. Speedy trial issues are forfeited if not raised before final adjournment (unless affirmatively waived). RCM 905(e)(2). *But see United States v. Britton*, 26 M.J. 24 (C.M.A. 1988) ("While it is the general rule that failure to make a timely motion at trial may estop one from raising the issue on appeal, failure to raise the issue does not preclude the Court of Military Review in the exercise of its powers from granting relief.").

2. Forfeiture by guilty plea: "Except as provided in [a conditional plea], a plea of guilty which results in a finding of guilty forfeits any speedy trial issue as to that offense, unless affirmatively waived." RCM 707(e).

a. A litigated Article 10 motion is not waived by an unconditional guilty plea.

3. Plea agreement provisions. A term or condition in a plea agreement that deprives the accused of the right to a speedy trial is not enforceable. RCM 705(c)(1).

a. *United States v. McLaughlin*, 50 M.J. 217 (C.A.A.F. 1999): The accused challenged a provision in the pretrial agreement that required a waiver of a speedy trial motion. Finding that such a provision is impermissible, CAAF said the Military Judge should have set aside that provision and held the Government to the balance of the PTA, giving the defense the chance to raise or waive the motion at trial. Absent this "cleaner" waiver process, the CAAF says that the accused must make a colorable or prima facie claim that he would have been entitled to relief on

his speedy trial motion. The CAAF said the defense failed in this case, when the accused had been in PTC for 95 days, no prejudice was claimed by the defense and no demand for immediate trial was made.

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CHAPTER 11
DISCOVERY & PRODUCTION

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I. REFERENCES

A. UCMJ art. 46

B. Rules for Courts-Martial 701, 703

C. Army Regulation 27-26, Rules of Professional Conduct for Lawyers

D. U.S. Army Trial Judiciary Rules of Practice before Army Courts-Martial

II. INTRODUCTION

A. This outline contains those discovery requirements that are found in the UCMJ, Military Rules of Evidence, Rules for Courts-Martial, and the Rules of Practice that relate to the exchange of information between the parties.

1. Although the outline covers the most significant rules governing discovery and production, practitioners must always refer to the applicable RCMs or MREs governing the portion of proceedings they are in, or the action they seek to take, in order to ensure they are aware of all disclosure or notice requirements particular to their situation and the facts of their case. For example, many rules of evidence contain requirements that the proponent provide advance notice of certain types of evidence to be offered at trial to the opposing party.

2. Practitioners must also consider whether discovery or production must be made or supplemented throughout the proceedings as many requirements are not limited to just the pretrial phase of the proceedings. Remember that parties have a continuing duty to disclose and supplement discovery throughout the court-martial. RCM 701(d).

B. Discovery basics

1. The rules for discovery establish how each party will help the other party to develop the other party's case. Fundamentally, these rules govern how the parties will exchange information.

a) Discovery is a broad term. It means attaining that which was previously unknown. Black's Law Dictionary 322 (6th ed. 1991). It includes "the pre-trial devices that can be used by one party to obtain facts and information about the case from the other party in order to assist the party's preparation for trial." *Id*.

b) Generally, one party requests discovery, to which the other party provides disclosure of the material. Disclosure means to bring into view or to make known. *Id*. at 320. The terms "disclosure" and "allowing to inspect" are often used interchangeably.

c) Discovery includes disclosure of something tangible or notice of something intangible, like a party's intent to do something.

2. The discovery rules in the military are very liberal/open and are designed to encourage an efficient system. Requiring parties to exchange information early in the process reduces pretrial motions practice; reduces surprise and gamesmanship; reduces delay at trial when delay is especially costly because the court is assembled; leads to better-informed decisions about the merits of the case; and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. RCM 701 analysis, app. 21, at A21-31 (MCM 2016 ed.).

C. Production basics

1. Production and discovery are different concepts. Discovery deals with case development. Information learned during the discovery process may or may not ultimately be introduced as evidence at trial.

2. Production is where one party (typically, the defense) requests that the other party (typically, the government) be responsible for ensuring a witness or item of evidence makes it to the courthouse on the date scheduled for a motions hearing or trial. In practice, the defense will also often use production rules to request documents in advance of a hearing or trial date. The party seeking production intends to call this witness or introduce this evidence at the hearing or trial. If the accused is denied production, or does not want to request that the government produce a witness or some evidence, the accused can always arrange for the production of that witness or evidence at his own expense (having family members drive in on sentencing but not seek reimbursement from the government, for example). If the accused is denied production and is unwilling to arrange for production at his own expense, he can file a motion with the court requesting relief.

III. GENERAL

A. Liberal mandate of discovery in the military: UCMJ art. 46(a) is the root source for much of the military's discovery and production rules: "[T]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."

1. For discovery, this statute is embodied in RCM 701(e): "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence . . . . No party may unreasonably impede the access of another party to a witness or evidence." The remainder of RCM 701 provide the regulations implementing the discovery process in military courts-martial.

a) If the government analyzes the evidence, then the defense can analyze it too. *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008) (in a capital trial, the military judge erred when he refused to allow the defense experts to conduct independent testing of physical evidence admitted at trial).

2. For production, this statute is embodied in RCM 703(a): "The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence . . . including the benefit of compulsory process." The remainder of RCM 703 provide the regulations implementing the production process in military courts-martial.

B. Witness interviews

1. Generally speaking, the government cannot require that a government representative be present during defense interviews of government witnesses, although in certain circumstances a

third party observer may be permissible. *United States v. Irwin*, 30 M.J. 87 (C.M.A. 1990); *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980).

2. Victim interviews. RCM 701(e)(1): Defense counsel must request interviews of any victim the government plans to call to testify through that victim's SVC or other victim counsel. AR 27-10, para. 17-19d (11 May 2016) states that, at the request of the witness, a VWL or designee may act as an intermediary between the witness and trial counsel/defense counsel for purposes of arranging witness interviews during trial preparation.

a) Victims who the government intends to call as a witness can request that defense interviews take place in the presence of the trial counsel, victim counsel, or victim advocate.

C. Preservation of evidence. *United States v. Kern*, 22 M.J. 49 (C.M.A. 1986): "Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to an accused." *See also United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (criticizing government failure to seek preservation of evidence outside of government control).

1. "In the case of evidence under control of the Government as well as evidence not under control of the Government, the person seeking production of the evidence may include with any request for evidence or subpoena a request that the custodian of the evidence take all necessary steps to preserve specifically described records and other evidence in its possession until such time as they may be produced or inspected by the parties." RCM 703(g)(4).

2. Due process test. Unless the government acts in bad faith, failure to preserve potentially useful evidence does not constitute a denial of due process

a) *Arizona v. Youngblood*, 488 U.S. 51 (1988): The government did not preserve clothes or perform certain tests on physical evidence taken from a child victim who had been sexually assaulted. The government did not make use of any of the materials in its case-in-chief. The Court stated "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process."

(1) *See also Illinois v. Fisher*, 540 U.S. 544 (2004) (bad faith is the issue, even when the government destroys evidence for which the defense has submitted a discovery request).

(2) *Youngblood* clarified *California v. Trombetta*, 467 U.S. 479 (1984), which stated that absent bad faith, any constitutional duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense; that is, the evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Some military cases from the period 1984-1988 refer to *Trombetta* as the controlling source.

b) Military cases.

(1) *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986): Blood stained fabric was consumed during testing. The court used the *Trombetta* test which applied at the time and found no constitutional violation. However, the court stated, "Under Article 46, the defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory. . . . Thus, the better practice is to inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present."

(2) *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990): Crime scene processors took evidence (including swatches) from a car and then released the car to the owners before the defense had an opportunity to examine the car. At trial, the defense made a due

process objection. The court found no bad faith, and the evidence collected from the car was still available for testing.

(3) *United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008): After the first trial, the government lost or destroyed almost all of the physical evidence in a rape case. The court conducted due process analysis, finding no bad faith.

(4) *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015). The duty to preserve evidence includes:

(a) Evidence that has apparent exculpatory value and no comparable substitute;

(b) Evidence that is of such central importance to the defense that it is essential to a fair trial; and

(c) Statements of witnesses testifying at trial

3. Service regulations may provide further rights and remedies.

a) *United States v. Manuel*, 43 M.J. 282 (C.A.A.F. 1995): Destruction of accused's positive urine sample one month after testing violated Air Force regulation and DoD directive. Lower court's suppression of positive results not an abuse of discretion where court concluded that standards for preserving samples conferred a substantial right on the accused.

b) *United States v. Madigan*, 63 M.J. 118 (C.A.A.F. 2006): An Air Force Institute of Pathology regulation required that positive urine samples be kept for two years. The lab inadvertently destroyed accused's sample before two years were up. The defense did not request access to the sample during this period. Later, the defense discovered the sample was destroyed. The court found that applicable regulations concerning retention of drug testing samples conferred a right on Servicemembers to discover evidence, and suppression is an appropriate remedy for lost or destroyed evidence in those cases. If defense does not make a request to preserve the evidence before the period ends, they have essentially become the reason that the evidence is unavailable and so cannot seek a remedy under RCM 703.

c) Department of Defense policy requires retention of drug abuse testing records for one year. Dep't of Defense, Instr. 1010.16, Technical Procedures for the Military Personnel Drug Abuse Testing Program encl. 4, para. 15.b.(2) (Oct. 10, 2012) (c1 Feb. 27, 2017)

D. Ethical considerations. AR 27-26:

1. Counsel may not unlawfully obstruct another party's access to evidence, destroy evidence, make a frivolous discovery request, or fail to make a reasonably diligent effort to comply with a proper discovery request from an opposing party. Rule 3.4(a) and (d).

2. Counsel may not knowingly disobey an obligation to an opposing party. Rule 3.4(c).

3. Trial counsel must "make timely disclosure to the defense of all evidence or information known to the Trial Counsel that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the Trial Counsel." Rule 3.8(d).

4. The ABA Standards for Criminal Justice, which apply to Army lawyers to the extent that they do not conflict with AR 27-26, contain additional ethical considerations.

E. Continuing duty to disclose: "If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material." RCM 701(d); *see United States v. Eshalomi*, 23

M.J. 12 (C.M.A. 1986); *United States v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004); *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015).

F. Information not subject to disclosure: Disclosure is not required if the information is protected under the MREs or if the information is attorney work product (notes, memoranda, or similar working papers prepared by counsel or counsel's assistants or representatives). RCM 701(f).

1. *United States v. Vanderwier*, 25 M.J. 263 (C.M.A. 1987) ("Even though liberal, discovery in the military does not 'justify unwarranted inquiries into the files and the mental impressions of an attorney.'").

2. *United States v. King*, 32 M.J. 709 (A.C.M.R. 1991), *rev'd on other grounds*, 35 M.J. 337 (C.M.A. 1992): A defense expert witness is subject to a pretrial interview by trial counsel, but a defense "representative" under MRE 502 is not. It was improper for trial counsel to communicate with defense representative concerning interview with appellant. Parties may interview testifying expert witnesses for the other side, but they cannot interview the other side's expert consultants.

3. *United States v. Vanderbilt*, 58 M.J. 725 (N-M. Ct. Crim. App. 2003) (holding that a civilian witness's agreement to testify pursuant to a pretrial agreement with the U.S. Attorney's Office does not waive that witness's attorney-client privilege regarding statement made to his attorney during the course of pretrial negotiations).

IV. GOVERNMENT DISCOVERY RESPONSIBILITIES

A. Mandatory disclosure or notice requirements from trial counsel to defense

1. Evidence that reasonably tends to negate guilt, reduces the degree of guilt, reduces punishment, or adversely affects the credibility of any prosecution witness or evidence.

a) Sources

(1) RCM 701(a)(6). The trial counsel shall, as soon as practicable, disclose evidence known to the trial counsel (note the discussion of the due diligence requirement *infra*) which reasonably tends to:

(a) Negate guilt;

(b) Reduce the degree of guilt

(c) Reduce the punishment; or

(d) Adversely affect the credibility of any prosecution witness or evidence.

(2) *Brady v. Maryland*, 373 U.S. 83 (1963): In a death penalty case, the government did not disclose a statement where the codefendant admitted to being the actual killer. The Supreme Court stated "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The Court held that the government must disclose evidence that is favorable to the accused and material to either guilt or punishment.

(a) Evidence is favorable if it is exculpatory substantive evidence or evidence capable of impeaching the government's case. *United States v. Orena*, 145 F.3d 551 (2d Cir. 1998). Evidence is material when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different"; the evidence must have made the "likelihood of a different result . . . great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith v. Cain*, 132 S. Ct. 627

(2012). Once a Brady violation is established, courts need not test for harmlessness. *Kyles v. Whitley*, 514 U.S. 419 (1995).

(b) *See United States v. Behenna*, 71 M.J. 228 (C.A.A.F 2012); *United States v. Kinzer*, 39 M.J. 559 (A.C.M.R. 1994); *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002).

(3) AR 27-26, para. 3.8(d). Trial counsel will disclose all evidence that tends to:

(a) Negate guilt;

(b) Mitigate the offense; or

(c) Mitigate the sentence.

b) Pursuant to RCM 701(a)(6)(D), favorable impeachment information (*Giglio* information) must also be disclosed to the defense:

(1) *See Banks v. Dretke*, 124 S. Ct. 1256 (2004); *Strickler v. Greene*, 527 U.S. 263 (1999); *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985)*; Giglio v. United States*, 405 U.S. 150 (1972).

(2) This impeachment information may include:

(a) Any promise of immunity or leniency offered to a witness in exchange for testimony. *See, e.g., Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013).

(b) Specific instances of conduct of a witness for the purpose of attacking the witness's credibility or character for truthfulness. *See, e.g., United States v. Watson*, 31 M.J. 49 (C.M.A. 1990) (finding evidence that witness had monetary interest in outcome of case could have been favorable); *United States v. Mahoney*, 58 M.J. 346 (C.A.A.F. 2003) (holding that trial counsel's failure to disclose a letter impeaching government's expert witness was reversible error).

(c) Evidence in the form of opinion or reputation as to a witness's character for truthfulness. MRE 608.

(d) Prior inconsistent statements. *See, e.g., Graves v. Cockrell*, 351 F.3d 156 (5th Cir. 2003); *United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997) (trial counsel had a duty to disclose statements by witnesses at the Article 32 investigation of co-accuseds, where the prior statements were inconsistent with government's main witness' testimony at trial).

(e) Information to suggest that a witness is biased. *See, e.g., United States v. Bagley*, 473 U.S. 667 (1985); *Banks v. Dretke*, 124 S. Ct. 1256 (2004) (finding State's failure to disclose key state witness in capital sentencing proceeding was a paid government informant and played an important role in setting up Banks' arrest was error); *United States v. Claxton*, 76 M.J. 356 (C.A.A.F. 2017) (finding government committed a *Brady* violation when it did not disclose to the defense that two witnesses against the accused were confidential informants working with USAF OSI).

(3) Guilty Pleas. *United States v. Ruiz*, 536 U.S. 622 (2002): The Constitution does not require the pre-guilty plea disclosure of impeachment information. The Court noted that disclosure of impeachment information relates to the fairness of a trial, as opposed to the voluntariness of a plea. Impeachment information, the Court declared, is particularly difficult to characterize "as critical information of which the defendant must always be

aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant."

c) Scope of the government's due diligence duty to discover favorable evidence

(1) The prosecutor does not have to have *actual* knowledge of the evidence to commit a *Brady* violation. *See Kyles v. Whitley***,** 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Mahoney*, 58 M.J. 346 (C.A.A.F. 2003); *Bailey v. Rae*, 339 F.3d 1107 (9th Cir. 2003).

(2) *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999): The government may be required to look beyond its own files for exculpatory evidence. "The parameters of the review that must be undertaken outside the prosecutor's own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request." The scope of the government's duty to search beyond the prosecutor's own files generally is limited to:

(a) The files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses.

(i) This includes CID and MPI, and law enforcement agencies outside of the DoD, such as local police departments, state law enforcement, and federal law enforcement agencies. It also includes labs that participated in the investigation such as USACIL and drug labs. Note that AR 195-2, Appendix B sets forth which Army MCIO has investigative responsibility for each type of offense under the UCMJ.

(ii) *United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989) (the "prosecutor will be deemed to have knowledge of and access to anything in the possession, custody, or control of any federal agency participating in the same investigation of the defendant.").

(iii) *United States v. Simmons*, 38 M.J. 376 (C.M.A. 1993) (holding that trial counsel must exercise due diligence in discovering the results of exams and tests which are in possession of CID).

(iv) *United States v. Sebring*, 44 M.J. 805 (N-M Ct. Crim. App. 1996) (holding that trial counsel had a duty to discover quality control investigation into problems at Navy drug lab that tested the accused's urine sample).

(v) *Kyles v. Whitley*, 514 U.S. 419 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

(vi) *United States v. Ellis*, 77 M.J. 671 (Army Ct. Crim. App. 2018): In this marital sexual assault case, the victim crashed her car into her husband's car the day before the rape at issue. The victim was apprehended by the military police for child endangerment because there was a child in the vehicle at the time of the crash. At trial, defense argued that the victim fabricated the rape in order to advantage herself in divorce/child custody proceedings, especially in light of the child endangerment allegation. At trial, the victim denied the crash was intentional and denied knowing she was apprehended for child endangerment during cross-examination. Trial counsel had not disclosed the military police report from the car crash to the defense because they did not know about it; the MPR found the crash was intentional and contained a DA Form 3881 citing the victim for child endangerment. ACCA held that the government did not violate

Brady or RCM 701(a)(6) by not disclosing the military police report where the trial counsel did not know about the crash, and that the military police report did not fall within the government due diligence obligation, even though both the rape and the crash occurred on the same military installation (but were investigated by different MCIOs). The defense did not specifically request the military police report from the government, even though the defense counsel knew about it, and the accused had obtained a copy of it through a FOIA request.

(b) Investigative files in a related case maintained by an entity closely aligned with the prosecution

(i) *United States v. Hankins*, 872 F.Supp. 170 (D.N.J. 1995) ("[W]hen the government is pursuing both a civil and criminal prosecution against a defendant stemming from the same underlying activity, the government must search both the civil and criminal files in search of exculpatory material.").

(c) Investigative files of tangential or unrelated investigations if specifically requested by the defense. These requests should also be analyzed under RCM 701(a)(2).

(i) *United States v. Veksler*, 62 F.3d 544 (3d Cir. 1995) (the request provides constructive notice to the prosecution about the existence of the files).

(ii) *United States v. Green*, 37 M.J. 88 (C.M.A. 1993): The defense requested "[a]ny record of prior conviction, and/or nonjudicial punishment of" any government witness. The trial counsel responded without comment. The CID agent had an Art. 15 for fraternization, false claim, and larceny. Error was harmless beyond a reasonable doubt because the CID agent was only used to authenticate physical evidence.

(3) Evidence outside of government control that the prosecution knows about. *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2016): "The RCMs generally do not place on the government a duty to search for exculpatory evidence held by people or entities not under its control, such as a witness; nevertheless, a trial counsel cannot avoid discovery obligations by remaining willfully ignorant of evidence that reasonably tends to be exculpatory, even if that evidence is in the hands of a government witness instead of the government; this prohibition against willful ignorance has special force in the military justice system, which mandates that an accused be afforded the equal opportunity to inspect evidence."

(4) The exact left and right limits of the government's due diligence obligation will depend on the facts and circumstances of each case, and may not be limited just to those mentioned in *Williams*. *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015): The government's duty under the RCMs of disclosing exculpatory evidence encompasses more than producing what was in its physical possession, but also what is in its control; "trial counsel must review their own case files and must also exercise due diligence and good faith in learning about any evidence favorable to the defense known to the others acting on the government's behalf in the case, including the police"; "In regard to the latter point, a trial counsel's duty to search beyond his or her own prosecution files is generally limited to: (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity." "However, this list is not exhaustive because trial

counsel's duty to search beyond his own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request."

d) Understanding and applying RCM 701(a)(6) and *Brady* at trial

(1) The *Brady* rule is designed to ensure the defendant learns of exculpatory evidence that is known only to the government. If the defendant knows or should know the essential facts permitting him to take advantage of the exculpatory evidence (like the witness's identity), then the government does not have a duty to disclose the information. *United States v. Grossman*, 843 F.2d 78 (2d Cir. 1988) (no *Brady* violation when the defense knew the witness' name, that he might have testified before a grand jury, and that the testimony might have been favorable). Under RCM 701(a)(6) and AR 27-26, para. 3.8(d), the trial counsel must always disclose favorable matter, whether or not that matter may later be found to be material.

(2) Applying RCM 701(a)(6) and *Brady* at trial is not that difficult. Typically, these issues arise when the government makes a late disclosure or the defense discovers this evidence on its own late in the process. Everyone knows about the evidence (they are, after all, litigating about it). The real problem is that the defense needs more time to prepare for trial based on this newly discovered evidence. The military judge just needs to fashion a just action in response under RCM 701(g), which will probably be to grant a continuance. The other actions the military judge can take pursuant to RCM 701(g) in response to a failure to disclose RCM 701(a)(6) or *Brady* material includes ordering further discovery, prohibiting the government from introducing certain evidence or calling a witness, or such other order as is just under the circumstances.

(a) Whether disclosure is sufficiently complete or timely to satisfy *Brady* can only be evaluated in terms of "the sufficiency, under the circumstances, of the defense's opportunity to use the evidence when disclosure is made." *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001) ("The opportunity for use under *Brady* is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought.").

(3) The RCM 701(a)(6) language uses the phrase "reasonably tends" rather than the *Brady* term "material." Under *Brady*, if the government fails to disclose favorable information, that nondisclosure violates due process only if the matter was material. *Kyles v. Whitley*, 514 U.S. 419 (1995); *Cone v. Bell*, 129 S.Ct. 1769 (2009).

(a) The phrase "reasonably tends" can be readily applied during trial proceedings, where the parties are arguing prospectively. The term "material" is essentially a test for prejudice that is applied retrospectively, on appeal, where the defense has only now learned of the evidence. The issue on appeal is whether the first trial should be set aside based on this discovery violation. As such, much of the case law related to the term "material" may not translate well to litigation at trial. At trial, use "reasonably tends."

(b) The case law that has developed around the term "favorable" does have application at trial litigation, but again, if the issue is being litigated at trial, then the defense knows about the evidence and the real issue is whether the defense has enough time to prepare based on that new knowledge. And, if the defense has made a discovery request under RCM 701(a)(2), the defense does not have to make a showing that the evidence is "favorable." Under that rule, the information only needs to be "relevant."

2. Charges (accused must be informed of the charges by his immediate commander as soon as practicable). RCM 308(a).

3. Initial Disclosures. RCM 404A

a) Disclosures due after preferral of charges: As soon as practicable after notification to the accused of preferred charges, trial counsel must provide the defense copies of the charges and any matters that accompanied the charges when preferred. RCM 404A(a)(1).

(1) Preferred charges must be provided to TDS at the earliest possible date so that defense counsel can be appointed and begin preparation. Rule of Practice 1.1.

b) After direction of a preliminary hearing: No later than 5 days after direction of an Article 32, trial counsel must provide the defense copies of the order directing the preliminary hearing, statements within the control of military authorities of witnesses the trial counsel intends to call at the preliminary hearing, evidence the trial counsel intends to present at the preliminary hearing, and any matters provided to the convening authority when deciding to direct the preliminary hearing. RCM 404A(a)(2).

c) RCM 404A does not require the production of any items that are privileged, classified, or otherwise protected under Section V of the MREs. The trial counsel may disclose such items if authorized by the holder of the privilege or a competent authority; if the trial counsel does so, the convening authority may issue a protective order to safeguard the information against compromise. RCM 404A(c)-(d).

4. Report of Article 32 preliminary hearing (promptly after completion). RCM 405(l)(4).

5. Allied papers (as soon as practicable after service of charges under RCM 602). RCM 701(a)(1):

a) Any papers that accompanied the charges when referred;

b) The convening orders;

c) Any sworn or signed statement relating to an offense charged in the case which is in the trial counsel's possession;

d) Additional requirements from the Rules of Practice: ERB/ORB and referred charges must be provided within 24 hours to both accused and defense counsel. Rule of Practice 1.1.

6. Prior convictions of the accused (before arraignment). The "trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment." RCM 701(a)(4).

7. "Section III" disclosures under the Military Rules of Evidence due before arraignment

a) Grants of immunity or leniency (prior to arraignment or within a reasonable time before the witness testifies): When a government witness has been granted immunity or leniency in exchange for testimony, the grant must be reduced to writing and served on the accused. MRE 301(d)(2); *see also Giglio v. United States*, 405 U.S. 150 (1972).

b) Accused's statements (prior to arraignment): The prosecution must disclose all statements of the accused, oral or written, that are relevant to the case, known to the trial counsel, and within the control of the Armed Forces, and all evidence derived from such statements, that the prosecution intends to offer against the accused at trial. MRE 304(d). Counsel must provide timely notice of an intent to offer a statement that was not disclosed prior to arraignment; military judge retains discretion as to whether to admit such a statement. MRE 304(f)(2). "All statements:"

(1) Includes remarks made during informal conversations. *United States v. Callara*, 21 M.J. 259 (C.M.A. 1986).

(2) Is not limited to those made to military superiors or law enforcement. *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989).

(3) Potential sources of accused statements: sworn statements; oral statements made during law enforcement or command interviews; oral statements made to friends, co-workers, victims; statements on counseling forms; emails; texts; social media posts; etc.

(4) Note that ACCA has ruled that "trial counsel complies with the 300-series of the Rules of Evidence when he or she turns over *all* statements by an accused. While it is a commendable Army practice to separately turn over a list of statements that the trial counsel intends to introduce at trial, this is not a strict requirement." *United States v. Urik*, 2017 CCA LEXIS 134 (Army Ct. Crim. App. 2017). Trial counsel should be very cautious in their reliance on this unpublished case, and should consult with their chief of justice and senior trial counsel regarding local standards for the depth of Section III disclosures.

c) Evidence seized from the accused or property owned by the accused (prior to arraignment): The prosecution shall disclose all evidence seized from the accused or property owned by the accused, or evidence derived therefrom, that it intends to offer into evidence against the accused at trial. MRE 311(d)(1). Trial counsel must provide timely notice of an intent to offer this evidence that was not disclosed prior to arraignment. MRE 311(d)(2)(B).

d) Identifications (prior to arraignment): The prosecution shall disclose all evidence of prior identifications of the accused as a lineup or other identification process that it intends to offer into evidence against the accused at trial. MRE 321(d)(1). Trial counsel must provide timely notice of an intent to offer lineup evidence that was not disclosed prior to arraignment. MRE 321(d)(3).

e) Rule of Practice 2.1.7 requires that Section III disclosures be made not later than two duty days after the trial date is set if arraignment is the day of trial.

8. Similar sex assault or molestation crimes (5 days prior to entry of pleas): If the government intends to offer evidence of similar crimes (sexual assault or child molestation), the trial counsel must notify the defense of its intent and disclose the evidence. MRE 413 and 414.

9. Notice of intent to employ an expert at government expense and submission of a request to the convening authority to authorize the expert and fix compensation (in advance of employment). RCM 703(d).

10. Merits witnesses (before the beginning of the trial on the merits). RCM 701(a)(3).

a) The trial counsel shall notify the defense of the names and contact information of the witnesses the trial counsel intends to call:

(1) In the prosecution case-in-chief; and

(2) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when the trial counsel has received timely notice of such a defense.

b) Notice must be provided no later than seven duty days prior to trial. Rule of Practice 2.1.8.

11. Testing may consume only available samples of evidence. *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986): Inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present.

B. Disclosures and notices made upon defense request

1. Documents and tangible objects (after service of charges and upon defense request). RCM 701(a)(2)(A).

a) Books, papers, documents, photographs, data, tangible objects, buildings, or places, AND

b) In the possession, custody, or control of military authorities, AND

c) Either relevant to defense preparation OR intended for use by the trial counsel as evidence in the case-in-chief OR the government anticipates using the material in rebuttal OR was obtained from or belonged to the accused.

(1) Unlike RCM 701(a)(6) and *Brady*, this matter does not have to be favorable – just relevant to defense preparation. Unfavorable matter can be disclosable under RCM 701(a)(2)(A). *See United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002). Other potential categories of RCM 701(a)(2)(A) information include:

(a) Might affect the accused's decision on how to plead. *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002); *United States v. Trigueros*, 69 M.J. 604 (Army Ct. Crim. App. 2010).

(b) May inform lines of investigation, defenses, or trial strategies. *United States v. Eshalomi*, 22 M.J. 12 (C.M.A. 1986); *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008).

(c) Information defense could use to persuade the convening authority not to refer the case. *United States v. Eshalomi*, 22 M.J. 12 (C.M.A. 1986).

(d) Inadmissible information that is nonetheless relevant to defense preparation. *United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011).

(2) Trial counsel's duty to search:

(a) The government must make good faith efforts to comply with defense requests. *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999).

(b) "The government cannot intentionally remain ignorant and then claim it exercised due diligence." *United States v. Trigueros*, 69 M.J. 604 (Army Ct. Crim. App. 2010).

(c) *United States v. Stellato*, 47 M.J. 473 (2015): "[A] trial counsel cannot avoid R.C.M. 701(a)(2)(A) through 'the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial.'" The court determined that the government need not physically possess an object for it to be within the possession, custody, or control of military authorities. Generally, where the trial counsel has knowledge that an entity has potentially disclosable material and the trial counsel has access to that material, then the trial counsel must review the material to determine whether it meets disclosure requirements.

(d) *United States v. Shorts*, 76 M.J. 523 (Army Ct. Crim. App. 2017): If the defense seeks specific information through RCM 701(a)(2) that the government is not aware of, the discovery request under RCM 701(a)(2) must be specific and accurate enough that the trial counsel, through the exercise of due diligence, knows where to look (or where to provide the defense access). "We cannot find the trial counsel erred under R.C.M. 701(a)(2) when he: 1) failed to produce something that was not requested; 2) had no knowledge whatsoever of its existence; and 3) exercised due diligence in

responding to the defense request he did receive. A trial counsel does not violate R.C.M. 701(a)(2) when he looks for information in the exact place the defense requested." In *Shorts*, the defense requested an administrative investigation related to the case that was conducted in another unit that the trial counsel was not tracking; however, the defense gave the trial counsel the wrong unit name and the wrong investigating officer name.

2. Reports (after service of charges and upon defense request). RCM 701(a)(2)(B).

a) Results or reports of physical or mental examinations, and of scientific tests or experiments, AND

b) In the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, AND

c) Either relevant to defense preparation OR intended for use by the trial counsel as evidence in the case-in-chief OR the government intends to use the material in rebuttal.

(1) *United States v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004): Defense counsel specifically requested "any reports, memos for record or other documentation relating to Quality Control and/or other documentation relating to Quality Control and/or inspections pertaining to quality control at the Brooks Lab for the three quarters prior to [the accused]'s sample being tested, and the available quarters since [the accused]'s sample was tested." The lab failed to identify a blind quality control sample by reporting a negative sample as a positive less than four months after the accused's sample was tested and less than three months after the defense's request. The trial counsel failed to discover and disclose the report to the defense. That failure violated the accused's rights under RCM 701(a)(2)(B). The CAAF found prejudice because had the information been disclosed, the defense could have used the information to demonstrate the existence of quality control problems.

3. Sentencing information (upon request). RCM 701(a)(5).

a) Written material that will be presented by the prosecution during the presentencing proceedings.

(1) Trial counsel are not required to disclose written matters intended to be offered in rebuttal of an accused's presentencing case where the matter could not have been offered during government's presentencing case. *United States v. Clark*, 37 M.J. 1098 (N.M.C.M.R. 1993).

b) Names and contact information of witnesses the trial counsel intends to call during the presentencing proceedings.

(1) Rule of Practice 2.1.8 requires notice no later than seven duty days prior to trial and does not require a defense request for this information.

4. Notice of uncharged misconduct (reasonable notice in advance of trial). MRE 404(b).

a) Upon defense request, the government must provide reasonable pretrial notice of the general nature of evidence of other crimes, wrongs, or acts which it intends to introduce at trial for some nonpropensity purpose.

5. Statements by a witness who has testified (after testimony). RCM 914.

a) A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any "statement" by the witness in the possession

of the other party (i.e., the United States or the accused/defense counsel) that relates to the subject of his testimony.

b) RCM 914 is a counterpart to the Jencks Act, 18 U.S.C. § 3500. Much of what the government would have to disclose to the defense under RCM 914 will also fall under other discovery rules like RCM 701(a)(1), (2), or (6), and *Brady*. Therefore, this requirement should generally not become a show-stopper at trial.

c) Remedy for non-disclosure. "[M]ilitary judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice." RCM 914(e).

d) What counts as a statement?

(1) "A written statement made by the witness that is signed or otherwise adopted or approved by the witness." RCM 914(f)(1).

(2) "A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a recording or a transcription thereof." RCM 914(f)(2); *United States v. Holmes*, 25 M.J. 674 (A.F.C.M.R. 1987).

(3) CID Agent investigator notes: If the agent testifies or if a witness who has reviewed and approved the agent's notes testifies, the notes must be produced under this rule. *Goldberg v. United States*, 425 U.S. 94 (1976); *United States v. Smaldone*, 484 F. 2d 311 (10th Cir. 1973). If the agent does not testify, then the defense will have to look to another rule to seek discovery.

(4) Article 32 testimony. *United States v. Muwwakkil*, 74 M.J. 187 (C.A.A.F. 2015): Military judge did not err in striking the in court testimony of the alleged victim where the government negligently deleted the recording of the cross-examination and redirect of the alleged victim at the Article 32 preliminary hearing. The military judge was not required to conduct a prejudice analysis or conclude that the recordings were lost in bad faith to strike the testimony. In his report, the preliminary hearing officer had recommended the charges not proceed due to his concerns about the alleged victim's credibility.

(5) Administrative board hearings. *United States v. Staley*, 36 M.J. 896 (A.F.C.M.R. 1993): Military judge found that statements made by witnesses before an administrative discharge board were within the general mandate of RCM 914.

(6) Drafts and notes:

(a) *United States v. Guthrie*, 25 M.J. 808 (A.C.M.R. 1988): No Jencks Act violation when a handwritten statement was destroyed after a typed version was created and adopted by the witness.

(b) *United States v. Merzlak*, 1992 CMR LEXIS 832 (A.F.C.M.R. 1992): Interview notes are generally not a statement where not written by witness, not signed, adopted, or approved by witness, and not a substantially verbatim recording. To determine whether or not a party has to disclose witness interview notes under RCM 914, you have to look at whether the notes are adopted or approved by the witness after they review them, or whether they are a substantially verbatim recitation of what was said made at the time it was said (near a summarized transcript).

(c) *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991): An informant did not keep his notes about an investigation. "Whenever military law enforcement agents request that an informant prepare written notes regarding an on-going investigation, those notes should be obtained from the informant and included in the investigative case file."

C. Privilege: prior to disclosing any information to the defense, trial counsel must ensure that they carefully check to determine that the materials do not contain anything that falls under one of the privileges set forth in Section V of the MREs or that constitutes attorney work product. If any information is potentially privileged, trial counsel must refer to the specific rule in Section V to determine the proper procedure to determine if/how the privileged material will be disclosed.

D. Standards of review for nondisclosure on appeal

1. Specific defense request for disclosure (*Hart* test): if the government failed to disclose information specifically requested by the defense, "the appellant is entitled to relief unless the government can show that the nondisclosure is harmless beyond a reasonable doubt. If the nondisclosure 'might have' effected the verdict, the government's non-disclosure will not be harmless beyond a reasonable doubt." *United States v. Ellis*, 77 M.J. 671 (Army Ct. Crim. App. 2018); *see also United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004).

a) A specific request: identifies the specific file, document, or evidence; reasonably identifies the location of the evidence or the custodian; and provides a statement of the expected materiality of the evidence to the preparation of the defense case. *United States v. Ellis*, 77 M.J. 671 (Army Ct. Crim. App. 2018).

2. *Brady* violations: if the information is material to the appellant's case, the courts will "provide relief to an appellant upon finding a reasonable probability that the verdict would have been different had the government provided the information in question." *United States v. Ellis*, 77 M.J. 671 (Army Ct. Crim. App. 2018).

3. No specific defense request and not a *Brady* violation: "if the government violates any other disclosure requirement, [the courts] will test for material prejudice to a substantial right in accordance with Article 59(a), UCMJ." *United States v. Ellis*, 77 M.J. 671 (Army Ct. Crim. App. 2018).

V. DEFENSE DISCOVERY RESPONSIBILITIES

A. Mandatory disclosure or notice requirements for defense counsel

1. Notice of plea and forum. Unless the judge sets a different deadline, defense counsel will notify trial counsel and the judge, in writing, at least ten duty days before an Article 39(a) session to resolve motions or the date of trial (whichever is earlier), of the forum and pleas. Rule of Practice 2.2.1.

2. Notice of certain defenses (before the beginning of trial on the merits). RCM 701(b)(2): The defense shall give notice before the beginning of trial on the merits of its intent to offer the defense of:

a) Alibi, to include the place or places at which the defense claims the accused to have been at the time of the alleged offense.

b) Innocent ingestion, to include the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substances in question.

(1) *United States v. Lewis*, 51 M.J. 376 (C.A.A.F. 1999): The trial judge erroneously prevented the accused from presenting an innocent ingestion defense because the defense

could not give notice of places where the innocent ingestion occurred and witnesses to be relied upon. The judge prevented the accused from raising this defense herself by her testimony alone. CAAF reversed, holding that RCM 701(b)(2) does not require corroborative witnesses or direct evidence as a condition for raising innocent ingestion.

c) Lack of mental responsibility, or use of expert testimony on mental condition.

d) Notice shall include names and addresses of witnesses to be relied upon to establish these defenses.

e) Rule of Practice 2.2.4 requires notice at least ten duty days before trial.

3. Merits witnesses list and statements (before beginning of trial on the merits). RCM 701(b)(1)(A).

a) The defense shall notify the trial counsel of the names and contact information of all witnesses, other than the accused, whom the defense intends to call during the defense case-in-chief, and shall provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

b) Rule of Practice 2.2.5 requires notice no later than seven duty days prior to trial.

4. Evidence of the victim's sexual behavior or predisposition (defense must file a motion at least 5 days prior to entry of plea). MRE 412(c).

B. Disclosures or notices made upon government request (not based on reciprocity)

1. Sentencing witnesses (upon request). RCM 701(b)(1)(B)(i): Provide trial counsel with names and contact information of any witness the defense intends to call at the presentencing proceeding.

a) Rule of Practice 2.2.5 requires disclosure of witness lists no later than 7 duty days before trial.

2. Written presenting material (upon request). RCM 701(b)(1)(B)(ii): Permit trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

3. Statements by a witness that testifies (after testifying, upon motion). RCM 914: for a complete discussion of RCM 914, see Section IV.B.5 *supra*.

C. Disclosures made upon government requests (based on reciprocity). If the defense requests discovery under RCM 701(a)(2), upon compliance with such request by the government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect and photograph/copy:

1. Books, papers, documents, data, photographs, or tangible objects within the possession, custody or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief. RCM 701(b)(3).

a) Defense not required to disclose surrebuttal evidence. *United States v. Stewart*, 29 M.J. 621 (C.G.C.M.R. 1989).

2. Results or reports of physical or mental examinations and scientific tests or experiments within the possession, custody or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief or which were prepared by a defense witness who will be called at trial (except as provided in RCM 706, MRE 302, and MRE 513). RCM 701(b)(4).

D. Privilege: prior to disclosing any information to the government, defense counsel must ensure that they carefully check to determine that the materials do not contain anything that falls under one of the privileges set forth in Section V of the MREs or that constitutes attorney-client

communications or attorney work product. If any information is potentially privileged, counsel must refer to the specific rule in Section V to determine the proper procedure to determine if/how the privileged material will be disclosed.

E. Defense discovery requests: see discussion of government discovery/disclosures due upon request *supra* at Section IV.B

VI. REGULATION OF DISCOVERY

A. General. The basic procedural rules for discovery, to include the basic remedies available for noncompliance, come from RCM 701(g). However, many discovery rules and rules with notice requirements contain their own remedies for noncompliance.

B. Pretrial orders: The military judge may issue pretrial orders that regulate when the parties will provide notices and make disclosures to the other party.

1. "The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just." RCM 701(g)(1).

2. Note that the Rules of Practice also contain guidance regarding the conduct of discovery, including specific procedures and timelines.

C. Protective and modifying orders

1. A party may seek relief from a discovery obligation (i.e., that discovery be denied, restricted or deferred) by providing the military judge with a sufficient showing that relief is warranted. RCM 701(g)(2); *see generally* RCM 906(b)(7) (motion for appropriate relief – discovery).

2. *In camera* review

a) Upon motion or if a rule requires, the military judge may review any materials *in camera* or permit a party to make a showing, in whole or in part, in writing to be inspected only by the judge. In the case of *in camera* review, the military judge must attach any materials examined by the judge to the record of trial as an appellate exhibit. The military judge must seal any materials examined *in camera* that were not disclosed to the accused. RCM 701(g)(2).

(1) Failure of military judge to seal and attach military records of government's key witness, after denying defense request for their disclosure for impeachment purposes, made proper appellate review impossible. *United States v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999).

(2) Military judges can allow the defense counsel to perform a review for materiality under a protective order to enable them to make informed arguments about discoverability. *United States v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999).

(a) When trial judges consider whether the information is relevant to defense preparation they should remember that they may not be in the best position to judge what is relevant and what is not: "An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances." *Alderman v. United States*, 394 U.S. 165 (1969).

b) Potential situations that may warrant *in camera* review:

(1) Matters are privileged (see Section V, MRE as each MRE regarding privilege has its own procedures governing if/how privileged materials are disclosed)

(2) Medical records, mental health records, therapist notes: *United States v. Cano*, 61 M.J. 74 (C.A.A.F. 2005); *United States v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *United States v. Kelly*, 52 M.J. 773 (Army Ct. Crim. App. 1999); *United States v. Trigueros*, 69 M.J. 604 (Army Ct. Crim. App. 2010).

(3) Personnel records. *United States v. Kelly*, 52 M.J. 773 (Army Ct. Crim. App. 1999).

(4) Inspector General's Report of Inquiry. *United States v. Sanchez*, 50 M.J. 506 (A.F. Ct. Crim. App. 1999).

D. Remedies for nondisclosure. RCM 701(g)(3): At any time during the court-martial, if a party has failed to comply with RCM 701, the military judge can take one or more of the following actions:

1. Order discovery. RCM 701(g)(3)(A).

2. Grant a continuance (common remedy). RCM 701(g)(3)(B).

a) *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989): Defense counsel moved to preclude use of a urinalysis report that was disclosed by the government just before trial. The military judge denied the request for exclusion, but granted a continuance, which was an appropriate remedy.

b) *United States v. Murphy*, 33 M.J. 323 (C.M.A. 1991): Government did not disclose its sole witness (an eyewitness accomplice) that they learned of the night before trial, but used the witness on rebuttal. Exclusion of testimony was not necessary. Violation of disclosure was adequately remedied by military judge's actions in granting accused a continuance for several hours to allow the defense to interview the witness, read her statement, interview the investigator that interviewed the witness, and conduct background checks of the witness.

3. Prohibit introduction of the evidence, calling a witness, or raising a defense not disclosed. RCM 701(g)(3)(C).

a) Factors to consider in determining whether to grant this remedy. RCM 701(g)(3) discussion):

(1) The extent of disadvantage that resulted from a failure to disclose;

(2) The reason for the failure to disclose;

(3) The extent to which later events mitigated the disadvantage caused by the failure to disclose;

(4) Any other relevant factors.

b) Excluding defense evidence:

(1) RCM 701(g)(3) discussion.

(a) Only use this sanction upon finding that the defense counsel's failure to comply was willful and motivated by a desire to obtain tactical advantage or to conceal a plan to present fabricated testimony, and if alternative sanctions could not have minimized the prejudice to the government.

(b) Before imposing the sanction, the military judge must weigh the right to compulsory process against the countervailing public interests, including:

(i) The integrity of the adversarial process;

(ii) The interest in the fair and efficient administration of justice;

(iii) The potential prejudice to the truth-determining function of the trial process.

(2) The Sixth Amendment right to present witnesses is not absolute. *Taylor v. Illinois*, 484 U.S. 400 (1988): The sword of compulsory process cannot be used irresponsibly. Excluding testimony is allowable; however, alternative sanctions will be adequate and appropriate in most cases.

(3) *United States v. Nobles*, 422 U.S. 225 (1975): Defense expert testimony excluded because expert refused to permit discovery of a "highly relevant" report. "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth."

(4) *Michigan v. Lucas*, 500 U.S. 145 (1991): The Court held that the state court of appeals erred in holding that the exclusion of evidence for the violation of a notice requirement under a state rape-shield law always violates the Sixth Amendment. The preclusion may be appropriate where willful misconduct is designed to gain a tactical advantage over the prosecution.

(5) *United States v. Pomarleau*, 57 M.J. 352 (C.A.A.F. 2002): The military judge erred by excluding defense evidence as a discovery sanction without conducting a fact-finding hearing or otherwise ascertaining the cause for untimely disclosure by the defense, and by not making findings of fact on the record as to whether less restrictive measures could have remedied any prejudice to the government.

(6) *United States v. Preuss*, 34 M.J. 688 (N.M.C.M.R. 1991): Applying the RCM 703(g)(3) discussion factors, the court found that the military judge abused his discretion by excluding the defense's alibi witness because the defense counsel failed to give notice of its intent to offer the alibi defense before the beginning of the trial.

4. Such other order as is just under the circumstances. RCM 701(g)(3)(D),

a) Mistrial. RCM 915.

b) Order a deposition. RCM 702:

(1) Depositions are primarily used to preserve testimony for later use at trial; however, depositions can be used for discovery when the government has improperly impeded defense access to a witness. RCM 702(a) analysis, app. 21, at A21-33 (MCM 2016 ed.).

(2) *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980): Where the government substantially impaired the defense counsel's ability to interview a witness, the defense could have sought a deposition.

(3) *United States v. Cumberledge*, 6 M.J. 203 (C.M.A. 1979): Where the government substantially impaired the defense's ability to interview witnesses, "timely use of the deposition process would provide the defense with meaningful discovery of these witnesses' testimony . . ."

c) Count the delay caused by the noncompliance against the government when calculating speedy trial. *United States v. Tebsherany*, 32 M.J. 351 (C.M.A. 1991) ("[T]ime requested by counsel to examine material not disclosed until the pretrial investigation might, under facts showing bad faith, be charged to the United States in accounting for pretrial delay.").

d) *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002): The government failed to disclose unfavorable but material evidence to the defense. A government witness then

testified early on in the trial regarding this undisclosed evidence. The remedies fashioned by military judge for the government's failure to disclose the evidence included making the assistant trial counsel lead counsel for the remainder of the case, with the "quiet assistance" of the lead counsel, and exclusion of the undisclosed evidence and some related evidence. The military judge failed, however, to instruct the members to disregard the testimony from the government witness, given five days earlier, about the evidence. The court held that while the decision not to instruct the members was "understandable under the circumstances," the failure to instruct negated the validity of the other remedies.

e) Dismissal with Prejudice. *U.S. v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015): On interlocutory appeal by the Government, CAAF upheld the military judge's decision to dismiss with prejudice when the government's multiple and repeated discovery violations resulted in lost or unaccounted for evidence which compromised the accused's ability to mount a defense. The military judge had determined that dismissal with prejudice was appropriate because of the "nature, magnitude, and consistency of the discovery violations."

E. Post-Trial: A military judge has the authority under Article 39(a), UCMJ to convene a post-trial session to consider a discovery violation and to take whatever remedial action is appropriate to include ordering a new trial. *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008).

1. *Brady*/RCM 701(a)(6) disclosure requirement lasts beyond trial. If any member of the Judge Advocate Legal Service (JALS) learns of new, credible, and material evidence or information creating a reasonable likelihood that an accused did not commit an offence of which the accused has been convicted they must disclose that evidence or information. AR 27-10, para. 5-51 (11 May 2016).

a) After adjournment but before initial action, trial counsel who learn of such evidence must disclose to defense counsel and make reasonable efforts to investigate. Any other member of JALS making such a discovery shall disclose to the SJA. AR 27-10, para. 5-51*b* (11 May 2016).

b) After initial action but before final action, any member of JALS who learns of such evidence or information must promptly notify the Army Court of Criminal Appeals Clerk of Court. AR 27-10, para. 5-51*c* (11 May 2016).

c) After completion of appellate review, any member of JALS who learns of such evidence or information must notify OTJAG. From there, the Criminal Law Division must promptly forward the notice to the last known address of the accused. AR 27-10, para. 5-51*d* (11 May 2016).

VII. PRODUCTION

A. General.

1. RCM 703(a) provides that "[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence . . . including the benefit of compulsory process." This rule is based on Article 46, UCMJ and implements the accused's 6th Amendment right to compulsory process.

a) Merits witnesses. RCM 703(b)(1): "Each party is entitled to production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary."

(1) Evidence is relevant when it has a tendency to make a fact that is of consequence in determining the action more or less probable than it would be without the evidence. MRE 401.

(2) Necessary means the evidence is not cumulative and would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact. RCM 703(b)(1) discussion.

(3) With the consent of both parties, the military judge may allow a merits witness to testify via remote means. On interlocutory matters, the military judge may allow a witness to testify via remote means where the practical difficulties of producing the witness outweigh the significance of the witness's personal appearance.

b) Sentencing witnesses. RCM 703(b)(2): Each party is entitled to the production of a witness whose testimony on sentencing is required under RCM 1001(f).

(1) There is much greater latitude during presentencing proceedings to receive information from witnesses testifying remotely. RCM 1001(f)(1).

(2) RCM 1001(f)(2) criteria for in-person production during sentencing:

(a) The testimony is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence.

(b) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence.

(c) The other party refuses to enter into a stipulation of fact.

(d) Other forms of evidence (depositions, interrogatories, former testimony, testimony by remote means) would not be sufficient in the determination of an appropriate sentence.

(e) The significance of the personal appearance to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production. *See* RCM 1001(f)(2)(E) for a list of factors related to this balancing test.

c) Evidence. RCM 703(e)(1): Each party is entitled to production of evidence that is relevant and necessary.

(1) Generally, the government has no responsibility to create records to satisfy demands for them. *United States v. Birbeck*, 35 M.J. 519 (A.F.C.M.R. 1992) (military judge did not err in denying defense request for the government to create laboratory reports on two negative urinalyses). The court used "discovery" language rather than "production" language. If the government will not produce a report, the defense can seek the employment of an expert witness, who can then test the evidence and produce a report. *United States v. Walker*, 66 M.J. 721 (N-M Ct. Crim. App. 2008).

2. How the process works:

a) The parties identify the witness or evidence that they want produced.

b) The trial counsel secures the presence of the witnesses or evidence required by the government. The defense submits its production requests to the trial counsel.

c) The trial counsel secures the presence of defense witnesses and evidence that the government determines meet production standards. If the trial counsel contends that defense witnesses or evidence do not satisfy the production standards, the trial counsel denies production of those witnesses or evidence, and tells the defense.

d) The defense may file a motion to compel production with the military judge. The military judge rules on the motion to compel production.

e) If the military judge grants the defense motion to compel production in whole or in part, the trial counsel secures the presence of those witnesses and/or evidence. The trial counsel arranges for orders or subpoenas of witnesses, depending on the witnesses' status, and arranges for requests or subpoenas for evidence, depending on who controls the evidence.

B. Pre-referral production of evidence through investigative subpoenas

1. Neither the trial counsel nor the military judge can issue a subpoena compelling a person to appear to provide testimony or a statement for use in an investigation or testify in a preliminary hearing.

2. The trial counsel (with authorization of the GCMCA) or a military judge pursuant to a RCM 309 proceeding, may issue investigative subpoenas prior to referral for the production of evidence not under the control of the government for use in an investigation. RCM 703(g)(3)(C)(i).

a) Absent exceptional circumstances, a victim named in a specification must be given notice of a subpoena requiring production of personal or confidential information about the victim so that the victim can move for relief under RCM 703(g)(3)(G) or otherwise object. RCM 703(g)(3)(C)(ii).

C. Production process for prosecution witnesses and evidence: The government shall obtain the presence of witnesses and evidence for the prosecution whose testimony the trial counsel considers to be relevant and necessary. RCM 703(c)(1); RCM 703(f).

D. Production process for defense witnesses and evidence

1. Defense submits a production request to the trial counsel

a) Witness and evidence production lists must be submitted in reasonably sufficient time to give the government a chance to get the witnesses and evidence. RCM 703(c)(2)(C); RCM 703(f). The military judge may set a date for production requests in the pretrial order, and can grant a continuance if the defense submits a request late in the proceedings.

(1) Rule of Court 2.2.3 sets a deadline of 10 duty days prior to trial or an Article 39a session unless the military judge sets a different deadline.

b) Witness requests. RCM 703(c)(2): The defense shall submit to the trial counsel a written list of the witnesses that the defense wants the government to produce.

(1) Merits and interlocutory questions…requests shall include:

(a) Name, phone number if known, address, or location where witness can be found; and

(b) A synopsis of the expected testimony sufficient to show its relevance and necessity.

(2) Sentencing…requests shall include:

(a) Name, phone number if known, address, or location where witness can be found; and

(b) A synopsis of the expected testimony and why personal appearance is necessary under the standards set forth in RCM 1001(f).

c) Evidence. RCM 703(f):

(1) Defense requests for evidence shall:

(a) List the items of evidence to be produced;

(b) Include a description of each item sufficient to show relevance and necessity; and

(c) Include a statement of where it can be obtained; and, if known, the name, address, and telephone number of the custodian of the evidence.

2. Trial counsel evaluates defense production requests and either arranges for the presence of defense-requested witnesses and evidence, or contends that production is not required. RCM 703(c)(2)(D); RCM 703(f).

a) Denials of witnesses/evidence whose production is requested by the defense must be made in writing and must detail the reasons for denial. Rule of Practice 2.2.3.

3. If trial counsel contends that the defense requests for witness/evidence production are not required by the rules, then the defense may file a motion to compel production with the military judge. RCM 703(c)(2)(D); RCM 703(f); RCM 906(b)(7).

a) If the military judge grants a motion to compel production, the trial counsel shall produce the witness or evidence, or the proceedings shall be abated. RCM 703(c)(2)(D); RCM 703(f).

b) The standard of review for the denial of a request for production is abuse of discretion. *United States v. Powell*, 49 M.J. 220 (C.A.A.F. 1998); *United States v. Mosley*, 42 M.J. 300 (C.A.A.F. 1995). If the military judge abused her discretion, then the test for prejudice is harmless beyond a reasonable doubt. *United States v. Powell*, 49 M.J. 220 (C.A.A.F. 1998).

4. Unavailable witnesses and evidence

a) A party is not entitled to the presence of a witness who is unavailable under MRE 804(a) or evidence that is destroyed, lost, or otherwise not subject to compulsory process.

b) However, if the testimony or the evidence is of such central importance to an issue that is essential to a fair trial, and there is no adequate substitute, the military judge shall:

(1) Grant a continuance or other relief in order to attempt to secure the witness or evidence; or

(2) Shall abate the proceedings. RCM 703(b)(3); RCM 703(e)(2).

c) A party cannot seek a remedy under this rule if they are the reason that the evidence is unavailable. RCM 703(b)(3); RCM 703(e)(2).

d) There is no "bad faith" requirement. The defense can seek a remedy under this rule even if the government was not at fault when destroying the evidence, or was simply negligent in losing the evidence. *United States v. Simmermacher*, 74 M.J. 196 (C.A.A.F. 2015). "An adverse inference instruction is an appropriate curative measure for improper destruction of evidence." *United States v. Ellis*, 57 M.J. 375 (C.A.A.F. 2002).

e) Cases.

(1) *United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008): After the first trial, the government lost or destroyed almost all of the physical evidence in a rape case. The second trial judge dismissed the related charges. The appellate court found that there were adequate substitutes and the evidence did not go to an issue of central importance.

(2) *United States v. Barreto*, 57 M.J. 127 (C.A.A.F. 2002): Appellant caused a car accident, killing a passenger and injuring himself. The government was unable to locate two unknown witnesses to the fatal traffic accident whom the defense requested, despite efforts that included running ads in German and U.S. newspapers. The defense moved to compel their production, or, in the alternative, abate the proceedings until the witnesses could be produced. The court found that these witnesses were unavailable and that other

eyewitnesses with unobstructed views of the accident who testified at trial were an adequate substitute for the potential testimony of the unknown witnesses.

(3) *United States v. Eiland*, 39 M.J. 566 (N.M.C.M.R. 1993): Military judge abated the proceedings when the government failed to produce two critical witnesses requested by the defense in a rape case. One witness was the doctor who examined the alleged victim and the other witness was another employee of the hospital who observed her demeanor. Defense refused to stipulate. No abuse of discretion in abating trial when testimony is "of such central importance to an issue that it is essential to a fair trial."

5. Procedures to facilitate production

a) Military witnesses on Active Duty. RCM 703(g)(1): Trial counsel notifies the witness's commander of the time, place, and date of the proceedings, and requests that the commander issue any necessary orders.

b) Evidence under control of the government. RCM 703(g)(2): Trial counsel notifies the custodian of the evidence of the time, place, and date evidence is required and requests that the custodian send or deliver the evidence.

c) Civilian witnesses and evidence. RCM 703(g)(3): Trial counsel can issue a subpoena for witnesses not on active duty/evidence custodians not under the control of the government, who are within the United States for a court-martial occurring in the U.S. if it appears that a civilian witness will not appear, or a civilian custodian will not produce requested evidence, through noncompulsory means.

(1) Subpoenas can be used for court-martial, military commission, court of inquiry, or deposition, but not for pretrial interviews or preliminary hearings. UCMJ art. 46(c).

(2) Subpoenas can be issued by the summary court-martial, trial counsel, president of a court of inquiry, or an officer detailed to take a deposition. They are usually issued by the trial counsel. RCM 703(g)(3)(D).

(3) Issuing authority should use DD Form 453. See the content requirements of RCM 703(g)(3)(B) and service instructions of RCM 703(g)(3)(E). Note that a subpoena may be served informally by certified first class mail, return receipt requested, and must be formally served by personal delivery. AR 27-10, para. 5-22(a) (11 May 2016).

(4) Subpoenas are not required for civilian witnesses who will voluntarily appear, and are typically not required for civilian Department of Defense employees.

d) Relief from a subpoena. RCM 703(g)(3)(G): Subpoena recipients can request relief from a subpoena on the grounds that compliance would be unreasonable, oppressive, or prohibited by law, from the military judge or, if prior to referral, a military judge detailed under Article 30a. The military judge will review the request and order that the subpoena be modified or quashed, or order the person to comply with the subpoena.

(1) *United States v. Rodriguez*, 57 M.J. 765 (N-M Ct. Crim. App. 2002): Law enforcement agents invited NBC for a "ride along" where an NBC videographer may have taped the scene of the traffic stop and search of appellant's vehicle. The accused filed a motion to suppress based on violations of his Fourth Amendment rights and believed that the video may contain evidence in support of his motion. NBC provided a videotape of the broadcast material of the traffic stop but stated that it relied on its First Amendment privilege regarding the production of the video "outtakes" and reporter's notes. The trial defense counsel requested the military judge to order production of any remaining videotape. The military judge denied the defense request to compel production. The appellate court stated that, essentially, the accused asked for production;

NBC asked for relief; and the trial counsel supported that with a motion to quash the subpoena. The court found that the accused never met his burden for production: relevance and necessity. Even if it had, and assuming the evidence was unavailable under RCM 703(e)(2) because it was not subject to compulsory process, the evidence was not of central importance to an issue that was essential to a fair trial. The military judge should have at least reviewed the material *in camera*, though.

(2) *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008): The accused gave an interview to CBS. CBS broadcast a portion of the interview and the government issued a subpoena for the remainder. The military judge did not conduct an *in camera* review and ordered the subpoena quashed. The court remanded for an *in camera* review and suggested that if the outtakes were not cumulative, then production and a subpoena would be appropriate.

(3) *United States v. Reece*, 25 M.J. 93 (C.M.A. 1987): The military judge should have conducted an *in camera* inspection of the victims' treatment and disciplinary records. The defense counsel "made as specific a showing of relevance as possible, given that he was denied all access to the documents." Witness credibility would be central in this case because there were no eyewitnesses. The court held that the military judge abused his discretion in failing to order production of the requested records for an *in camera* review.

(4) *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006): Defense counsel requested production of a rape victim's medical records during discovery. Trial counsel subpoenaed the requested records; however the custodian, a private social worker who had counseled the victim, refused to produce the records. Defense counsel filed a motion asking the military judge to order production of the records, which he agreed to do after a hearing where he considered MRE 513 and decided an *in camera* review would be appropriate. When the social worker still declined to produce the records, military judge issued a warrant of attachment. The warrant of attachment authorized the United States Marshal Service to seize the records and deliver them to the judge. The Marshal Service failed to seize the records, instead merely asking the social worker to produce the records, and gave up when she declined to do so. Faced with the government's failure to enforce the warrant of attachment, and deciding that the case could not proceed without *in camera* consideration of the records, the military judge abated the proceedings with regard to the rape charge. Appellate courts upheld the military judge.

6. Enforcement of compulsory process

a) If a person subpoenaed neglects or refuses to appear, or refuses to produce evidence, a military judge (or a military judge detailed under Article 30a or the GCMCA before referral) may issue a warrant of attachment to compel attendance or production. RCM 703(g)(3)(H).

(1) A warrant of attachment is issued only upon probable cause to believe that the witness/custodian was duly served with the subpoena, that fees and mileage were tendered, that the witness/evidence was material, that the witness/custodian refused or willfully neglected to appear, and that no valid excuse exists. RCM 703(g)(3)(H)(ii).

(2) Only non-deadly force may be used to bring the witness/custodian before the court-martial. The witness/custodian should be released as soon as possible after testifying or providing the evidence. RCM 703(g)(3)(H)(iv).

(3) Although a warrant of attachment can be executed by any person who is 18 years of age or over, it should be executed by a civilian officer of the United States where practicable. AR 27-10, para. 5-22(b) (11 May 2016).

b) Refusal to appear or testify is a separate offense under Article 47.

(1) A person not subject to the UCMJ who was issued a subpoena and provided a means of reimbursement, but willfully neglects or refuses to appear, qualify as a witness, testify, or produce any evidence required to be produced is guilty of an offense against the United States. UCMJ art. 47(a).

(2) Such persons shall be tried in U.S. District Court by a U.S. Attorney. UCMJ art. 47(b)-(c).

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CHAPTER 12
EXPERT WITNESSES

I. References
II. Introduction
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I. REFERENCES

A. UCMJ, art. 46

B. Rule for Courts-Martial 703

C. Military Rules of Evidence 701–706

II. INTRODUCTION

A. Some cases demand investigation and proof in matters involving highly technical evidence. Common examples are DNA, digital forensics, and various fields in medicine and mental health. Experts aid during investigative phases of a case in the collection and analysis of evidence; prior to trial in the preparation of cases; and during trial in the presentation of evidence and the consideration of that evidence by the members at trial. Ultimately, the purpose of an expert consultant or witness is to enable counsel, the judge, or the members to understand and apply information to their respective role in the military justice process.

B. Prior to trial, the government may employ one or more experts in preparing its case. Experts may also be essential government witnesses where the case involves understanding complex concepts related to computers, medicine, or other fields.

C. An "expert consultant" is someone detailed to the defense team to assist the accused and defense counsel during the investigative stage of the trial process, although expert assistance can be requested for any stage. Expert consultants commonly assist defense counsel in the evaluation of scientific or technical evidence the government intends to offer at trial. In addition, expert consultants can also be helpful in evaluating and presenting certain defenses, and in the areas of mitigation, member selection, evaluation of physical evidence, or in providing a psychological evaluation of the accused. Like the government, the defense may use expert witnesses at trial to testify regarding complex subject matter.

D. Rule framework:

1. The production of expert consultants and witnesses is governed by RCM 703;
2. The qualifications of experts are governed by MRE 702;
3. In general, the question of admissibility follows this line of questions:

   a) Is the expert qualified?

   b) Does the expert's testimony help the factfinder understand other evidence or determine a fact in issue?

   c) Is the testimony derived from a proper source?

   d) Is the testimony relevant?

e) Is the testimony based on reliable methods?

f) Were those methods reliably applied to the facts of this case?

g) Is the probative value of the testimony substantially outweighed by the danger of unfair prejudice?

4. If relevant, expert testimony and opinions are presumptively admissible unless they fail balancing under MRE 403, the witness is not qualified, or the testimony is based on an improper basis under MRE 702 or 703;

5. Questions regarding expert production, qualifications, and the admissibility of expert testimony are resolved by the military judge under MRE 104(a);

6. Once an expert testifies, the facts and data underlying the expert's opinion are ripe for cross-examination.

III. EXPERT TESTIMONY GENERALLY

MRE 702. Testimony by experts

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

A. The requirements of MRE 702(a) through (d) are stated in the conjunctive, and a party seeking admission of expert testimony must meet all of the rule's requirements. Preliminary questions concerning the availability, qualifications, relevance, propriety, and necessity of expert testimony are matters which must be determined by the military judge. MRE 104(a).

B. In *United States v. Houser*, 36 M.J. 392 (C.A.A.F. 1993), the CAAF set out six factors that a judge should use to determine the admissibility of expert testimony. CAAF continues to apply the *Houser* factors, which are similar to the requirements of MRE 702:

1. Qualified Expert. To give expert testimony, a witness must qualify as an expert by virtue of his or her "knowledge, skill, experience, training, or education." See MRE 702.

2. Proper Subject Matter. Expert testimony is appropriate if it would be "helpful" to the trier of fact. It is essential if the trier of fact could not otherwise be expected to understand the issues and rationally resolve them. See MRE 702.

3. Proper Basis. The expert's opinion may be based on admissible evidence "perceived by or made known to the expert at or before the hearing" or inadmissible hearsay if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ." The expert's opinion must have an adequate factual basis and cannot be simply a bare opinion. See MREs 702 and 703.

4. Relevant. Expert testimony must be relevant. See MRE 401.

5. Reliable. The expert's methodology and conclusions must be reliable. See MRE 702.

6. Probative Value. The probative value of the expert's opinion and the information comprising the basis of the opinion must not be substantially outweighed by any unfair prejudice that could result from the expert's testimony. See MRE 403.

C. Qualified expert: the expert's qualification to form an opinion.

1. Expertise based on knowledge can be established by:

a) Degrees attained from educational institutions;

b) Specialized training in the field;

c) Witness has maintained licensure in a particular field and has done so (if applicable) for a sufficient period of time;

d) Teaching experience in the field;

e) Witness publications;

f) Membership in professional organizations, honors or prizes received, previous expert testimony.

2. Expertise based on skill and experience. An expert due to specialized knowledge. *See United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986).

a) *United States v. Meeks*, 35 M.J. 64 (C.M.A. 1992): involved testimony by an FBI agent concerning his "crime scene analysis" of a double homicide. The testimony included observations that the killer was an "organized individual" who had planned and spent some time in preparation for the crime, was familiar with the crime scene and victims, and acted alone. Such evidence was not too speculative for admission under MRE 702.

b) *United States v. Banks*, 36 M.J. 150 (C.M.A. 1992): Military judge erred when he refused to allow defense clinical psychologist to testify about the relevance of specific measurements for a normal prepubescent vagina, solely because the psychologist was not a medical doctor. As the court noted, testimony from a qualified expert, not proffered as a medical doctor, would have assisted the panel in understanding the government's evidence.

c) *United States v. Harris*, 46 M.J. 221 (C.A.A.F. 1997): Military Judge did not err in qualifying a highway patrolman who investigated over 1500 accidents, as an expert in accident reconstruction.

d) *United States v. Billings*, 61 M.J. 163 (C.A.A.F. 2005): To link appellant to a stolen (and never recovered) Cartier Tank Francaise watch, the government called a local jeweler as an expert witness to testify that a watch the appellant was wearing in a photograph had similar characteristics as a Tank Francaise watch. Although the jeweler had never actually seen a Tank Francaise watch, his twenty-five years of experience and general familiarity with the characteristics of Cartier watches qualified him as a technical expert.

e) *United States v. Flescher*, 73 M.J. 303 (C.A.A.F. 2014): The military judge did not hold a *Daubert* hearing and failed to properly establish the qualifications of a Sexual Assault Response Coordinator to testify as an expert on counterintuitive victim behaviors. The fact that an expert may be qualified by experience does not mean that experience, standing alone, is sufficient foundation rendering reliable any conceivable opinion the expert may express; if the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion and how that experience is reliably applied to the facts; and the military judge should state on the record why he concludes that such a witness's testimony is reliable.

Because the witness was not qualified, testified on improper bases during the testimony, and provided some testimony which was either not relevant or improper bolstering of the victim, trial judge abused his discretion in admitting the evidence. The error was not harmless beyond a reasonable doubt. CAAF set aside the findings on aggravated sexual assault, and the sentence.

D. Proper subject matter. MRE 702(a).

1. Helpfulness: Expert testimony is admissible if it will assist the fact finder. There are two primary ways an expert's testimony may assist the fact finder:

a) Complex testimony: Experts can explain complex matters such as scientific evidence or extremely technical information that the fact finder could not understand without expert testimony.

b) Unusual applications: Experts can also help explain apparently ordinary evidence that may have unusual applications; without the expert's assistance, the fact finders may misinterpret the evidence. *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998); *United States v. Brown*, 49 M.J. 448 (C.A.A.F. 1998).

(1) *United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999): The trial judge did not abuse his discretion in excluding the defense expert on eyewitness identification. Even if the evidence meets the reliability prong of *Daubert*, it must also meet the helpfulness prong. Here the judge properly ruled that such testimony is not beyond the ken of lay jurors and there was no need for expert opinion testimony.

(2) *United States v. Dimberio*, 52 M.J. 550 (A.F. Ct. Crim. App. 1999): Military judge excluded testimony of defense expert who would testify about the alcoholism and mental problems of the accused's wife. AFCCA affirmed and held the evidence was irrelevant because there was no link between her problems and her alleged violence. The testimony was impermissible profile evidence.

(3) *United States v. Traum*, 60 M.J. 226 (C.A.A.F. 2004): To answer the question of why a parent would kill her child, the government called a forensic pediatrician, who testified to the following matters: (1) overwhelmingly, the most likely person to kill a child would be his or her biological parent; (2) the most common cause of trauma death for children under four is child maltreatment; (3) for 80% of child abuse fatalities, there are no prior instances of reported abuse; (4) victim died of non-accidental asphyxiation. CAAF held that there was no error in admitting "victim profile" evidence regarding the most common cause of trauma death in children under four and the fact that most child abuse deaths involve first-time abuse reports for that child. CAAF held that the military judge erred in admitting evidence that overwhelmingly, the most likely person to kill a child is its biological parent. In context, however, the error was harmless because the government already had admitted the appellant's confession.

(4) *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005): CAAF held that the appellant was not entitled to a false confession expert consultant absent evidence of abnormal mental condition, submissive personality, or other factors suggesting that the confession was actually false.

(5) Child Abuse Accommodation Syndrome. *United States v. Suarez*, 35 M.J. 374 (C.M.A. 1992): In trial for child sex abuse crimes, evidence was received on how the victim exhibited "Child Sexual Abuse Accommodation Syndrome" (children change or recant their stories, delay or fail to report abuse, accommodate themselves to the abuse). While such evidence is controversial, it may be admitted where it explains the abused

child's delay or recantation, as in this case. *See also United States v. Cacy*, 43 M.J. 214 (C.A.A.F. 1995).

2. Form of the opinion. The foundation consists of no more than determining that the witness has formed an opinion, and what that opinion is.

E. Proper basis: The language of the rule is broad enough to allow at least three types of bases: facts personally observed by the expert; facts posed in a hypothetical question; and hearsay reports from third parties. However, expert testimony must be based on the facts of the case being tried.

MRE 703. Bases of an expert's opinion testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. If the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the members of a court-martial only if the military judge finds that their probative value in helping the members evaluate the opinion substantially outweighs their prejudicial effect.

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1. There must be some basis for the opinion. *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000): During the sentencing phase, the government called an expert on future dangerousness of the accused. The expert said he could not diagnose the accused because he had not interviewed him nor had he reviewed his medical records. In spite of this and objections by defense counsel, the expert did testify about pedophilia and made a strong inference that the accused was a pedophile who had little hope of rehabilitation. CAAF held it was error for the judge to admit this evidence. Citing *Houser*, the court noted the expert lacked proper foundation for this testimony, as noted by his own statements that he could not perform a diagnosis because of his lack of contact with the accused.

2. Personal perception. *United States v. Hammond*, 17 M.J. 218 (C.M.A. 1984): The fact that expert did not interview or counsel victim did not render expert unqualified to arrive at an opinion concerning rape trauma syndrome. *United States v. Snodgrass*, 22 M.J. 866 (A.C.M.R. 1986). Defense objected to social worker's opinion that victim was exhibiting symptoms consistent with rape trauma accommodation syndrome and suffered from PTSD on basis that opinion was based solely on observing victim in court, reading reports of others and assuming facts as alleged by victim were true. Objection went to weight to be given expert opinion, not admissibility. *United States v. Raya*, 45 M.J. 251 (C.A.A.F. 1996). The foundational elements include:

a) Where and when the witness observed the fact;

b) Who was present;

c) How the witness observed the fact; and

d) A description of the observed fact.

3. Hypothetical questions (no longer required): No need to assume facts in evidence, but, if used, must be reasonable in light of the evidence. *United States v. Breuer*, 14 M.J. 723 (A.F.C.M.R. 1982). The proponent may specify historical facts for the expert to assume as true, or may have the expert assume the truth of another witness or witnesses.

4. Hearsay reports of third parties are admissible, provided the Confrontation Clause and other MREs are satisfied:

a) The elements of the foundation for this basis include:

(1) The source of the third party report;

(2) The facts or data in the report;

(3) If the facts are inadmissible, a showing that they are nonetheless of the type reasonably relied upon by experts in the particular field.

b) *United States v. Sims*, 514 F.2d 147 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975): "The rationale in favor of admissibility of expert testimony based on hearsay is that the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion. This relates directly to one of the functions of the expert witness, namely to lend his special expertise to the issue before him." However, the testimony of an expert witness does not permit "smuggling in" otherwise inadmissible hearsay evidence.

c) *United States v. Katso*, 74 M.J. 273 (C.A.A.F. 2015): An expert may rely on otherwise inadmissible testimonial hearsay in formulating an admissible opinion. The question of admissibility in these cases is the degree to which the testifying expert conducts an independent analysis in reaching the offered opinion.

d) *United States v. Neeley*, 25 M.J. 105 (C.M.A. 1987), *cert. denied*, 484 U.S. 1011 (1988): Psychiatrist's testimony that she consulted with other psychologists in reaching her conclusion that accused had inflated results of psychiatric tests and her opinion was the consensus among these people was hearsay and inadmissible. Military judge may conduct MRE 403 balancing to determine if the probative value of this foundation evidence is outweighed by unfair prejudice.

e) *United States v. Hartford*, 50 M.J. 402 (C.A.A.F. 1999): Defense was not allowed to cross-examine government expert about contrary opinions from two colleagues. Defense did not call the two as witnesses and there was no evidence the government expert relied on the opinions of these colleagues. CAAF held the MJ did not err in excluding this questioning as impermissible smuggling under MRE 703.

f) For more information on the admissibility of hearsay reports through experts, refer to the Deskbook Chapter on the Confrontation Clause.

5. Disclosing basis for the opinion

a) Proponent can disclose inadmissible bases of an expert's opinion (e.g., hearsay that the expert relied on) to the members if the military judge determines that the probative value in helping the members evaluate the opinion outweighs the prejudicial effect. MRE 703.

(1) Although an expert can rely on testimonial hearsay in forming his opinion, MRE 703 cannot be used to circumvent the Confrontation Clause through the expert by using the expert to disclose testimonial hearsay. *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010).

(2) The military judge should give a limiting instruction to the panel. MRE 105.

b) An opposing party can request that the military judge order the proponent of the expert to disclose the facts/data that underline his opinion, and then cross examine the expert on that information. MRE 705.

F. Relevance: Expert testimony, like any other testimony must be relevant to an issue at trial. MRE 401; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The standard for relevance is low, and MRE 402 reflects a strong bias in favor of admissibility for relevant evidence.

G. Reliability:

1. The reliability test for scientific evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993): In *Daubert*, the Supreme Court held that nothing in the Federal Rules indicates that "general acceptance" is a precondition to admission of scientific evidence. The rules assign the task to the judge to ensure that expert testimony rests on a reliable basis and is relevant. The judge assesses the principles and methodologies of such evidence pursuant to MRE 104(a).

a) The role of the judge as a "gatekeeper" leads to a determination of whether the evidence is based on a methodology that is "scientific," and therefore reliable. The judgment is made before the evidence is admitted, and entails "a preliminary assessment of whether the reasoning or methodology is scientifically valid." Trial court possesses broad discretion in admitting expert testimony with rulings tested only for abuse of discretion. *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997); *see also United States v. Kaspers*, 47 M.J. 176 (C.A.A.F. 1997).

b) *Daubert* factors: The Supreme Court discussed a nonexclusive list of factors to consider in admitting scientific evidence, which included the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), "general acceptance" test as a separate consideration:

(1) Whether the theory or technique can be and has been tested;

(2) Whether the theory or technique has been subjected to peer review and publication;

(3) Whether the known or potential rate of error is acceptable;

(4) Whether the theory/technique enjoys widespread acceptance.

c) After *Daubert*, "helpfulness" alone will not guarantee admission of evidence because it does not guarantee "reliability."

(1) Examples:

(a) DNA testing. *United States v. Thomas*, 43 M.J. 626 (A.F. Ct. Crim. App. 1995): The military judge did not abuse his discretion in admitting DNA results obtained by PCR methodology. Judge properly applied *Daubert* factors and any weaknesses in PCR methodology go to weight not admissibility.

(b) DNA testing: *United States v. Henning*, 75 M.J. 187 (C.A.A.F. 2016): CAAF again visited the issue of experts, technical evidence, and reliability. Applying both *Houser* and *Daubert*, the court held the military judge did not abuse his discretion by excluding DNA evidence and the testimony of an expert accompanying that evidence where the trial judge determined that the methods used in producing that evidence were not sufficiently reliable.

(c) Luminol testing. *United States v. Hill*, 41 M.J. 596 (Army Ct. Crim. App. 1994): Luminol tests satisfy the *Daubert* criteria where testimony is limited to an opinion that positive results only show a presumptive positive for blood. *See also United States v. Holt*, 46 M.J. 853 (N-M Ct. Crim. App. 1997); *United States v. Schlamer*, 47 M.J. 670 (N-M Ct. Crim. App. 1997).

(d) Chemical hair analysis. *United States v. Nimmer*, 43 M.J. 252 (C.A.A.F. 1995): Case remanded in order to allow the lower court to apply the *Daubert* model to RIA and GC/MS testing for the presence of cocaine. *See also United States v. Bush*, 44 M.J. 646 (A.F. Ct. Crim. App. 1996) (military judge did not abuse his discretion in applying *Daubert* factors and permitting analysis of the accused's hair to go before the members).

2. The reliability test for nonscientific evidence. *Kumho Tire v. Carmichael*, 119 S. Ct. 1167 (1999): Supreme Court held the trial judge's gatekeeping responsibility applies to all types of expert evidence, and that the *Daubert* factors apply to non-scientific evidence also. To the extent the *Daubert* factors apply, they can be used to evaluate the reliability of this evidence; factors other than those announced in *Daubert* can also be used to evaluate the reliability of non-scientific expert evidence.

a) Other factors courts have considered to evaluate the reliability of scientific and non-scientific testimony include:

(1) Was the information developed for the purpose of litigation?

(2) Did the expert unjustifiably extrapolate facts to support conclusions?

(3) Are there alternative explanations?

(4) Is the expert being as careful as they would be in their regular professional work outside paid litigation?

(5) Is there a well-accepted body of learning in this area?

(6) How much practical experience does the expert have and is there a close fit between the experience and the testimony?

(7) Is the testimony based on objective observations and standards?

3. Application of *Daubert*/*Kumho Tire*

a) Blood spatter: *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986), *cert. denied*, 479 U.S. 953 (1986): In this pre-*Daubert* case involving blood-spatter evidence, the court used a three-step analysis. First, does the evidence involve an area of specialized knowledge? Second, would the expert testimony be relevant (helpful) to the trier of fact? Third, is the expert qualified to testify? After *Kumho Tire*, this minimal inquiry may not be sufficient. The trial judge should do more than consider the expert's qualifications in making the reliability determination.

b) Drug testing:

(1) *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999): Defense claimed that the lab's use of GC/MS to determine the existence of LSD in urine failed under *Daubert*. CAAF reversed the case because the government failed to show that the 200 PG/ML established by DoD adequately accounted for innocent ingestion. On reconsideration, CAAF clarified its opinion in *Campbell* at 52 M.J. 386 (2000). In a urinalysis case, the government can show wrongful use by expert testimony that meets this 3-part test: (1) proof must show that the metabolite is not naturally produced by the body; (2) cutoff level and concentration are high enough to reasonably discount innocent ingestion; (3) testing method reliably detected and quantified the concentration. The 3-part test is not required if the evidence can explain, with equivalent persuasiveness, the underlying scientific methodology and significance of test results.

(2) *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001): CAAF held that a positive urinalysis, accompanied by the testimony of an expert witness interpreting the result, was sufficient to support the permissive inference of knowing and wrongful use of cocaine.

c) Sleep disorders. *United States v. Blaney*, 50 M.J. 533 (A.F. Ct. Crim. App. 1999): Accused charged with sodomizing a male victim while the victim was asleep. Defense wanted to admit the testimony of two experts to testify about the victim's alleged sleep

disorders. Military judge excluded the testimony and AFCCA affirmed. Court held that under *Daubert*, the expert's methodologies were unreliable and not helpful because the victim had not been interviewed.

d) False confessions. *United States v. Griffin*, 50 M.J. 278 (C.A.A.F. 1999): CAAF held military judge did not abuse his discretion in excluding the testimony of an expert in false confessions. The court reasoned that no witness could serve as a human lie detector, and in this case the evidence was unreliable because there was no correlation between the expert's studies and the accused in this case. In the future, no per se exclusion may be admissible if testimony is limited to factors and there is a close correlation between the study group and the accused at trial.

e) Dysfunctional family profile evidence.

(1) *United States v. Banks*, 36 M.J. 150 (C.M.A. 1992): Error to present expert testimony that accused's family was in a situation that was ripe for child sexual abuse. The expert testified by presenting characteristics of a family that included a child sexual abuser. Then pursuing a deductive scheme of reasoning, the expert opined that families with the profile present an increased risk of child sexual abuse. Finally, the expert testified that the Banks family fit the profile.

(2) *United States v. Pagel*, 45 M.J. 64 (C.A.A.F. 1996): No abuse of discretion in allowing government expert to testify concerning a dysfunctional family "profile" and whether the accused's family displayed any of its characteristics. Testimony went to support credibility of daughter's accusations and to explain her admitted unusual behavior. Unlike in *Banks*, evidence used to explain the behavior of the victim on the assumption she was abused by someone, not necessarily the accused. Using "profile" evidence to explain the counter-intuitive behavioral characteristics of sexual abuse victims was permissible.

f) Rape trauma syndrome. *United States v. Carter*, 26 M.J. 428 (C.M.A. 1988): Rape trauma is a subcategory of PTSD in the DSM-IV. The psychiatric community recognizes it as valid and reliable. Evidence may assist factfinder by providing knowledge concerning victim's reaction to assault. Rape trauma syndrome evidence will also assist the trier of fact in determining the issue of consent. This would be particularly true where members would likely have little or no experience with victims of rape. *See also United States v. Cox*, 23 M.J. 808 (N.M.C.M.R. 1986); *United States v. Hartford*, 50 M.J. 402 (C.A.A.F. 1999).

(1) Impermissible Testimony. *United States v. Bostick*, 33 M.J. 849 (A.C.M.R. 1991): Psychologist impermissibly expressed an opinion concerning the rape victim's credibility by discussing the performance of the victim on a "Rape Aftermath Symptoms Test" (RAST) and by stating that the victim did not fake or feign her condition. The expert thus became a "human lie detector." The RAST failed to meet the requirements for admissibility of scientific testimony (lack of foundation). Despite lack of defense objection, the court finds plain error and sets aside findings and sentence.

g) Handwriting analysis: Two more district courts are following the trend to limit the expert's testimony to characteristics and prevent them from either testifying that a certain individual was the author of a questioned document or to their degree of certainty. *United States v. Ruthaford*, 104 F. Supp. 2d 1190 (D. Neb. 2000); *United States v. Santillan*, 1999 U.S. Dist. Lexis 21611 (N.D. Ca. 1999).

h) Hypnosis: Admissible if the military judge finds that the use of hypnosis was reasonably likely to result in recall comparable in accuracy to normal human memory. *United States v.*

Harrington, 18 M.J. 797 (A.C.M.R. 1984); *Rock v. Arkansas*, 483 U.S. 44 (1987). Proponent must show by clear and convincing evidence satisfaction of the following procedural safeguards:

(1) Independent, experienced hypnotist conducted the session.

(2) Hypnotist not regularly employed by the parties.

(3) Information revealed to the hypnotist is recorded.

(4) Detailed statement must be obtained from the witness in advance.

(5) Only hypnotist and subject present during session.

i) DNA: *United States v. Youngberg*, 43 M.J. 379 (C.A.A.F. 1995) (evidence of DNA testing is admissible at courts-martial if proper foundation is laid); *United States v. Davis*, 40 F.3d 1069 (10th Cir), cert. denied, 115 S. Ct. 1387 (1995) (statistical probabilities are basic to DNA analysis and their use has been widely researched and discussed).

j) Psychological autopsy

(1) *United States v. St. Jean*, 45 M.J. 435 (C.A.A.F. 1996): No error in allowing forensic psychologist to testify about suicide profiles and that his "psychological autopsy" revealed it was unlikely the deceased committed suicide.

(2) *United States v. Huberty*, 53 M.J. 369 (C.A.A.F. 2000): Applying *Daubert* and *Kumho Tire* the CAAF affirmed the military judge's decision to exclude an expert's opinion that the accused was not an exhibitionist. The court noted that there was no body of scientific knowledge to support the expert's claim that the MMPI could be used to conclude that an individual was not an exhibitionist and could not have committed a crime.

k) Eyewitness Identification. *United States v. Garcia*, 44 M.J. 27 (C.A.A.F. 1996), cert. denied, 117 S. Ct. 174 (1996): Abuse of discretion, though harmless, to limit testimony concerning the unreliability of eyewitness identification by preventing testimony on the inverse relationship between confidence and accuracy in identifications and theories of memory transference and transposition.

(1) *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000): Trial judge abused his discretion by excluding a defense expert on the weaknesses of eyewitness identification. The trial judge's comments that he wanted to "experiment" were indicative of the abuse of his discretion, as was his failure to even conduct a *Daubert*-type reliability hearing.

l) Gang activity. *United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000): The accused was charged with conspiracy and distribution of drugs. Accused was a member of a gang and a co-accused and other witnesses testified for the defense and denied any wrongdoing. In rebuttal the government called a police officer to render an expert opinion that part of the gang affiliation code was not to testify against another gang member or suffer physical injury. Defense said the witness's opinion was not reliable and more prejudicial than probative. The 9th Circuit, applying *Kumho Tire*, said the judge did not abuse his discretion in admitting this evidence.

m) Behavioral aspects of child pornographers. *United States v. Hays*, 62 M.J. 158 (C.A.A.F. 2005): CAAF held the military judge did not abuse her discretion in admitting testimony of an FBI expert on the behavioral aspects of victimization of children. The expert testified that appellant's email was an attempt to persuade another person to sexually abuse a child and photograph it in exchange for similar acts from the appellant at a future date.

n) Future dangerousness. *United States v. Latorree*, 53 M.J. 179 (C.A.A.F. 2000): Accused pleaded guilty to sodomizing a 7-year old girl. In sentencing, the government expert testified, in response to both defense and government questioning, that during treatment most sexual offenders admit to other sexual assaults. On appeal, defense claimed it was error for the expert to provide this information. CAAF ruled the expert evidence lacked relevance and failed the reliability standards as required by *Daubert*, but any error in admitting the testimony was harmless.

H. Opinion on ultimate issue: The standard is whether the testimony assists the trier of fact, not whether it embraces an "ultimate issue" so as to usurp the panel's function. However, ultimate-issue opinion testimony is not automatically admissible. Opinion must be relevant and helpful as determined under MRE 401-403 and 702.

MRE 704. Opinion on Ultimate Issue

An opinion is not objectionable just because it embraces an ultimate issue.

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1. Human lie detector evidence impermissible: An expert should not opine that a certain witness's rendition of events is believable or not. *See, e.g.*, *United States v. Petersen*, 24 M.J. 283 (C.M.A. 1987) ("We are skeptical about whether any witness could be qualified to opine as to the credibility of another."). The expert may not become a "human lie detector." *United States v. Palmer*, 33 M.J. 7 (C.M.A. 1991). Questions such as whether the expert believes the victim was raped, or whether the victim is telling the truth when she claimed to have been raped (i.e. was the witness truthful?) are impermissible. However, the expert may opine that a victim's testimony or history is consistent with what the expert's examination found, and whether the behavior at issue is typical of victims of such crimes. Questions such as whether the victim's behavior is consistent with individuals who have been raped, or whether injuries are consistent with a child who has been battered, are therefore permissible. The relevant focus is on symptoms, not conclusions concerning veracity. *See United States v. Birdsall*, 47 M.J. 404 (C.A.A.F. 1998) (expert's focus should be on whether children exhibit behavior and symptoms consistent with abuse; reversible error to allow social worker and doctor to testify that the child-victims were telling the truth and were the victims of sexual abuse).

a) *United States v. Hill-Dunning*, 26 M.J. 260 (C.M.A. 1988), *cert. denied*, 488 U.S. 967 (1988): Psychiatrist is competent to testify as to diagnosis of client and may testify that diagnosis is based upon assumption that what client said is the truth; yet, same witness may not testify that it is his opinion that what client said is truthful.

b) *United States v. Schlamer*, 47 M.J. 670 (N-M Ct. Crim. App. 1997), *affirmed*, 52 M.J. 80 (1999): On redirect examination TC asked one of the accused's interrogators if he believed the accused was making the confession up. The court said the question was permissible because investigator was an eyewitness to the confession, the witness gave a conclusory answer that added nothing, and the accused had two doctors testify that the confession was unreliable, so the government should have the chance to rebut with an eyewitness. And, if this was error, it was harmless.

c) *United States v. Eggen*, 51 M.J. 159 (C.A.A.F. 1999): Accused convicted of forcible sodomy with another soldier. Defense theory was that it was consensual. The victim sought counseling after the incident and the government called the counselor in as an expert witness. The defense asked the expert if the victim could be faking his emotions. The expert said it was possible. On re-direct, the expert testified that he saw no evidence of faking. On appeal, defense claimed that this opinion was error because he was commenting on the witness'

credibility. CAAF rejected this argument noting that the defense opened the door to this line of questioning and did not object at trial.

d) *United States v. Marrie*, 43 M.J. 35 (C.A.A.F. 1995): Government expert testified preteen and teenage boys (the victims) were the least likely group to report abuse because of shame and embarrassment and fear of being labeled a homosexual. She opined false allegations from that group were "extremely rare" and outside of her clinical experience. Such testimony was improperly admitted, although harmless.

e) *United States v. Robbins*, 52 M.J. 455 (C.A.A.F. 2000). Accused charged with two specifications of sodomy with a child under 16. Social worker testified that in this case, the allegation was substantiated. A second witness also testified about what the victim told her. She testified that when the victim reported the incident to her, the victim appeared not to be lying. The defense did not object to any of this evidence. CAAF cited *Birdsall* and then distinguished this case primarily because it was a judge alone case and since the judge is presumed to know and apply the law correctly, these errors were not plain error and no relief.

f) *United States v. Brooks*, 64 M.J. 325 (C.A.A.F. 2007): Where the government expert's testimony suggested there was better than a 98% probability the victim was telling the truth, such testimony was the functional equivalent of vouching for the credibility or truthfulness of the victim, and implicates the very concerns underlying the prohibition against human lie detector testimony.

2. *United States v. Lipscomb*, 14 F.3d 1236 (7th Cir. 1994): Conclusion of law enforcement experts held qualified to opine that circumstances and behavior indicated intent to distribute drugs was not a legal conclusion as to a specific intent element.

3. *United States v. Diaz*, 59 M.J. 79 (C.A.A.F. 2003): CAAF held it was improper for an expert to testify that the death of appellant's child was a homicide and that the appellant was the perpetrator, when the cause of death and identify of the perpetrator were the primary issues at trial.

4. Profile and propensity.

a) *United States v. Banks*, 36 M.J. 150 (C.M.A. 1992): "[G]enerally, use of any characteristic 'profile' as evidence of guilt or innocence in criminal trials is improper." Such evidence is improper because it treads too closely to character evidence offered to show that an accused acted in conformity with that character and committed the act in question, evidence prohibited under MRE 404(b).

b) *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005): Profile evidence (evidence that presents a characteristic profile of an offender and then places the accused's personal characteristics within that profile as proof of guilt) is generally improper in a court-martial as evidence of guilt or innocence. Profile evidence is admissible only in narrow and limited circumstances; for example, in rebuttal when a party opens the door by presenting potentially misleading testimony.

c) *United States v. Harrow*, 65 M.J. 190 (C.A.A.F. 2007): In a murder case based on shaken baby syndrome, testimony by an expert witness in the fields of developmental and forensic psychiatry that the most common person to fatally abuse a child is a biological parent and that the most common trigger for baby shakings is persistent crying, was inadmissible profile evidence that focused on characteristics of the abuser, as opposed to characteristics of the child. Testimony by an expert witness in the fields of developmental and forensic psychiatry about the symptoms and progression of shaken baby syndrome and medical conclusion that the victim's primary diagnosis was probably most consistent with an inflicted

injury, was not inadmissible profile evidence because that evidence focused on the characteristics of the child, not the abuser; and the evidence was not profile evidence simply because it tended to incriminate the accused.

5. Victim behavior and injuries:

a) *United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990): An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms.

b) *United States v. Cacy*, 43 M.J. 214 (C.A.A.F. 1995): While expert testimony that a child's behavior is consistent with behavior patterns of a typical sexual abuse victim and that victim did not appear rehearsed were admissible, testimony that expert explained to child importance of being truthful and, based on child's responses, recommended further treatment, was an affirmation that expert believed the victim, which improperly usurped the responsibility of the fact-finder.

c) *United States v. Raya*, 45 M.J. 251 (C.A.A.F. 1996): Social worker's testimony that rape victim was not vindictive and wanted to stay away from the accused was not improper comment on credibility.

d) *United States v. Anderson*, 50 M.J. 447 (C.A.A.F. 1999): Accused charged with child sexual abuse. On appeal for the first time, defense objected to testimony of government expert on child abuse accommodation syndrome. Defense claimed that it amounted to labeling the accused as an abuser and vouching for the credibility of the victims because the expert got all her information from the victims. CAAF rejected that argument and noted that the expert testimony was limited to factors and that the facts of this case were consistent with those factors.

e) *United States v. Armstrong*, 53 M.J. 76 (C.A.A.F. 2000): Accused charged with indecent acts with his daughter. Accused made a partial confession to the police and at trial stated that any contact with his daughters was not of a sexual nature. On rebuttal, the government called an expert in child abuse who testified that in her opinion the victim suffered abuse at the hands of her father. The defense did not object. On appeal, CAAF found error and, while that error was not constitutional, it had a substantial influence on the findings. Reversed.

f) *United States v. Mullins*, 69 M.J. 113 (C.A.A.F. 2010): An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child has exhibited these symptoms. Expert may not testify regarding the credibility or believability of a victim, or opine as to the guilt or innocence of an accused; it was error to admit expert testimony from which the court members could infer that there was a 1 in 200 chance that the allegations of child victims of sexual assault were false because such an inference assumes the members' responsibility to determine the credibility of witnesses.

g) *United States v. Foster*, 64 M.J. 331 (C.A.A.F. 2007): Expert may testify about symptoms that are generally found among children who have suffered sexual abuse and whether the child has exhibited the symptoms. Expert may also testify about patterns of consistency generally found in the stories of victims as compared to patterns in the victim's story. But note that there is a fine line between admissible testimony in this area and testimony about a victim's credibility or its functional equivalent, which is not admissible.

I. Polygraph Evidence. In 1991, the President promulgated MRE 707 as a *per se* ban on all polygraph evidence in courts-martial, including the results of an examination, the opinion of an examiner, and any reference to an offer to take, the failure to take, or the taking of a polygraph examination.

MRE 707. Polygraph Examinations.

(a) *Prohibitions.* Notwithstanding any other provision of law, the result of a polygraph examination, the polygraph examiner's opinion, or any reference to an offer to take, failure to take, or taking of a polygraph examination is not admissible.
(b) *Statements Made During a Polygraph Examination.* This rule does not prohibit admission of an otherwise admissible statement made during a polygraph examination.

1. In 1996, CAAF held that the categorical ban on polygraph evidence is an impermissible infringement on the accused's 6th Amendment right to present a defense provided the accused testifies and had his credibility placed at issue. *United States v. Scheffer*, 44 M.J. 442 (C.A.A.F. 1996). In *United States v. Scheffer,* 523 U.S. 303 (1998), the Supreme Court overruled CAAF. In an 8 to 1 opinion the Court said that a per se exclusion on polygraph evidence does not unconstitutionally abridge the right of an accused to present a defense.

2. *United States v. Light*, 48 M.J. 187 (C.A.A.F. 1998): Accused was convicted of larceny for stealing government equipment. During the course of the investigation, he was given a polygraph by CID which he failed. The polygraph failure was one issue that a Texas Justice of the Peace used to grant a search warrant of his civilian quarters. Issue, can polygraph results be considered to decide probable cause questions? The court noted, but did not resolve, the tension between MRE 104(a) and MRE 707 as to whether polygraph evidence can be considered in reviewing the issuance of the search warrant.

3. *United States v. Clark*, 53 M.J. 280 (C.A.A.F. 2000): Accused pleaded guilty to larceny and false official swearing. In his judge alone case, the stipulation of fact included information that the accused failed a polygraph test. The CAAF ruled that it was plain error for the military judge to admit this evidence, however, the error did not materially prejudice his rights. Therefore, no relief.

4. *United States v. Southwick*, 53 M.J. 412 (C.A.A.F. 2000): Accused convicted of wrongful distribution of drugs to an informant. At trial, defense attacked the credibility of the informant by trying to demonstrate the USAF had not done a proper certification of him. In response, the informant testified that he had been polygraphed before being accepted as an informant. The defense did not object to this evidence. CAAF held it was harmless error for this evidence to come before the fact finders, because the polygraph was not directly related to any issues at trial or the informant's in court testimony.

5. *United States v. Tanksley*, 54 M.J. 169 (C.A.A.F. 2000): Buried on page seven of a nine-page statement to NIS agents, the accused stated he refused to take a polygraph. The government offered the entire statement and the information about his refusal to take a polygraph was not redacted. The defense did not object. CAAF ruled that any passing reference to a polygraph examination did not materially prejudice the accused.

6. *Unites States v. Morris*, 47 M.J. 695 (N-M Ct. Crim. App. 1997): Accused was convicted of false official statements and battery for sexually forcing himself on a female friend. Accused was questioned and he initially claimed the contact was consensual. Then, in a pre-polygraph interview he admitted the contact was not consensual. The polygraph was never conducted. The military judge prohibited the accused from introducing evidence that the investigators never actually gave him a polygraph. Judge struck the right balance required by MRE 707 by admitting the statement and the circumstances surrounding the statement but not allowing any evidence about an offer to take or the taking of a polygraph to be admitted.

7. *United States v. Wheeler*, 66 M.J. 590 (N-M Ct. Crim. App. 2008): Accused was charged with conspiracy to commit larceny and only confessed to his crimes after an agent told him he would be convicted based on his failed polygraph but that his command would not get the polygraph results if he confessed. At trial, the defense moved to admit the polygraph examinations as evidence of the surrounding circumstances that led to his confession. The military judge denied the defense motion. On appeal, NMCCA ruled that the military judge erred in not allowing the polygraph evidence. NMCCA distinguished this case from *Scheffer*, finding that the accused in this case was not trying to use an exculpatory polygraph to bolster his credibility but was attempting to shed light into the res gestae of his confession.

IV. PRODUCTION OF EXPERTS FOR THE DEFENSE

RCM 703. Production of witnesses and evidence

(d) Employment of expert witnesses and consultants
(1) In general. When the employment at Government expense of an expert witness or consultant is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment.
(2) Review by military judge
(A) A request for an expert witness or consultant denied by the convening authority may be renewed after referral of the charges before the military judge who shall determine-
(i) in the case of an expert witness, whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute; or
(ii) in the case of an expert consultant, whether the assistance of the expert is necessary for an adequate defense.
(B) If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which they are entitled under subparagraph (g)(3)(E).

A. General: While the MREs establish the requirements for qualifying experts and determining the admissibility of expert testimony, the UCMJ and RCMs provide that the government and accused shall have equal opportunity to obtain witnesses and evidence. Although an accused could secure an expert consultant or witness at his/her own expense, he/she will typically seek production of an expert at government expense from the convening authority. RCM 703(d) specifically provides for employment of defense requested expert witnesses (i.e., experts who testify during the court-martial) and consultants/assistants (note that for purposes of this outline, "consultant" and "assistant" are used interchangeably). An expert consultant is someone detailed to the defense team to assist the accused and defense counsel in handling issues that require expert assistance. Expert consultants most commonly assist defense counsel in the evaluation of scientific or technical evidence that the government intends to offer at trial. Expert consultants can also be helpful in the areas of mitigation, member selection, evaluation of physical evidence, or in providing a psychological evaluation of the accused. The most important point to remember is that if the defense is successful in obtaining an expert consultant that does not mean the accused will automatically be entitled to have that consultant testify as an expert witness. Ordinarily the two will merge but such merger is not automatic.

1. The standard for production of an expert witness for the defense is "whether the testimony of the expert is relevant and necessary, and, if so, whether the government has provided or will provide an adequate substitute." RCM 703(d)(2)(A)(i).

a) In requesting a defense expert witness, or seeking to compel production of a defense expert witness, defense must show the witness is relevant and necessary. RCM 703(d)(2)(A)(i); *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998).

b) *United States v. McHugh*, 2018 CCA LEXIS 462 (Army Ct. Crim. App. 2018): Military judge did not abuse discretion when denying the defense motion to compel production of an expert witness on intimate partner violence in a trial where the gravamen of the misconduct was rape. The intimate partner violence testimony would not have been relevant in the case, and was not necessary as it would not have assisted the trier of fact to understand the evidence or determine a fact in issue.

2. The standard for production of an expert consultant is "whether the assistance of the expert is necessary for an adequate defense." RCM 703(d)(2)(A)(ii).

a) Although RCM 703(d) first contained a standard for production of expert consultants following changes in the RCMs implemented pursuant to the Military Justice Act of 2016, the limited right to expert assistance has long been guaranteed by the Due Process Clause, federal civilian case law, and military case law, provided certain circumstances exist. *United States v. Short*, 50 M.J. 370 (C.A.A.F. 1999); *United States v. Ndanyi*, 45 M.J. 315 (C.A.A.F. 1996). In both the revised RCM 703(d) (effective on or after 1 January 2019) and in the existing case law prior to 1 January 2019, the standard applied is that production of an expert consultant is required where "necessary for an adequate defense." RCM 703(d)(2)(A)(ii); *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986).

(1) *Ake v. Oklahoma*, 470 U.S. 68 (1985): In a capital case, the accused asked for a court-appointed psychiatrist to assist with the defense. The trial court denied the request. The Supreme Court held when an indigent accused makes a showing that expert assistance is needed on a substantial issue in the case both during case-in-chief and at sentencing, Due Process requires that the government provide that assistance.

(2) *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986): As a matter of military due process, Servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense, without regard to indigence.

3. Equal access. *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005): CAAF held "Article 46 is a clear statement of congressional intent against government exploitation of its opportunity to obtain an expert vastly superior to the defense's." Where the government provides itself with a top expert, it should provide a reasonably comparable expert to the defense.

a) *United States v. Lee*, 64 M.J. 213 (C.A.A.F. 2006): Commenting on *Warner* and Article 46, CAAF held the playing field is even more uneven when the government benefits from scientific evidence and expert testimony, and the defense is denied a necessary expert to prepare for and respond to the government's expert.

b) Absent a showing that his case was unusual, when the government offered CID laboratory experts in a child sexual assault case, the military judge did not abuse his discretion when denying the defense request for expert assistance. *United States v. Ndanyi*, 45 M.J. 315 (C.A.A.F. 1996). However, the military judge cannot deny a defense request for an expert assistant by telling the defense to use the government's own expert to prepare for trial. *United States v. Lee*, 64 M.J. 213 (C.A.A.F. 2006).

c) *United States v. McAllister*, 64 M.J. 248 (C.A.A.F. 2007): CAAF held an appellant's right to present a defense was violated when the accused was prevented from employing and utilizing a necessary DNA expert at trial. Had the military judge granted the defense request for a PCR expert, the members would have heard testimony about the discovery of DNA

from three previously unidentified individuals. The defense could have used this evidence to attack not only the thoroughness of the original test, but the weight that the members should have given to the government's expert testimony. Additionally, the CAAF believed the new evidence would have changed the evidentiary posture of the case. At trial, the defense had nothing to contradict the character of the government's DNA evidence which excluded all known suspects other than the appellant. The additional evidence indicated that someone other than the appellant, or any other known suspect, was in physical contact with the victim at or near the time of her death. The CAAF concluded that this evidence could have raised a reasonable doubt as to guilt. As such, the court held that the appellant was deprived of his constitutional right to a fair hearing as required by the Due Process Clause. The error in denying the defense request for expert assistance was not harmless beyond a reasonable doubt. As such, the findings and sentence were set aside.

4. Communications with opposing experts: If the defense successfully obtains an expert assistant, then the expert becomes a part of the defense team. Therefore, communications between the expert assistant and the defense counsel/accused are privileged under MRE 502. *United States v. Turner*, 28 M.J. 487 (C.M.A. 1989); *United States v. King*, 32 M.J. 709 (A.C.M.R. 1991), *rev'd on other grounds*, 35 M.J. 337 (C.M.A. 1992). The government may not interview a defense expert assistant without the approval of the defense counsel.

a) Once the defense lists an expert as a witness, the government is free to contact and interview the expert. *United States v. Langston*, 32 M.J. 894 (A.F.C.M.R 1991).

B. The *Freeman/Gonzalez* test for production of an expert consultant for the defense: In order to determine whether the defense is entitled to production of expert assistance, the military judge will apply a combination of the *Freeman* and *Gonzalez* tests.

1. *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008) 2-part showing—defense has the burden of showing that a reasonable probability exists that:

a) Expert would be of assistance to the defense (necessity); and

b) Denial of the expert assistance would result in a fundamentally unfair trial.

2. *United States v. Gonzalez*, 39 M.J. 459 (C.M.A. 1991) 3-part showing to establish reasonable probability of necessity (i.e., the first prong of the *Freeman* test)—defense must show:

a) Why is the expert assistance required?

(1) The issue must be central to the defense theory of the case. *United States v. Lloyd*, 69 M.J. 95 (C.A.A.F. 2010).

b) What would expert assistance accomplish for the accused?

c) Why is the defense unable to gather and present the evidence that the expert assistant would be able to develop?

(1) Defense counsel are expected to educate themselves to attain competence in defending the issues in a case. *United States v. Kelley*, 39 M.J. 235 (C.M.A. 1994).

(a) The rapid growth in forensic science techniques at trial may make cases more complex than general practitioners can handle on their own. *United States v. McAllister*, 55 M.J. 270 (C.A.A.F. 2001); *United States v. Warner*, 62 M.J. 114, (C.A.A.F. 2005).

(2) Where the defense counsel had already tried 15-20 urinalysis cases; had previously worked with an expert assistant on two urinalysis cases; had telephonic access to an

expert consultant during trial; knew of the appropriate sources in the field; and did not raise irregularities in the handling of the urine specimen, military judge did not err in not requiring the physical presence of the expert assistant during trial. *United States v. Kelley*, 39 M.J. 235 (C.M.A. 1994).

3. Even though a case may involve difficult issues, this does not mean the defense is automatically entitled to expert assistance. *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994). The three-part *Gonzalez* test requires the defense to show the necessity of having the assistance of an expert. Unless the defense can articulate such a need, the convening authority, and ultimately the military judge, will likely deny the defense request.

a) The defense must show more than just a mere possibility that the expert would be of assistance. *United States v. Lloyd*, 69 M.J. 95 (C.A.A.F. 2010) (the defense's desire to "explore all possibilities" did not reach the "reasonable probability" threshold).

b) The defense must provide specific information regarding the *Freeman*/*Gonzalez* factors in support of a motion to compel expert assistance. Assertions without support are insufficient. "First, defense counsel provided virtually no evidence as to what efforts they made and why they were thus unable to understand, gather, develop, or present evidence in the areas of alcohol induced blackouts or false confessions. Rather, defense counsel attempted to meet their burden through unsupported assertions that they lacked the necessary education and experience to even attempt such a task. Second, defense counsel offered nothing in either their written or oral pleadings that explained why a denial of expert assistance in either area would result in a fundamentally unfair trial." *United States v. Leyba*, 2018 CCA LEXIS 394 (Army Ct. Crim. App. 2018).

C. Process for production of expert witnesses and consultants for the defense

1. Initial request to the convening authority: The defense must "submit a request to the convening authority to authorize the employment [of an expert] and to fix the compensation." This request "shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment." RCM 703(d)(1). Typically, but not always, this request is for the employment of a civilian expert witness.

a) Under RCM 703(d)(1), the defense must make their request for employment of an expert at government expense before employing the expert. Nothing in the MCM permits the government to ratify previous employment of a defense expert.

2. If the convening authority denies the defense request, it may be renewed as a motion for appropriate relief to the military judge after referral of charges. RCM 703(d)(2).

a) Courts may use the *Houser* factors when determining whether a requested expert witness's testimony would be necessary and relevant. *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998).

b) Where a request to the convening authority is denied, the military judge becomes the "gatekeeper" with regards to expert assistants and witnesses. Under MRE 702 and 104(a), a military judge will determine if an expert is needed by the defense. *United States v. Ndanyi*, 45 M.J. 315 (C.A.A.F. 1996).

c) The defense may be entitled to an ex parte hearing to justify their request for a defense expert. This is not an absolute right and is only for unusual situations. *United States v. Garries*, 22 M.J. 288 (C.A.A.F. 1986); *United States v. Kaspers*, 47 M.J. 176 (C.A.A.F. 1997).

3. If the military judge grants a defense motion to compel an expert, "the proceedings shall be abated if the Government fails to comply with the ruling." RCM 703(d)(2)(B). Although the military judge may grant the defense motion for employment of an expert, it is still up to the government to actually produce the expert and arrange for the expert's compensation.

a) Except in unusual circumstances, the military judge does not have authority to appoint a specific expert. *United States v. Thorpe*, 38 M.J. 8 (C.M.A. 1993).

4. Specific expert not required.

a) Named expert: The defense is generally not entitled to a named expert of its choice. If the government decides an expert is needed, or if the military judge grants a defense motion for an expert, the government may provide a reasonable substitute. *United States v. Ndanyi*, 45 M.J. 315 (C.A.A.F. 1996); *United States v. Burnette*, 29 M.J. 473 (C.M.A 1990).

b) Eminent expert: The defense is not entitled to an eminent expert in a particular field. The defense is only entitled to receive a qualified expert. *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1993).

(1) The government cannot secure for itself the top expert in the field and then provide the defense with a generalist. To do so violates the letter and spirit of Article 46. "Article 46 is a clear statement of congressional intent against government exploitation of its opportunity to obtain an expert vastly superior to the defense's." *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005).

(2) However, giving the defense a generalist but then having the government call a specialist in rebuttal is not per se unfair. The disparity must cause some prejudice to the accused. *United States v. Anderson*, 68 M.J. 378 (C.A.A.F. 2010).

c) Adequate substitute: If the government substitute and the defense expert have differing views, the government substitute is not "adequate." The burden is on the defense to show the views of the experts diverge. *United States v. Robinson*, 43 M.J. 501 (A.F.C.C.A. 1995).

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CHAPTER 13
ARTICLE 32 PRELIMINARY HEARING

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I. REFERENCES

A. U.C.M.J., Article 32

B. Rules for Courts-Martial (RCM) 404A and 405

C. DA Pam 27-17, *Procedural Guide for Article 32 Preliminary Hearing Officer* (18 Jun 15).

II. WHAT IS AN ARTICLE 32 PRELIMINARY HEARING?

A. The preliminary hearing is a formal preliminary hearing conducted prior to referral of charges. Article 32(a)(1)(A), UCMJ reads: "a preliminary hearing shall be held before referral of charges and specifications for trial by a general court-martial." Note that the preliminary hearing is only required when charges will be referred to a general court-martial. RCM 405(a).

B. The preliminary hearing has been labeled the "military equivalent" of a civilian grand jury proceeding. *United States v. Bell*, 44 M.J. 403 (C.A.A.F. 1996); *United States v. Powell*, 17 M.J. 975 (A.C.M.R. 1984).

C. Note that older caselaw cited in this chapter may refer to the preliminary hearing as an "investigation" and may refer to the preliminary hearing officer as the "investigating officer" or "IO." This reflects the terminology in use at the time those cases were decided.

III. WHEN IS A PRELIMINARY HEARING NECESSARY?

A. The preliminary hearing is a prerequisite to trial by General Court-Martial. UCMJ art. 32(a)(1); RCM 405(a).

1. Not required for trial by special court-martial.

2. Not required for trial by summary court-martial.

B. Exceptions to the preliminary hearing requirement.

1. Earlier preliminary hearing. Another preliminary hearing is not required where there has already been a preliminary hearing into the subject matter of the charges before the accused is charged, the accused was present at that hearing, and was afforded the rights to counsel, cross-examination, and presentation of evidence required by RCM 405. RCM 405(b).

a. *United States v. Diaz*, 54 M.J. 880 (N-M. Ct. Crim. App. 2000): After the Article 32, the accused identified a defect in the preferral of the initial charges, which were dismissed, and new charges preferred. The accused requested a new Article 32, contending that the preferral defect meant that no charges had been investigated by the first Article 32. The Navy Court held the first hearing was valid and satisfied the requirements of Article 32.

b. *United States v. Burton*, 2007 CCA LEXIS 281 (A.F. Ct. Crim. App. 2007) (unpublished): A rape charge was preferred against the accused and the charge was investigated in accordance with UCMJ, Article 32. At the investigation, the accused was represented by counsel and had an opportunity to cross-examine the victim. The charge was referred to trial, but subsequently withdrawn because the accused committed additional misconduct. The rape charge was re-preferred (along with several other charges) in an identical fashion except the accused's unit had changed. The charges were once again sent to an Article 32 investigating officer. The defense counsel noted that the Government intended to rely on the previous Article 32 investigation for the rape charge and objected, demanding further investigation into the rape charge under RCM 405(b) because of new evidence calling the victim's credibility into question. The investigating officer did not investigate the rape charge, but simply attached a copy of the previous Article 32 investigation to the report of the investigation for the three new charges. The defense objected that the original rape charge had not been re-investigated and filed a motion to dismiss at trial. The military judge denied the motion to dismiss, finding that the original rape charge was identical to the new rape charge (except for the unit) and that charge had been properly investigated, so no new investigation was required. The AFCCA held that the military judge abused his discretion in failing to order a new Article 32 investigation into the rape charge. The court found that: "[W]hen the government relies on a previously completed Article 32 . . . hearing to support re-referral of dismissed charges, with no new recommendations by an investigating officer, the investigation is covered by Article 32(c) . . . and an accused has the opportunity to demand further investigation." However, the court held that the error was harmless beyond a reasonable doubt because the convening authority had been given the information concerning victim credibility, the SJA had commented on the victim's credibility in the Article 34 advice, and the defense conducted a detailed cross-examination of the victim at trial.

2. Accused may waive the preliminary hearing, although the convening authority may decide to conduct the preliminary hearing notwithstanding the waiver. UCMJ art. 32(a)(1)(B); RCM 405(m).

a. Personal right of the accused. *United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004): Accused must personally waive right to preliminary hearing (attorney cannot waive it for him).

b. May be waived for personal reasons. If waived for personal reasons, withdrawal of the waiver permitted upon a showing of good cause. *United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993); *United States v. Nickerson*, 27 M.J. 30 (C.M.A. 1988).

c. May be waived as a condition of a pretrial agreement. RCM 705(c)(2)(E); *United States v. Shaffer*, 12 M.J. 425 (C.M.A. 1982).

1) *United States v. Von Bergen*, 67 M.J. 290 (C.A.A.F. 2008): The military judge abused his discretion in denying appellant an Article 32 investigation on rehearing where the appellant had waived the investigation in a pretrial agreement, but then pled not guilty at rehearing. The appellant's improvident original plea had the effect of canceling the pretrial agreement according to its terms.

IV. WHAT ARE ITS PURPOSES?

A. The preliminary hearing is limited to the following purposes. UCMJ art. 32(a)(1)(B)(2); RCM 405(a); RCM 405(e):

1. Determine whether each specification alleges an offense;

2. Determine whether there is probable cause to believe the accused committed the offense(s) charged;

3. Determine whether the convening authority has court-martial jurisdiction over the offense and the accused; and

4. Recommend the disposition that should be made of the case.

B. Discovery is not a valid purpose. "The preliminary hearing is not intended to perfect a case against the accused and is not intended to serve as a means of discovery or to provide a right of confrontation required at trial." RCM 405(a) discussion.

C. Preservation of testimony.

1. Preliminary hearing testimony might be admissible as substantive evidence at trial, as a prior inconsistent statement under MRE 801(d)(1) or as prior testimony under MRE 804(b)(1). But counsel must use caution. *United States v. Austin*, 35 M.J. 271 (C.M.A. 1992): Child victim testified in detail at the Article 32 but recanted her testimony at trial and refused to talk about the offense. Over defense objection, trial court admitted the 15-page transcript of the Article 32 testimony as a prior inconsistent statement pursuant to MRE 801(d)(1)(A) and as former testimony under MRE 804(b)(1). The transcript was both read to the panel and given to the panel to take into the deliberation room. Held: reversible error to send transcript back to deliberation room with the panel. The transcript was not an exhibit under RCM 921.

a. *United States v. Ureta*, 44 M.J. 290 (C.A.A.F. 1996): Article 32 transcript admissible as prior inconsistent statement and substantive evidence on issue of guilt in case of rape and carnal knowledge of 13-year-old daughter, under MRE 801(d)(1). Accused's wife testified at Article 32 that accused confessed. After Article 32 terminated, wife refused to discuss her testimony with Government. Unsure whether wife would recant her Article 32 testimony at trial, Government called wife as witness, she recanted, acknowledged inconsistency, and over defense objection, Article 32 transcript was admitted and taken into deliberations. CAAF held that Article 32 transcript was not admissible under MRE 608(b) (no extrinsic evidence of prior inconsistent statement when witness available and testifies, admits making prior statement, and acknowledges specific inconsistencies), but Article 32 transcript admissible under MRE 801(d)(1)(A) as substantive evidence and Government can call witness to establish foundation for admission. Error to send transcript into deliberations, but harmless because unlike *Austin*, transcript was not the only evidence against accused.

b. Article 32 testimony may be admissible at trial as former testimony under MRE 804(b)(1), when the witness is unavailable. *United States v. Austin*, 35 M.J. 271 (C.M.A. 1992); *United States v. Connor*, 27 M.J. 378 (C.M.A. 1989) ("If the defense counsel has been allowed to cross-examine the Government witness without restriction on the scope of cross-examination, then the provisions of M.R.E. 804(b)(1) and of the 6th Amendment are satisfied, even if that opportunity is not used, and the testimony can later be admitted at trial."); *United States v. Ortiz*, 35 M.J. 391 (C.M.A. 1992) (government must establish that the witness was unavailable before former testimony may be properly admitted); *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989) (stating when Article 32 testimony is offered at

trial, the proponent must establish the unavailability of the witness per MRE 804(b)(1) and the 6th Amendment).

2. Article 32 testimony may be admissible at trial as residual hearsay for unavailable declarants under MRE 807. *United States v. Cabral*, 47 M.J. 268 (C.A.A.F. 1997): Five-year-old victim of sexual abuse appeared for trial but refused to testify. Witness declared "functionally unavailable" and Article 32 videotaped testimony, which had "particularized guarantees of trustworthiness" (language suitable for 5 year old, described acts not common to experience of 5 year old, use of non-leading questions, no motive to fabricate) was admissible as residual hearsay.

V. SCOPE OF THE PRELIMINARY HEARING

A. The preliminary hearing is limited to the examination of evidence and witnesses relevant to (RCM 405(e)(1)):

1. A determination whether each specification alleges an offense;

2. A determination whether there is probable cause to believe the accused committed the offense(s) charged;

3. A determination whether the convening authority has court-martial jurisdiction over the offense and the accused; and

4. Recommendation as to the disposition that should be made of the case.

B. Consideration of uncharged offenses. UCMJ art. 32(f); RCM 405(e)(2): If evidence adduced in a preliminary hearing indicates the accused may have committed uncharged offense(s), the Preliminary Hearing Officer (PHO) may consider subject matter of uncharged offense(s) without preferral of additional charge(s), provided the accused is present at the preliminary hearing, and notice of the nature of the uncharged charge(s) considered and certain rights (representation, cross-examination, and presentation) are afforded to the accused.

1. If the PHO considers uncharged offenses, the PHO may examine evidence and hear witnesses regarding those offenses. The accused must be afforded all the rights listed in RCM 405(f), and must be afforded the opportunity to seek production of witnesses and evidence under RCM 405(h) so long as doing so would not cause undue delay to the proceedings. RCM 405(e)(2).

2. If charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matter. *United States v. Bender*, 32 M.J. 1002 (N.M.C.M.R. 1991).

VI. PARTICIPANTS

A. Appointing authority.

1. Any court-martial convening authority may direct a preliminary hearing. RCM 405(c).

2. Usually, the special court-martial convening authority will order the preliminary hearing.

B. Preliminary hearing officer.

1. Whenever practicable, the PHO should be an impartial judge advocate. When it is impracticable to appoint a judge advocate due to exceptional circumstances, the convening authority may appoint an impartial commissioned officer, so long as that PHO has an impartial judge advocate available to provide legal advice to the PHO. UCMJ art. 32(b); RCM 405(d)(1)(A).

a. Whenever practicable, the PHO should be equal or senior in grade to the trial counsel and defense counsel. UCMJ art. 32(b)(3); RCM 405(d)(1)(B).

b. The PHO must maintain impartiality throughout the proceedings, and must avoid becoming an advocate for either side. RCM 405(d)(1)(D).

c. PHOs are disqualified from later acting in the case in any capacity. RCM 405(d)(1)(D); *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004).

2. Controls the proceedings. It was not error for the investigating officer (IO) to limit redundant, repetitive, or irrelevant questions by the defense counsel. *United States v. Lewis*, 33 M.J. 758 (A.C.M.R. 1991).

3. Must be impartial.

a. PHO must be impartial, but not disqualified merely because of:

1) Prior knowledge about the case. *United States v. Schreiber*, 16 C.M.R. 639 (A.F.B.R. 1954).

2) Investigated a related case. *United States v. Collins*, 6 M.J. 256 (C.M.A. 1979).

b. The PHO is partial and is disqualified if:

1) Played a prior role in perfecting the case against the accused. *United States v. Lopez*, 42 C.M.R. 268 (C.M.A. 1970); *United States v. Parker*, 19 C.M.R. 201 (C.M.A. 1955).

2) Previously formed or expressed an opinion about the accused's guilt. *United States v. Natallelo*, 10 M.J. 594 (A.F.C.M.R. 1980).

3) Served as DSJA in the OSJA. *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985).

4) Anytime his/her impartiality might reasonably be questioned. *United States v. Castleman*, 11 M.J. 562 (A.F.C.M.R. 1981) (IO was close friend of accuser and vacationed with accuser two days before Article 32); *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985) (IO was XO of NLSO and was defense counsel's supervisor).

4. Advice. Legal advisors should be impartial, and should limit their advice to matters of law or procedure. Any substantive advice given by the legal advisor must be disclosed to the parties to provide them an opportunity to respond.

a. Persons performing prosecutorial functions are not neutral. *United States v. Grimm*, 6 M.J. 890 (A.C.M.R. 1979).

b. With regard to substantive matters, any advice received must be from a neutral source. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977).

c. Advice must not be given ex parte. *United States v. Payne*, 3 M.J 354 (C.M.A. 1977): After receiving the advice, notice must be given of the person consulted, the substance of the advice, and the parties must be afforded a reasonable opportunity to respond.

5. Ex parte communication with the PHO. Ex parte communication between trial counsel and the PHO regarding substantive matters constitutes error that will be tested for prejudice. Ex parte communication has a presumption of prejudice that may be rebutted by the trial counsel. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977) (seven meetings with trial counsel); *United States v. Whitt*, 21 M.J. 658 (A.C.M.R. 1985) (two "informal" ex parte interviews with three witnesses); *United States v. Francis*, 25 M.J. 614 (C.G.C.M.R. 1987) (meeting with CO, trial counsel, and accuser); *United States v. Rushatz*, 30 M.J. 532 (A.C.M.R), *aff'd*, 31 M.J. 450 (C.M.A. 1990) (contacting CID, visiting housing & finance offices, talking with potential witness).

a. *United States v. Argo*, 46 M.J. 454 (C.A.A.F. 1997): Staff Judge Advocate's request to IO (a subordinate officer not under his supervision) to reopen investigation to look into issue of unlawful command influence and reject the defense's interpretation of precedent regarding "no-contact" order did not constitute unlawful command influence. Accused suffered no prejudice by a full investigation of the unlawful command influence issues. Although SJA's ex parte contact violated the rule, there was no prejudicial impact because the IO consulted her own SJA for legal advice and exercised independent judgment and the defense did not enter an objection at any stage of the court-martial process.

b. *United States v. Holt*, 52 M.J. 173 (C.A.A.F. 1999): IO's post-Article 32 furnishing trial counsel with name and phone number of blood spatter expert who later provided helpful blood test and spatter testimony at trial created at least the appearance of impropriety by providing trial counsel with what was, in effect, a supplementary report that was neither transmitted to the commander who ordered the investigation nor served on the accused. Such communication did not prejudice the accused, although the CAAF held that, in the future, such supplementary communications must be reported promptly to the command and to the accused. If such a matter arises after referral, the information shall be provided promptly to the commander who referred the case to trial, the military judge, and the accused. The parties will be in the best position to determine whether any motions or objections are warranted based upon the nature of the information.

6. Delay authority. *United States v. Lazauskas*, 62 M.J. 39 (C.A.A.F. 2005): RCM 707(c) excludes, for 120-day speedy trial clock calculation purposes, any delay approved by the PHO if the convening authority previously delegated authority to the PHO to approve delays. RCM 707(c) discussion.

C. Accused.

1. Trial counsel must provide the defense with the following no later than five days after the direction of a preliminary hearing (RCM 404A(a)(2)):

a. The order directing the preliminary hearing;

b. Statements within the control of military authorities of witnesses the trial counsel intends to call at the preliminary hearing;

c. Evidence the trial counsel intends to present at the preliminary hearing; and

d. Any matters provided to the convening authority when deciding to direct the preliminary hearing.

2. The accused has the following rights at the hearing (UCMJ art. 32(d); RCM 405(f)):

a. To be advised of the charges under consideration;

b. To be represented by counsel;

c. To be informed of the purpose of the preliminary hearing;

d. To be informed of the right against self-incrimination under Article 31;

e. To be present throughout the taking of evidence unless the accused is voluntarily absent or disruptive (see RCM 405(j)(4));

f. To cross-examine witnesses on matters relevant to the purpose of the hearing;

g. Present matters relevant to the purpose of the hearing;

h. Make a sworn or unsworn statement relevant to the purpose of the hearing.

D. Defense counsel.

1. Military counsel will be detailed to represent the accused. RCM 405(d)(3)(A). Accused may also request individual military counsel (IMC). RCM 405(d)(3)(B).

2. Accused may be represented by civilian counsel at no expense to the government. The accused will be provided reasonable time to employ civilian counsel and have that civilian counsel present at the preliminary hearing. But, the hearing will not be unduly delayed for this purpose. RCM 405(d)(3)(C); *United States v. Pruner*, 33 M.J. 272 (C.M.A. 1991).

E. Trial counsel. A judge advocate, not the accuser, will serve as counsel for the government. RCM 405(d)(2).

F. Reporter. The convening authority may detail a reporter (i.e., paralegal) to assist the PHO in executing the preliminary hearing and preparing the report. RCM 405(d)(4). The reporter is usually the paralegal assigned to the accused's unit, and the PHO must therefore take care to avoid substantive communications with the reporter. The reporter can assist the PHO with coordinating witnesses, coordinating a location for the preliminary hearing, acquiring and operating recording and communications equipment, preparing correspondence for the PHO, and assisting the PHO with compiling the report of the preliminary hearing. DA Pam 27-17, para. 1-4g (18 June 2015).

VII. WITNESS AND EVIDENCE PRODUCTION

A. Notice of witnesses and evidence. In accordance with timelines set by the PHO, the parties must provide to the PHO and the opposing party notice of the names and contact information for witnesses the party intends to call at the preliminary hearing, evidence the party intends to offer at the preliminary hearing, and any supplemental information the party intends to submit pursuant to RCM 405(k). RCM 405(h)(1).

B. Witness production. RCM 405(h)(2):

1. Prior to the preliminary hearing, defense counsel shall provide trial counsel a list of witnesses they want the government to produce for the preliminary hearing, and the form of their testimony (i.e., in person, telephonic, video conference).

2. Trial counsel must then respond to defense counsel as to whether the witness's testimony is relevant, not cumulative, and necessary for the purpose of the hearing (see RCM 405(a)).

3. If trial counsel objects to a witness, defense counsel may ask the PHO to determine whether the witness is relevant, not cumulative, and necessary.

4. Military witnesses. RCM 405(h)(2)(A):

a. If government does not object to a defense-requested military witness, or if the PHO determines a military witness is relevant, not cumulative, and necessary, trial counsel will ask the witness's commander to make the individual available to testify.

b. The witness's commander will make the final decision as to whether the individual is available based on "operational necessity or mission requirements." The commander will also decide if the witness will testify in person, telephone, or other means of remote testimony. The commander's determination is final.

c. In any case, a named victim who has suffered a direct physical, emotional, or pecuniary harm as a result of the misconduct being considered and who declines to testify is not required to testify at the preliminary hearing. UCMJ art. 32(d)(3).

5. Civilian witnesses. RCM 405(h)(2)(B):

a. If government does not object to a defense-requested civilian witness, or if the PHO determines a civilian witness is relevant, not cumulative, and necessary, trial counsel will invite the witness to provide testimony at the hearing. The civilian witness will decide whether or not to appear; civilian witnesses cannot be compelled to appear at the preliminary hearing.

b. If any expense will be incurred to produce the civilian witness, the convening authority will decide if the witness will testify in person, telephone, or other means of remote testimony. The commander's determination is final. Civilian witnesses may not be compelled to provide testimony at a preliminary hearing.

6. Immunized witnesses. Only a General Court-Martial Convening Authority (GCMCA) or designee has the authority to grant immunity to witnesses to testify at a preliminary hearing (or court-martial). RCM 704(c); *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991) (no abuse of discretion in denying defense requested immunity for two witnesses at Article 32).

C. Evidence production. RCM 405(h)(3):

1. Prior to the preliminary hearing, defense counsel shall provide trial counsel a list of evidence they want the government to produce for introduction at the preliminary hearing.

2. Trial counsel must then respond to defense counsel as to whether the evidence is relevant, not cumulative, and necessary for the purpose of the hearing (see RCM 405(a)).

3. If trial counsel objects to the evidence, defense counsel may ask the PHO to determine whether the evidence is relevant, not cumulative, and necessary.

4. Evidence under the control of the government. RCM 405(h)(3)(A): If government does not object to the evidence, or if the PHO determines the evidence shall be produced, trial counsel will make reasonable efforts to obtain the evidence from the government custodian.

5. Evidence not under the control of the government. RCM 405(h)(3)(B):

a. If government does not object to the evidence, or if the PHO directs the trial counsel to produce the evidence after determining that the evidence is relevant, not cumulative, and necessary, and that compelling production would not cause undue delay, the trial counsel can request that the evidence custodian produce the evidence, or can seek a pre-referral investigative subpoena (see Chapter 11 for details on the pre-referral investigative subpoena).

b. If the PHO determines that the defense-requested evidence is relevant, not cumulative, and necessary, and the trial counsel refuses to seek a pre-referral investigative subpoena, the PHO must include a written statement from the trial counsel explaining the reasons for the refusal in the PHO's report.

6. Production of privileged matters not permitted. RCM 405(h)(3)(A)(iii), 405(h)(3)(B)(iv): The PHO "may not order the production of any privileged matters; however, when a party offers evidence that an opposing party claims is privileged, the [PHO] may rule on whether a privilege applies."

VIII. PROCEDURE FOR CONDUCTING THE HEARING

A. General procedure.

1. RCM 405 provides detailed guidance on how to conduct the preliminary hearing. Normally, the procedures in DA Pam 27-17 that are not inconsistent with Article 32, UCMJ or RCM 405 will also be followed. In addition to these, the convening authority is authorized to prescribe specific procedures for conducting the preliminary hearing. RCM 405(c); *United States v.*

Bramel, 32 M.J. 3 (C.M.A. 1990) (appointing authority's instructions to IO to place a partition between the child witness and the accused okay).

a. The preliminary hearing begins with the PHO informing the accused of his/her rights under RCM 405(f).

b. Trial counsel will then present the government evidence and government witnesses. Defense counsel and the PHO may examine the government witnesses.

c. Defense counsel will then present defense evidence and defense witnesses. Trial counsel and the PHO may examine the defense witnesses.

d. Witnesses may testify in person, by video teleconference, telephone, or similar remote means. All testimony must be under oath, except the accused may make an unsworn statement. The PHO can consider only testimony that is relevant to the purpose of the preliminary hearing.

e. The PHO may consider other evidence besides testimony, including statements, tangible evidence, etc., that the PHO determines to be reliable. The PHO must preclude any evidence not relevant to the purpose of the preliminary hearing.

f. The PHO may provide the parties an opportunity call additional witnesses or present additional evidence, however, the PHO may not call witnesses sua sponte or consider any evidence not offered by the parties during the hearing or in the parties' RCM 405(k) submissions. RCM 405(j).

2. The convening authority should require expeditious proceedings and set a deadline for receipt of the report of the preliminary hearing. The convening authority should also specify the extent of the PHO's authority to grant excludable delay pursuant to RCM 707. RCM 707(c) discussion; *United States v. Thompson*, 46 M.J. 472 (1997) (defense requested delays that were granted by the Article 32 investigating officer and later ratified by the convening authority after the fact were properly excluded from the speedy trial calculations under RCM 707).

B. Military Rules of Evidence. RCM 405(i)(1): MREs do not apply other than:

1. MRE 301 (self-incrimination), 302 (statements from mental examination), 303 (degrading questions), and 305 (rights warning);

2. MRE 412(a) as supplemented by RCM 405(i)(2) (rape shield);

3. Section V (privileges), except the following DO NOT apply: MRE 505(f)-(h) and (j) (dealing with classified information), MRE 506(f)-(h), (j), (k), and (m) (dealing with other government information); and MRE 514(d)(6) (victim advocate communications).

4. The PHO shall assume the role of the "military judge" as referenced in the MREs listed above. The PHO will have the same authority as a military judge to exclude evidence from the hearing, and will follow the procedures as stated in those rules. Unless good cause is shown, evidence offered in violation of the procedural provisions of the rules above must be excluded from the preliminary hearing.

a. The PHO "may not order the production of any privileged matters; however, when a party offers evidence that an opposing party claims is privileged, the [PHO] may rule on whether a privilege applies." RCM 405(h)(3)(A)(iii), 405(h)(3)(B)(iv).

5. Application of MRE 412 to preliminary hearings. RCM 405(i)(2).

a. Prior to the amendments to RCM 405 pursuant to the Military Justice Act of 2016, the PHO was directed to apply the provisions of MRE 412 itself during preliminary hearings.

The amended RCM 405 now contains detailed guidance in the RCM itself for applying the general rule of privilege set forth in MRE 412(a).

b. In any proceeding involving an alleged sexual offense, evidence offered to prove a victim engaged in other sexual behavior and evidence offered to prove a victim's sexual predisposition is not admissible at the preliminary hearing unless:

1) The evidence is:

(a) Evidence of specific instances of a victim's sexual behavior offered to prove that someone other than the accused was the source of semen, injury, or other physical evidence; OR

(b) Evidence of specific instances of a victim's sexual behavior with the accused offered by the accused to prove consent or offered by the prosecution; AND

2) The evidence is relevant, not cumulative, and necessary to a determination of the purposes of the preliminary hearing IAW RCM 405(a). RCM 405(i)(2)(A).

c. Procedure to determine admissibility. RCM 405(i)(2)(B):

1) Notice: the party intending to offer the evidence subject to MRE 412(a) must give written notice via a motion no later than 5 days before the preliminary hearing begins describing the evidence and stating why the evidence is admissible. The PHO can provide a different deadline, but notice must be given before the hearing begins.

2) The opposing party can respond to the motion providing notice with their own written motion.

3) The trial counsel must serve the motion and any responses to the victim and the victim's counsel, or to the victim's guardian or representative.

4) The PHO has the following options with respect to the motion:

(a) Deny the motion; or

(b) Conduct a hearing to determine admissibility of the evidence. The hearing must be closed and should be conducted at the end of the preliminary hearing after all other evidence offered has been admitted. The parties may call witnesses and offer evidence at the closed hearing, and the victim must be afforded reasonable opportunity to attend and be heard. The motions, evidence, and record of the admissibility hearing must be sealed in accordance with RCM 1113. RCM 405(i)(2)(C)-(D).

C. Victim rights at the preliminary hearing. RCM 405(g):

1. Victim for these purposes is any person who has suffered direct physical, emotional, or pecuniary harm from the alleged misconduct at issue.

2. Rights include:

a. Reasonable, accurate, and timely notice of the preliminary hearing.

b. Reasonable right to confer with the trial counsel.

c. Right not to be excluded from any public portion of the preliminary hearing. PHO can exclude a victim based on clear and convincing evidence that the victim's testimony would be materially altered if the victim observed the proceedings, if governmental privilege is

invoked, or if evidence is offered under MRE 412, MRE 513, or MRE 514 regarding another victim.

d. Named victim is not required to testify. RCM 405(h)(2)(A)(iii).

e. A named victim can request access to, or a copy of, the recording of the proceedings, and the trial counsel must provide the recording or a transcript (with sealed material redacted) after dismissal or adjournment of the court-martial. RCM 405(j)(5).

D. Open vs. closed hearing. RCM 405(j)(3): Ordinarily, preliminary hearings should be open to the public. The proceedings may be closed to the public by the convening authority or PHO under limited circumstances where: (1) there is an overriding interest that outweighs the value of an open preliminary hearing; (2) any closure is narrowly tailored to protect the overriding interest; (3) the convening authority or PHO concludes that no lesser methods short of closing the preliminary hearing can be used to protect the overriding interest; and (4) specific findings of fact in writing are made to support the closure (which are included in the report).

1. *ABC, Inc, v. Powell,* 47 M.J. 363 (C.A.A.F. 1997): SPCMCA's reasons supporting decision to close *entire* investigation (maintain integrity of military justice system, prevent dissemination of evidence that might not be admissible at trial, and shield alleged victims from possible news reports about anticipated attempts to delve into each woman's sexual history) were insufficient and closure of the entire proceedings was overly broad. The CAAF held that the accused has a qualified right to an open Article 32 hearing.

a. Closure determination must be a "'reasoned,' not 'reflexive'" one, made on a "case-by-case, witness-by-witness, and circumstance-by-circumstance basis whether closure in a case in necessary to protect the welfare of a victim. . . ."

b. The press enjoys the same right to a public Article 32 and has standing to complain if access is denied.

2. *United States v. Davis*, 62 M.J. 645 (A.F. Ct. Crim. App. 2006), *aff'd*, 64 M.J. 445 (C.A.A.F. 2007): The IO closed the Article 32 hearing during testimony of two victims of alleged sexual assault "due to the sensitive and potentially embarrassing nature of the testimony and in order to encourage complete testimony about the alleged sexual offenses." The IO failed to speak to either witness and no evidence existed that the witnesses were reluctant to testify in a public hearing. The MJ held that the IO's decision was not supported by the evidence and was error, but the MJ declined to fashion any relief because he could determine no "articulable harm" to the accused. The AFCCA agreed that the IO erred in closing the hearing but held that once the MJ found that the accused's rights to a public hearing were violated, "the [MJ]—without a showing of prejudice or articulable harm—. . . should have dismissed the affected charges to allow for reinvestigation under Article 32." The AFCCA, however, did not reverse or order a new Article 32 hearing because the closure did not adversely affect the accused's rights at trial so setting aside his conviction was not warranted. On appeal, CAAF affirmed, clarifying that, on appeal, Article 32 issues will be reviewed under Article 59(a). CAAF noted that the AFCCA was correct in holding that the MJ erred by requiring a showing of prejudice before providing a remedy.

3. *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996): Court denied newspaper's extraordinary writ to reverse by mandamus IO's decision to close hearing, over defense objection, concerning O-4 charged with murder of 11-year old girl. While Article 32 investigations are presumptively public hearings, the IO did not abuse discretion, and articulated good reasons supporting her action (citing a need to protect against the dissemination of information that might not be admissible in court; to prevent against contamination of a potential jury pool; to maintain a dignified, orderly, and thorough hearing; and to encourage the

complete candor of witnesses called to testify). The court reasoned that RCM 405(h)(3) is unclear how competing interests are to be weighed in deciding whether to close a hearing, or whether the entire hearing could be closed, so mandamus was not appropriate for this area of law that is "developing" and "subject to differing interpretations."

4. *Denver Post Corp. v. United States*, 2005 CCA LEXIS 550 (Army Ct. Crim. App. 2005): The IO conducted preliminary matters in an open forum and then closed the proceeding to hear testimony from a security specialist regarding classified information. After receiving the security specialist's testimony, the IO closed the *entire* hearing. Additional witnesses testified to non-classified information in a closed session later in the day. *Denver Post* filed a writ demanding a stay of the proceeding until ACCA could rule on the hearing's closure. ACCA granted the stay and ruled the IO erred in closing the entire proceeding. Closing a proceeding is only warranted when a "compelling showing [exists] that such was necessary to prevent the disclosure of classified information." An IO may only close a proceeding "after consideration of the specific substance of the testimony of individual witnesses expected by the parties and a factual determination that all of the expected testimony of such a witness will reveal classified information."

E. Supplementary information submitted after closure of the preliminary hearing. RCM 405(k):

1. Parties can submit supplementary material after closure of the hearing that the submitting party "deems relevant to the convening authority's disposition of the charges and specifications."

2. Supplementary information can be submitted to the PHO (with copies provided to the other parties) by the trial counsel, defense counsel, or a named victim within 24 hours of closure of the hearing.

a. The defense counsel can submit to the PHO (with copies provided to the trial counsel) additional material rebutting any supplementary information submitted by the trial counsel or a named victim within 5 days of closure of the hearing. RCM 405(k)(2).

3. Upon receipt of supplementary information, the PHO must take the following actions (RCM 405(k)(3)):

a. Examine the supplementary information and seal any matters the PHO deems privileged or otherwise not subject to disclosure.

b. Provide a written summary and analysis of supplementary information that is not sealed and is relevant to disposition to be included in the report of preliminary hearing.

c. Provide a written analysis of supplementary information that is sealed and is relevant to disposition to be included in the report of preliminary hearing. The analysis itself should also be sealed. The PHO should generally describe the sealed materials and detail the basis for sealing them in a separate cover sheet accompanying the sealed materials.

IX. REPORT OF PRELIMINARY HEARING

A. PHO must submit a timely written report of the preliminary hearing to the convening authority. The report is advisory and does not bind the SJA or the convening authority. RCM 405(l)(1).

B. The report of preliminary hearing must include the following (RCM 405(l)(2)):

1. Names and organizations/address of trial counsel and defense counsel, and a statement why any counsel were absent during the preliminary hearing;

2. An audio recording of the preliminary hearing;

3. The PHO's "reasoning and conclusions with respect to the issues for determination [under RCM 405(a)]…, including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations concerning the testimony of witnesses and the availability and admissibility of evidence at trial" for each specification;

4. A statement as to whether any essential witness may not be available for court-martial;

5. An explanation of any delays in conducting the preliminary hearing;

6. Notation if the trial counsel refused to issue a pre-referral investigative subpoena that was directed by the PHO and the trial counsel's statement of reasons for the refusal;

7. Recommended modifications to the form of the charges;

8. A statement regarding whether the PHO considered any uncharged offenses, and the PHO's reasoning and conclusions regarding whether there is probable cause to believe the accused committed the uncharged offense, and whether the convening authority would have court-martial jurisdiction over the offense if charged;

9. Notation of any objections that a party requested be included in the PHO's report;

10. The PHO's recommendation as to disposition of the charges, including consideration of all evidence admitted during the preliminary hearing and matters submitted under RCM 405(k); and

11. The PHO's summary and analysis of materials submitted pursuant to RCM 405(k).

C. Form of the report. The report will consist of at least the DD Form 457 (Preliminary Hearing Officer's Report), the PHO's reasoning and analysis pursuant to RCM 405(l)(2)(C), and the recording of the preliminary hearing. Other elements listed above will also be required based on the particular facts of each case.

D. Distribution of the report. RCM 405(l)(4):

1. PHO will provide the preliminary hearing report to the convening authority. The convening authority will provide a copy of the report to the accused.

a. Defense counsel must make objections to the report to the convening authority via the PHO. These are due within 5 days after receiving the report. RCM 405(l)(5).

2. PHO can order exhibits, proceedings, or other materials sealed in accordance with RCM 1113. RCM 405(j)(8). Matters that the PHO should consider sealing include: testimony taken during closed proceedings, contraband (e.g., child pornography), and privileged material offered into evidence but not considered.

X. TREATMENT OF DEFECTS

A. Failure to follow the requirements of Article 32 does not constitute jurisdictional error. UCMJ art. 32(g).

B. Objections must be timely made. Defects observed during the preliminary hearing or defects in the preliminary hearing report must be made to the convening authority through the PHO via an objection in a timely manner (within 5 days of receipt of the report). RCM 405(l)(5). Failure to make a timely objection under RCM 405 to the conduct of the preliminary hearing or to the report constitutes forfeiture of the objection. The convening authority who directed the preliminary hearing, a superior convening authority, or the military judge may grant relief from the forfeiture for good cause shown. RCM 405(m).

C. Motion for appropriate relief to the military judge based on defects in the preliminary hearing must be made before a plea is entered. RCM 905(b)(1). Failure to raise the matter before pleas forfeits the error. RCM 905(e)(1).

1. Types of defects.

a. Preliminary hearing improperly convened. *United States v. Donaldson*, 49 C.M.R. 542 (C.M.A. 1975): Accused is denied a substantial pretrial right when the Article 32 investigation is ordered by an officer who lacks proper authority.

b. Partiality of the PHO. *United States v. Cunningham*, 30 C.M.R. 402 (C.M.A. 1961): Partiality of the PHO will be tested for prejudice.

c. Denial of right to counsel/ineffective assistance of counsel:

1) The right to the assistance of counsel of one's own choice during the pretrial investigation is a substantial pretrial right of the accused. *United States v. Maness*, 48 C.M.R. 512 (C.M.A. 1974); *United States v. Miro*, 22 M.J. 509 (A.F.C.M.R. 1986) ("An unprepared counsel is tantamount to no counsel at all.").

2) Improper denial of counsel and denial of effective assistance of counsel at the Article 32 should be tested for prejudice. *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985); *United States v. Freedman*, 23 M.J. 820 (N.M.C.M.R. 1987).

2. Remedy.

a. Ordinarily the remedy is a continuance to re-open the preliminary hearing. RCM 906(b)(3) discussion.

b. If the charges have already been referred, re-referral is not required following a re-opening of the preliminary hearing; affirmance of the prior referral is sufficient. *United States v. Clark*, 11 M.J. 179 (C.M.A. 1981).

D. During post-trial appeal, relief for a defective preliminary hearing may only be granted where an accused can show violation of his substantial rights. UCMJ art. 59 ("A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.").

1. *United States v. Von Bergen*, 67 M.J. 290 (C.A.A.F. 2009) ("Article 32, UCMJ, errors are tested on direct review for prejudice as defined by Article 59(a)."): It may be very difficult to show prejudice. *Von Bergen* noted military courts have a long history of deciding that the Article 32 proceedings are "superseded" by the trial procedures, so the accused's rights at an Article 32 "merge into his rights at trial." Because these rights merge, the court held the accused suffered no prejudice, even though he was erroneously denied his right to an Article 32 hearing.

2. *United States v. Allen*, 5 C.M.A. 626 (1955) (quoting testimony of Mr. Larkin at *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 998 (1949)): "[I]n the event that a pretrial investigation, less complete than is provided here, is held and thereafter at the trial full and complete evidence is presented which establishes beyond a reasonable doubt the guilt of the accused, there doesn't seem to be any reason … that the case should be set aside if lack of full compliance doesn't materially prejudice his substantial rights …. Now, if it has, that is and should be grounds for a reversal of a verdict of guilty."

3. *United States v. Mickel*, 26 C.M.R. 104 (C.M.A. 1958): "[I]f an accused is deprived of a substantial pretrial right on a timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at trial. At that stage of the proceedings, he is perhaps the best judge of the benefits he can obtain from the pretrial right.

Once the case comes to trial on the merits, the pretrial proceedings are superseded by the procedures at trial; the rights accorded to the accused at the pretrial stage merge into his rights at trial. If there is no timely objection to the pretrial proceedings or no indication that these proceedings adversely affected the accused's rights at the trial, there is no good reason in law or logic to set aside his conviction."

4. *United States v. Davis*, 64 M.J. 445 (C.A.A.F. 2007): Case involves closing an Article 32 and clarifies the standard for appellate review. "The time for correction of [procedural errors in the Article 32] is when the military judge can fashion an appropriate remedy . . . before it infects the trial . . . ." CAAF explains that, on appeal, the standard of review of Article 32 procedural errors is under Article 59(a), UCMJ, which states, "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error *materially prejudices the substantial rights of the accused*."

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CHAPTER 14
PRETRIAL ADVICE

I. Introduction
II. Pretrial Advice Purposes
III. Pretrial Advice Preparation
IV. Pretrial Advice Defects
V. Sexual Assault Cases

I. INTRODUCTION

A. **Defined**. Pretrial Advice (also known as Article 34 Advice) is the SJA's written advice given to the Convening Authority prior to referral. There are mandatory components to the advice (covered in this outline and also found at RCM 406), and optional components.

B. **General Courts-Martial**. Written pretrial advice is a prerequisite to referral to a General Court-Martial.

C. **Special Courts-Martial**. The 2016 Military Justice Act (2016 MJA) requires that a "convening authority shall consult a judge advocate on relevant legal issues. Additionally, the Army requires a written pretrial advice prior to referral to a Special Court-Martial. AR 27-10, para 5-28(b) (11 May 2016) ("The servicing staff judge advocate will prepare a pretrial advice, following generally the format of RCM 406(b).").

II. PRETRIAL ADVICE PURPOSES

A. **Substantial Pretrial Right of the Accused**.

1. Protects accused against trial on baseless charges.

2. Protects accused against referral to an inappropriate level of court-martial.

3. Limited veto over convening authority's power to refer charges.

B. **Prosecutorial Tool**.

1. Provides legal advice to the convening authority regarding the charges.

2. Additional opportunity for the SJA/military justice section to review the charges (form, substance, etc.) prior to referral.

III. PRETRIAL ADVICE PREPARATION

A. **Mandatory Contents**. UCMJ art. 34.

1. The Pretrial Advice is required to include:

a) Conclusions with respect to whether each specification alleges an offense under the code;

b) Conclusions with respect to whether there is probable cause to believe the accused committed the offense;[1]

c) Conclusions with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

d) A recommendation of the action to be taken by the convening authority.

e) Capital Cases ONLY: The pretrial advice should give notice of aggravating factors prior to arraignment, per RCM 1004(b)(1) and (c).

2. **Binding Effect on the Convening Authority**

a) The three legal conclusions are binding on the convening authority. For example, if the Staff Judge Advocate concludes there is no jurisdiction over the offense, then the affected charges and their specification CANNOT be referred.

b) The SJA's recommendation as to referral is non-binding. The convening authority may follow it, or not follow it, as s/he deems appropriate.

c) Sex related offenses. In certain sex related offenses, the Staff Judge Advocate's recommendation as to referral will impact the level of subsequent review of a convening authority's non-referral decision. *See* AR 27-10, para 5-19 (11 May 2016).

3. **Basis for the Recommendation**. Practitioners should consult the Non-Binding Disposition Guidance at Appendix 2.1 of the Manual for Courts-Martial in formulating a recommendation as to disposition.

4. **Practice Tip**: When preparing the Pretrial Advice, check RCM 406 to make certain all of the mandatory contents are covered.

B. **Optional Contents**

1. **Relevant additional information**. The discussion to RCM 406(b) states that "[t]he pretrial advice should include, when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; any recommendations for disposition of the case by commanders or others who have forwarded the charges." Failure to include this information is not error.

2. **Rationale or underlying analysis**. There is no requirement that the Staff Judge Advocate include his rationale or underlying analysis regarding his legal conclusions or recommendation

C. **Who Prepares/Signs the Advice?**

1. **Contents**. The SJA is personally responsible for the contents of the advice. The SJA must make an independent and informed appraisal in arriving at his conclusions.

2. **Preparation**. The SJA does not have to prepare the advice by himself/herself. Trial counsel may draft the pretrial advice for the SJA's consideration.

3. **Signature**. The SJA (or Acting SJA) must personally sign the pretrial advice. Signing "For the SJA" is error. *United States v. Hayes*, 24 M.J. 786 (A.C.M.R. 1987).

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[1] The legacy Article 34 required conclusions that the allegation of each offense was "warranted by the evidence indicated in the report of investigation."

D. **Subsequent Disqualification of the SJA to Prepare Post-Trial Recommendations**

1. **Controverted Pretrial Advice**. If there sufficiency or correctness of the Pretrial Advice is challenged at trial, the SJA may be disqualified from preparing the post-trial recommendation. RCM 1106(b); *United States v. Lynch*, 39 MJ 223 (CMA 1994) (SJA must disqualify self from participating in the post-trial recommendation where the accused raised "a legitimate factual controversy. . .between the SJA and the Defense Counsel.")

2. **Impartiality**. Pretrial advice which calls into question the SJA's impartiality may disqualify the SJA from preparing the post-trial recommendation. *United States v. Plumb*, 47 MJ 771 (A. F. Ct. Crim. App. 1997) (findings and sentence set aside where pretrial advice (in conjunction with other errors) referred to the accused as a "shark in the waters, [who] goes after the weak and leaves the strong alone.")

E. **Enclosures to the Pretrial Advice**. Any enclosure should be listed on the Pretrial Advice itself.

1. Charge Sheet

2. Forwarding Letters and Endorsements

3. Report of Investigation, DD Form 457

4. Allied papers.

5. Character and military service of the accused. Pursuant to section 1708 of the 2014 NDAA, the discussion to RCM 306(b) no longer includes "the character and military service of the accused" as a factor for command consideration in the initial disposition decision.

F. **Discovery**

1. A copy of the Pretrial Advice must be provided to the defense if the charges are referred to a GCM. RCM 406(c). Because 27-10 now mandates pretrial advice in Special Courts-Martial, provide those to the defense as well.

IV. PRETRIAL ADVICE DEFECTS

A. **Accuracy of contents**. All conclusions, advice, and information included in the Pretrial Advice must be accurate, even if the contents is optional.

B. **Standard for Relief**. Information which is so incomplete as to be misleading may result in a determination of defective advice, necessitating appropriate relief. RCM 406(b) discussion. *United States v. Kemp*, 7 MJ 760 (A.C.M.R. 1979); *United States v. Murray*, 25 MJ 445 (CMA 1988) (Pretrial Advice which omitted a charge is a procedural error tested for prejudice, considering several factors: whether the charges were serious enough to warrant trial by general court-martial; whether they were supported by the evidence before referral; how the appellant pleaded; whether the appellant objected to the advice at trial; and whether the error was disclosed to the convening authority during the post-trial process.)

C. **Types of Relief**

1. **Continuance to address the defect**. Discussion to RCM 906(b)(3). SJA neglects to include the mandatory contents: return the case for a new pretrial advice.

2. **Defects are not jurisdictional**.

D. **Waiver**. Objections are waived if not raised prior to entry of plea or if the accused pleads guilty. RCM 905(b) and (e); see generally RCM 910(j).

V. SEXUAL ASSAULT CASES

A. A GCMCA's decision not to refer certain sex related offenses must be forwarded for review by a superior GCMCA. The level of GCMCA depends on the SJA's advice.

B. A certification that the victim was notified of the opportunity to express their views regarding the preferred disposition of the offense for consideration by the convening authority must be included.

C. Authority. AR 27-10, para 5-19(c)(5) (11 May 2016) (Implementing Section 1744 of the National Defense Authorization Act for Fiscal Year 2014).

Practice Tip: Practitioners may wish to notify victims of the opportunity to express their views regarding the preferred disposition of the offense to the convening authority BEFORE the SJA presents his pretrial advice, thereby making the victim's preferred disposition a supplemental enclosure to the pretrial advice packet.

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CHAPTER 15
PLEA AGREEMENTS

I. Introduction
II. Basic Components of a PA
III. Negotiation and Form of Agreement
IV. Military Judge's Inquiry at Trial
V. Withdrawal from PA
VI. Content
VII. Remedies
VIII. Post-Trial Issues and Defects

I. INTRODUCTION

A. Defined. A plea agreement (PA) is an agreement between the convening authority and the accused. Only the convening authority can bind the government. PAs are governed by RCM 705. Practitioners should note that prior to the 2016 Military Justice Act, the terminology used for an agreement was a "pretrial agreement." To the extent that older case law is discussed herein, this chapter will use the older terminology to avoid confusion about which law was applied.

B. Major changes made by the 2016 Military Justice Act (2016 MJA). The 2016 MJA introduced a new article—Article 53a—which serves as the authority to entire into plea agreements. Among other things, the Article specifies what may be the subject of agreement, stipulates when the military judge must reject an agreement, makes certain exceptions for agreements affecting a mandatory minimum, and provides that a court-martial is bound by the limitations expressed in the agreement once the military judge accepts the agreement.

C. Significant differences between the 2016 MJA and the legacy system.

1. Legacy system. Under the legacy system, a convening authority's power to grant clemency forms the basis upon which the agreement rested. Under that system, a typical pretrial agreement includes an accused's promises to plead guilty in exchange for the convening authority's agreement to limit the sentence imposed at trial when the case reaches her for initial action. After the accused enters a plea of guilty at trial, the military judge examines the agreement and ensure the accused understands it. After the judge accepts the plea as providently made, the sentencing authority (the military judge or panel) will proceed to sentencing without knowledge of the sentence limitation the convening authority has agreed to. To facilitate this, the PTA is physically separated into two parts (i.e. separate pieces of paper): the agreement (or Part I) and the quantum (or Part II). The accused will get the benefit of the lesser sentence - that contained within the agreement or that announced at trial. For example, suppose the accused agrees to plead guilty to larceny in exchange for an approved sentence no greater than 8 months confinement. Assume that at trial the military judge adjudges a sentence of only 6 months confinement. In that case, the agreement has no effect on the sentence because the convening authority may only approve a sentence of 6 months confinement. On the other hand, if the military judge had sentenced the accused to 12 months of confinement, then the accused would receive a benefit from the agreement because the convening authority would only be able to approve 8 months of confinement. Because the basis for the agreement is the clemency power, post-trial agreements are possible, and the convening authority is responsible for monitoring and enforcing any term required to be performed after adjournment.

2. 2016 MJA. Under the 2016 MJA, the plea agreement is to a sentence limitation that acts directly on the power of the court-martial. Under this system, once the plea agreement is accepted by the judge, the court is bound. The court will know the agreement and sentence within the limitations imposed by the agreement. Because the agreement is a limitation expressed ab initio, rather than an agreement to exercise clemency over a previously adjudged sentence, practitioners should take care to understand the full sentencing landscape before proposing or agreeing to a term.

II. BASIC COMPONENTS OF A PA

A. A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under RCM 706.

B. A promise by the convening authority to do one or more of the following:

1. Refer the charges to a certain type of court-martial;
2. Refer a capital offense as non-capital;
3. Withdraw one or more charges or specifications from the court-martial;
4. Have the trial counsel present no evidence as to one or more specifications or portions thereof; and/or
5. Limit the sentence that may be adjudged by the court-martial.

C. The following cases help to flesh out the nature of pretrial agreements and their basic use at trial *United States v. Brice*, 38 C.M.R. 134 (C.M.A. 1967); *United States v. Monett*, 36 C.M.R. 335 (C.M.A. 1966); *United States v. Neal*, 12 M.J. 522 (N.M.C.M.R. 1981).

III. NEGOTIATION AND FORM OF AGREEMENT

A. **Negotiations**. PA negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives must negotiate with defense counsel unless the accused has waived the right to counsel. Under Article 53a, the military judge may not participate in negotiations.

B. **Proposal**. If the accused elects to propose a PA, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. Unwritten, or *sub rosa*, agreements are prohibited. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.

1. **Terms not in writing**. *United States v. Mooney*, 47 M.J. 496 (C.A.A.F. 1997). Military judge erred by accepting accused's guilty plea and pretrial agreement after it was clear that the pretrial agreement was not in writing as required by RCM 705(d)(2) [now RCM 705(e)(2)]. However, while CAAF criticized counsels' and the judge's disregard for the rule, court held that reversal of conviction was not required where the specific terms of the oral agreement were placed on the record, all parties acknowledged and complied with terms of agreement, and accused conceded that he received the benefit of the bargain.

2. **Terms contained in stipulation of fact**. *United States v. Forrester*, 48 M.J. 1 (C.A.A.F. 1998). Term in stipulation of fact which required the accused to waive his right to "any and all defenses" did not violate RCM 705 or public policy. CAAF cautions the Government not to attempt to avoid the requirements of RCM 705(c)(1)(B) by including terms in a document other

than the pretrial agreement itself (terms must not be in a stipulation of fact). The reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

C. **Acceptance**. The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

D. **Victim input.** Pursuant to RCM 705(e)(3)(b), the government will provide the victim an opportunity for input as to the pretrial agreement and their potential terms.

IV. MILITARY JUDGE'S INQUIRY AT TRIAL

A. **General**. The military judge is required to ensure the accused understands each provision of the PA and that entry into the agreement was *knowing* and *voluntary*. Additionally, the military judge has an implied duty to determine whether there exists a mandatory basis to reject the agreement. *See* Art 53a(b)(1)-(5).

B. **Providence**. The following cases help to flesh out this requirement.

1. ***Waiver of Motions.*** *United States v. Felder*, 59 M.J. 444 (C.A.A.F. 2004). Military judge did not inquire into a term of the PTA regarding defense's waiver of any motions for sentence credit based on Article 13 and/or restriction tantamount to confinement. Accused's counsel did inform the military judge that no punishment under Article 13 or restriction tantamount to confinement had occurred. While the judge's failure to discuss the term was error, the accused failed to show the error materially prejudiced a substantial right. The reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

2. ***Meeting of the minds.*** *United States v. Dunbar*, 60 M.J. 748 (A. Ct. Crim. App. 2004). The accused's PTA stated "[a]ny adjudged confinement of three (3) months or more shall be converted into a [BCD], which may be approved; any adjudged confinement of less than three (3) months shall be disapproved upon submission by the accused [of a Chapter 10]" with a handwritten annotation stating "with an Other Than Honorable (OTH) discharge." The MJ sentenced the accused to a BCD, two months confinement, and reduction to PFC, causing the parties to disagree whether the convening authority could approve the BCD. Defense argued the convening authority could not approve both an OTH and a BCD discharge. The government's position was that the accused could submit a Chapter 10 and the convening authority must disapprove the two months confinement but the PTA did not require the convening authority's approval of the Chapter 10. RCM 910(h)(3) provides, after the sentence is announced, if the parties disagree with the PTA terms the MJ shall "conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea." The MJ did not clarify the accused's understanding or attempt to conform the agreement. Court granted rescission for lack of meeting of the minds; findings and sentence set aside.

3. ***Misconduct clause.*** *United States v. Sheehan*, 62 M.J. 568 (C.G. Ct. Crim. App. 2005). Military judge failed to cover a misconduct clause and "specially negotiated provisions" of the accused's PTA and provided an incorrect explanation as to another provision. CGCCA found that the military judge erred but that his omissions and misleading explanation did not prejudice the accused's substantial personal rights.

4. ***Responsibility to 'police' terms.*** *United States v. Sharper*, 17 M.J. 803 (A.C.M.R. 1984)

("While the military judge may not have the authority to directly intervene in the pretrial negotiations between an accused and a convening authority, he does have the responsibility to police the terms of pretrial agreements to insure compliance with statutory and decisional law as well as adherence to basic notions of fundamental fairness.").

V. WITHDRAWAL FROM PA

A. ***General***. Under RCM 705(e)(4), "The accused may withdraw from a plea agreement at any time prior to the sentence being announced," but shall be permitted to withdraw the plea after acceptance only for good cause shown. The government may withdraw "at any time before substantial performance by the accused of promises contained in the agreement," and under certain other limited conditions. Additionally, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in RCM 910(h) or 811(d), respectively."

B. ***Entry into a new PTA subsequent to withdrawal***. *United States v. Bray*, 49 M.J. 300 (C.A.A.F. 1998). A convening authority may increase the sentence cap of a pretrial agreement when an accused withdraws a guilty plea after successful completion of a providence inquiry and, in the same court-martial, later reenters pleas of guilty to the same charges. The accused entered guilty pleas to assault and battery on a child, communicating a threat, and drunk driving. During extenuation and mitigation, a defense witness testified that the accused could have committed the offenses after being exposed to insecticide poisoning. Accused withdrew his guilty plea and from the pretrial agreement, which limited confinement to 20 years to pursue the "bug spray" defense. Accused obtained a new pretrial agreement after changing his mind. The sentence cap under the new PTA limited confinement to 30 years. Neither case law nor RCM 705 prohibit a convening authority from increasing a sentence cap in a new pretrial agreement after the convening authority properly withdraws from the original pretrial agreement. Accused chose to reopen the initial providence inquiry based on the "bug spray" defense and voluntarily withdrew from the original agreement after full consultation with counsel. The consequences of withdrawal were addressed in the original agreement, explained on the record, and the accused failed to object at trial.

C. ***Accused's post-trial withdrawal of plea***. *United States v. Olson*, 25 M.J. 293 (C.M.A. 1987), was decided under the legacy system. This case is likely no longer good law because under the 2016 MJA the convening authority fully performs on the agreement upfront. Accused had right to withdraw his guilty plea in light of additional, unanticipated subtraction from pay, if he had good-faith belief that he had fully settled his liability to reimburse Government for overpayment under allegedly false travel vouchers and if that belief had induced accused's entry of his pleas.

D. ***CA withdrawal***

1. **General**. The standard for government withdrawal under RCM 705 has changed under the 2016 MJA.

a) **Legacy system**. Under legacy RCM 705(d)(5)(b), the convening authority could withdraw from a pretrial agreement at any time before the accused <u>*begins performance*</u> of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review. As a practical matter, once the accused begins performance, the convening authority has limited opportunity to withdraw from the PTA. *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009); *United States v. Manley*, 25 M.J. 346 (C.M.A. 1987) (once accused completed performance of pretrial agreement, as modified by parties at trial, the convening authority was not authorized to unilaterally withdraw from the agreement). Performance will often take the

form of entry into a stipulation of fact. The basic rationale for this rule is to protect an accused who is in the midst of performing in reliance on the convening authority's agreement to exercise clemency after trial. While the convening authority may not have performed yet, he is still legally obligated to do so at the appropriate time. Courts have strictly construed this rule. See, e.g., *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009). *See also United States v. Pruner*, 37 M.J. 573 (A.C.M.R. 1993). (convening authority withdrawal effective where performance of pretrial agreement was not commenced because the accused had not yet signed proposed stipulation of fact and had not yet requested witnesses); *United States v. Villareal*, 52 M.J. 27 (C.A.A.F. 1999) (Convening authority could lawfully withdraw from pretrial agreement based upon pressure from victim's family members, where the accused had not relied to his detriment on the agreement in any manner that would prejudice his right to a fair trial.)

b) **2016 MJA**. The new rule, expressed at RCM 705(e)(4)(B), modifies the language concerning 'beginning of performance,' and provides that the convening authority may withdraw "at any time before *substantial performance* by the accused of promises contained in the agreement." The basic rationale behind this rule appears to be to protect the convening authority. Under the 2016 MJA, the convening authority's performance occurs at the outset, in directing the court to sentence in accordance with the limitations expressed in the agreement. The term requiring substantial performance therefore appears to protect a convening authority from a situation where an accused obtains the favorable sentence limitation without having substantially performed.

2. ***Where no Meeting of the minds***. *United States v. Williams*, 60 M.J. 360 (C.A.A.F. 2004). Accused's pretrial agreement required him to reimburse his victim(s) "once those individuals and the amounts owed have been ascertained." On the day of trial the government withdrew from the PTA reasoning, under RCM 705(d)(4)(B), that the accused's failure to reimburse his victim breached a material PTA term. Defense argued he was not in breach because the term failed to establish a time limit, allowing for restitution after trial. Defense requested specific performance of the PTA arguing (also under RCM 705(d)(4)(B)) that his execution of a stipulation of fact with the government constituted performance and he had not otherwise breached any material term. CAAF did not rule whether entrance into a stipulation of fact constitutes performance or whether the accused failed to fulfill a material term. CAAF, focusing on the parties' failure to establish a meeting of the minds for the restitution time limit, held, under RCM 705(d)(4)(B), that the government can withdraw from a PTA if the MJ "discloses a disagreement as to a material term in the agreement."

3. ***Accused fails to perform material term***. *United States v. Parker*, 62 M.J. 459 (C.A.A.F. 2006). Accused entered into a PTA to plead guilty to AWOL and missing movement by neglect in return for the CA suspending any adjudged BCD or confinement in excess of thirty days. The military judge, however, rejected the accused's plea to missing movement by neglect because the accused said he only overheard statements by his NCOs, as opposed to a direct or official conveyance, regarding the place and time of the movement. When the military judge rejected the accused's plea, the government withdrew from the PTA and moved forward to trial before the military judge alone on the charge of missing movement by design. The military judge found the accused guilty of missing movement by design and sentenced him to a BCD and five months confinement. After trial, the accused submitted a clemency letter stating he did not desire suspension of his BCD. CAAF held that the MJ did not erroneously reject the accused's plea and defense never requested the MJ to reopen the plea. Therefore, PTA failed to exist and the accused's express and repeated request for a non-suspended BCD during his unsworn statement and clemency matters controls.

E. Withdrawal by Government before beginning of performance.

VI. CONTENT

A. Permissible Terms/Conditions

1. **Stipulation of fact**. A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty is entered or as to which a confessional stipulation will be entered. *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977). Stipulations of fact are governed by RCM 811.

a) Aggravation evidence. Government can require the accused to stipulate to aggravation evidence or refuse to accept pretrial agreement. *United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985); *United States v. Sharper*, 17 M.J. 803 (A.C.M.R. 1984). The Government can also require accused to agree to both truth and admissibility of matters contained in the stipulation of fact. The stipulation should be unequivocal that counsel and the accused agree not only to the truth of the matters stipulated but that such matters are admissible in evidence against the accused.

b) Uncharged misconduct. *United States v. Vargas*, 29 M.J. 968 (A.C.M.R. 1990). Defense counsel objected at trial to the inclusion of the uncharged misconduct and indicated that the accused only agreed to the stipulation out of fear of losing the deal. Military judge gave the accused an opportunity to withdraw, but the accused elected to adhere to the stipulation; no overreaching by the Government. See also *United States v. Mezzanatto*, 513 U.S. 196 (1995) (agreement to waive evidentiary provisions are subject to waiver by voluntary agreement of the parties). The reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

2. **Promise to testify**. Accused may agree to testify or provide assistance to investigators as a witness in the trial of another person. However, it is likely impermissible to require an accused to testify without a grant of immunity. See *United States v. Profitt*, 1997 WL 165434 (A.F. Ct. Crim. App. 1997) (unpub); *United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997), affirming 44 M.J. 527 (A.F. Ct. Crim. App. 1996) (term which required accused to "testify in any trial related in my case without a grant of immunity" did not violate public policy, under facts of this case as the accused had not been called to testify. Both cases discussed supra.

3. **Provide restitution**. *United States v. Mitchell*, 46 M.J. 840 (N-M. Ct. Crim. App. 1997). Accused who fails to make full restitution pursuant to a defense proposed term in PTA is not unlawfully deprived of the benefit of the PTA where the failure to comply with the restitution obligation is based on indigency. Accused uttered bad checks and defrauded financial institutions of $30,733. The defense proposed a term that required accused to make full restitution in exchange for suspension of confinement in excess of 60 months. The accused was sentenced, inter alia, to 10 years confinement. While in jail, the accused made partial restitution until his business failed. The accused, now indigent, cannot necessarily use indigency to negate operation of PTA term requiring full restitution. CA properly vacated suspension under PTA.

4. **Conform accused's conduct to certain conditions of probation**. Generally, the period of suspension acceptable relates to the length of the sentence adjudged.

a) **Before entry of judgment**. While this term is authorized under the 2016 MJA, it appears that the military judge, and not the convening authority, will have the obligation to enforce the agreement. The following two cases were decided under the legacy system in which the convening authority declined to exercise the agreed upon clemency post-trial.

(1) *United States v. Bulla*, 58 M.J. 715 (C.G. Ct. Crim. App. 2003). Pretrial agreement included a misconduct provision "that permitted the convening authority, among other things, to disregard the sentence limiting part of the pretrial agreement if the [accused] committed a violation of the UCMJ between the time the sentence was announced at her court-martial and the time the convening authority acted on the sentence." Accused was in an unauthorized absence status for two days shortly after the end of court-martial proceedings. Relying on the misconduct provision, the convening authority approved the sentence as adjudged, rather than as would have been limited by the PTA (which would have suspended the BCD for twelve months from action). Although CGCCA had "reservations about some of the potential results of this misconduct provision, it held that [the] provision [did] not violate public policy," at least as applied to a sentence element that the convening authority only agreed to suspend. Further, accused's two-day AWOL was a "material breach" of the PTA that released the convening authority from the agreement. Finally, court finds that prior to finding accused violated the misconduct provision, convening authority should hold a proceeding similar to that provided for by Article 72, UCMJ and RCM 1109 (vacation proceedings) and apply a preponderance of the evidence burden of proof. Although convening authority applied a lesser, incorrect burden of proof, the error was harmless.

(2) *United States v. Tester*, 59 M.J. 644 (A. Ct. Crim. App. 2003). Pretrial agreement contained deferral of confinement provision and misconduct provision similar to that in *Bulla, supra.* Court held procedures of RCM 1109 (vacation of suspension) must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement. Convening authority followed provisions to rescind deferral of confinement.

b) ***15 year suspension***. *United States v. Spriggs*, 40 M.J. 158 (C.M.A. 1994) (an indeterminate term of suspension of up to 15 years to complete sex offender program was inappropriate).

c) ***31 year suspension***. *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). Accused sentenced to life without parole. In accordance with his pretrial agreement, the convening authority suspended all confinement in excess of 30 years for the period of confinement plus 12 months after accused's release. Accused argued that the period of suspension could only be 5 years from the date sentence was announced. HELD: Pretrial agreement provision imposing a suspension period for the period of confinement and one year from date of release does not violate public policy. RCM 1108 states that a period of suspension should not be unreasonably long. "It is this Court's opinion that placing Accused on probation for 31 years of an adjudged life sentence without possibility of parole is not unreasonably long and does not violate public policy."

5. **Waive unreasonable multiplication of charges**. *United States v. Mitchell*, 62 M.J. 673 (N-M. Ct. Crim. App. 2006). The accused agreed in his PTA to waive a motion alleging unreasonable multiplication of charges. The military judge reviewed this provision with the accused but did not ask him if he had an unreasonable multiplication of charges motion to make. On appeal, defense argued that the term violated public policy, requiring the nullification of the accused's PTA under RCM 705(c)(1)(B). Based on the facts of the accused's case, the provision did not violate public policy. See also *United States v. Hardy*, 77 M.J. 438 (CAAF 2018) (finding waiver where accused failed to raise UMC and there was no term in the PTA specifically addressing the issue). The reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

6. **Waive Article 32 Preliminary Hearing and other procedural protections**. Accused may waive the Article 32 as well as the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings. RCM 705(c)(2)(E). The reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

7. **Waiver of admin board in subsequent separation proceedings**. *United States v. Gansemer*, 38 M.J. 340, (C.M.A. 1993) (upholding term requiring accused to waive separation board if punitive discharge was not adjudged; term does not violate public policy or fundamental fairness, as accused can ask for discharge in lieu of court-martial and there was no overreaching).

8. **Forfeiture of personal property used in the commission of a crime**. *United States v. Henthorn*, 58 M.J. 556 (N-M. Ct. Crim. App. 2003). Accused convicted of receiving child pornography in violation of 18 U.S.C. § 2252A. Court holds that provision in pretrial agreement that required accused "to forfeit his personal property (laptop computer) pursuant to 18 U.S.C. §2253 did not constitute an unauthorized forfeiture or fine and was not an excessively harsh punishment." Because the computer was used in the commission of the crime, its forfeiture was consistent with the application of the federal forfeiture statute, and was not a "punishment." "Needless to say, if the [accused] found his agreement too onerous, he could have withdrawn from it."

9. **Waiver of accusatory phase unlawful command influence**. *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995). Waiver of UCI was not against public policy where the alleged UCI motion originated with defense, concerned a matter not affecting the fairness of the adjudicative process, and where the waiver also originated with the defense. The reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

10. **Fines**. *United States v. Smith*, 44 M.J. 720 (A. Ct. Crim. App. 1996). Including fines as a term in pretrial agreements is a recognized "good reason" for imposing same, where agreement is freely and voluntarily assented to avoid some more dreaded lawful punishment. Accused was convicted of felony murder. Military judge imposed a fine as part of the sentence which required the accused to pay the $100,000 by the time he is considered for parole (sometime in the next century) or be confined for an additional 50 years or until he dies, whichever comes first. The court held the fine was permissible but the contingent confinement provision was not, as it circumvented Secretary of Army's parole authority. (The agreement here was for non-capital referral. The issue was that the sentence itself violated public policy.)

11. **Article 13 punishment**. *United States v. McFadyen*, 51 M.J. 289 (C.A.A.F. 1999). Accused's waiver of Article 13 issue as part of pretrial agreement does not violate public policy. For all cases in which "a military judge is faced with a pretrial agreement which contains an Article 13 waiver, the military judge should inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion." Here, accused agreed to plead guilty and, in exchange for a sentence limitation, to waive his right to challenge his pretrial treatment under Article 13. Accused was an airman who complained about his treatment in pretrial confinement at a Navy brig (where he was stripped of rank, prevented from contacting his attorney, and had his phone calls monitored). While announcing a prospective rule only, the court found no reason to disturb the waiver here: Accused did not contest the voluntariness of waiver, an inquiry was conducted by the military judge, the accused was allowed to raise and argue in mitigation his claims of ill-treatment at the hands of the Navy, and the military judge was able, if he wished, to consider the nature of pretrial confinement in determining the sentence. The reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

12. **Waive comparative sentencing information**. *United States v. Oaks*, 2003 CCA LEXIS 301 (A.F. Ct. Crim. App. Dec. 10, 2003) (unpub.). Term waiving right to present comparative sentencing information in unsworn statement does not impermissibly limit right to present a full sentence case to the sentencing authority. *Compare United States v. Grill*, 48 M.J. 131 (C.A.A.F. 1998) (error where judge precluded accused from presenting sentence comparison material, but where there was no agreement to waive his right in exchange for the benefits of a pretrial agreement). The reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

13. **Enrollment in a sexual offender treatment program**. *United States v. Cockrell*, 60 M.J. 501 (C.G. Ct. Crim. App. 2004). MJ failed to discuss with the accused a provision in the PTA requiring the accused to enroll in a sexual offender treatment program following his release from confinement and the ramifications if he failed to comply with that requirement. While the ramifications of failing to comply with the terms of the sexual offender treatment program were unclear in the PTA, and left unexplained by the MJ, requiring an accused to enroll in a sexual offender treatment program is not a per se impermissible term.

14. **Agreement not to discuss alleged constitutional violation**. *United States v. Edwards*, 58 M.J. 49 (C.A.A.F. 2003). As part of PTA, accused agreed not to discuss, in his unsworn statement, any circumstances surrounding potential constitutional violations occurring during AFOSI's interrogation of him (interrogation after detailing of defense counsel without first notifying defense counsel). If a provision is not contrary to public policy or RCM 705, accused may knowingly and voluntarily waive it. RCM 705 does not prohibit this pretrial term, and the term did not deprive the accused of the right to a complete sentencing proceeding. Military judge conducted detailed inquiry of the accused to determine if he knowingly and voluntarily agreed to it, and whether he understood the implications of his waiver. The reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

15. **Forum selection (military judge alone)**. Practitioners should be aware that under the 2016 MJA, there is no longer a default panel composition. It is unlikely that this change would impact the line of cases involving waiver of *any* panel right in a request for trial by judge alone. However, the reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e). *United States v. Burnell*, 40 M.J. 175 (C.M.A. 1994). Government would not agree to two-year sentencing limitation unless accused waived members. Accused's voluntary and intelligent waiver did not violate public interest. See also *United States v. Andrews*, 38 M.J. 650 (A.C.M.R. 1993). Government indicated during pre-trial negotiations that if accused elected trial with members, "then the quantum portion would be higher than if we went with military judge alone." Court ruled, "[W]e hold that the change to RCM 705 now permits the government to propose as a term of the pretrial agreement, that the [accused] elect trial by military judge alone, and the amount of the sentence limitation may depend on that election." See also *United States v. McClure*, A.C.M.R. No. 9300748 (A.C.M.R. Nov. 23, 1993) (unpub.) (convening authority's handwritten counter-offer on pretrial agreement stated: "The foregoing is accepted only if the accused elects to be tried by military judge alone."). But see *United States v. Young*, 35 M.J. 541 (A.C.M.R. 1992) (Appellate courts might invalidate a pretrial agreement if accused asserts (s)he was "coerced" into waiving trial by members.) Ultimately, a service or command policy, such as standardized pretrial agreements, which undermines the legislative intent of Article 16 "will be closely scrutinized." But, agreements are permissible if waivers contained in them are a "freely conceived defense product." *United States v. Zelenski*, 24 M.J. 1 (C.M.A. 1987).

B. **Prohibited Terms/Conditions**

1. Terms which are not voluntarily.

2. Terms which deprive the accused of certain Constitutional protections, such as: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; and the complete and effective exercise of post-trial and appellate rights.

a) **Complete sentencing proceedings (request BCD).** This prohibited term is likely to be the most hotly litigated term under the 2016 MJA because of the likely tendency that direct sentence limitations will have to truncate sentencing proceedings. In the event the military judge has no discretion to decide upon a sentence that deviates from the one agreed upon by the convening authority and the accused, this issue is likely to come up on appeal. Under pre-existing case law, a term cannot term the sentencing proceeding into an "empty ritual." *United States v. Davis*, 50 MJ 426 (CAAF 1999)("A fundamental principle underlying this Court's jurisprudence on pretrial agreements is that "the agreement *cannot transform the trial into an empty ritual*.")(*citing United States v. Allen*, 8 USCMA 504, 507 (1957).

(1) *United States v. Libecap*, 57 M.J. 611 (C.G. Ct. Crim. App. 2002). Accused contended that the pretrial agreement, requiring him to request a bad conduct discharge at trial, was unenforceable. The appellate court concluded that RCM 705(c)(1) prohibited the provision because it deprived the accused of a complete sentencing proceeding by negating the value of putting on a defense sentencing case. Moreover, the requirement to request a bad conduct discharge improperly placed the accused in the position of either giving up a favorable pretrial agreement or forgoing a complete sentence proceeding. The provision was against public policy for similar reasons. The accused was prejudiced by the provision, even though he had not requested a bad conduct discharge at trial, because he was precluded from telling the military judge that he wanted a second chance and from arguing for a sentence that did not include a punitive discharge. Since the accused had specifically stated that the error did not affect the voluntariness of his pleas, the appellate court determined that the appropriate remedy was a rehearing on sentence.

b) **Waive speedy trial.**

(1) ***When issue not raised by facts.*** The language of RCM 705 prohibits waiver of a speedy trial. RCM 707 specifies speedy trial rights in the military. *United States v. McLaughlin*, 50 M.J. 217 (C.A.A.F. 1999) addresses a case where the accused offered to waive a speedy trial issue in his pretrial agreement. The accused had been in pretrial confinement for 95 days. The accused later claimed that waiver was impermissible under RCM 705. CAAF held that under the MCM this waiver was unenforceable. The military judge should have declared it impermissible, upheld the remainder of the agreement, and then asked the accused if he wished to litigate the issue. The military judge did not do that, so the case was unclear as to whether the accused would have waived the issue anyway, even without a PTA. Nevertheless, the accused did not make a prima facie showing or colorable claim of a speedy trial violation. Despite the 95-day delay, the accused failed to show prejudice, that he had demanded trial, or that the amount of time to investigation was unreasonable. The reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

(2) ***When issue raised by facts.*** The accused had been in pretrial confinement for 117 days at the time of arraignment. Accused offered to waive all non-constitutional and non-jurisdictional motions. The military judge determined there was a speedy trial issue, and that the term was proposed by the government. The court held that there was a colorable speedy trial claim and that waiver was not harmless error. Finding and sentence set aside. *United States v. Benitez*, 49 M.J. 539 (N.M. Ct. Crim. App. 1998). The

reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

3. **Term involving individual military counsel**. Agreement to an increase in the confinement cap from 12 to 13 months to allow a delay so the accused could obtain individual military counsel "inferentially implicated appellant's right to individual military counsel," and violated public policy. Court reassessed sentence and affirmed only 11 months confinement. *United States v. Copley*, No. 20011015 (A. Ct. Crim. App. Feb. 26, 2004) (unpub.).

4. **Waiver of clemency or parole**. A PTA term limiting the accused's right to clemency or parole violates the RCM 705(c) right to a complete and effective exercise of post-trial and appellate rights. *United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007). In that case, the accused agreed to decline any clemency or parole offered to him for a period of twenty years. The MJ sentenced the accused to life without parole but the PTA limited the accused's confinement to fifty years, which, but for his PTA term, would have made him eligible for clemency in five years and parole in ten years. Allowing such a term would improperly impede the ability of service secretaries to exercise their clemency and parole powers, "as well as ultimate control of sentence uniformity" throughout their respective service. CAAF struck the PTA's specific term but ruled the stricken term did not impair the balance of the agreement and the plea. See also *United States v. Thomas*, 60 M.J. 521 (N-M. Ct. Crim. App. 2004) (violating public policy where PTA precluded an accused from accepting clemency and the accused's sentence could include death and required a mandatory minimum of confinement for life). The reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

5. **Terms which deprive the accused of a complete sentencing proceeding**. It is permissible to waive personal appearance of sentencing witnesses, so long as other methods are available for presenting that evidence to the factfinder (like telephonic testimony or stipulations of expected testimony). A term, originating with accused, that prohibited accused from presenting testimony of witnesses located outside of Hawaii either in person, by telephone, letter, or affidavit, violated public policy because it impermissibly deprived the accused of a complete sentencing proceeding. *United States v. Sunzeri*, 59 M.J. 758 (N-M. Ct. Crim. App. 2004).

6. **Terms which are fundamentally unfair**.

a) **Terms which incentivize counterintuitive sentencing argument.** Accused pled guilty in exchange for a pretrial agreement which would suspend an adjudged bad-conduct discharge, provided confinement for more than four months was adjudged. Confinement adjudged was for less than four months, and convening authority did not suspend the discharge. Agreement found to be contrary to public policy and fundamentally unfair. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992).

b) **Retirement eligibility**. A provision requiring the accused not to request transfer to the reserves if a punitive discharge was not adjudged violated public policy based on the accused's eligibility for retirement. *United States v. Schmelzle*, No. 200400007, 2004 CCA LEXIS 148 (N-M. Ct. Crim. App. July 14, 2004) (unpub)

c) **Immunity/Court "tax."** Pretrial agreement in which the quantum portion was increased if the accused raised claims of de facto immunity encumbered the accused's due process right to challenge the jurisdiction of the court-martial. The litigation of non-frivolous claims of lack of jurisdiction and immunity are not the proper subjects for plea bargaining. *United States v. Conklan*, 41 M.J. 800 (A. Ct. Crim. App. 1995).

d) **Impartial tribunal**. Improper to have accused waive military judge's disqualification in pretrial agreement after judge's impartiality is reasonably questioned. *United States v. Keyes*,

33 M.J. 567 (N.M.C.M.R. 1991). The reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

C. **Problematic Terms/Conditions**

1. **Waive all waivable motions**. A "waive all waivable motions" provision raises an issue as to whether the accused *knowingly waived* the issue. Under RCM 910(f)(4), the military judge must ensure the accused understands the pretrial agreement. If the accused and counsel did not anticipate a motion at trial, yet purported to waive all motions, the waiver of the unanticipated motion was arguably unknowing. In *Gladue*, the court addressed this issue. The accused pled guilty pursuant to a pretrial agreement agreeing to "waive any waiveable [sic] motions." At trial, military judge asked the defense what motions were waived by this provision; defense counsel stated the only contemplated motions were for a continuance, suppression of evidence, change of venue, and entrapment. On appeal (and for the first time), the accused argued multiplicity or, alternatively, unreasonable multiplication of charges. The CAAF found the accused waived those issues in the pretrial agreement. Implicit in the court's reasoning was that the facts giving rise to a motion for multiplicity or unreasonable multiplication of charges were known at the time of the plea. Even though counsel did not list those motions as being waived, the accused in fact waived the right to make that motion in the PTA, and also by not raising them at trial. The court found that "if an accused waives a right at trial, it is "extinguished" and will not be reviewed on appeal." *United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009).

Despite the CAAF's decision in *Gladue*, military judges, in an abundance of caution, should ask defense counsel what specific motions are being waived under a "waive all waivable motions" provision. This practice precludes challenges on appeal that an accused was unaware of other motions or (more problematic) believed he was waiving a non-waivable motion (like speedy trial). Additionally, judges should be aware of the new waiver/forfeiture rules in RCM 905(e).

Practitioners should also review *United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997), affirming 44 M.J. 527 (A.F. Ct. Crim. App. 1996) (term in PTA which required that accused waive "all pretrial motions" was too broad, and purported to deprive accused of right to make motions that could not be bargained away); *United States v. Jennings*, 22 M.J. 837, 838-39 (N.M.C.M.R. 1986) (provision in pretrial agreement to "waive any pretrial motion I may be entitled to raise" is "null and void" as "contrary to public policy"); and *United States v. Silva*, 1997 CCA LEXIS 267 (N-M. Ct. Crim. App. 1997) (unpub.) (Term in PTA, which required accused to "waive all waiveable motions" not contrary to public policy and RCM 705(c)(1)(B). Such a term does not include motions that are nonwaivable under RCM 705(c)(1)(B)).

2. **Testifying without Immunity**. A PTA is valid where, *inter alia*, the accused promised to testify without grant of immunity against any other military members and where the MJ questioned the accused and counsel extensively during providence. *United States v. Profitt*, 1997 CCA LEXIS 117 (A.F. Ct. Crim. App. Apr. 4, 1997) (unpub.). *See also United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997), affirming 44 M.J. 527 (A.F. Ct. Crim. App. 1996) (term which required accused to "testify in any trial related in my case without a grant of immunity" did not violate public policy, under facts of this case as accused had not yet been called to testify).

3. **Waive any and all defenses where no defenses existed**. A term which required the accused to waive his right to "any and all defenses" did not violate RCM 705 or public policy. The accused was charged with attempted housebreaking, attempted larceny, violation of a lawful general regulation, and aggravated assault. Requirement to waive all defenses was not overly broad, considering that the accused failed to raise any defense during the providence inquiry or

sentencing. *United States v. Forrester*, 48 M.J. 1 (C.A.A.F. 1998). The reasoning in this case may be impacted by the new waiver/forfeiture rules in RCM 905(e).

4. **Vacation of suspension term**. Government argued that a term in the PTA permitted the SPCMCA to execute vacation of suspension without forwarding the case to GCMCA for action. Court held that although PTA does not indicate that accused wanted to waive those rights; Congressional intent was to grant accused an important procedural due process right for vacation actions and it is doubtful whether such rights are waivable. *United States v. Perlman*, 44 M.J. 615 (N-M. Ct. Crim. App. 1996), 48 M.J. 353 (C.A.A.F. 1998) (sum. disp.) (affirming but expressing no opinion on whether term was lawful). *See also United States v. Smith*, 46 M.J. 263 (C.A.A.F. 1997) (holding that PTA term providing for vacation proceedings and processing under Article 72 and RCM 1109 in the event of future misconduct cannot be interpreted as waiver of the GCMCA's authority to review and take action on vacation).

5. Confessional Stipulations.

a) **Problematic**. Accused offered a PTA in which he agreed to plead not guilty and, in exchange for a sentence limitation, to enter into a confessional stipulation and present no evidence. The stipulation admitted basically all elements of the offenses except the wrongfulness of marijuana use and the intent to defraud concerning the bad check offenses. CAAF found the provision violated the prohibition against accepting a confessional stipulation as part of a pretrial agreement promising not to raise any defense. *United States v. Davis*, 50 M.J. 426 (C.A.A.F. 1999).

b) **Limitations on use.**

(1) If the accused fails to satisfy the military judge's inquiry into the providency of his plea, a confessional stipulation may be used at trial with consent of the accused. Otherwise military judge would not be at liberty to consider matters presented in the unsuccessful attempt to plead guilty. *United States v. Matlock*, 35 M.J. 895 (A.C.M.R. 1992). Prosecution cannot receive the benefit of the stipulation without the concomitant limitations of the pretrial agreement. See *United States v. Cunningham*, 36 M.J. 1011 (A.C.M.R. 1993).

(2) Unless otherwise agreed to by the accused, confessional stipulation in connection with guilty pleas may not be considered by military judge as to those charges to which accused has pled not guilty (contested charges). *United States v. Banks*, 36 M.J. 1003 (A.C.M.R. 1993). Confessional stipulation is the equivalent of entering a guilty plea to a charged offense; accused must knowingly and voluntarily consent to any use of stipulation beyond the limited purpose of facilitating providence inquiry. *United States v. Rouviere*, No. 9200242 (A.C.M.R. Aug. 24, 1993) (unpub.).

(3) *United States v. Craig*, 48 M.J. 77 (C.A.A.F. 1998). Military judge erred by advising the accused that her confessional stipulation (which contained facts substantiating both guilty and not guilty pleas to drug offenses) waived her constitutional rights against self-incrimination, to a trial of by the facts, and to confront and cross-examine witnesses against her.

(4) *United States v. Dixon*, 45 M.J. 104 (C.A.A.F. 1996). Where a stipulation leaves room for the defense to reasonably contest certain elements, and the defense in fact does so, a stipulation is not confessional. Accused entered mixed pleas to stealing mail. He entered into a stipulation of fact, in conjunction with his pretrial agreement, regarding two uncontested specifications, and the Government presented evidence on the remaining two specifications. Specification 3 involved a larceny of mail matter. The stipulation

established that accused removed mail matter from its lawful place and did not intend to return the parcel to the addressee. There was no requirement to do a *United States v. Bertelson,* 3 M.J. 314 (C.M.A. 1977) inquiry. The stipulation was not "confessional" because it did not effectively establish an express admission that accused's removal of mail matter was done with an intent to steal.

VII. REMEDIES

A. **General.** The remedy for a breached PTA depends on the breach. Depending on the issue, withdrawal, specific performance, or rescission may be available. Additionally, an unenforceable term may be declared void.

B. **Unenforceable Terms. The usual remedy is to declare the term void and unenforceable.** Whether the remainder of the PA remains enforceable depends on the existence and language of any severance clause in the PA. See generally *United States v. McLaughlin,* 50 M.J. 217 (C.A.A.F. 1999) (a term requiring accused to "waive the speedy trial issue" is impermissible under RCM 705(c)(1)(B) and the military judge should have declared it void and unenforceable, while upholding the rest of the agreement; judge should have also asked the accused if he wanted to raise the issue).

C. **Specific performance.**

1. *United States v. Lundy*, 60 M.J. 52 (C.A.A.F. 2004). Accused entered into PTA term, whereby the convening authority agreed to defer any and all reductions and forfeitures until the sentence was approved and suspend all adjudged and waive any and all automatic reductions and forfeitures. For sexually assaulting his children, the accused (a SSG) was sentenced to a DD, confinement for 23 years, and reduction to E-1, which subjected him to automatic reduction and forfeitures.

The convening authority attempted to suspend the automatic reduction IAW the PTA to provide the accused's family with waived forfeitures at the E-6, as opposed to the E-1, rate. The parties, however, overlooked AR 600-8-19 which precludes a CA from suspending an automatic reduction unless the convening authority also suspends any related confinement or discharge which triggered the automatic reduction. ACCA stated no remedial action was required because the accused's family was adequately compensated with transitional compensation (TC), which ACCA concluded the accused's family was not entitled to because they were receiving waived forfeitures, albeit at the E-1 rate.

CAAF reversed, holding if a material term of a PTA is not met by the government, three options exist: (1) the government's specific performance of the term; (2) withdrawal by the accused from the PTA, or (3) alternative relief, if the accused consents to such relief. Additionally, CAAF held an accused's family could receive TC while receiving either deferred or waived forfeitures if the receipt of TC was based on a discharge and if the receipt of TC was based only on the accused receiving forfeitures, the family could receive TC if not actively receiving the deferred or waived forfeitures. On remand, ACCA, ruled specific performance was "more appropriate because the [accused] has not indicated he would consent to any particular alternative relief." In January 2005, the Secretary of the Army (SECARMY) granted an exception to AR 600-8-19 allowing the suspension of the rank reduction and the provision of forfeitures at the E6 rate without requiring the CA to suspend the discharge or confinement triggering the automatic reduction. SECARMY did not approve interest on the E6 forfeiture amount and ACCA ruled it did not have the authority to provide the approximately $3,000 in interest on the original amount owed to the accused and remanded the case to the SA to approve the interest payment or to otherwise return the case to ACCA to set aside the findings and sentence.

In Fall 2005, SECARMY made the interest payment. In Summer 2006, CAAF issued another Lundy opinion, holding that the accused bore the burden to show that the timing of the payment was material to his decision to plead guilty.

2. *United States v. Perron*, 58 M.J. 78 (C.A.A.F. 2003). In *Perron*, the accused agreed to plead guilty in exchange for sentence limitations that included pay and allowances going to his family. However, prior to trial the accused's term of service expired and once convicted he entered into a no-pay status. As a matter of clemency the accused's counsel asked the convening authority to release Perron from confinement "to gain immediate employment . . . to allow for the financial relief his family desperately needs." The convening authority did not grant the request, opting instead to grant alternative relief. A tortured set of appeals and remands followed concerning the adequacy of the alternative relief. The issue that finally reached CAAF was whether convening authorities and appellate courts may "fashion an alternative remedy of [their] own choosing" against the accused's wishes. CAAF said no: "It is fundamental to a knowing and intelligent plea that where an accused pleads guilty in reliance on the promises made by Government in a pretrial agreement, the voluntariness of that plea depends on the fulfillment of those promises by the Government . . . Imposing alternative relief on an unwilling [accused] to rectify a mutual misunderstanding of a material term in a pretrial agreement violates the [accused]'s Fifth Amendment Right to due process."

D. **Withdrawal.** *United States v. Sheffield*, 60 M.J. 591 (A.F. Ct. Crim. App. 2004). Accused pled guilty to numerous military offenses and was sentenced to a BCD, four months confinement, and reduction to E-1. The accused's PTA contained a term that the CA would "waive automatic forfeitures in the amount of five hundred dollars, which sum was to be paid to the guardian appointed by the accused to care for his minor dependents." The SJAR failed to mention this term and the CA did not pay the five hundred dollars to the accused's dependents. On appeal, the accused requested the court to disapprove his adjudged BCD, or in the alternative, to allow him to withdraw from the plea. The government contended specific performance was appropriate. AFCCA held the government could not specifically perform because the accused could not receive the benefit of his PTA bargain (for his dependents to receive five hundred dollars per month during his incarceration). Likewise, the court failed to approve the accused's request to disapprove his BCD because the government did not agree to the alternative relief. The original PTA was nullified and findings and sentence set aside.

VIII. POST-TRIAL ISSUES AND EFFECTS

A. Article 53a of the 2016 MJA does not contemplate post-trial agreements. However, because convening authorities still have clemency powers they can exercise apart from an agreement under Article 53a, it is possible that post-trial agreements could continue to arise under the limited powers still articulated in Article 60. The following paragraphs relate explicitly to the legacy system.

B. **[Legacy] Approved sentence not explicitly conforming to the terms of the pre-trial agreement.** Generally, convening authority action not conforming explicitly to the terms of the PTA may be acceptable if the approved sentence is of lesser severity than the one agreed to in the PTA.

1. *Suspended sentences. United States v. Barraza*, 44 M.J. 622 (N.M. Ct. Crim. App. 1996) (extending suspension of confinement from 12 months (agreed) to 36 months (approved) did not increase severity of sentence where the CA also decreased unsuspended confinement from 46 months (agreed) to 14 months (approved)); *United States v. Hayes*, No. 9002521 (A.C.M.R. Aug. 29, 1991) (unpub). In pretrial agreement, convening authority would suspend for 12 months any confinement over 20 months. The adjudged sentence was confinement for 5 years, total forfeiture of all pay and allowances, reduction to E-1, and dishonorable discharge. At action, convening

authority approved confinement for 36 months (confinement over 18 months suspended for 18 months), TF, reduction to E-1, and dishonorable discharge. HELD: Reducing confinement by two months and increasing the period of suspension by six months is more favorable to the accused than the pretrial agreement, so action was proper.

2. *Forfeitures. United States v. Sparks*, 15 M.J. 895 (A.C.M.R. 1983) (approving adjudged sentence which included an additional two months forfeiture of pay was less severe than the PTA where the confinement adjudged was also two months less than the PTA)

3. *Discharges*. *United States v. Barratt*, 42 M.J. 734 (A. Ct. Crim. App. 1995). No PTA. Adjudged sentence was 16 months confinement, total forfeiture of all pay and allowances, and reduction to E-1. Accused requested convening authority substitute bad-conduct discharge for reduction in confinement to 6 months. At action, convening authority approved new sentence of bad-conduct discharge and 6 months confinement. HELD: CA may not approve a punitive discharge when punitive discharge not adjudged at trial. Punitive discharge, as a matter of law, is not a LIO punishment to confinement. See 10 U.S.C § 3811.

C. **[Legacy] Post-Trial Agreement**. It is permissible for the accused and convening authority to enter into a post-trial agreement, even though this eliminates any judicial scrutiny of the agreement, as would happen at trial.

1. *Renegotiation of Pre Trial Agreement. United States v. Pilkington*, 51 M.J. 415 (C.A.A.F. 1999). An accused has the right to enter into an enforceable post-trial agreement with the convening authority when the parties decide that such an agreement is mutually beneficial. Accused pled guilty to conspiracy to maltreat subordinates, maltreatment, false official statements, and assault. In a pretrial agreement, the convening authority agreed to suspend the bad-conduct discharge for 12 months. Accused and the convening authority agreed, in a post-trial agreement, that the latter could approve the punitive discharge as long as he "limited confinement to 90 days." On appeal, the accused argued that the post-trial agreement should be invalidated because it prevented judicial scrutiny of the terms and conditions. The court refused to invalidate the agreement, noting that the accused proposed the agreement after full consultation with counsel, stated that he voluntarily entered the agreement, and the post-trial agreement was directly related to the convening authority's obligations under the sentencing provisions of the pretrial agreement. Additionally, the court held that while the trial court did not review the post-trial agreement, the intermediate appellate court always have the opportunity to review such agreements.
Post-Trial Agreement. United States v. Dawson, 51 M.J. 411 (C.A.A.F. 1999). Accused and CA agreed to a PTA in which the first 30 days of any adjudged punishment would be converted into 15 days' restriction. Confinement in excess of 30 days would be suspended. The accused received 100 days confinement and a BCD. She was placed on restriction, missed a muster, and was notified of pending vacation proceedings. She went AWOL, but was later apprehended and placed in confinement. Accused entered a new agreement with the CA where she agreed to waive the right to appear at a hearing to vacate the suspension of her sentence (the SJA had opined the one held in her absence was illegal), to waive any claims she might have concerning post-apprehension confinement, and to release the CA from the prior agreement. In return, the CA would withdraw the new absence charge, and provide day-for-day credit toward her time served in "pretrial confinement" (on the new charge). The SJA advised that, based on the errors that occurred in the first trial, he should disapprove all confinement. The CA approved the BCD and disapproved the confinement. CAAF held that this was a valid post-trial agreement that did not involve post-trial renegotiation of an approved PTA. The agreement related to proceedings collateral to the original trial, and did not require the approval of a military judge.

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CHAPTER 16
MOTIONS

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I. INTRODUCTION

A. This chapter covers the "science" of motions--a rule-by-rule breakdown of the motions you are likely to face in practice. Guidance on the "art" of motions practice, including effective motions practice techniques and templates, can be found in the Advocacy Trainer.

B. Effect of the 2016 Military Justice Act (2016 MJA) on motions practice. The effect of the 2016 MJA is likely to be significant and difficult to predict. Practitioners should have in mind two different major categories of change. First, practitioners should be aware of the substantive changes. For example, practitioners should understand the changes to the Articles, and the accompanying rules. These changes are likely to be the most obvious; however, practitioners should also take care to evaluate how those changes may have an impact on other unchanged rules. For example, the new impanelment procedures will likely have an impact on voir dire, even though the Article and the implementing voir dire Rule remain largely unchanged. Second, practitioners should be aware of how the rules have been recodified to reflect the substantive changes. For example, new rules have been added. Some paragraphs have been shifted around. Because many of the rules have been re-numbered, practitioners should carefully revalidate the knowledge of the old rules in light of the new rules to determine whether their substantive arguments are correct. It is not enough to cite a rule for a proposition—practitioners should take care to re-visit the rule and ensure that the rule has not changed. A goal of this edition of the Deskbook is to assist practitioners in understanding the changes.

C. The following Rules for Courts-Martial and Military Rules of Evidence govern motions practice and form the content of this section of the chapter:

1. R.C.M. 905. Motions generally.
2. R.C.M. 906. Motions for appropriate relief.
3. R.C.M. 907. Motions to dismiss.
4. R.C.M. 915. Mistrial.
5. R.C.M. 917. Motion for a finding of not guilty.
6. R.C.M. 1102. Post-trial sessions.

7. M.R.E. 304. Confessions and admissions.

8. M.R.E. 311. Search and seizure.

9. M.R.E. 321. Eyewitness identification.

II. MOTIONS GENERALLY. R.C.M. 905

A. Definition.

1. General. A motion is a request to the judge for particular relief.

2. Grounds. Based on specific grounds (rule or case law).

3. Notice. Notice should be given to the judge and opposing counsel.

4. Hearings

a. May be litigated at an Article 39(a) session, usually after arraignment, before a plea is entered. R.C.M. 905(h).

b. When one of the parties so requests, R.C.M. 905(h) requires that the military judge hold a hearing on a written motion. *See United States v. Savard*, 69 M.J. 211 (C.A.A.F. 2010).

c. An ex parte hearing may be conducted to determine whether to grant a pre-referral warrant or subpoena. R.C.M. 309.

5. Rules of Evidence.

a. General Rule. The rules of evidence apply at all court-martial sessions, to include Article 39(a) sessions. M.R.E. 1101(a).

b. Exceptions. The rules of evidence (except those with respect to privileges) do not apply when the judge is deciding the following preliminary questions: whether a witness is available or qualified, whether a privilege exists, whether a continuance should be granted, whether evidence is admissible, or whether the accused is competent. See M.R.E. 104(a) and R.C.M. 909(e)(2).

B. General Requirements

1. Factual Predicate. A motion must be supported by evidence. An offer of proof is permissible, but is disfavored especially where contradicted.

a. *United States v. Hodge*, 26 M.J. 596 (1988) (A.C.M.R. 1988), aff'd, 29 M.J. 304 (C.M.A. 1989). An offer of proof should be specific and should include the names and addresses of witnesses and a summary of expected testimony.

b. *United States v. Stubbs*, 23 M.J. 188 (C.M.A.), *cert. denied*, 484 U.S. 846 (1987). "[T]rial judges should not let the litigants lapse into a procedure whereby the moving party will state the motion and then launch right into argument without presenting any proof but buttressing his/her argument with the assertion that so and so would testify as indicated, if called. The other party then counters with his/her own argument and offers of proof ... Do not let counsel stray into stating what someone would say if they were called. Force them to call the witness, provide valid real and documentary evidence or provide a stipulation. Sticking to proper procedure will save you time and grief and provide a solid record." Id. at 195.

c. *United States v. Alexander*, 32 M.J. 664 (1991) (A.F.C.M.R. 1991), *aff'd*, 34 M.J. 121 (C.M.A. 1992). Court notes that "Counsel based much of their arguments on offers of proof; although opposing counsel frequently disagreed with the proffers, no additional evidence was

tendered" Counsel and judges must be careful to establish a proper factual basis for evidentiary rulings. Id. at 667 n.3.

2. Notice.

a. Written motions shall be served on all parties. R.C.M. 905(i).

3. Local judiciary rules.

a. General. Rules issued by a trial judiciary or local court may be valid, so long as they do not conflict with the Manual for Courts-Martial. *See United States v. Williams*, 23 M.J. 362 (C.M.A. 1987).

b. The Rules for Practice before Army Courts-Martial should be consulted before filing a motion with the court-martial.

4. Timing of motions

a. Some motions must be made prior to the plea or else they are waived, absent good cause. R.C.M. 905(b) and (e). These motions are:

(1) Defects in the charges and specifications.

(2) Defects in preferral, forwarding, and referral.

(3) Suppression of evidence.

(4) Discovery and witness production.

(5) Severance of charges, specifications, or accused.

(6) Individual Military Counsel (IMC) requests.

b. Motions which should be made before final adjournment (or else waived).

(1) Continuance. R.C.M. 906(b)(1).

(2) Speedy trial. R.C.M. 907(b)(2)(A). *But see United States v. Mizgala*, 61 M.J. 122, 127 (2005) (stating that a speedy trial right under Article 10 should not be subject to rules of "waiver and forfeiture associated with guilty pleas").

(3) Release from pretrial confinement. R.C.M. 906(b)(8).

(4) Statute of limitations. R.C.M. 907(b)(2)(B).

(5) Former jeopardy. R.C.M. 907(b)(2)(C).

(6) Grant of immunity. R.C.M. 907(b)(2)(D).

(7) Failure to state an offense. R.C.M. 907(b)(2)(E).

c. Motions which may be made at any time, including appellate review.

(1) Lack of jurisdiction over accused or offense. R.C.M. 907(b)(1).

(2) Unlawful command influence (adjudicative phase). *Cf. United States v. Weasler*, 43 M.J. 15 (1995)(Pretrial agreement initiated by accused waived any objection to UCI on appeal. Waiver of UCI in accusatory phase, as distinguished from adjudicative stage, is permissible).

(3) Speedy Trial (Article 10). If defense raises an Article 10 violation prior to entry of plea, a subsequent plea of guilty does not waive appellate review of this issue. Additionally, failure to raise an Article 10 motion prior to plea may not result in forfeiture of the issue for purposes of appeal. *See United States v. Mizgala*, 61 M.J. 122,

127 (2005) (stating that a speedy trial right under Article 10 should not be subject to rules of "waiver and forfeiture associated with guilty pleas").

C. Waiver – R.C.M. 905(e)

1. General Rule. Failure to comply with timeliness requirements is generally considered a waiver unless the military judge finds good cause to consider the untimely motion. The rules "should be liberally construed in favor of permitting an accused the right to be heard fully in his defense." *United States v. Coffin*, 25 M.J. 32, 34 (C.M.A. 1987). There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege. *See United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011).

2. Exception – Good Cause. Where the accused has "good cause" for its failure to raise the issue, the accused may generally raise the waived issue. Inability to discover the issue due to "sandbagging" by the government constitutes good cause. *United States v. Coffin*, 25 M.J. 32, 34 (C.M.A. 1987). On the other hand, where the military judge has "fully probed" the defense counsel's reasons for not making a timely motion, and where the prosecution "did nothing to contributed to the defense decision not to file the motion," there is not good cause to later raise the issue. *United States v. Jameson*, 65 M.J. 160 (CAAF 2007).

D. Burden of Proof – R.C.M. 905(c)

1. Who has the burden?

a. The moving party – R.C.M. 905(c)(1),

b. *Except*, the Government has the burden of proof for:

(1) Jurisdiction – R.C.M. 905(c)(2)(B).

(2) Speedy trial – R.C.M. 905(c)(2)(B).

(3) Statute of limitations – R.C.M. 905(c)(2)(B).

(4) Suppression motions: confessions, evidence, identifications – M.R.E. Sect. III.

(5) Unlawful command influence.

2. What is the standard?

a. Preponderance of evidence.

b. Clear and convincing evidence standard for subterfuge inspections (three triggers for higher standard) (M.R.E. 313(b)); consent searches (M.R.E. 314(e)(5)); and, "unlawful" identifications (M.R.E. 321).

c. Command influence. When defense raises an issue of UCI at trial by some evidence sufficient to render a reasonable conclusion in favor of the allegation, burden shifts to the Government to prove, beyond a reasonable doubt (*United States v. Biagase*, 50 M.J. 143 (1999)) that command influence did not occur. If the Government is unable to do so, then the trial court (or the appellate court) must be satisfied beyond a reasonable doubt that the findings and sentence were unaffected. *See United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987) (reviewing court may not affirm the findings and sentence unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the existence of unlawful command influence).

E. Appeal of Rulings.

1. Defense: extraordinary writs.

2. Government appeals: R.C.M. 908.

F. Effect of a Guilty Plea.

1. *General rule:* guilty plea waives all issues which are not jurisdictional or do not deprive an accused of due process. Waived by guilty plea:

a. Suppression of evidence, confessions, identifications.

(1) *See, e.g., United States v. Cooper*, 32 M.J. 83 (C.M.A. 1991) (accused who pleaded guilty without condition or restriction to offense of adultery did not preserve for appellate review his motion to suppress items seized in an illegal search by pleading not guilty to rape of the same victim at the same place and time).

(2) *See, e.g., United States v. Hinojosa*, 33 M.J. 353 (C.M.A. 1991). Accused's motion to suppress statements to CID was denied. Accused then entered guilty pleas to some of the offenses and not guilty to the remaining offenses. The government, however, elected to present no evidence on the contested allegations and those specifications were dismissed. Accused's guilty pleas foreclosed any appellate relief from the unsuccessful suppression motion.

(3) *United States v. Robinson*, 77 M.J. 303 (CAAF 2017). Failure to raise suppression motion prior to entry of plea waived the issue where the adverse evidence was disclosed prior to arraignment.

b. Pretrial processing defects.

c. Unreasonable multiplication of charges. See *United States v. Hardy*, 77 M.J. 438 (CAAF 2018) (finding that an unconditional entry of a guilty plea waived the issue of unreasonable multiplication of charges).

2. *Not* waived by guilty plea:

a. Jurisdiction. *United States v. Conklan*, 41 M.J. 800, 805 (A. Ct. Crim. App. 1995) (accused may not bargain away "non-frivolous, good faith claims of lack of jurisdiction and transactional immunity.")

b. Article 10 violation. *Mizgala*, 61 M.J. at 127. *See United States v. Dubouchet*, 63 M.J. 586 (2006) distinguishing *Mizgala* as standing for the proposition that only litigated Article 10 issues survive a waiver stemming from a guilty plea.

c. Failure to allege an offense.

d. Adjudicative phase unlawful command influence. *See United States v. Hill*, 2017 CCA LEXIS 477 (AFCCA 2017) (finding guilty plea did not waive adjudicative phase UCI); *see also United States v. Weasler*, 43 M.J. 15 (condition in PTA waiving accusatory phase command influence, originating from defense, does not violate public policy).

e. Post-trial defects.

3. Another Exception. *United States v. Lippoldt*, 34 M.J. 523 (1991) (A.F.C.M.R. 1991). Prior to entry of plea, defense moved to require the prosecution to elect to proceed on either conspiracy to possess marijuana or distribution of same marijuana as an aider or abettor. Military judge wanted the pleas entered as a basis for development of the facts so that he could decide the motion. No waiver.

G. **Conditional Guilty Plea.** R.C.M. 910(a)(2). Will *not* waive pretrial motions made a part of the conditional guilty plea.

III. MOTIONS FOR APPROPRIATE RELIEF. R.C.M. 906

A. General. A motion for appropriate relief is a request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing or presenting its case.

B. Continuances. Some common grounds:

1. Witness unavailable. Continuance requested. *See, e.g., United States v. Mow*, 22 M.J. 906 (1986) (N.M.C.M.R. 1986); *United States v. Maresca*, 28 M.J. 328 (C.M.A. 1989).

2. Obtaining civilian counsel.

a. Three tries you're out. *United States v. Thomas*, 22 M.J. 57 (C.M.A. 1986) (Military judge did not abuse discretion in refusing the accused a fourth continuance to permit attendance of civilian counsel where judge had gone to great lengths to accommodate accused's wishes and where civilian counsel failed to make even a written appearance.)

b. *Compare United States v. Wilson*, 28 M.J. 1054 (1989) (N.M.C.M.R. 1989) (Judge abused discretion in denying civilian counsel's only request for delay after he had made a personal appearance and could not try case earlier due to "existing professional obligations.")

3. Illness of counsel, judge, witness, member.

4. Order of trial of related cases.

5. Insufficient opportunity to prepare. *United States v. Galinato*, 28 M.J. 1049 (1989) (N.M.C.M.R. 1989) (finding the military judge denied assistance of counsel where, after he denied a request for delay, defense counsel went "on strike" and refused to participate in case)

C. Motions Concerning Charges and Specifications. R.C.M. 307; 906.

1. Amend charges or specifications. R.C.M. 603, 906(b)(4).

2. Bill of particulars. R.C.M. 906(b)(6).

3. Multiplicity. R.C.M. 307, 906(b)(12), 907(b)(3)(B), 1003(c)(1)(c).

4. Sever duplicitous specifications. R.C.M. 307, 906(b)(5).

5. Sever offenses, *but* only to prevent manifest injustice. R.C.M. 906(b)(10). In *United States v. Giles*, 59 M.J. 374 (2004), the CAAF held that a military judge abused his discretion in denying the appellant's motion for severance of new perjury charges on a rehearing of an earlier drug-related attempt offense. In order to prove the perjury charge, the Government had to prove a materiality element, which required evidence of the earlier conviction. The CAAF stated that the MJ's ruling caused actual prejudice to the accused and prevented a fair trial.

D. Defective Article 32 Investigation or Pretrial Advice. R.C.M. 405, 406.

E. Discovery. R.C.M. 701, 914.

F. Witness Production. R.C.M. 703, 1001.

G. Individual Military Counsel or Detailed Counsel Request. R.C.M. 506.

H. Pretrial Restraint. R.C.M. 305.

I. Mentally Incompetent to Stand Trial. R.C.M. 706; 909; 916.

J. Change Location of Trial. R.C.M. 906(b)(11).

K. Sever Accused. R.C.M. 307; 906(b)(9).

L. Reopen Case. R.C.M. 913(c)(5). *United States v. Fisiorek*, 43 M.J. 244 (C.A.A.F. 1995); *United States v. Giles*, 51 M.J. 583 (N.M.C.C.A. 1999)

M. Miscellaneous. *See, e.g., United States v. Stubbs*, 23 M.J. 188. Defense moved to recuse entire prosecution office because of prior contact between one prosecutor and accused on a legal assistance matter.

N. Motion *in limine* (M.R.E. 906(b)(13)).

1. Definition. A preliminary ruling on the admissibility of evidence made outside the presence of members.

2. Procedure. Government or defense may make a motion *in limine*.

3. Rulings. The decision when to rule on a motion *in limine* is left to the discretion of the military judge. R.C.M. 906(b)(13) discussion. Judicial economy and judicial accuracy constitute "good cause" which, under R.C.M. 905(d), allows a military judge to defer ruling on an *in limine* motion until presentation of the merits.

a. *See, e.g., United States v. Helweg*, 32 M.J. 129 (C.M.A. 1991) (separate litigation of motion would have replicated large segments of a trial on the merits and in the judge-alone format; the judge is not required to hear the case twice).

b. *See also United States v. Cannon*, 33 M.J. 376 (C.M.A. 1991) (it is appropriate to defer ruling on the admissibility of evidence until such time as it becomes an issue).

4. Common uses of a motion *in limine*.

a. Admissibility of uncharged misconduct. *See, e.g., United States v. Thompson*, 30 M.J. 99 (C.M.A. 1990). Defense moved *in limine* to suppress a sworn statement accused made one year before charged offenses wherein accused admitted to bad checks, extramarital affair and financial problems. Trial counsel intended to use statement as evidence of scheme or plan under M.R.E. 404(b).

b. Motions to keep out M.R.E. 413/414 evidence should be made *in limine*.

c. Admissibility of prior conviction for impeachment.

d. Admissibility of impeachment evidence as to credibility.

e. Admissibility of witness's out-of-court statements.

f. Admissibility of a victim's sexual behavior or predisposition under M.R.E. 412(b).

g. Motions to suppress evidence other than confessions, seizures, or identifications. *See* R.C.M. 905(b)(3) discussion.

h. Preemptive strike by the government to exclude anticipated favorable defense evidence. Examples:

(1) *United States v. Huet-Vaughn*, 43 M.J. 105 (1995). The Government made 2 motions *in limine* and prevented the accused, an Army physician, from presenting evidence of motives and reasons for refusing to support Desert Shield and views on unlawfulness of the war on charge of desertion with intent to avoid hazardous duty.

(2) *United States v. West*, 27 M.J. 223 (C.M.A. 1988). The Government's motion *in limine* limited the defendant's testimony on his request for a polygraph and for sodium pentothal.

(3) *United States v. Rivera*, 24 M.J. 156 (C.M.A. 1987). Defense failure to make an offer of proof does not constitute appellate waiver where Government makes a preemptive strike to exclude evidence and evidentiary issue is apparent from the record.

i. Preservation for appellate review of issue raised by motion *in limine*.

(1) The accused must testify to preserve review of a denied motion *in limine* on the admissibility of accused's prior conviction. *United States v. Sutton*, 31 M.J. 11, 21 (C.M.A. 1990). This holding reverses prior military practice and adopts the U.S. Supreme Court ruling in *Luce v. United States*, 469 U.S. 38 (1984). *See also United States v. Gee*, 39 M.J. 311 (C.M.A. 1994) (character testimony) and *United States v. Williams*, 43 M.J. 348 (1995).

(2) *United States v. Sheridan*, 43 M.J. 682 (A.F. Ct. Crim. App. 1995). Counsel do not have to repeat objections during trial if they first obtain unconditional, unfavorable rulings from the military judge in out-of-court sessions. *See* M.R.E. 103(a)(2); R.C.M. 801(e)(1)(A) (finality of ruling); R.C.M. 906(b)(13). However, a preliminary, tentative ruling may require a subsequent objection to preserve issue for appeal. *United States v. Jones*, 43 M.J. 708 (A.F. Ct. Crim. App. 1995).

5. Time. Rulings are generally made at the earliest possible time unless the military judge, for good cause, defers ruling until later in the trial. Written motions may be disposed of before arraignment and without an Article 39(a) session. A party may request oral argument or an evidentiary hearing concerning disposition of the motion. R.C.M. 905(h).

6. Essential findings. R.C.M. 905(d). Where factual issues are involved, the military judge *shall* state essential findings on the record.

7. Reconsideration. R.C.M. 905(f). The military judge on his or her own, or at the request of either party, may reconsider any ruling not amounting to a finding of not guilty any time before authentication of the record. Read in conjunction with R.C.M. 917(f). Motion for a Finding of Not Guilty. Reconsideration of a granted motion for a finding of not guilty is not permitted.

IV. MOTIONS TO SUPPRESS

A. General. A motion to suppress is based on an alleged constitutional violation.

B. Procedure. M.R.E. 304(d) [pretrial statements], 311(d) [search & seizure], 321(c) [eyewitness identification].

1. Disclosure by the Government.

2. Notice of motion by defense.

3. Specific grounds for objection.

a. *United States v. Miller*, 31 M.J. 247 (C.M.A. 1990). Motion to suppress statement under M.R.E. 304(d)(2)(A) must be made prior to plea. Absent motion, no burden on prosecution to prove admissibility; no requirement for specific findings by MJ; and, no duty to conduct a voluntariness hearing.

b. *United States v. Vaughters*, 42 M.J. 564 (A.F. Ct. Crim. App. 1995), *aff'd*, 44 M.J. 377 (C.A.A.F. 1996). Accused challenged admissibility solely on technical *Edwards* violations. On appeal, asserts AFOSI also coerced confession by threatening to tell neighbors and alleged drug dealers that he had informed on them. As motion to suppress did not raise coercion issue, court held accused had forfeited or "waived" issue on appeal.

4. Burden on the prosecution by preponderance. If the underlying facts involve an alleged subterfuge inspection, the standard is higher for the government. Under M.R.E. 313(b), the burden is clear and convincing if the purpose of the inspection is to discover contraband *and* is directed immediately following report of specific offense, specific individuals are selected, *or* persons examined are subject to substantially different intrusions; if none of the three factors are present, the burden remains by preponderance). *See United States v. Shover*, 45 M.J. 119 (C.A.A.F. 1996) (finding clear and convincing standard met by the government).

5. Essential findings of fact, prior to plea.

6. Guilty plea waives, except conditional guilty plea.

V. MOTIONS TO DISMISS. R.C.M. 907

A. General. A motion to dismiss is a request that the trial judge terminate the proceedings as to those charges and specifications without a trial on the merits.

B. Nonwaivable Grounds. Can be raised anytime, including appellate review.

1. Lack of Jurisdiction.

2. Failure to Allege an Offense.

3. Unlawful Command Influence.

4. Improperly Convened Court.

C. Waivable Grounds**.** Must be raised before final adjournment of trial.

1. Speedy Trial. *But see Mizgala*, 61 M.J. at 127 (stating that court will not apply forfeiture of Article 10 issues).

2. Statute of Limitations.

a. Unlimited - capital offenses, AWOL in time of war.

b. Five years - all other offenses.

c. Child Abuse offenses – life of child, or within five years of date crime committed, whichever is longer

d. Two years - Article 15 nonjudicial punishment.

3. Former Jeopardy.

a. *See United States v. Burns*, 29 F.Supp.2d 318 (E.D.Va. 1998)(analyzing *Hudson v. United States*, 522 U.S. 93, to conclude that Article 15, UCMJ punishment does not raise double jeopardy concerns because punishment is administrative and not punitive in nature).

4. Presidential Pardon.

5. Grant of Immunity.

6. Constructive Condonation of Desertion.

7. Prior Article 15 Punishment for same, *minor* offense. *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989). Prior Article 15 punishment for *serious* offense does not bar subsequent trial for same offense, but the accused must be given complete sentence credit for any punishment resulting from the Article 15 proceeding. *United States v. Edwards*, 42 M.J. 381 (C.A.A.F. 1995). The military judge may apply the required credit in fashioning a sentence.

D. Permissible Grounds. *May* be dismissed upon timely motion by the accused.

1. Misleading Specification.

2. Multiplicity.

E. Other Grounds.

1. Vindictive or Selective Prosecution.

2. Constitutional Challenges.

a. Equal protection.

b. First Amendment.

c. Privacy rights. *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989). Direct observation of urine collection during urinalysis is not *per se* an unreasonable invasion of privacy.

d. Lack of notice.

e. Ex post facto laws.

VI. MISTRIAL. R.C.M. 915

A. General

1. A drastic remedy. The judge should declare a mistrial only when "*manifestly necessary in the interest of justice*" due to circumstances which "cast substantial doubt upon the fairness or impartiality of the trial." *United States v. Waldron*, 36 C.M.R. 126, 129 (C.M.A. 1966). *United States v. Brooks*, 42 M.J. 484 (1995) (MJ should not have declared mistrial based on his improper inquiry into members' deliberative process).

a. *See, e.g., United States v. King*, 32 M.J. 709 (1991) (A.C.M.R. 1991), *rev'd on other grounds*, 35 M.J. 337 (C.M.A. 1992). Mistrial not required even though trial counsel improperly communicated to civilian psychologist who was defense representative. Factors considered by the court: the psychologist would have eventually asked for the background information provided by the trial counsel; any advantage to the trial counsel from the information was minimal; and there was no bad faith on the part of the trial counsel.

b. *But see United States v. Diaz*, 59 M.J. 79 (C.A.A.F. 2003), in which the CAAF held that a military judge abused his discretion in denying a motion for a mistrial when two witnesses -- one of them an expert -- testified they believed death of appellant's daughter was a homicide and appellant was the perpetrator. The combined prejudicial impact of the testimony could not be overcome by a curative instruction, particularly since the testimony went to the two main issues of the case: the cause of the death and the identity of the perpetrator.

2. Effect. A declaration of a mistrial shall have the effect of withdrawing the affected charges and specifications from the court-martial.

3. First consider alternative measures.

a. *United States v. Balagna*, 33 M.J. 54 (C.M.A. 1991). Witness testimony before panel included reference to accused's submission of Chapter 10 request. The MJ gave *curative instruction* immediately. Defense motion for mistrial was denied. MJ gave second curative instruction during findings. Held no error to deny motion for mistrial.

b. *United States v. Taylor*, 53 M.J. 195 (C.A.A.F. 2000). Military Judge did not abuse his discretion in denying a defense request for mistrial where trial counsel made several impermissible references to accused's gang affiliation in his opening statement. Curative

instruction to members was sufficient, in spite of the fact that during the trial several members asked questions about the accused's gang affiliation.

c. *United States v. Mobley*, 34 M.J. 527 (1991) (A.F.C.M.R. 1991), aff'd, 36 M.J. 34 (C.M.A. 1992). Instructions advising members of accused's right to remain silent; that they could not draw any adverse inference from accused's failure to testify; and, that trial counsel's exposition of the facts was argument and not evidence ameliorated any prejudice caused by trial counsel's comments during closing argument that called attention to the accused's failure to testify.

d. *United States v. Skerrett*, 40 M.J. 331 (C.M.A. 1994)(no mistrial warranted where MJ admonished panel twice to disregard testimony concerning dismissed specification and each member individually assured MJ that excluded testimony would not influence consideration of remaining specifications.

4. Government can usually re-refer charges. *See United States v. Mora*, 26 M.J. 122 (C.M.A. 1988) (upholding new referral after a mistrial in a military judge alone case).

B. Retrial barred if mistrial declared after jeopardy attaches and before findings under R.C.M. 915(c)(2) if:

1. Defense objects and judge abuses discretion. *Burtt v. Schick*, 23 M.J. 140 (C.M.A. 1986). Trial counsel requested mistrial when defense divulged accomplice's sentence. Granted over defense objection; abuse of discretion, double jeopardy barred retrial.

-- OR --

2. Intentional prosecution misconduct induces mistrial. *United States v. Diangelo*, 31 M.J. 135 (C.M.A. 1990). Trial counsel's cross examination of accused elicited juvenile arrest record. Fact of arrest record had not previously been disclosed to defense despite discovery request. Trial court granted mistrial. CMA holds that conduct of trial counsel did not amount to prosecutorial misconduct and therefore, under R.C.M. 915(c)(2)(B), retrial of the accused was not barred.

C. Defense Motion for Mistrial. Examples of grounds raised in motions for mistrial:

1. Court members' actions.

a. *United States v. Johnson*, 23 M.J. 327 (C.M.A. 1987). Two motions for mistrial based on a member inadvertently seeing autopsy photos and a Government witness riding with a member.

b. *United States v. West*, 27 M.J. 223. A motion for a mistrial based on an inattentive or sleeping court member.

c. *United States v. Knight*, 41 M.J. 867 (A. Ct. Crim. App. 1995) (extensive, frequent and member initiated communications with third party intended to gain improper and extrajudicial information relevant to key issues in case warranted mistrial).

d. *United States v. Hamilton*, 41 M.J. 22 (C.M.A. 1994) (mistrial not required by trial counsel's inadvertent, but improper, social conversation with president of court where no information regarding accused's case was discussed and president was removed for cause).

2. Military judge's actions.

a. Contempt. *United States v. Burnett*, 27 M.J. 99 (C.M.A. 1988)(mistrial should have been granted where military judge asked the members to find the defense counsel in contempt, and they did so; even the threat to hold a defense counsel in contempt poses a "substantial risk of prejudice to the appellant, where members are aware of the threat) *But see United States v. Warnock*, 34 M.J. 567 (A.C.M.R. 1991) (threat to hold defense counsel in contempt which

was made in front of the panel did not prejudice the accused where the judge was equally hard on both sides, the defense counsel had repeatedly ignored the judge, and the evidence of guilt was overwhelming; motion for mistrial was correctly denied).

b. *United States v. Donley*, 33 M.J. 44 (C.M.A. 1991). Military judge did not err when he failed, *sua sponte*, to declare a mistrial over a defense objection. During general court-martial for premeditated murder of accused's wife the president of court-martial over-heard sidebar conference during which military judge and counsel discussed inadmissible hearsay. Military judge offered to declare a mistrial but defense counsel objected.

c. Noncompliance with discovery rules. *United States v. Palumbo*, 27 M.J. 565 (1988) (A.C.M.R. 1988), *pet. denied*, 28 M.J. 265 (C.M.A. 1989). Mistrial not necessary as trial judge gave proper curative instructions after the trial counsel elicited statements made by the accused which were not disclosed to the defense before trial and also elicited testimony that the accused had invoked his rights.

VII. MOTIONS FOR FINDING OF NOT GUILTY. R.C.M. 917

A. Procedure.

1. *Sua sponte* or defense motion.

2. Defense must specifically state where evidence is insufficient.

3. Opposing counsel shall be given an opportunity to be heard.

4. After the evidence on either side is closed and before findings are announced.

B. Standard.

1. Deny motion if there is *any* evidence which, together with all reasonable inferences and presumptions, could reasonably tend to establish every element of the offense.

2. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses. *See, e.g., United States v. Felix*, 25 M.J. 509 (1987) (A.F.C.M.R. 1987). Allegations of deviation from standard operating procedure at a drug-testing lab. Trial judge did not abuse his discretion when he denied the defense motion for a finding of not guilty.

3. Grant motion if the government has introduced no evidence at all of an offense occurring during the charged dates of the offense. In *United States v. Parker*, 59 M.J. 195 (C.A.A.F. 2003), the Government charged the accused with raping a woman in 1995. At trial, the woman testified that the rape had actually occurred in 1993. The Government unsuccessfully moved to amend the charge, but persuaded the military judge give a variance instruction that would permit the members to substitute 1993 for 1995. The CAAF held the military judge erred in denying the defense's R.C.M. 917 motion for the 1995 rape offense; the Government had introduced no evidence of any sexual interaction between the accused and the victim in 1995.

C. Effect.

1. If motion is granted only as to part of a specification, a lesser included offense may remain.

2. If motion is denied, it may be reconsidered at any time before authentication of the Record of Trial. R.C.M. 917(f). *See also United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988). Trial judge stated he had no power to set aside findings of guilty by court members. (He had previously denied a motion for a finding of not guilty due to the lower standard for such motions.) HELD: "We are convinced that, if before authenticating the record of trial, a military judge becomes aware of an error which has prejudiced the rights of the accused—whether this error involves jury

misconduct, misleading instructions, or insufficient evidence—he may take remedial action." Id. at 47.

3. If motion is granted, it may not be reconsidered.

VIII. POST-TRIAL SESSIONS. R.C.M. 1102

A. Purpose. Corrective, clean-up the record, fix obvious errors, and inquire into new matters affecting findings or sentence.

B. Hearing. Article 39(a) session or proceeding in revision directed by the military judge or the convening authority.

C. Time. Military judge - any time before the record is authenticated. Convening Authority - before initial action or if directed by a reviewing authority. R.C.M. 1102(b)(2) & (d).

D. Grounds

1. Investigate alleged court member misconduct. *United States v. Stone*, 26 M.J. 401 (C.M.A. 1988). Post-trial allegations by appellant's father concerning laughter and festive atmosphere within the deliberation room and an improper comment by a court-member made during a recess. A post-trial hearing was not required in this case, but court indicates that it is an appropriate mechanism in such cases.

2. Change plea when alleged cocaine was actually caffeine. *United States v. Washington*, 23 M.J. 679 (1986) (A.C.M.R. 1986), review denied, 25 M.J. 197 (C.M.A. 1987). A post-trial session was appropriate.

3. Lost tapes of the announcement of findings and sentencing proceedings. *United States v. Crowell*, 21 M.J. 760 (1985) (N.M.C.M.R. 1985), *review denied*, 23 M.J. 281 (C.M.A. 1986). A post-trial session, before authentication of the record, was appropriate to recreate lost verbatim tapes.

4. Newly discovered evidence.

a. *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989). "Article permitting MJ to call court into session without presence of members at any time after referral of charges to court-martial empowers judge to convene post-trial session to consider newly discovered evidence and to take whatever remedial action is appropriate." Until he authenticates the record, the MJ can set aside the findings of guilt and sentence. If the convening authority disagrees with the MJ, the only remedy is to direct trial counsel to move for reconsideration or to initiate government appeal. *See United States v. Meghdadi*, 60 M.J. 438 (C.A.A.F. 2005) (military judge abused his discretion in denying appellant's motion for a post-trial 39(a) session to inquiry into newly discovered evidence and fraud on the court).

b. *United States v. Fisiorek*, 43 M.J. 244 (MJ applied incorrect legal standard in denying accused opportunity to reopen case to present newly discovered evidence).

IX. MOTIONS WAIVER CHECKLIST

MOTION	HOW WAIVED
Suppression of Confession or Admission.	1. Failure to raise before submission of plea [after proper disclosure by trial counsel under M.R.E. 304(d)(1)], except for good cause shown, as permitted by the military judge. M.R.E. 304(d)(2)(A)].

	2. Plea of guilty regardless of whether the motion was raised prior to plea, unless conditional plea. M.R.E. 304(d)(5). 3. When a specific motion or objection has been made, the burden on the prosecution extends only to the grounds upon which the defense moved to suppress the evidence. M.R.E. 304(e).
Suppression of evidence seized from the accused or believed owned by the accused.	1. Failure to raise before submission of plea [after proper disclosure by trial counsel under M.R.E. 311(d)(1)], except for good cause shown, as permitted by the military judge. M.R.E. 311(d)(2). 2. Plea of guilty, regardless of whether the motion was raised prior to plea. M.R.E. 311(i). 3. When a specific motion or objection has been made, the burden on the prosecution extends only to grounds upon which the defense moved to suppress. M.R.E. 311(e)(3).
Suppression of Eyewitness ID.	1. Failure to raise before submission of plea [after proper disclosure by trial counsel under M.R.E. 321(c)(1)], except for good cause shown, as permitted by the military judge. M.R.E. 321(c)(2)(A). 2. Plea of guilty, regardless of whether raised prior to plea. M.R.E. 321(g). 3. When a specific motion or objection has been made, the burden on the prosecution extends only to grounds upon which the defense moved to suppress. M.R.E. 321(d).
Defects (other than jurisdiction) in preferral, forwarding, investigation, or referral of charges.	Failure to raise before plea is entered. R.C.M. 905(b)(1).
Motions for discovery (R.C.M. 701), or for production of witnesses or evidence.	Failure to raise before plea is entered. R.C.M. 905(b)(4).
Defects in Charges or Specs (other than juris. or stating offense).	Failure to raise before plea is entered. R.C.M. 905(b)(2).
Motions for severance of charges or accused.	Failure to raise before plea is entered. R.C.M. 905(b)(5).
Objections to denial of IMC request or for retention of detailed counsel when IMC granted.	Failure to raise before plea is entered. R.C.M. 905(b)(6).
Lack of jurisdiction over accused.	Not Waivable. R.C.M. 907(b)(1)(A).
Command Influence	Generally Not Waivable. *But see United States v. Weasler*, 43 M.J. 15. (Defense initiated waiver of UCI in accusatory phase for favorable PTA is permissible), and *United States v. Drayton*, 45 M.J. 180 (1996)(Failure to raise accusatory UCI constitutes waiver)
Failure to State Offense	Not Waivable. R.C.M. 907(b)(1)(B).

Improperly Convened CM (Incorrect Member Subst.)	Not Waivable.
Speedy Trial	1. Waived if not raised before final adjournment. R.C.M. 907(b)(2)(A), and 905(e). 2. Plea of guilty, except as provided in R.C.M. 910(a)(2). R.C.M. 707(e); note: Article 10 issues not waived by GP.
Statute of Limitations	Waived if not raised before final adjournment, provided it appears that the accused is aware of his right to assert the statute, otherwise the judge must inform the accused of the right. R.C.M. 907(b)(2)(B).
Use of Victims Past Sexual Behavior or Predisposition.	Failure to file written motion 5 days before trial. M.R.E. 412(c)(1)(A).
Former Jeopardy	Waived if not raised before final adjournment of the court. R.C.M .907(b)(2)(C).
Pardon, grant of immunity, condonation of desertion or prior punishment under Articles 13 & 15.	Waived if not raised before final adjournment of the court. R.C.M. 907(b)(2)(D).

NOTE: R.C.M. 910(j) provides that [except for a conditional guilty plea under R.C.M. 910(a)(2)] a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offenses to which the plea was made.

R.C.M. 910(a)(2) provides that, with the approval of the military judge and the consent of the government, an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review the adverse determination of any specified pretrial motion.

X. SPECIAL VICTIM COUNSEL (SVC) PROGRAM IMPACT

A. Pursuant to *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013), a victim of sexual assault has a right to be heard through counsel on issues implicating M.R.E. 412 (rape shield), M.R.E. 513 (psychiatrist - patient privilege), and M.R.E. 514 (victim advocate – victim privilege). The right to be heard necessarily involves access to court documents and legal and factual presentation relevant to the issues.

B. Rule 2.3.1 of the Rules of Practice Before Army Courts-Martial. All parties will serve the SVC with copies of motions and responses, as well as any accompanying documents which touch on the interest of the victim.

C. Filing of motions by Special Victim Counsel. An SVC, who has been identified on an Electronic Docket Request or has filed a notice of appearance may be heard before the court to the extent allowed by applicable law and subject to rulings and direction of the military judge. An SVC may file such motions and other pleadings with the court as deemed necessary to protect the interests of the client. Copies of all SVC filings will be served on all counsel participating in the case. Filings by the SVC should comply with the format and deadlines established by the military judge for the parties to the extent practicable. When filing a motion on behalf of a minor client, the SVC shall identify the client by initials in any pleadings with the court.

D. Limitation of Appellate Standing. *Randolf v. HV*, 76 M.J. 27 (C.A.A.F. 2017)(finding that amendments to Articles limited victim standing for enforcement of Article 6b to the service courts; CAAF did not have jurisdiction to hear)

XI. GETTING BETTER BY READING:

A. Lieutenant Colonel Patricia A. Ham, Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections – the Why and How, Army Law., Mar. 2003, at 10.

B. James McElhaney, Dirty Dozen: Do You Want to Write a Really Bad Brief? Here Are 12 Ways to Do It, ABA J., June 2011, at 24.

C. James McElhaney, *Listen to What You Write*, ABA J., Jan. 2011, at 20.

D. James McElhaney, *Style Matters*, ABA J., June 2008, at 28.

E. James McElhaney, *Telling It to the Judge*, ABA J., Nov. 2006, at 22.

F. James McElhaney, *Story Line*, ABA J., Apr. 2006, at 26.

APPENDIX
MOTION SHELL

UNITED STATES OF AMERICA	)	
	)	(Prosecution)(Defense)
v.	)	Motion for Appropriate Relief:
	)	
(Last Name), (First Name) (MI)	)	Date
(Rank), U.S. Army,	)	
(BN), (BDE)	)	
10th Mountain Division (Light Infantry)	)	
Fort Drum, New York 13603	)	
	)	

RELIEF SOUGHT

The (Prosecution)(Defense) requests that the Court (**do what**) because (**briefly state the reason**).

The (Prosecution)(Defense) (does)(does not) request oral argument.

BURDEN OF PROOF AND STANDARD OF PROOF

The Defense has the burden of proof on any factual issue. R.C.M. 905(c)(2). The standard of proof on any factual issue is preponderance of the evidence. R.C.M. 905(c)(1).

(A short statement should work for most motions. If the motion is from M.R.E. Section III, see the particular rule – generally, the government will have the burden and may have a higher standard. See also R.C.M. 905(c)(2)(B) for other occasions where the government has the burden).

FACTS

(It may be wise to complete this section last. Include the facts required to support the argument, determinative facts, and include other facts only if they are required for the judge to make sense of the determinative facts or if they affect witness credibility, bias, etc. After you write the argument section, you should be able to use that part of the motion to present the facts into a chronological narrative. It often helps both parties to agree to undisputed facts – it helps focus the motion hearing and the issues. When there are undisputed facts, include this language in the motion: "The Prosecution and Defense, with the express consent of the accused, agree to stipulate to the following facts for the purposes of this motion.")

WITNESSES / EVIDENCE

(Include witnesses or evidence that will support every fact that you have raised. The Defense almost always has the burden, so you have to prove the facts – the government may have to produce the witnesses, but you have to prove the facts.)

LEGAL AUTHORITY AND ARGUMENT

(Use the "IRAC" formula. If you have multiple arguments, do an IRAC for each, and use a separate header for each. Go ahead and use "Law", "Fact Analysis" and "Conclusion" as your headers.)

1. Article 10 Violation.

a. The issue is whether XXX.

b. Law. The test under Article 10, UCMJ, is whether the government proceeded with reasonable diligence in bringing the case to trial. United States v. Bell, 38 M.J. 358 (C.M.A. 1993). Stated in the inverse, the government cannot negligently fail to bring charges. Id. The remedy for an Article 10 violation is dismissal of all charges with prejudice. Kossman, at 262. The standard of review on appeal is de novo. United States v. Cooper, 58 M.J. 54 (2003). Article 10 analysis should include the Barker v. Wingo factors (United States v. Birge, 52 M.J. 209 (1999)), but is not limited to those factors because Article 10 is more exacting than standard Sixth Amendment analysis (United States v. Mizgala, 61 M.J. 217 (2005)).

(Use simple statements of the law followed by a case cite. Generally, the law is not in dispute, and the judge knows the law. If the law is unclear or is in dispute, you may make a more detailed argument.)

c. Fact analysis. Barker v. Wingo Factors. Many of the factors named above which serve to demonstrate an Article 10 violation are present in the facts of this case.

(State the facts that support your proposition, and explain why the facts support your proposition. State the inferences that the judge needs to make. Tell him why these facts matter. After you have written your argument, you will know the determinative facts. Those are the facts you put in the statement of facts, above.)

1. Length of delays.
2. Reason for the delay.

d. Conclusion. ***(State your position on the issue)***.

2. Unlawful Command Influence.

a. The issue is XXX.
b. Law.
c. Fact Analysis.
d. Conclusion.

CONCLUSION

(Restate the relief requested paragraph here.)

SIGNATURE BLOCK
CPT, JA
Defense Counsel

(Note: No certificate of service is required.)

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CHAPTER 17
PLEAS

I. Introduction
II. Conditional Guilty Plea. RCM 910(a)(2)
III. Pleading Procedure—Guilty Plea and Providence Inquiry
IV. Use of Guilty Plea in Mixed Plea Cases
V. Acceptance of Pleas and Entering Findings

I. INTRODUCTION

A. Impact of the 2016 Military Justice Act (2016 MJA)

1. The 2016 MJA made two significant changes to Article 45 governing plea practice. The first change enables the accused to plead guilty in capital cases, so long as death is not a mandatory punishment. The other change concerns the standard of appellate review of a guilty plea. This second change may influence practice significantly over time.

2. Under *United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008), the standard of review of a plea was whether the record as a whole showed a "substantial basis in law *or* fact for questioning the guilty plea."

3. Under the 2016 MJA, the standard of review is now harmless error: whether the variance "materially prejudice[s] the substantial rights of the accused." The change brings the standard of review in line with Article 59.

4. Effect of the change. The Military Justice Review Group analysis of the amendment to Article 45 states that the language is adapted from Fed. R. Crim. P. 11(h), except that it substitutes the word "affects" the substantial rights of the accused with "prejudices" the substantial rights of the accused. Military Justice Review Group Legislative Report, at 401. The standard is perhaps even more deferential than the Federal system. The new standard may result in a relaxation of case law, particularly where the plea was voluntary, knowing, and intelligent. The prudent trial practitioners should still apply case law developed under the legacy standard of review in order to prevent appellate issues; however, appellate practitioners should recognize that the newer relaxed standard of review may result in different appellate outcomes for cases under the 2016 MJA.

B. Five Recognized Pleas. RCM 910(a)(1).

1. ***Not Guilty***: "Your honor, the accused, SGT Archie, pleads, to all Charges and Specifications, Not Guilty." ***** Not Guilty Only by Reason of Lack of Mental Responsibility*** is not recognized in RCM 910(a)(1). It is treated as irregular plea under RCM 910(b), which equates to a plea of not guilty. "The accused pleads as follows: To the Specification: Not Guilty only by reason of lack of mental responsibility."

2. **Guilty:** "Your honor, the accused, SGT Archie, pleads as follows: To the Specification and to The Charge: Guilty."

3. **Guilty by Exceptions:** (example of AWOL terminated by apprehension) "Your honor, the accused, SGT Archie, pleads as follows: To the Specification: Guilty, except the words, 'he was apprehended.' To the excepted words: Not Guilty. To the Charge: Guilty."

4. **Guilty by Exceptions and Substitutions:** (pleading to wrongful appropriation rather than larceny, using Exceptions and Substitutions) "Your honor, the accused, SGT Archie, pleads as

follows: To the Specification: Guilty, except the word 'steal,' substituting therefor the words 'wrongfully appropriate.' To the excepted word: Not Guilty; to the substituted words: Guilty. To the Charge: Guilty."

5. **Guilty to a Named Lesser Included Offense:** (pleading to wrongful appropriation as a lesser included offense of larceny) "Your honor the accused, SGT Snuffy, pleads as follows: To the Specification: Not Guilty, but Guilty to the lesser included offense of wrongful appropriation." Remember, that in order to plead to a LIO, the specification to which the accused is pleading guilty must actually be an LIO- just because the Manual says it is an LIO does not make it so- you must conduct an elements test.

C. How to Enter Pleas.

Step 1: Plead to the Specification;

Step 2: Plead to the excepted words or figures (if applicable);

Step 3: Plead to the substituted words or figures (if applicable); AND

Step 4: Plead to the Charge.

D. Effect of Pleas.

1. *Governm*ent's burden of proof. Plea of not guilty places burden upon government to prove elements of the charges offense(s). A guilty plea relieves government of burden to prove elements of offense(s).

a) *United States v. Honea*, 77 M.J. 181. Charges were set aside and dismissed where an accused pleaded not guilty to an offense, but submitted a specification of a lesser included offense which was drafted at the military judge's instance, and of which the accused was found guilty at trial. The court held it is the government's responsibility to identify the charges against the accused.

2. Waiver. By pleading **Guilty** (unconditionally) the accused waives certain things:

a) Factual issues of guilt.

(1) Objections: under RCM 910(j), a plea of guilty that results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt.

b) Defects not raised at trial that are neither jurisdictional nor tantamount to a denial of due process. *See United States v. Mooney*, 77 M.J. 252 (an unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings).

c) Motion to suppress confession. MRE 304(d)(5); *see United States v. Hinojosa*, 33 M.J. 353 (C.M.A. 1991) (guilty plea waived right to contest motion denying suppression of confession).

d) Speedy Trial. *See United States v. Tippit*, 65 M.J. 69 (C.A.A.F. 2007)

(1) Speedy trial rights provided under the 6th Amendment and RCM 707 are waived. RCM 707(e)

(2) Article 10 challenges not waived at trial are waived.

(3) Properly litigated Article 10 challenges are not waived.

(4) Trial counsel disqualification. *See United States v. Bradley*, 68 M.J. 279 (C.A.A.F. 2010)

e) Unreasonable multiplication of charges. See 77 M.J. 438 (CAAF 2018) (finding that an unconditional entry of a guilty plea waived the issue of unreasonable multiplication of charges).

3. No Waiver. The following issues are not waived by an unconditional guilty plea:

a) Unlawful command influence. *United States v. Johnston*, 39 M.J. 242 (C.M.A. 1994).

b) Jurisdiction. *United States v. Coffey*, 38 M.J. 290 (C.M.A. 1993)

c) Ineffective assistance of counsel.

d) Properly litigated Article 10 motion. *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005). Id. "A fundamental, substantial, personal right… should not be diminished by applying ordinary rules of waiver and forfeiture associated with guilty pleas."

e) Multiplicious charging. An unconditional guilty plea, ordinarily, waives multiplicity issues, unless those issues constitute plain error. *United States v. Rhine*, 67 M.J. 646 (A.F.Ct.Crim.App. 2009) (citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998).

f) Statute of limitations. Accused can, though, on the record, voluntarily and expressly waive the statute of limitations as a bar to trial. *United States v. Province*, 42 M.J. 821 (N-M Ct. Crim. App. 1995).

g) Selective prosecution not waived in situations in which facts necessary to make the claim were not fully developed at the time of plea. *United States v. Henry*, 42 M.J. 231 (C.A.A.F. 1995).

II. CONDITIONAL GUILTY PLEA. RCM 910(A)(2)

A. **RCM 910(a)(2)**. With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for Government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the Government.

B. Coordination with OTJAG.

1. In the Army, SJAs *should* consult with the Criminal Law Division, OTJAG, prior to the government's consent to an accused entering a conditional plea of guilty.

a) AR 27-10, para. 5-26b (11 May 2016) ("Because conditional guilty pleas subject the government to substantial risks of appellate reversal and the expense of retrial, SJAs should consult with the Chief, Criminal Law Division, ATTN: DAJA–CL, Office of The Judge Advocate General, HQDA, prior to the government's consent regarding an accused entering a conditional guilty plea at court-martial.")

b) Once this coordination is complete, the Trial Counsel may consent, on behalf of the government, to the entering of the conditional guilty plea by the accused in accordance with RCM 910(a)(2).). *See generally* RCM 910(a)(2) ("The Secretary concerned may prescribe who may consent for the Government…").

C. Issue Should be Case Dispositive.

1. The motion or issue in question should be case dispositive. (RCM 910 analysis (MCM 2016 ed.). But note, only the Air Force requires that the issue be case dispositive. (See AFI 51-201, para 8.3).

2. Practice Tip: where a conditional guilty plea is NOT case dispositive as to either the issue preserved for appeal or to all of the charges in a case, the military judge should address as part of the providence inquiry the understanding that the accused and the parties have as to the result of the issue prevailing on appeal.

3. Additionally, even if the conditional plea issue is not case dispositive, it might be best to narrowly tailor the conditional plea.

a) *United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003). Accused convicted of involuntary manslaughter and various other offenses arising from his injection of a fellow soldier with a fatal dose of heroin. Accused entered into a pretrial agreement that permitted him to enter a conditional plea pursuant to RCM 910(a)(2) that preserved his "right to appeal all adverse determinations resulting from pretrial motions." At trial, accused moved to dismiss all charges due to improper use of immunized testimony and evidence derived from that immunized testimony in violation of *Kastigar v. United States*, 406 U.S. 441 (1972). Although the CAAF dismissed most of the charges and specifications due to the *Kastigar* violation, accused was permitted to withdraw his plea to those remaining offenses which were not directly tainted by that violation, as the violation caused or played a substantial role in the GCM referral of those offenses. In so doing, CAAF noted that although military practice, unlike its federal civilian counterpart, does not limit conditional pleas to issues that are dispositive, there should be "cautious use of the conditional plea when the decision on appeal will not dispose of the case." *See also United States v. Proctor*, 58 M.J. 792 (A.F. Ct. Crim. App. 2003)

D. Military Judge and Government Counsel Must Consent. RCM 910 analysis at A21-60 (MCM 2016 ed.) ("There is no right to enter a conditional guilty plea. The military judge and the government each have complete discretion whether to permit or consent to a conditional guilty plea."

E. Issue Must be Raised at Trial. *United States v. Forbes*, 19 M.J. 953 (1985) (A.F.C.M.R. 1985) (accused's failure to make motion to suppress drug test waived issue despite conditional plea).

III. PLEADING PROCEDURE- GUILTY PLEA AND PROVIDENCE INQUIRY

A. In general.

1. After the accused is arraigned under RCM 904, the military judge will call on accused and counsel to enter a plea. If the accused pleads guilty to any offense, the military judge will follow this procedure to ensure the plea is voluntary and accurate. An accused must admit his own guilt in court. See RCM 910(d)-(e). Alford pleas or nolo contendere pleas are not allowed.

2. The origin and purpose of the providence (Care) inquiry. "The record must reflect not only that the elements of each offense charge have been explained to the accused, but also that the military trial judge or the president has questioned the accused about what he did or did not do, and what he intended (where this is pertinent) to make clear the basis for a determination by the military trial judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969).

B. Elements of the Providence Inquiry- RCM 910(c)-(e)

1. Military judge must explain the offenses to the accused and ensure the accused understands:

a) Waiver of rights (with respect to the charges/specifications to which he has pled guilty).

b) The right against self-incrimination, trial of the facts by the court, and right of confrontation

c) Elements of the offense(s) to which accused has pled guilty

d) And agrees that the plea admits every element, act, or omission and relevant intent

e) That he may be convicted on the plea alone without any further proof

f) The maximum sentence available based on the plea alone

g) His opportunity to consult with counsel

h) That he is entering the plea knowingly and voluntarily.

2. Military judge must advise the accused of his rights on the record. RCM 910(c).

3. Military judge must advise the accused of the elements of the offense. RCM 910(c)(1) and discussion.

a) Where there is a challenge in defining a term of an element, there are three sources to find the meaning of terms not defined in statute: "(1) the plain meaning of the term; (2) the manner in which Article III courts have construed the term; and (3) the guidance gleaned from any parallel UCMJ provisions." *United States v. Craig*, 67 M.J. 742 (N-M Ct. Crim. App. 2009)(citing *United States v. Kuemmerle*, 67 MJ 141 (C.A.A.F. 2009).

b) When the military judge has to define a term of art (like attempt), appellate courts will ascertain whether the plea was knowing and voluntary by looking at the record of trial and deciding whether it is clear from the entire record that the accused knew the elements, admitted them freely, and pled guilty because he was guilty. *See United States v. Redlinski*, 58 M.J. 117 (C.A.A.F. 2003).

C. Factual Predicate for Plea

1. The accused shall be questioned under oath about the offense(s) as part of the guilty plea inquiry. RCMs 910(c)(5), 910(e). The military judge must ascertain why the accused believes he is guilty and advise the accused of the elements of the offense.

a) Leading questions by the military judge are generally disfavored. *United States v. Nance*, 67 M.J. 362 (C.A.A.F. 2009)

b) If the military judge conducts too little of an inquiry, the case may be set aside. *United States v. Bailey*, 20 M.J. 703 (1985) (A.C.M.R. 1985) and *United States v. Frederick*, 23 M.J. 561 (1985) (A.C.M.R. 1986) (military judge's inquiry requiring simple yes or no answers when asked whether he did that which the specification alleged was inadequate).

c) The colloquy is between the Military Judge and the accused- not between the Military Judge and counsel. *See United States v. Hartman*, 69 M.J. 467 (C.A.A.F. 2011)(where military judge asked the trial counsel questions regarding the accused's conduct within the confines of the *Marcum* factors in a consensual sodomy case, the court held the plea improvident because the Military Judge failed to discuss those factors with the accused).

2. Factual Predicate for the Plea- appellate review under the "Substantial Basis" test has been superseded by 2016 MJA amendments to Article 45. Under the "substantial basis" test, appellate courts considered whether the record as a whole showed a substantial basis in law *or* fact for questioning the guilty plea. *United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008). Under that standard, the review standards follow:

a) Questions of Fact: "The standard for reviewing a military judge's decision to accept a plea of guilty is an abuse of discretion." A military judge abuses his discretion "if he accepts a guilty plea without an adequate factual basis to support the plea.

(1) **Example of "substantial basis" in fact: where the factual predicate of the guilty plea falls short.

b) Questions of Law: "The military judge's determinations of questions of law arising during the plea inquiry are reviewed de novo."

(1) **Example of "substantial basis" in law: an accused who knowingly admitted the facts necessary to prove he or she met all the elements of an offense, but was not advised of an available defense.

c) Military Judge Must Resolve Potential Defenses

(1) If any potential defense is raised by the accused or by any other matter presented, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense. RCM 910(e) discussion.

(2) If a potential defense is raised after findings are entered, then the military judge must reopen the inquiry. RCM 910(h)(2).

(3) ***Lack of personal recollection not a bar to pleading guilty***. *United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977). Accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea. Nevertheless the accused must be convinced of, and able to describe all the facts necessary to establish guilt. *See also* RCM 910(e) discussion; *United States v. Wiles*, 30 M.J. 1097 (1989) (N.M.C.M.R. 1989).

D. Inquiry into the Pretrial Agreement (PTA).

1. The military judge must fully explore the terms of the PTA with the accused to ensure he understands them. This includes both the offer portion and the sentence limitation.

a) *United States v. Soto*, 69 M.J. 304 (C.A.A.F. 2011) (where a term in the quantum whereby the accused agreed to ask for a BCD was not discussed with the accused on the record, there was a substantial basis in law to question the plea. The plea was deemed improvident.)

b) *United States v. Green*, 1 M.J. 453 (C.M.A. 1976) (military judge must establish "on the record that an accused understands the meaning and effect of each condition as well as the sentence limitations imposed by any existing pretrial agreement").

c) *United States v. Felder*, 59 M.J. 444 (C.A.A.F. 2004). Military judge did not inquire into a term of the PTA regarding defense's waiver of any motions for sentence credit based on Article 13 and/or restriction tantamount to confinement. Defense counsel did inform the MJ that no punishment under Article 13 or restriction tantamount to confinement had occurred. While the MJ's failure to discuss the term was error, the accused failed to show the error materially prejudiced a substantial right.

2. ***Military judge cannot expand PTA terms***. *United States v. Brehm*, ARMY 20070688, [*not available on Westlaw*] (A. Ct. Crim. App. May 13, 2009) (unpublished). Accused pled guilty to indecent liberties with a child for an offense committed in 1999; charges were not forwarded until October 2006. At that time, the CAAF had not released its opinion in *United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008), which held that the 2003 amendment to Article 43, UCMJ (excepting child abuse offenses from the five-year statute of limitations) did not apply retroactively. At the guilty plea, the military judge asked the accused if he intended to waive a

possible statute of limitations challenge from "any hypothetical ruling" by the CAAF. The ACCA ruled that the military judge exceeded his authority by adding an additional term to the pretrial agreement (specifically, waiver of a potential statute of limitation defense). The court noted it would have "less concern" if the pretrial agreement expressly discussed a "bargained-for waiver of a hypothetical future defense."

E. Inquiry into the Stipulation of Fact

1. The military judge must conduct an inquiry into the stip of fact (if there is one) to ensure that the accused understands the stip of fact and has agreed to its contents knowingly and voluntarily.

2. Stipulations of fact and polygraphs. *United States v. Clark*, 53 M.J. 280 (C.A.A.F. 2000). Accused submitted a false claim, then took a polygraph (which he failed). He was charged and elected to plead guilty. Accused and convening authority agreed to PTA which included a promise to enter into "reasonable stipulations concerning the facts and circumstances" of his case. MJ at trial noticed the polygraph in the stipulation, noted that accused had agreed to take a polygraph test and that the "test results revealed deception." There was no objection to the stipulation and he admitted the stipulation into evidence. Applying MRE 707 and *United States v. Glazier*, 26 M.J. 268, 270 (C.M.A. 1988), CAAF held it was plain error for military judge to admit the evidence of the polygraph, even via a stipulation.

IV. USE OF GUILTY PLEA IN MIXED PLEA CASES

A. **Panel Not Notified of Guilty Plea**. Generally, the panel will not be informed when the accused enters mixed pleas. RCM 913(a) (if mixed pleas have been entered, the military judge should ordinarily defer informing the members of the offenses to which the accused pled guilty until after the findings on the remaining contested offenses have been entered). Thus, where an accused pleads guilty to offense A, but not guilty to offense B, military judge should defer informing court members of the plea to offense A until after findings are announced on contested offense B. *United States v. Smit*h, 23 M.J. 118, 120 (C.M.A. 1986). *See also United States v. Hamilton*, 36 M.J. 723 (1992) (A.C.M.R. 1993) (reversible error to advise members that accused had pled guilty to other offenses).

B. Entering Findings. Typically, the military judge will enter findings immediately after acceptance of a plea. RCM 910(g). However, where the accused pleads guilty to a lesser included offense and the prosecution intends to go forward on the contested charge: (1) the military judge should not enter findings after the accused pleads pursuant to RCM 910(g)(2); and (2) prior to commencement of trial on the merits, military judge will instruct the members that they should "accept as proved the matters admitted by the plea, but must determine whether the remaining elements are established" pursuant to RCM 920(e) discussion.

C. Exceptions

1. If the accused requests members be informed of guilty pleas; or

2. If guilty plea is to a lesser included offense and the trial counsel intends to prove the greater offense. RCM 913(a) discussion. *United States v. Irons*, 34 M.J. 807 (1992) (N.M.C.M.R. 1992) (military judge committed error in not cleaning up flyer, which reflected greater offense to which the accused pled not guilty and which the government did not intend to pursue, was not waived by accused's failure to object; sentence set aside).

3. In cases of multiple offenses, however, the military judge should instruct the panel that it may not use the plea of guilty to one offense to establish the elements of a separate offense. RCM 920(e) discussion. *Cf. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993).

D. Use of providence inquiry admissions in mixed pleas.

1. Use of providence inquiry during merits phase in mixed plea.

   a) *United States v. Grijalva*, 55 M.J. 223 (C.A.A.F. 2001). Accused shot his wife. At trial, MJ rejected the accused's plea of guilty to attempted premeditated murder, but accepted his plea to the lesser-included offense of aggravated assault by intentional infliction of grievous bodily harm. On the merits (of the greater offense) the MJ used not only the accused's plea to the lesser offense, but also his admissions during the GP inquiry. The MJ then convicted the accused of attempted premeditated murder. Following settled case law, CAAF held the MJ properly used the accused's plea to the lesser-included offense, but erred by considering statements made by the accused during the plea inquiry.

   b) *United States v. Ramelb*, 44 M.J. 625 (A. Ct. Crim. App. 1996). Providence inquiry can be used only to establish common elements between LIO and greater offenses. After accused pled guilty to LIO of wrongful appropriation, TC proved greater offense of larceny through testimony about what accused said in providence inquiry concerning intent. TC must obtain independent evidence to prove greater offense.

2. Use of providence inquiry admissions on sentencing.

   a) ***Rule***. *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988). Sworn testimony given by accused during providence inquiry may be received as admission at sentencing hearing and can be provided either by properly authenticated transcript or by testimony of court reporter or other persons who heard what accused said during providence inquiry.

   b) *United States v. Dukes*, 30 M.J. 793 (1990) (N.M.C.M.R. 1990). Court indicated that Holt permits the trial counsel to offer an accused's responses during the providence inquiry into evidence, "but that such responses are not automatically in evidence . . . an accused must be given notice of what matters are being considered against him . . . opportunity to object . . . on grounds of improper aggravation, undue prejudice, or whatever." *See also United States v. Irwin*, 42 M.J. 479 (C.A.A.F. 1995) (accused's description of his misconduct–AWOL, rape, sodomy,

   c) Indecent acts, kidnapping, threats, and unlawful entry–was so detailed and graphic that trial counsel played tape to members; tape was proper aggravation under RCM 1001(b)(4) and not cumulative because there was no stipulation of fact).

   d) *United States v. Figura*, 44 M.J. 308 (C.A.A.F. 1996). CID agent charged with forgery. Trial counsel sought to use providence inquiry to establish the dates of checks, where written, and where the checks were cashed because information did not appear in stipulation of fact. Parties agreed to have MJ summarize for court members the information stated during providence inquiry, rather than have a written stipulation or spectator testimony. Court held there is no demonstrative right or wrong way to introduce evidence taken during providence inquiry, and that MJ giving summary to members was probably to accused's advantage.

3. Exclusion of witnesses from providence inquiry.

   a) *United States v. Langston*, 53 M.J. 335 (C.A.A.F. 2000). Defense requested exclusion of witnesses from courtroom during providence inquiry. Military judge refused the request, ruling incorrectly that MRE 615 did not apply to providence inquiry. CAAF held the accused was not prejudiced, however, as the bulk of the witnesses' testimony went to victim impact.

   b) *See* MRE 615 on excluding "victims" from trial proceedings.

V. ACCEPTANCE OF PLEAS AND ENTERING FINDINGS

A. Findings Entered Upon Acceptance of Plea. Ordinarily, a military judge will enter findings upon acceptance of the accused's guilty plea, but not if the trial counsel intends to "prove up" a greater offense. *See United States v. Baker*, 28 M.J. 900 (1989) (A.C.M.R. 1989) (military judge who knew that trial counsel intended to prove rape improperly entered findings pursuant to pleas of guilty to lesser included offense of carnal knowledge).

B. Refusal of Military Judge to Accept Pleas

1. Improvident Pleas.

a) For a plea to be inconsistent with factual and legal guilt, there must be more than the possibility of a defense; however, if the accused raises an inconsistency the MJ must resolve it. *United States v. Johnson*, 25 M.J. 553 (C.M.A. 1987). If accused's comments or any other evidence reasonably raises a defense, military judge must explain elements of defense to accused. It is not relevant that comments are not credible; the sole question is whether accused made a statement during the trial that was in conflict with his plea.

b) Confusion about maximum sentence may render plea improvident. *United States v. Castrillion-Moreno*, 7 M.J. 414 (C.M.A. 1979). *But see United States v. Hunt*, 10 M.J. 222 (C.M.A. 1981) (all factors are examined to determine if misapprehension of maximum punishment affected guilty plea, or whether the factor was insubstantial in accused's decision). *See also United States v. Poole*, 26 M.J. 272 (C.M.A. 1988); *United States v. Kyle*, 32 M.J. 724 (1991) (A.F.C.M.R. 1991); *United States v. Hemingway*, 36 M.J. 349 (C.M.A. 1993).

c) Plea may be improvident where the stipulation of fact sets up a matter inconsistent with the plea. *United States v. Simpson*, 77 M.J. 279 (CAAF 2017) (military judge must resolve inconsistency or reject the plea where stipulation of fact set up a matter inconsistent with the plea).

2. Irregular Pleas. RCM 910(b)

a) **Plea that does not admit guilt**. *Alford* and nolo contendre pleas are not recognized under the UCMJ. If the accused attempts to enter such a plea (which purports to be a guilty plea without admitting guilt) military judge is required to enter a plea of not guilty on the accused's behalf.

b) Guilty plea in capital case. *United States v. Fricke*, 53 M.J. 149 (C.A.A.F. 2000). Military judge did not err in accepting accused's plea to premeditated murder where there was no written record of CA withdrawing capital referral and re-referring as non-capital case. Military judge noted noncapital referral on record with no objection of parties.

C. Effect of Refusal to Accept Guilty Plea.

1. Plea(s) of not guilty entered on behalf of accused.

a) No automatic recusal of military judge; however in a trial by military judge alone, refusal of the request for trial by military judge alone will normally be necessary when a plea is rejected or withdrawn after findings. RCM 910(h)(2) discussion. *United States v. Rhule*, 53 M.J. 647 (A. Ct. Crim. App. 2000) (finding the Army preference is for the MJ to recuse himself)

2. Use of testimony gained from "busted" (unsuccessful) providence inquiry.

a) RCM 910(e) allows for accused to be prosecuted for making false statements during a providence inquiry.

b) MRE 410(a) addresses the "Inadmissibility of Pleas, Plea Discussions, and Related Statements" made during the course of "any judicial inquiry" regarding a plea of guilty which is later withdrawn. MRE 410(a) goes on to state, however, that such statement(s) are admissible "in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it." *See United States v. Doran*, 564 F.2d 1176 (5th Cir. 1977), cert. denied, 435 U.S. 928 (1978). *See also United States v. Mezzanato*, 513 U.S. 196 (1995) (statements made during plea negotiations admissible where accused decided to plead not guilty and understood the nature of agreement).

D. Accused's Withdrawal of Guilty Plea. RCM 910(h)(1).

1. Prior to acceptance by military judge—A matter of right.
2. Prior to announcement of sentence—for good cause only.

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CHAPTER 18
VOIR DIRE & CHALLENGES

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I. INTRODUCTION

A. 2016 Military Justice Act (2016 MJA).

1. There were no major changes to Article 41 concerning challenges. There were procedural changes in R.C.M. 912 to enable the identification and excusal of excess members at impanelment. Namely, panel members will be assigned random numbers after challenges for cause are complete, and before peremptory challenges. The purpose of the random numbers is to enable impanelment of the correct number of members, and to identify any authorized alternates.

2. "Alternates," substitutes," and standing panels. Practitioners who have prior experience with standing panels under the legacy system will recognize that the term "alternate" has a new meaning. Under legacy Army practice, an "alternate" was an individual who had been selected and prepositioned by the convening authority to serve upon the excusal of a member *before assembly*. Under the 2016 MJA, an alternate is a non-deliberating member who the convening authority may authorize to be impaneled with the members, who will serve as a deliberating member only on the excusal of a member after impanelment. The purpose of alternates under the 2016 MJA is to enable a court-martial to continue without loss of the numbers required for the type of court-martial concerned. Because the role of an "alternate" is fixed under the 2016 MJA, practitioners who wish to set up a standing panel should use the term "substitute" to describe individuals whom the convening authority selects to serve upon the excusal of a member *before assembly*.

3. Notification of alternate status. As of the date of this deskbook, no guidance had been issued concerning when the alternate members will be notified that they will not be deliberating. In the absence of guidance, practitioners should raise the issue and resolve it with the military judge ahead of trial. A factor that should be considered is whether early notification of alternate status could give rise to a later challenge based on member behavior during the trial (e.g., not paying attention).

4. Peremptory challenges against alternates. A challenge against a member is not preserved if counsel uses a peremptory challenge against that member. R.C.M. 912(f)(4). This general rule will likely apply the same to challenges of alternate members, with the caveat that an alternate who did not deliberate will likely not raise the same concerns as one who did. *See infra* Section

IX. Under the 2016 MJA, practitioners should recognize that the relevant member pool for peremptory challenge includes any authorized alternates. Practitioners should carefully consider how to use the peremptory challenge, noting that alternate members only deliberate on the excusal of a member.

B. In General. The Sixth Amendment right to a jury trial does not apply to military Servicemembers. However, a military accused enjoys the right to trial before court members, as provided by Congress in Article 25, UCMJ. *See United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) ("Again, we note that a military accused has no right to a trial by jury under the Sixth Amendment. He does, however, have a right to due process of law under the Fifth Amendment, and Congress has provided for trial by members at a court-martial.") (citations omitted). To ensure the impartiality of panel members, they are subject to voir dire by the military judge and counsel. Article 41, UCMJ, and R.C.M. 912 control the process. Both sides have an unlimited number of challenges for cause against panel members. See Article 41(a)(1), UCMJ. Both sides are also allowed one peremptory challenge of the members. See Article 41(b)(1).

C. The Sixth Amendment right to a trial by an impartial jury of the "state" does not apply to the military because panel members are selected not from the "state" but from those in the military service per Article 25, UCMJ. *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950). The Sixth Amendment right to an "impartial" jury, however, applies to military practice, through the Due Process Clause.

D. "Part of the process due is the right to challenge for cause and challenge peremptorily the members detailed by the convening authority." Witham, 47 M.J. at 301

E. "The reliability of a verdict depends upon the impartiality of the court members. Voir dire is fundamental to a fair trial." *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996).

II. BACKGROUND

A. The Rules for Courts-Martial describe the sole purpose of voir dire to be a conduit for an intelligent use of challenges. R.C.M. 912(d) discussion.

1. "The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel." *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008).

2. Under Article 25, UCMJ, the convening authority personally selects panel members with two significant limitations:

a. The convening authority cannot select members in any manner that systematically excludes a group of otherwise qualified candidates (for example, potential members cannot be excluded on the basis of rank, religion, race, or gender).

b. The convening authority cannot "stack" a panel to obtain a certain result (for example, cannot pick members who will dole out harsh sentences).

3. "The reliability of a verdict depends upon the impartiality of the court members. Voir dire is fundamental to a fair trial." *Jefferson*, 44 M.J. 312.

B. Impartial Members. Court members must be impartial. To ensure this impartiality, both sides have an unlimited number of challenges for cause against panel members. See Article 41(a), UCMJ.

C. Military Judge Controls Voir Dire. Under R.C.M. 912(d), "The military judge may permit the parties to conduct the examination of members or may personally conduct the examination." The Discussion to R.C.M. 912(d) suggests a preference for allowing counsel to question members (noting that "[o]rdinarily, the military judge should permit counsel to personally question the members") but

does not give counsel a right to personally question members. Under this rule and attendant case law, the military judge remains in virtually complete control of voir dire.

D. Order Of March: While the 2016 Military Justice Act made no changes to the voir dire process, the Rules governing the impanelment process resulted in significant procedural changes. The Army process generally follows this order:

1. Selection of members.

2. Drafting of a court-martial convening order (CMCO).

3. Selected members complete questionnaires.

4. Case is referred to a certain CMCO.

5. After case is docketed, members are excused who are unavailable for the trial date and alternate members are added.

6. Counsel review questionnaires for the members who will sit.

7. On the day of trial, members come to court and are sworn as a group; the military judge then asks the entire group questions (Military Judges' Benchbook recommends preliminary questions for group voir dire).

8. Both counsel (normally with trial counsel going first and defense second) ask the group questions.

9. Parties may request permission from the military judge to question member(s) individually as necessary.

10. After all questioning, trial counsel asserts challenges for cause.

11. Defense then asserts challenges for cause.

12. The remaining members are issued a random number

13. Trial counsel can use a peremptory challenge and then defense counsel can use a peremptory challenge.

14. The remaining members required to be impaneled (based on the directions of the convening authority and the type of court-martial concerned) are seated

15. Finally, excess and challenged members are excused and the trial proceeds.

III. CHALLENGING THE ENTIRE PANEL

A. In General. There may be cases in which the defense has some reason to believe that the military panel, or the "venire," has been improperly selected. In such cases, defense may wish to challenge entire panel. R.C.M. 912(b) sets out the procedure for mounting such a challenge.

1. Before voir dire begins, a party may move to stay the proceedings on the ground that members were selected improperly.

2. Once defense makes an offer of proof that, if true, would constitute improper selection of members, the moving party shall be entitled to present evidence. If the military judge determines the convening authority improperly selected the members, the military judge shall stay proceedings until members are properly selected.

3. Forfeiture. Failure to make a timely motion under this section forfeits the issue of improper selection except where:

a. The issue relates to the minimum required number of members under R.C.M. 501(a);

b. The member does not have the requisite qualifications (for example, does not satisfy Article 25 criteria; or where the member is not active duty, not a commissioned or warrant officer, or is an enlisted member where the accused has not requested enlisted members); or

c. The accused has requested a panel comprised of one-third (⅓) enlisted members, and they are not present or there is an inadequate explanation for their absence.

4. Defense counsel challenging panel selection frequently allege that the panel was "packed" or "stacked" to achieve a desired result; panel stacking is prohibited. *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999); *United States v. White*, 48 M.J. 251, 254 (C.A.A.F. 1998).

B. Matters Considered By Convening Authority. Under R.C.M. 912(a)(2), a copy of written materials considered by the convening authority in selecting the detailed members shall be provided to any party upon request. This information includes the SJA's advice to the convening authority for panel selection, the nominations from subordinate commanders, and other documents presented to the convening authority. While the rule states that "such materials pertaining solely to persons who were not selected for detail as members" need not be provided, the military judge has the authority to direct such information be disclosed for good cause.

C. Theories for Attacking Panel Selection – In General. In selecting panel members, the convening authority cannot systematically exclude otherwise qualified personnel from serving. *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004); *Roland*, 50 M.J. at 68-69.

1. Attacking Selection – Exclusion Of Nominees By Rank

a. General rule. Convening authority cannot systematically exclude personnel from panel selection based on rank. *Dowty*, 60 M.J. at 171 ("[S]ystemic exclusion of otherwise qualified potential members based on an impermissible variable such as rank is improper."); *United States v. Bertie*, 50 M.J. 489, 492 (C.A.A.F. 1999) ("[W]e have also held that deliberate and systematic exclusion of lower grades and ranks from court-martial panels is not permissible."); *United States v. Morrison*, 66 M.J. 508, 510 (N-M Ct. Crim. App. 2008). However, Servicemembers in the grades of E-1 and E-2 are presumptively unqualified under Article 25 and may be excluded from selection. *United States v. Yager*, 7 M.J. 171 (C.M.A. 1979) (exclusion of persons in grades below E-3 permissible where there was a demonstrable relationship between exclusion and selection criteria embodied in Article 25(d)(2)).

b. Rationale. *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998). Convening authority violated Article 25 by sending memorandum to subordinate commands directing them to nominate "officers in all grades and NCOs in the grade of master sergeant or above" and then by failing to select members below the rank of master sergeant (E-7). Convening authority testified that he did not intend to violate Article 25, but he never selected a member below the grade of E-7; AFCCA held that systematic exclusion of junior enlisted members is inappropriate, as most junior enlisted have sufficient education and experience as to be eligible to serve (specifically, many E-4s have served at least 5 years on active duty and 88 percent have some form of post-secondary education, and the majority of E-5s have served 10 or more years on active duty and 18 percent have an associate's or higher degree).

c. Examples. *United States v. Daigle*, 1 M.J. 139, 141 (C.M.A. 1975) (improper for convening authority to systematically exclude lieutenants and warrant officers); *United States v. Smith*, 37 M.J. 773 (1993) (A.C.M.R. 1993) (improper for convening authority to return initial panel selection documents and direct subordinate commanders to provide Soldiers in the grades of E-7 and E-8). *Cf. United States v. Nixo*n, 33 M.J. 433 (C.M.A. 1991) (noting a panel consisting of only members in the grades of E-8s and E-9s creates an appearance of evil

and is probably contrary to Congressional intent, but affirming because the convening authority testified he complied with Article 25 and did not use rank as a criterion).

d. Paperwork cannot inadvertently exclude qualified personnel. *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000). The SJA solicited nominees from subordinate commanders via a memo signed by the SPCMCA. The memo sought nominees in various grades. The chart had a column for E-9, E-8, and E-7, but no place to list a nominee in a lower grade. To nominate E-6 or below, nominating officer would have had to modify form. No one below E-7 was nominated or selected for the panel. CAAF held that where there was an "unresolved appearance" of exclusion based on rank, "reversal of the sentence is appropriate to uphold the essential fairness . . . of the military justice system."

e. May replace nominees with others of similar rank. *United States v. Ruiz*, 46 M.J. 503 (A.F. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 340 (C.A.A.F. 1998) (convening authority did not improperly select members based on rank when, after rejecting certain senior nominees from consideration for valid reasons, he requested replacement nominees of similar ranks to keep the overall balance of nominee ranks relatively the same).

2. Attacking Selection – Exclusion Of Nominees Based On Unit Of Assignment. *United States v. Brocks*, 55 M.J. 614 (A.F. Ct. Crim. App. 2001), aff'd, 58 M.J. 11 (C.A.A.F. 2002). Base legal office intentionally excluded all officers from the medical group from the nominee list, because all four alleged conspirators and many of the witnesses were assigned to that unit. Citing *United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998), the court said, "[a]n element of unlawful court stacking is improper motive. Thus, where the convening authority's motive is benign, systematic inclusion or exclusion may not be improper." Held: Exclusion of medical group officers did not constitute unlawful command influence.

3. Difficult To Mount Challenges: Hard To Find Evidence Of Impropriety.

a. Composition of panel is not enough to show impropriety. *United States v. Voorhees*, 50 M.J. 494 (C.A.A.F. 1999) (disproportionate number of high-ranking panel members did not create presumption of impropriety in selection).

b. Paperwork errors may not be enough to show impropriety. *Roland*, 50 M.J. 66 (SJA's memo soliciting nominees E-5 to O-6 was not error); *Upshaw*, 49 M.J. 111 (good faith administrative error resulting in exclusion of otherwise eligible members (E-6s) was not error).

c. Convening authority selecting commanders. *United States v. White*, 48 M.J. 251 (C.A.A.F. 1998). A CA who issues a memorandum directing subordinate commands to include commanders, deputies and first sergeants in the court member applicant pool, and then proceeds to select more commanders than non-commanders for court-martial duty does not engage in court-packing absent evidence of improper motive or systematic exclusion of a class or group of candidates. No systematic exclusion because the CA's memo instructed that "staff officers and NCOs" and "your best and brightest staff officers" should be nominated to serve as member. See Effron, J., and Sullivan, J., concurring in the result, but criticizing the majority's willingness to equate selection for command with selection for panel duty.

IV. INVESTIGATING COURT MEMBERS

A. Panel Questionnaires. Under R.C.M. 912(a)(1), trial counsel may (and shall upon request of defense counsel) submit to members written questionnaires before trial. "Using questionnaires before trial may expedite voir dire and may permit more informed exercise of challenges." R.C.M. 912(a)(1) discussion.

1. Required questions: Under R.C.M. 912(a)(1), the following information shall be requested upon application by defense counsel and may be requested by trial counsel in written questionnaires: date of birth; sex; race; marital status and sex, age, and number of dependents; home of record; civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received; current unit to which assigned; past duty assignments; awards and decorations received; date of rank; and whether the member has acted as accuser, counsel, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

2. Additional questions: Under R.C.M. 912(a), "Additional information may be requested with the approval of the military judge."

3. Format: Under R.C.M. 912(a), "Each member's responses to the questions shall be written and signed by the member."

B. Disclosure By Members At Trial.

1. Members under oath. Before voir dire, trial counsel administer to panel members an oath to "answer truthfully the questions concerning whether you should serve as a member of this court-martial." DA Pam 27-9, Military Judges' Benchbook, at 36. See also R.C.M. 807(b)(2) discussion (providing suggested oath for panel members); R.C.M. 912(d) discussion ("If the members have not already been placed under oath for the purpose of voir dire . . . , they should be sworn before they are questioned.") (citation omitted).

2. Instruction about impartiality. After panel members are sworn, the military judge instructs, "With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so." DA Pam 27-9, Military Judges' Benchbook, at 41.

3. Broad inquiry. The military judge asks 28 standard questions during group voir dire, including, "Having seen the accused and having read the charge(s) and specification(s), does anyone feel that you cannot give the accused a fair trial for any reason?" Id. at 42.

4. Members have duty to disclose.

a. *United States v. Albaaj*, 65 M.J. 167 (C.A.A.F. 2007). Accused's brother testified as a merits witness. He was also recalled briefly as a defense sentencing witness, offering evidence in extenuation and mitigation. One of the members, LTC M, had a previous working relationship with the brother, that defense described as "extremely antagonistic." During voir dire, military judge instructed the members to disclose any matter that might affect their partiality. During trial, the defense called the brother as a witness and LTC M did not indicate at any time that he knew him, even after he recognized him. Following a DuBay hearing, military judge found LTC M and the brother had professional contact while the brother was at Range Control and the member developed negative impressions of the brother that were memorialized in several e-mails. However, LTC M testified that, between the last e-mail and the trial (a period of 15 months), LTC M "developed a favorable opinion" of the brother. At the DuBay hearing, military judge found that LTC M "did not fail to honestly answer a material question on voir dire and that [LTC M] did not fail to later disclose his knowledge of [the brother] in bad faith." CAAF reversed. Applying the test from *McDonough Power Equip. v. Greenwood*, 464 U.S. 548 (1984), CAAF found that LTC M violated his duty of candor as a panel member. First, LTC M incorrectly indicated that he did not know the brother during voir dire and then "fail[ed] to correct the misinformation." Second, LTC M "failed to disclose information that was material to the conduct of a fair and impartial trial" because as a result of the nondisclosure, the parties were unaware of LTC M's relationship

with the brother. Third, the "correct response . . . would have provided a valid basis for challenge." Applying the implied bias standard, CAAF found that "[a] reasonable public observer of this trial would conclude that [LTC M's] actions injured the perception of fairness in the military justice system."

b. *United States v. Commisso*, 76 M.J. 315 (CAAF 2016)(finding that dishonesty during voir dire prevented the accused from exercising his right to challenge members, where the members did not answer correctly about their involvement in the Sexual Assault Review Board process and the judge did not take sufficient remedial action to determine whether a challenge for cause should be granted once the misstatements were identified).

C. Disclosure by Trial Counsel or Government.

1. Affirmative duty to disclose. *United States v. Glenn*, 25 M.J. 278 (C.M.A. 1987). Case reversed because Deputy Staff Judge Advocate failed to disclose that member was his sister-in-law. Court reversed even though member signed affidavit swearing that she had no prior knowledge of the case and was not affected by the relationship.

2. Close calls and trial counsel duty to disclose. *United States v. Modesto*, 43 M.J. 315 (C.A.A.F. 1995). Colonel was charged with conduct unbecoming (performing as female impersonator at gay club, sodomy with another male, indecent touching with another male, cross-dressing in public). Trial counsel failed to disclose that male panel member had dressed as a woman at Halloween Party. Court held that reversal was unwarranted because incident would not have been valid grounds for challenge, so effective voir dire was not prevented. Despite the outcome, the CAAF noted, "Both the SJA and the trial counsel have an affirmative duty to disclose any known ground for challenge for cause." *Id.* at 318.

3. Practice Point: Government should liberally disclose information that might be a basis for a challenge for cause.

D. Defense Duty to Discover.

1. Under R.C.M. 912(f)(4), most grounds for challenging a member may be waived. The rule notes that waiver extends those matters "the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner."

2. *United States v. Dunbar*, 48 M.J. 288 (C.A.A.F. 1998). When panel member questionnaire contains information that may result in disqualification, the defense must make reasonable inquiries into the member's background either before trial or during voir dire. The Government may not be required to provide the background for the disqualifying information in every situation. The accused was charged with dereliction of duty, conduct unbecoming an officer, and fraternization. A member's questionnaire revealed that she had testified as an expert witness in child-abuse cases prosecuted by the trial counsel. The defense failed to conduct voir dire on this issue. The defense waived the issue by failing to conduct voir dire after reviewing the questionnaire and then failing to exercise a causal or peremptory challenge. There was no additional affirmative requirement for the Government to disclose the information.

3. *United States v. Briggs*, No. ACM 35123 (f rev), 2008 CCA LEXIS 227 (A.F. Ct. Crim. App. June 13, 2008) (unpublished). Accused was charged with selling survival vests and body armor taken from C-5s. This equipment was used to protect the flight crews operating these aircrafts. On appeal, defense argued for a new sentencing hearing because a member was a pilot. Essentially arguing implied bias, the defense claimed that the member, as a pilot, could not have been impartial because the crime involved "stealing safety and survival gear off an aircraft." First, the court noted the Supreme Court standard: "[F]or an accused to be entitled to a new trial due to an incorrect voir dire response the 'party must first demonstrate that a juror failed to answer honestly

a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.'" (quoting *McDonough Power Equip., Inc.*, 464 U.S. at 556). In this case, the court held the member did not fail to honestly answer a material question. Rather, he truthfully stated he worked with C-5 aircraft, which the accused "with his years and background in the Air Force" would have understood to mean the member was a pilot. In biting language, the court noted, "[T]here is no evidence that the member failed to honestly answer a material question by not stating the obvious."

V. VOIR DIRE

A. Purposes Of Voir Dire. The questioning of panel members (known as voir dire) exists so parties can intelligently exercise both challenges for cause and peremptory challenges. *See* R.C.M. 912(d) discussion, ("The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges."); *Bragg*, 66 M.J. at 327 ("The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members' sincerity, and to adjudicate the members' ability to sit as part of a fair and impartial panel."). In addition to this primary purpose, there are three secondary purposes of voir dire:

1. Educate the panel and defuse weaknesses in the case. *But see* R.C.M. 912(d) discussion ("[C]ounsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case").

2. Establish a theme.

3. Build rapport with members

4. *See also* Francis A. Gilligan and Fredric I. Lederer, Court-Martial Procedure § 15-53.00 at 15-29 (3d ed. 2006) ("Although voir dire can be used for many other purposes, such as highlighting various issues, educating the court members, or building rapport between counsel [and] members, such uses are improper unless done in the otherwise proper process of voir dire."); id. n.164 ("This is not to deny that voir dire may play a legitimate tactical role. Few questions can be asked in an entirely neutral fashion, and to require neutrality might well defeat the very purpose of voir dire. . . . The key, however, is that questions may not be asked for other purposes; they must have independent legitimacy as a proper part of the process of voir dire and challenges.").

B. Military Judge Controls Voir Dire – In General.

> R.C.M. 912(d). Challenge of selection of members; examination and challenges of members. The military judge may permit the parties to conduct the examination of members or may personally conduct the examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of the other members when the military judge so directs."

1. Rule. "Generally, the procedures for voir dire are within the discretion of the trial judge." *Jefferson*, 44 M.J. at 318. See also R.C.M. 912(d) (printed above) and discussion ("The nature and scope of the examination of members is within the discretion of the military judge.").

2. Broad latitude to military judge in controlling voir dire. "Neither the UCMJ nor the Manual for Courts-Martial gives the defense the right to individually question the members." *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001) (upholding military judge's practice of requiring written voir dire questions from counsel seven days before trial and denying defense and trial counsel requests to personally question the members). The court suggested that the

military judge who reserves voir dire to the bench must conduct sufficient questioning to expose grounds for challenge: "The military judge's questions properly tested for a fair and impartial panel and allowed counsel to intelligently exercise challenges." *Id.* at 137.

3. Military judge may reserve voir dire to the bench.

a. Before impaneled. *United States v. Belflower*, 50 M.J. 306 (C.A.A.F. 1999) (holding military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four members where counsel did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire).

b. After impaneled. *United States v. Lambert*, 55 M.J. 293 (C.A.A.F. 2001). Right after the members returned a verdict of guilty to one specification of indecent assault, the civilian defense counsel asked military judge to allow voir dire of the members because one member took a book titled Guilty as Sin into the deliberation room. The military conducted voir dire of the member who brought the book into the deliberation room, but did not allow the defense an opportunity to conduct individual or group voir dire. Noting that neither the UCMJ nor the Manual gives the defense the right to individually question the members, and analyzing the issue under an abuse of discretion standard, CAAF held the military judge did not err by declining to allow defense counsel to voir dire the members.

4. Preference for group voir dire. *Belflower*, 50 M.J. 306. Military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four members where defense did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire.

5. Military judge may restrict method of voir dire. *Jefferson*, 44 M.J. 312. Military judge did not abuse discretion by: refusing to permit "double-teaming" by defense counsel during voir dire; limiting individual voir dire regarding burden of proof, inelastic attitude toward members, and credibility of witnesses when defense counsel admitted that initial questions in these areas were confusing. However, military judge did abuse discretion in not allowing defense to reopen voir dire to explore issue of potential bias of two members who stated they had friends or close relatives who were victims of crimes.

6. Military judge may require questions be submitted in writing and in advance. *Dewrell*, 55 M.J. at 136 (upholding military judge's practice of requiring written voir dire questions from counsel 7 days before trial); *United States v. Torres*, 25 M.J. 555 (1987) (A.C.M.R. 1987) (military judge may require counsel to submit questions in writing for approval); R.C.M. 912(d) discussion ("The nature and scope of the examination of members is within the discretion of the military judge."). However, the military judge may not deny otherwise proper questions solely because they were not previously submitted in writing.

7. Liberal voir dire and appellate review. In limiting voir dire, military judge should consider that liberal voir dire can save cases on appeal. *See Dowty*, 60 M.J. 163 (affirming a "novel" panel selection process, in part, due to the military judge allowing defense counsel to conduct extensive voir dire of members concerning their selection as panel members); *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003) (in high profile case involving allegations of unlawful command influence and unfair pretrial publicity, court notes repeatedly that the military judge permitted counsel to conduct extensive individual voir dire prior to trial).

C. Military Judge Controls Voir Dire – Properly Disallowed Questions.

1. Jury nullification. In *United States v. Smith*, 27 M.J. 25 (C.M.A. 1988), accused was charged with premeditated murder of his wife. Defense counsel wanted to ask members, "Are you aware that a conviction for premeditated murder carries a mandatory life sentence?" Military judge

could preclude defense counsel from asking this question where "jury nullification" was motive. Court noted that voir dire should be used to obtain information for the intelligent exercise of challenges. A per se claim of relevance and materiality simply because a peremptory challenge is involved is not sufficient. The broad scope of challenges does not authorize unrestricted voir dire.

2. "Commitment" questions. In *United States v. Nieto*, 66 M.J. 146 (C.A.A.F. 2008), accused was charged with wrongful use based solely on a positive urinalysis result. During voir dire, trial counsel walked the panel through the Government's case, asking specific questions about the reliability of urinalysis results. Trial counsel then received an affirmative response from each member to this confusing question: "Does any member believe that any technical error in the collection process, no matter how small[,] means that the urinalysis is per se invalid?" During individual voir dire, trial counsel aggressively attempted to rehabilitate members from this answer (which suggested the members would vote not guilty if evidence showed "any" technical error in the urinalysis collection process), using fact-intensive hypothetical questions related the accused's urinalysis. On appeal, defense argued the trial counsel's hypothetical questions improperly forced the members to commit to responses based on evidence not yet before them, denying a fair trial. Because there was no objection at trial, CAAF upheld the case under a plain error analysis. However, three judges wrote concurring opinions arguing that counsel cannot ask members to commit to findings or a sentence based on case-specific facts previewed in voir dire; the three judges even suggested that a military judge could commit plain error by not ending such questioning (presumably the questions would have to be particularly egregious to trigger a plain error finding). This case may have had a different result if the defense counsel had objected at trial.

3. Overly broad. *In United States v. Toro*, 34 M.J. 506 (1991) (A.F.C.M.R. 1991), trial counsel improperly converted lengthy discourses on the history and mechanics of drug abuse, and on the misconduct of the accused and others, into voir dire questions by asking whether the members "could consider this information in their deliberations?"

4. Sanctity of life. In *United States v. Nixon*, 30 M.J. 501 (1989) (A.F.C.M.R. 1989), accused was charged with unpremeditated murder of his Filipino wife. Air Force court found there was no abuse of discretion when military judge allowed trial counsel to ask panel whether Asian societies place a lower premium on human life and to ask if any member opposes capital punishment.

5. Vague or "trick" questions. *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985) ("We are aware that the liberal voir dire of court members which often occurs may lure a member into replies which are not fully representative of his frame of mind.").

a. *United States v. Dorsey*, 29 M.J. 761 (1989) (A.C.M.R. 1989). In case for cocaine use, defense counsel asked, "Does anyone feel that the accused needs to explain why his urine tested positive for cocaine?" All members replied yes. MJ properly denied challenges to all panel members based on members' responses to judge's inquiries concerning prosecution's burden of proof.

b. *United States v. Rood*, No. NMCCA 200700186 SPECIAL COURT-MARTIAL, 2008 CCA LEXIS 96 (N-M Ct. Crim. App. Mar. 20, 2008) (unpublished). Accused was charged with several offenses, including wrongful use of marijuana. During voir dire, civilian defense counsel asked the panel, "Does any member believe that a positive urinalysis alone proves a knowing use of a controlled substance?" The senior member of the panel, a Navy Captain, responded in the affirmative. The military judge then properly instructed the members that use of a controlled substance may be inferred to be wrongful, but that such an inference was not required. All members agreed that they could follow the military judge's instructions. During individual voir dire, the senior member said, "My opinion is that you are personally responsible for everything that goes into your body." He further elaborated:

> CC: This belief that you are responsible for everything that goes into your body is a firmly held belief?
>
> Member: I believe, yes.
>
> The defense challenged the member for cause for implied bias. The military judge rejected the challenge and the appellate court affirmed. "The beliefs he articulated in response to the defense counsel's questions were objectively reasonable for an average citizen not versed in the nuances of criminal law." The member also "clearly evinced his willingness to follow the court's instructions on the law regarding . . . a drug urinalysis case." The court seemed bothered by the civilian defense counsel's questioning, specifically framing a general voir dire question with a mild misstatement of law (whether a positive urinalysis proves wrongful use), arguably to trigger challenges for cause.

D. Military Judge Controls Voir Dire – Limits.

1. Insufficient questioning of members. In *United States v. Richardson*, 61 M.J. 113 (C.A.A.F. 2005), four members stated they had professional dealings with detailed trial counsel. Military judge briefly questioned all four members about the nature of these dealings, and all four responded that they would not give the government's case more or less credence based on their experience with the trial counsel. Defense counsel then questioned the first three members but did not ask about their relationship with the trial counsel. For the fourth member, defense counsel asked several questions about the member's dealings with trial counsel. Following that questioning, the defense counsel asked to "briefly recall" the other three members who had prior dealings with trial counsel. The military judge denied the request, noting that all members said they would not give the trial counsel "any special deference" and concluding, "I think there's been enough that's been brought out." *Id.* at 116. CAAF held the military judge abused his discretion by refusing to reopen voir dire to question the members about their relationships with the trial counsel. CAAF reasoned that further inquiry was necessary to determine whether the relationships with trial counsel were beyond a cursory professional connection. *Id.* at 119.

2. Member with friends or relatives who are crime victims. In *Jefferson*, 44 M.J. 312, military judge abused discretion by not allowing defense to reopen voir dire to explore potential bias of two members who said they had friends or close relatives who were victims of crimes. (Note, CAAF found no abuse of discretion in military judge refusing to permit "double-teaming" by defense counsel during voir dire or limiting individual voir dire regarding burden of proof, inelastic attitude toward members, and credibility of witnesses as defense counsel admitted those questions were confusing).

3. Urinalysis questions. *United States v. Adams*, 36 M.J. 1201 (1993) (N.M.C.M.R. 1993) (abuse of discretion not to allow defense counsel to voir dire prospective members about their previous experiences with or expertise in drug urinalysis program, and their beliefs about the reliability of the program).

E. Waiver of Voir Dire Issues.

1. Defense counsel should ensure the record clearly shows any voir dire issues that may be raised on appeal. Merely asking the military judge for individual voir dire without stating a legally-cognizable basis is likely waiver:

> A number of options were available to the defense counsel: (1) Defense counsel could have asked more detailed questions during group voir dire regarding the issues now raised on appeal; (2) defense counsel could have asked the military judge to re-open group voir dire; or (3) if he was concerned about the limited value of group voir dire

alone, defense counsel could have requested an Article 39(a) session to call the military judge's attention to specific matters, thus making a record for appeal. In the absence of such actions, the sparse record we are presented in this case provides no basis for reversal. *Belflower*, 50 M.J. at 310-11 (emphasis supplied).

2. *United States v. Williams*, 44 M.J. 482 (C.A.A.F. 1996). MJ did not unreasonably and arbitrarily restrict voir dire by denying a defense request for individual voir dire of member (SGM) who expressed difficulty with the proposition that no adverse inference could be drawn if accused failed to testify, and another member (MAJ) who disclosed that he had a few beers with one of the CID agents who would be a witness. Defense counsel did not conduct additional voir dire. The MJ granted the defense challenge for cause against the SGM. The defense peremptorily challenged the MAJ based on a theory that the denial of individual voir dire deprived the defense of an opportunity to sufficiently explore the basis for a challenge for cause. Court holds "[s]ince defense counsel decided to forego questioning, he cannot now complain that his ability to ask questions was unduly restricted."

F. Denial of questions tested for abuse of discretion.

1. Rule. *United States v. Belflower*, 50 M.J. 306 (C.A.A.F. 1999) (military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four members where defense did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire).

2. Generally, military judge will only abuse discretion if no questions are permitted into valid area for potential challenge. *United States v. McDonald*, 57 M.J. 747 (N-M Ct. Crim. App. 2002), *rev'd on other grounds*, 59 M.J. 426 (C.A.A.F. 2004). Military judge required written questions beforehand, and asked several government questions (some of which the MJ revised) over defense objection. Questions involved whether members ever discussed with their children what they should do if someone propositions them in an inappropriate way, and how the members thought a child would do if an adult solicited them for sex. Citing the *Belflower* standard (that "the appellate courts will not find an abuse of discretion when counsel is given an opportunity to explore possible bias or partiality"), the court found no abuse of discretion: "Whether it is the Government or the accused, we believe that the aforementioned rules governing the content of voir dire apply equally. In other words, the TC had as much right to obtain information for the intelligent exercise of challenges as the DC."

VI. CHALLENGES FOR CAUSE – GENERALLY

R.C.M. 912. Challenge of selection of members; examination and challenges of members.

(f) Challenges and removal for cause.

(1) Grounds. A member shall be excused for cause whenever it appears that the member:

(A) Is not competent to serve as a member under Article 25(a), (b), or (c);

(B) Has not been properly detailed as a member of the court-martial;

(C) Is an accuser as to any offense charged;

(D) Will be a witness in the court-martial;

(E) Has acted as counsel for any party as to any offense charged;

(F) Has been an investigating officer as to any offense charged;

(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;

(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;

(I) Has forwarded charges in the case with a personal recommendation as to disposition;

(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;

(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;

(L) Is in arrest or confinement;

(M) Has informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;

(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."

A. Each side has an unlimited number of challenges for cause. See Article 41(a)(1), UCMJ; R.C.M. 912(f).

1. Nondiscretionary bases. R.C.M. 912(f)(1)(A)-(M) list rarely-used scenarios that require a panel member be excused, to include a member who is "in arrest or confinement," "an accuser to any offense charged," or "a witness in the court-martial."

2. Discretionary bases. R.C.M. 912(f)(1)(N) allows a member to be challenged for actual bias and implied bias.

B. Actual Bias & Implied Bias. Actual and implied bias are based on R.C.M. 912(f)(1)(N), which provides that a member should be excused if serving would create a "substantial doubt as to [the] legality, fairness, and impartiality" of the proceedings. Actual and implied bias each have a separate test (set forth below), though a challenge for cause often invokes both principles. *United States v. Armstrong*, 54 M.J. 51 (C.A.A.F. 2000).

C. Rationale For Actual And Implied Bias Doctrines. "[T]he text of R.C.M. 912 is not framed in the absolutes of actual bias, but rather addresses the appearance of fairness as well, dictating the avoidance of situations where there will be substantial doubt as to fairness or impartiality. Thus, implied bias picks up where actual bias drops off because the facts are unknown, unreachable, or principles of fairness nonetheless warrant excusal." *Bragg*, 66 M.J. at 327.

D. Liberal Grant Mandate. Military judges are charged to liberally grant challenges for cause from the defense. *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005). The liberal grant mandate does not apply to Government challenges.

1. Rationale. The convening authority selects the panel members and can be said to have an unlimited number of peremptory challenges. Per *James*, "Given the convening authority's broad power to appoint [panel members], we find no basis for application of the 'liberal grant' policy when a military judge is ruling on the Government's challenges for cause." *Id.* at 139. Additionally, the court noted the SJA may excuse one third of the panel members under R.C.M. 505(c)(1)(B). By contrast, the accused "has only one peremptory challenge at his or her disposal." *James*, 61 M.J. at 139

2. Long history. *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987) ("We again take the opportunity to encourage liberality in ruling on challenges for cause. Failure to heed this

exhortation only results in the creation of needless appellate issues."); *United States v. Moyar*, 24 M.J. 635, 638, 639 (1987) (A.C.M.R. 1987) ("The issue of denial of challenges for cause remains one of the most sensitive in current military practice. . . . Military law mandates military judges to liberally pass on challenges. Notwithstanding this mandate . . . some trial judges have at best only grudgingly granted challenges for cause and others frustrate the rule with pro forma questions to rehabilitate challenged members.").

E. Rehabilitating Members. Once a member gives a response that shows a potential grounds for challenge, counsel or the military judge may ask questions of that member to rehabilitate him or her. *See United States v. Napolitano*, 53 M.J. 162 (C.A.A.F. 2000) (member indicated on questionnaire disapproval of civilian defense counsel's behavior in another case; judge did not abuse discretion in denying challenge for cause because member retracted opinion and said he was not biased against the counsel). Counsel should consider these questions when attempting to rehabilitate a member:

1. Can you follow the judge's instructions regarding the law?

2. Will you base your decision only on the evidence presented at trial, rather than your own personal experience?

3. Have you made your mind up right now concerning the type of punishment the accused should receive if convicted?

4. Can you give this accused a full, fair, and impartial hearing?

Note, these standard questions may not be sufficient, especially if counsel only gets "naked disclaimers" from the members. Counsel should tailor questions to the facts of the case and get clear, unequivocal answers. *But see United States v. Townsend*, 65 M.J. 460, 465 (C.A.A.F. 2008) ("[T]here is a point at which numerous efforts to rehabilitate a member will themselves create a perception of unfairness in the mind of a reasonable observer.").

VII. CHALLENGES FOR CAUSE – ACTUAL BIAS

A. Standard. Whether the bias is such that the member will not yield to the evidence presented and the judge's instructions. *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007); *United States v. New*, 55 M.J. 95, 99 (C.A.A.F. 2001; *United States v. Warden*, 51 M.J. 78, 81 (C.M.A. 1999). Appellate courts give great deference to the military judge's rulings on actual bias because it is a question of fact, and the military judge was able to observe the demeanor of the challenged member. *United States v. Bragg*, 66 M.J. 325 (C.A.A.F. 2008); *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000). The credibility of the member is key, so actual bias is a subjective determination made by the military judge.

B. Rarely Used To Excuse A Member. For example, in *United States v. Clay*, 64 M.J. 274 (C.A.A.F. 2007), accused was charged with rape and indecent assault. During voir dire, the senior panel member was asked whether his judgment would be affected because he had two teenage daughters. He responded, "[I]f I believed beyond a reasonable doubt that an individual were guilty of raping a young female, I would be merciless within the limit of the law." Trial counsel attempted to rehabilitate the member, who said, "I believe I could" when asked if he could consider the full range of permissible punishments. Despite the member's initial statement (which suggested he had an actual bias), the court ruled the case was not one of actual bias because the member said he could be fair and the military judge made "observations of those statements." *Id.* at 276. The case was ultimately reversed on implied bias grounds (that ruling is discussed below).

VIII. CHALLENGES FOR CAUSE – IMPLIED BIAS

A. Standard. *United States v. Elfayoumi*, 66 M.J. 354 (C.A.A.F. 2008). Challenge for cause based on implied bias is reviewed on an objective standard, through the eyes of the public. "Implied bias exists "when most people in the same position would be prejudiced." *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). In applying implied bias, the focus is on "the perception or appearance of fairness of the military justice system." *United States v. New*, 55 M.J. 95, 100 (C.A.A.F. 2001). Accordingly, "issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo." *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004). In *Elfayoumi*, the court provided this summary:

"Implied bias exists when most people in the same position as the court member would be prejudiced. To test whether there is substantial doubt about the fairness of the trial, we evaluate implied bias objectively, through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system. This review is based on the "totality of the circumstances." Although we review issues of implied bias for an abuse of discretion, because we apply an objective test, we apply a less deferential standard than we would when reviewing a claim of actual bias."

B. In General.

1. Common issues. Implied bias can be expansively applied, as the test considers the public's perception of the military justice system. Several cases have raised implied bias based on (1) member's knowledge of the case, issues, or witnesses; (2) member's rating chain relationship with other members; (3) member being a victim of a similar crime or knowing a victim of a similar crime; (4) member's predisposition to punishment; and (5) potential unlawful command influence. Each of these bases is discussed below:

2. Example. *United States v. Clay*, 64 M.J. 274 (C.A.A.F. 2007). Accused was charged with rape and indecent assault. During voir dire, the senior panel member was asked whether his judgment would be affected because he had two teenage daughters. He responded, "[I]f I believed beyond a reasonable doubt that an individual were guilty of raping a young female, I would be merciless within the limit of the law." Trial counsel attempted to rehabilitate the member, who said, "I believe I could" when asked if he could consider the full range of permissible punishments. While the court found no actual bias, the military judge erred and should have granted the challenge for cause based on implied bias and the liberal grant mandate. CAAF reasoned that the answers he gave, in response to the voir dire questions and rehabilitation questions, "create[d] the perception that if [he], the senior member of the panel, were convinced of the Appellant's guilt he would favor the harshest sentence available, without regard to the other evidence.

C. Grounds for Challenge– Knowledge of Case, Issues, Witnesses.

1. Generally. *United States v. Briggs*, 64 M.J. 285 (C.A.A.F. 2007). Air Force technical sergeant was tried for larceny of survival vests from the aircraft he was responsible for maintaining and re-selling them. Military judge denied challenge for cause against CPT H, the wife of the appellant's commander; she had learned from her husband that "vests went missing." In finding that the member lacked actual bias, the military judge did not address the liberal grant mandate or implied bias. On appeal, using the implied bias theory, CAAF found the military judge erred in denying the challenge for cause. The court cited a number of reasons why this challenge should have been granted, including: the safety of the member's husband's unit was placed at risk by the accused, the husband's performance evaluation could have been affected by the accused's criminal misconduct, and the member's husband was responsible for the initial inquiry into the misconduct and recommendation as to disposition. *See also United States v. Minyard*, 46 M.J. 229 (C.A.A.F. 1997) (military judge should have granted challenge for cause against member whose husband

investigated case against accused, despite member's claim that she knew little about the case, that she and he husband did not discuss cases).

2. Knowledge of the case. *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999). In a high profile case, some knowledge of the facts of the offense or an unfavorable inclination toward an offense is not per se disqualifying. The critical issue is whether a member is able to put aside outside knowledge, association, or inclination, and decide the case fairly and impartially on its merits. Accused was convicted of various offenses arising out of issues related to Operation Uphold Democracy in Haiti. The defense challenged the entire panel based on the following: an acquittal would damage the reputation of the members individually, the general court-martial convening authority, and the 10th Mountain Division; several members knew key witnesses against the accused and would give their testimony undue weight; that members were exposed to and would be affected by pretrial publicity; and members evinced an inelastic attitude about a possible sentence in the case. The court held that there was no actual bias; members are not automatically disqualified based on professional relationships with other members or with witnesses; and some knowledge of the facts or an unfavorable inclination toward and offense is not per se disqualifying.

a. *United States v. Hollings*, 65 M.J. 116 (C.A.A.F. 2007). Military judge did not abuse his discretion in denying this challenge for cause for a member that the defense alleged met the definition of legal officer under R.C.M. 912(f)(1)(G). Under the facts elicited at trial, the member did not meet the definition of "legal officer." The accused also argued on appeal that the challenge should have been granted under an implied bias theory because he was a "career legal officer, he was familiar with [the accused's] case as a result of his duties, and at least some of those duties were legal in nature." The member's responses during voir dire did not reveal any actual or implied bias.

b. *United States v. Baum*, 30 M.J. 626 (1990) (N.M.C.M.R. 1990). Military judge improperly denied two causal challenges: first member was the sergeant major of alleged co-conspirator who had testified at separate Article 32, was interviewed by chief prosecutor, and had voluntarily attended accused's Article 32 investigation; second member was colonel who headed depot inspector's office, had official interest in investigation, and had discussed cases with chief investigator and government witness.

3. Member's "possible" knowledge of case may require excusal. *Bragg*, 66 M.J. 325. Accused was a Marine recruiter charged with rape and other offenses involving two female high school students. Member stated during voir dire that he learned information about the case before trial. While he could not recall how he obtained this information, he knew the "general identity" of the victim, the general nature of the offense, and the investigatory measures taken by law enforcement. The member had been the deputy chief of staff for recruiting and, in that capacity, he normally read relief for cause (RFC) packets of recruiters. The member could not recall if he had reviewed the accused's RFC packet, though he said that if he had, he "probably would have" recommended relief. The member said he could be impartial despite his prior knowledge of the case. CAAF reversed: "In making judgments regarding implied bias, this Court looks at the totality of the factual circumstances." In this case, the member may have recommended adverse action against the accused, so he should have been excused.

4. Member knows about pretrial agreement. *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). Knowledge of pretrial agreement does not per se disqualify the court member. Whether the member is qualified to sit is a decision within the discretion of the military judge.

5. Member knows about accused's sanity report. *United States v. Dinatale*, 44 M.J. 325 (C.A.A.F. 1996). In an indecent acts on minors case, military judge did not clearly abuse his discretion by denying a challenge for cause against a member (Chief of Hospital Services at the

local military hospital) where voir dire supported the conclusion that the member's review of sanity report was limited to reading the psychologist's capsule findings, member did not recall seeing accused's report, member stated that she could decide the case based on the evidence and MJ instructions, and mental state of accused was not an issue at trial.

6. Member knows trial counsel. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). Military judge denied challenges for cause against three officer members who had been past legal assistance clients of assistant trial counsel. Professional relationship not a per se basis for challenge. Members provided assurances of impartiality.

7. Member is a potential witness. *United States v. Perez*, 36 M.J. 1198 (1993) (N.M.C.M.R. 1993). Three officer members stated during voir dire that they observed "stacking incident" (assault on a warrant officer). In reversing, court held potential witnesses in case should have been excused for cause.

8. Member's outside investigation. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Accused, who worked in the comptroller's disbursing office, was convicted of rape at a contested court-martial by members. LTC F, the eventual panel president, was the deputy comptroller and had pretrial knowledge of the accused and co-accused's cases through his own investigative efforts and newspaper articles. MJ granted seven of eight defense challenges for cause but denied the challenge against LTC F without making findings. CAAF held that LTC F's "inquiry went beyond a routine passing of information to a superior—. . . his inquiries were so through thorough that he subjectively believed he knew all there was to know—that he had the 'complete picture.'" Under the implied bias standard, an objective observer could reasonably question LTC F's impartiality and that the MJ erred in denying defense's challenge for cause. Findings reversed. *Cf. United States v. Nigr*o, 28 M.J. 415 (C.M.A. 1989) (in a bad check case, military judge properly denied challenge for cause against member who called credit union to ask about banking procedures; member's responses to inquiries were clear and unequivocal that he could remain impartial and follow judge's instructions).

9. Experience with key trial issues. *Daulton*, 45 M.J. 212. In a child sexual abuse case, military judge erred in failing to grant a defense challenge for cause against a member who stated that her sister had been abused by her grandfather, and was shocked when she first heard of her sister's allegations, "but had gotten over it." The member's responses to the MJ's rehabilitative questions regarding her ability to separate her sister's abuse from the evidence in the trial were not "resounding."

10. Member with position and experience. *United States v. Lattimore*, 1996 WL 595211 (A.F. Ct. Crim. App. 1996) (unpub.). In case involving stealing and use of Demerol, no abuse of discretion to deny challenge for cause against O-6-member who was a group commander and former squadron commander; had preferred charges in three or four courts-martial; recently forwarded charges of drug use; sat through portion of expert forensic toxicologist in unrelated drug case; and who indicated that, although not predisposed to give punitive discharge, some form of punishment was appropriate if accused was found guilty, but would consider sentence of no punishment. No per se exclusion for commanders and prior commanders who have preferred drug charges.

11. Knowledge of witnesses.

a. *United States v. Ai*, 49 M.J. 1 (C.A.A.F. 1998). Military judge did not abuse his discretion in denying a challenge for cause against a member who was a friend and former supervisor of a key government witness. In a graft case, during voir dire, an officer member revealed that a key government witness had previously worked for him as a food manager for one year three years ago. The member indicated, during group and individual voir dire, that the relationship

would not affect him as a member and he would follow all MJ instructions. CAAF recognized that while R.C.M. 912(f)(1)(N) is broad enough to permit a challenge for cause against a member on the basis of favoring witnesses for the prosecution, there was no "historical basis" in the record to support the challenge. The work relationship was limited in duration, negating any inference of predisposition.

b. *United States v. Napoleon*, 46 M.J. 279 (C.A.A.F. 1997) (holding that under both actual and implied bias standard, military judge properly denied challenge for cause against member who had official contacts with special agent-witness who was "very credible because of the job he has" and had knowledge of case through a staff meeting).

c. *United States v. Arnold*, 26 M.J. 965 (1988) (A.C.M.R. 1988). Member who had seen witness in another trial and formed opinion as to credibility should have been excused. However, the mere fact that a witness had appeared before the member in another case is not grounds by itself to grant a challenge; if so, this would virtually prohibit the repeated use in different trials of witnesses such as police officers and commanders.

d. Practice point. Trial and defense counsel should read a list of anticipated witnesses to the members during voir dire.

D. Grounds for Challenge – Rating Chain Relationship. If one member is in the rating chain of one or more other members, that may be a basis for challenge. It is not a per se basis for challenge. *United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988) (rating chain relationship is not an automatic disqualification; inquiry of both parties is necessary).

1. Rating chain as a voting block.

a. *United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001), recon. denied, *United States v. Wiesen*, 57 M.J. 48 (C.A.A.F. 2002). During voir dire, COL Williams, a brigade commander and the senior member, identified six of the other nine members as his subordinates. The defense argued implied bias and attempted to challenge COL Williams. The military judge denied this causal challenge. The defense then used their peremptory challenge to remove COL Williams, but preserved the issue for appeal by stating, "but for the military judge's denial of [our] challenge for cause against COL Williams, [we] would have peremptorily challenged [another member]." The court concluded, "Where a panel member has a supervisory position over six of the other members, and the resulting seven members make up the two-thirds majority sufficient to convict, we are placing an intolerable strain on public perception of the military justice system." CAAF held "the military judge abused his discretion when he denied the challenge for cause against COL Williams." Finding prejudice, findings and sentence were set aside.

b. But see *United States v. Bagstad*, 67 M.J. 599 (N-M. Ct. Crim. App. 2008), aff'd on other grounds, 68 M.J. 177 (C.A.A.F. 2010) (affirming based on defense counsel waiver without addressing issue before the N-MCCA). In a case similar to Wiesen, court upheld military judge's denial of challenge against senior member who rated another panel member, even though the rater and ratee constituted the two-thirds necessary to convict on a three-member panel. In questionable reasoning, N-MCCA held the case had different "contextual facts" from Wiesen, as the senior member was a Capt (O-3) and the junior member was a GySgt (E-7); the court added that the NCO was three years old older than the officer and had served seven years longer. Further, the third panel member was a 1stSgt (E-8). The court noted that the "camaraderie between, and respect and deference for, senior NCO's, is significant." In this context, N-MCCA concluded the presence of two senior NCOs serving on a panel with a company grade officer weakens "any reasonable perception" that the rating chain relationship

could have improperly influenced deliberation; hence, an informed public would not question the fairness of this proceeding.

2. Counsel must develop record. *United States v. Blocker*, 33 M.J. 349 (C.M.A. 1991) (noting obligation is on the party making the challenge to inquire into any rating chain relationships; military judge has no sua sponte duty to conduct such inquiry); *Murphy*, 26 M.J. 454 (rating chain relationship is not an automatic disqualification; careful inquiry of both parties is necessary).

3. Military judge may abuse discretion if questions about rating chain are not allowed. *United States v. Garcia*, 26 M.J. 844 (1988) (A.C.M.R. 1988) (rating relationship merits inquiry and appropriate action based on members' responses). *Cf. United States v. DeNoye*r, 44 M.J. 619 (A. Ct. Crim. App. 1996). Identification of supervisory or rating chain relationship not enough to support individual member questioning. After defense asked panel in excess of 25 questions, some repetitious, in various areas, and then identified possible rating or supervisory relationships among five of the nine members, MJ denied defense request for individual voir dire. No abuse of discretion by denying defense request for individual voir dire. However, ACCA cautioned that granting defense requests would have eliminated appellate issues and enhanced perception of fairness.

E. Grounds for Challenge – Victim (or Indirect Victim) of Similar Crime.

1. Considerations in victim analysis:

a. Who was victim? Panel member or a family member?

b. How similar was the accused's crime to the one the victim was involved in?

c. Was victim's crime unsolved?

d. Traumatic? How many times a victim?

e. Does the member give clear, reassuring, unequivocal answers about his impartiality.

2. Close relationship with victim of similar crime. *Terry*, 64 M.J. 295. Military judge erred in not granting challenge for cause under the implied bias theory and liberal grant mandate. In rape trial, member's girlfriend (whom he intended to marry) was raped, became pregnant, terminated their relationship, and named the child after him. Although six years had passed, "most members in [the member's position] would have difficulty sitting on a rape trial . . . . Further, an objective observer might well have doubts about the fairness of Appellant's court-martial panel."

3. Relative who died because of pre-natal drug use. *United States v. Miles*, 58 M.J. 192 (C.A.A.F. 2003). Military judge abused his discretion by failing to grant challenge for cause based on implied bias where, during voir dire in guilty plea case involving wrongful use of cocaine, member revealed his ten-year-old nephew died as a result of mother's pre-natal use of cocaine. Member described tragedy in article in base newspaper scheduled for publication shortly after court-martial. Trial counsel commented that event "evidently" was "a very traumatic experience" for the member. "We conclude that asking [the member] to set aside his memories of his nephew's death and to impartially sentence Appellant for illegal drug use was 'asking too much' of him and the system." Sentence set aside.

4. Wife victim of domestic violence. *United States v. White*, No. 2001132 (A. Ct. Crim. App. Dec. 8, 2003) (unpub.). Appellant charged with attempted murder of wife; convicted of assault with intent to inflict grievous bodily harm and other offenses. Military judge abused discretion by denying challenge for cause of member whose wife was victim of domestic abuse by her first husband. Individual voir dire revealed wife suffered a broken neck from abuse; member stated that "I've told him, simply, that, 'If I ever see you and you look like you're going to raise a hand for her, I'm gonna kill you and then we'll sort it out later.' That's kind of the way I feel about it."

While court found no abuse of discretion as to actual bias, the court found error as to implied bias. Notably, court gave MJ less discretion on implied bias because he did not address that issue on the record. "On these facts, an objective observer would likely question the fairness of the military justice system." Findings set aside.

5. Members in robbery case were victims of robbery/burglary. Member in a robbery case had been a robbery victim seven times. Another member, a two-time victim of burglary, indicated "it's hard to say" if those prior incidents would influence his deliberations; it "might trigger something from the past, and again it may not" *Smart*, 21 M.J. 15. Perfunctory claims of impartiality are not enough; challenge should have been granted to keep outcome "free from doubt." *But see United States v. Fulton*, 44 M.J. 100 (C.A.A.F. 1996) (member on robbery and larceny case not disqualified even though prior victim of burglary).

6. Panel was robbed during court-martial for larceny. *United States v. Lavender*, 46 M.J. 485 (C.A.A.F. 1997). The implied bias doctrine will not operate to entitle an accused on trial for larceny to have the entire panel removed for cause after two members had money stolen from their unattended purses in deliberation room. The implied bias doctrine is only applied in rare cases. *See United States v. Godinez*, 784 F. Supp. 522 (N.D. Ill.), *aff*'d, 975 F.2d 316 (7th Cir. 1992) (holding due process does not require a new trial every time a juror has been placed in a potentially compromising situation; doctrine of implied bias appropriately applied to defendant convicted of murder during a burglary where judge denied challenges for cause against members who changed vote from "not guilty" to "guilty" after becoming victims of burglary during overnight recess in sequestered hotel).

7. Minor victim of gun violence. *United States v. Henry*, 37 M.J. 968 (1993) (A.C.M.R. 1993). E-8 member in aggravated assault case involving shooting at NCO Club had been caught in crossfire during similar incident 15 years earlier in off-post bar fight. Member indicated that he could remain fair and impartial.

8. Victim of dissimilar crime not disqualified. *United States v. Smith*, 25 M.J. 785 (1988) (A.C.M.R. 1988). Member in a rape case had been a larceny victim. Challenge denied; any recent crime victim is not automatically disqualified.

9. Member duty to disclose. *United States v. Mack*, 36 M.J. 851 (1993) (A.C.M.R. 1993). Officer member in an assault case failed to disclose that he had been held at gunpoint, tied up, and threatened with death during armed robbery thirty years earlier. Member indicated that he had "forgotten about it." Returned for *DuBay* hearing to determine (1) was there a failure to honestly answer a material question?; (2) would the correct (honest) response provide a valid basis for challenge for cause? Case affirmed after *DuBay* hearing.

10. The outer limits. Victims of similar crimes have been allowed to sit as members, provided they unequivocally evince an ability to be open-minded and consider the full range of permissible punishments.

a. *United States v. Basnight*, 29 M.J. 838 (1989) (A.C.M.R. 1989). Member was victim of three larcenies and his parents were victims of two larcenies. Denial of challenge for cause proper in light of member's candor and willingness to consider complete range of punishments.

b. *United States v. Reichardt*, 28 M.J. 113 (C.M.A. 1989). Larceny of ATM card and money; member's wife had been victim of a similar crime. Not error to deny challenge based on judge's inquiry, unequivocal responses, and judge's findings.

c. *But see United States v. Campbell*, 26 M.J. 970 (1988) (A.C.M.R. 1988). Challenge should have been granted based on equivocal responses. Member "waffled" in response to

questions about his impartiality. Member "[w]ould try to be open-minded, somewhat objective, but 'not sympathetic to thieves.'"

F. Grounds for Challenge – Inelastic Predisposition to Sentence. A member is not automatically disqualified merely for admitting an unfavorable inclination or predisposition toward a particular offense.

1. Draconian view of punishment. *United States v. Schlamer*, 52 M.J. 80 (C.A.A.F. 1999). Member disclosed her severe notions of punishment ("rape = castration;" "you take a life, you owe a life"). Nevertheless, she was adamant that she had not made up her mind in accused's case, that she believed in the presumption of innocence, and that she would follow the judge's instructions. CAAF held the military judge did not abuse his discretion in denying the challenge. Similarly, the judge's grant of a Government challenge against a member who had received an Article 15 and stated he would be "uncomfortable" judging the accused was within the judge's discretion and comported with the "liberal grant" mandate.

2. Would you consider no punishment as a sentencing option? *United States v. Martinez*, 67 M.J. 59 (C.A.A.F. 2008) (per curiam). Accused pled guilty to a single specification of wrongful use of methamphetamines and elected sentencing before members. During general voir dire, member was asked if he could consider "no punishment" during sentencing; he said "no," adding, "He obviously knew it was wrong and came forward with his guilt, and there has to be punishment for it." During follow-up questioning, member said he could consider the full range of sentencing options, to include no punishment, however: "[W]e'll weigh it from no punishment to the max. I can do that, but something has to be done." CAAF unanimously reversed, reasoning that the member should have been excused for implied bias, as a reasonable person would question the fairness of the proceedings because the member stated "something has to be done" when asked about sentencing. Case seems inconsistent with Rolle, discussed infra.

a. But cf. *United States v. Rolle*, 53 M.J. 187 (C.A.A.F. 2000). Accused, a Staff Sergeant, pled guilty to use of cocaine. Much of voir dire focused on whether the members could seriously consider the option of no punishment or whether they felt a particular punishment (like a punitive discharge) was appropriate. One member, CSM L, stated "I wouldn't" let the accused stay in the military, and "I am inclined to believe that probably there is some punishment in order there . . . I very seriously doubt that he will go without punishment." CSM L conversely noted there was a difference between a discharge and an administrative elimination from the Army. Another member, SFC W, stated, "I can't [give a sentence of no punishment] . . . because basically it seems like facts have been presented to me because he evidentially [sic] said that he was guilty." Military judge denied the challenges for cause against CSM L and SFC W; CAAF noted that "[p]redisposition to impose some punishment is not automatically disqualifying." (citing *Jefferson*, 44 M.J. at 319; *United States v. Tippit*, 9 M.J. 106, 107 (C.M.A. 1980)). "[T]he test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions."

b. *United States v. Martinez*, 67 M.J. 59 (C.A.A.F. 2008) (per curiam). During voir dire in drug case, member stated, there is "no room in my Air Force for people that abuse drugs – you know – violate the articles and law that we have set forth." After several rehabilitation questions, the member hesitated about whether he would consider the full range of punishment, to include no punishment: "So, there has to be a punishment to fit the crime—whatever that case may be. . . . [W]e'll weigh it from no punishment to the max. I can do that, but something has to be done." CAAF reversed, finding the member "did not disavow an inelastic attitude toward punishment."

c. *United States v. McLaren*, 38 M.J. 112 (C.M.A. 1993). Despite member's initial responses that he could not consider "no punishment" as an option where accused charged

with rape, sodomy, and indecent acts, member's later responses showed he would listen to the evidence and follow the judge's instructions. Member's responses to defense counsel's "artful, sometimes ambiguous" questioning" does not necessarily require that a challenge for cause be granted. The majority opinion included this conclusion: "I would have substantial misgivings about holding that a military judge abused his discretion by refusing to excuse a court member who could not in good conscience consider a sentence to no punishment in a case where all parties agree that a sentence to no punishment would have been well outside the range of reasonable and even remotely probable sentences." *Id.* at 119 n.*.

d. *United States v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993), aff'd, 42 M.J. 168 (C.A.A.F. 1995). Member indicated an officer convicted of conduct unbecoming should not be permitted to remain on active duty. Member stated she would follow guidance of military judge. Denial of challenge for cause not abuse of discretion.

e. *United States v. Greaves*, 48 M.J. 885 (A.F. Ct. Crim. App. 1998). Accused pled guilty to wrongful use of cocaine. Military judge did not abuse his discretion by failing to grant a challenge for cause against member who stated during voir dire that, while he would keep an open mind, he thought that a sentence of no punishment would be an unlikely outcome, adding that in "99.9 percent of the cases, some punishment would be in order." *Id.* at 887. Court held the member did not express an inflexible attitude toward sentencing; he merely stated "what should be patently obvious to all; while a sentence to no punishment is an option which should be considered, it is not often appropriate." *Greaves*, 48 M.J. at 887

3. Member's strong predisposition to punitive discharge may require excusal. *United States v. Giles*, 48 M.J. 60 (C.A.A.F. 1998). Military judge "clearly" abused his discretion by failing to grant a challenge for cause against a member who demonstrated actual bias by his inelastic attitude toward sentencing in a case involving attempted possession of LSD with intent to distribute and attempted distribution of LSD. While member indicated that he could consider all evidence and circumstances, he responded to defense questions that anyone distributing drugs should be punitively discharged and that he had not heard of or experienced any circumstance where a punitive discharge would not be appropriate. These responses disqualified member under R.C.M. 912(f)(1)(N). *But see Rolle*, 53 M.J. 187, a later case with similar facts but an opposite outcome.

4. Suggested rehabilitation questions for sentencing predisposition:

a. Are you aware that punishment can range from no punishment, to the slight punishment of a letter of reprimand, all the way to a discharge and confinement?

b. Do you understand that you should not decide on a punishment until you hear all of the evidence?

c. Can you follow the judge's instructions regarding the law?

d. Will you listen to all of the evidence admitted at trial, before deciding a sentence?

e. Can you give this accused a full, fair, and impartial hearing.

G. Grounds for Challenge – Unlawful Command Influence.

1. Courts maintain that it is in the "rare case" where implied bias will be found. *United States v. Youngblood*, 47 M.J. 338 (C.A.A.F. 1997). Application of the implied bias standard is appropriate to determine whether a military judge abused his discretion in denying challenges for cause against court members based on counsel argument that members were affected by unlawful command influence. Prior to court-martial, each member attended staff meeting where convening authority and SJA gave a presentation on standards, command responsibility, and discipline;

during presentation, SJA and convening authority expressed dissatisfaction with a previous commander's disposition of an offense.

2. *United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002). Six of nine members either received email from brigade commander threatening to "declare war on all leaders not leading by example," to "CRUSH all leaders in this Brigade who don't lead by example" or attended a "leaders conference" where the same issues were discussed. MJ denied defense challenges for cause based on implied bias, but did not conduct a hearing concerning claim of UCI. Reversed and remanded for DuBay hearing. Case illustrates nexus between UCI and implied bias. Quantum of evidence to raise UCI is "some evidence;" quantum of evidence to sustain challenge for cause is greater. Just because burden not met on challenge does not mean burden not met to raise UCI. "[I]n some cases, voir dire might not be enough, and . . . witnesses may be required to testify on the issue of UCI."

H. Grounds for Challenge – Member has Bias Against/For Counsel.

1. Negative bias against specific counsel. *Napolitano*, 53 M.J. 162 (member indicated on questionnaire disapproval of civilian defense counsel's behavior in another case; judge did not abuse discretion in denying challenge for cause because member retracted opinion and said he was not biased against the counsel; different result likely if member has had adversarial dealings with counsel). *See also United States v. Rome*, 47 M.J. 467 (C.A.A.F. 1998) (military judge abused discretion by failing to grant a challenge for cause, based on implied bias, against member who judge determined had engaged in unlawful command influence in previous unrelated court-martial and who defense counsel had personally and professionally embarrassed through cross examination in previous high-profile case).

2. Bias against defense attorneys (in general). *Townsend*, 65 M.J. 460. When asked his "opinions of defense counsels," member said he had a "mixed view." While he respected military defense counsel as military officers with high ethical and moral standards, he had a "lesser respect for some of the ones you see on TV, out in the civilian world," an apparent reference to the member's regular viewing of the television show Law and Order. Court upheld military judge's denial of the challenge for cause, noting no actual or implied bias was present.

3. Positive bias for specific counsel. *United States v. Peters*, 74 M.J. 31 (C.A.A.F. 2015) (member bias based on the professional relationship between a member and the trial counsel; battalion commander disclosed on voir dire that he has regular engagements with trial counsel about legal issues and even had a phone conversation the night before voir dire about another legal issue and closed the conversation with, "I'll see you tomorrow." Trial Counsel provided "testimonial" that LTC is one of the most conscientious and thoughtful commanders within the brigade. . . . He takes this incredibly seriously as evidenced by his answers." Defense counsel challenged the LTC for cause, which was denied by the Military Judge after he considered the implied bias liberal grant mandate. In a 3-2 decision, CAAF determined that the TC's comments amounted to a personal endorsement and emphasized that a military judge should err on the side of granting a challenge for cause. The majority concluded that the relationship in this case rose to the level of implied bias requiring reversal. The dissenters each wrote separately, emphasizing largely pragmatic concerns with the majority's analysis.

I. Grounds For Challenge – Accused Should Testify. *United States v. Ovando-Moran*, 48 M.J. 300 (C.A.A.F. 1998). No abuse of discretion to deny challenge for cause against member who considered it unnatural if accused failed to testify. Court reasoned that MJ's explanation of accused's right to remain silent and member's statement that he would put preconceptions aside supported view that that member's "misperception" was not a personal bias against accused.

J. Grounds For Challenge – Accused Should Plead Guilty. *United States v. White*, No. 20061313 (A. Ct. Crim. App. Aug. 11, 2010) (unpublished). During individual voir dire, panel member said he observed a trial of one of his Soldiers who had been charged with sexually abusing a child. He said he resented the Soldier – who was clearly guilty – for pleading not guilty and forcing the child victim to testify. The trial counsel asked the member a few rehabilitation questions and the member agreed the other case would not affect his deliberations in the present case. The ACCA held the military judge did not abuse her discretion in denying the defense challenge for cause. Relying on *United States v. Elfayoumi*, 66 M.J. 354, 357 (C.A.A.F. 2008), the court noted that panel members are also members of society who may have strongly-held personal views which is part of the "human condition." In this case, a reasonable observer understanding the human condition would not question the neutrality, impartiality, and fairness of the proceeding.

IX. CHALLENGES FOR CAUSE – LOGISTICS

A. Timing Of Challenges. UCMJ art. 41.

1. UCMJ art. 41(a). If exercise of challenge for cause reduces court below minimum required per Article 16 (5 members for GCM, 3 members for SPCM), the parties shall exercise or waive all other causal challenges then apparent. Peremptories will not be exercised at this time.

2. UCMJ art. 41(b). Each party gets one peremptory. If the exercise of a peremptory reduces court below the minimum required by Article 16, the parties must use or waive any remaining peremptory challenge against the remaining members of the court before additional members are detailed to the court.

3. UCMJ art. 41(c). When additional members are detailed to the court, the parties get to exercise causal challenges against those new members. After causal challenges are decided, each party gets one peremptory challenge against members not previously subject to a peremptory challenge.

4. *See United States v. Dobson*, 63 M.J. 1 (C.A.A.F. 2006). The accused selected an enlisted panel to hear her contested premeditated murder case. After the military judge's grant of challenges for cause (CfCs) and peremptory challenges (PCs) the GCMCA needed to twice detail additional members for the court-martial to obtain ⅓ enlisted members, as required by Article 25, UCMJ.

> The issue on appeal was whether the MJ erred by granting the parties' PCs after the ⅓ enlisted quorum, as required by Article 25, UCMJ, was busted after the 1st and 2nd CfCs were granted. While ⅓ enlisted quorum was broken after the 1st and 2nd CfCs, the panel membership never dropped below five members as required for a general court-martial under Article 16, UCMJ. The defense argued that the MJ should not have granted the parties' PCs once the ⅓ enlisted quorum was broken under Article 25, UCMJ even though the total membership requirements of Article 16, UCMJ were met. Article 41, UCMJ states that if the exercise of CfCs drops panel membership below Article 16 requirements that additional members will be detailed and PCs will not be granted at that time. Article 41, UCMJ, however, does not address panel membership falling below Article 25, UCMJ ⅓ enlisted requirements. The CAAF held that the MJ did not error by granting PCs when Article 25 quorum was lacking but Article 16 quorum was met. The CAAF reasoned that "[t]he enlisted representation requirement in Article 25 employs a percentage, not an absolute number[, unlike Article 16,]. . . [a]s a result, there are circumstances in which an enlisted representation deficit under Article 25 can be corrected through exercise of a peremptory challenge against an officer." Defense also objected to the GCMCA detailing two additional officers to the panel after the 1st CfCs were granted as an attempt to dilute enlisted representation. The CAAF stated that the

accused is entitled only to ⅓ enlisted membership and the rules do not "require the [GCMCA] to add only the minimum number and type [of members] necessary to address a deficit under Article 16 or 25.

B. Preserving Denied Causal Challenges. R.C.M. 912(f)(4).

1. Background. Executive Order Amended R.C.M. 912(f)(4) and the "But For" Rule. See Executive Order 13387 – 2005, dated 18 October 2005. R.C.M. 912(f)(4) was amended by deleting the fifth sentence and adding other language to state: "When a challenge for cause has been denied the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review."

2. Old rule. *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). The CMA translated the old version of R.C.M. 912 (f)(4) as follows:

a. If counsel does not exercise her peremptory challenge, she waives her objection to the denied causal challenge. She preserves the denied causal if she uses her peremptory against any member of the panel. But…

b. If she uses her peremptory against the member she unsuccessfully challenged for cause and fails to state the "but for" rule, she waives your objection to the denied causal. So…

c. Counsel preserves her denied causal if she uses her peremptory against the member she unsuccessfully challenged for cause and she states the "but for" rule (i.e., "I'm using my peremptory to excuse Member X; but for your denial of my challenge for cause of Member X, I would have used my peremptory on Member A.").

3. Current rule. R.C.M. 912(f)(4). If "objectionable" member does not sit on the panel (for example, if defense counsel uses peremptory challenge to excuse the member), the appellate court will not review the military judge's denial of a challenge for cause for that member. The challenge will also be waived on appeal if the party exercising the challenge does not exercise its peremptory challenge against another member.

a. *Ross v. Okla.*, 487 U.S. 81 (1988). Defense had to use peremptory challenge to remove juror who should have been excused for cause; no violation of Sixth Amendment or due process right to an impartial jury. "Error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him."

b. *United States v. Medina*, 68 M.J. 587, 592 (N-M Ct. Crim. App. 2009). Defense counsel challenged member on implied bias grounds at trial and the military judge denied the challenge. Following the denial, defense did not exercise a peremptory against any member. The court held, "Failure to exercise a peremptory challenge against any member constitute[s] waiver of further review of an earlier challenge for cause, therefore, this issue is without merit." (citing R.C.M. 912(f)(4)).

c. Cf. *United States v. Eby*, 44 M.J. 425 (C.A.A.F. 1996). The defense failed to preserve for appeal the issue of prejudice under R.C.M. 912(f)(4) by using its peremptory challenge against a member who survived a challenge for cause without stating that the defense would have peremptorily challenged another member if military judge had granted the challenge for cause.

C. During-Trial Challenges. Although challenges to court members are normally made prior to presentation of evidence, R.C.M. 912(f)(2)(B) permits a challenge for cause to be made "at any other time during trial when it becomes apparent that a ground for challenge may exist." Peremptory challenges may not, however, be made after presentation of evidence has begun.

1. *United States v. Camacho*, 58 M.J. 624 (N-M Ct. Crim. App. 2003). During lunch break after completion of Government case on merits and rebuttal, the President of panel was overheard stating to government witness, "It's execution time," and making certain gestures, "including a vulgar one with his finger." Challenge for cause granted, which left only two members in this BCD-Special CM. Four new members were detailed, two of whom remained after voir dire and challenges. The remaining members were read all testimony without original members present. While the case was affirmed, the court noted, "Of great importance in this case is the fact that the defense offered no objection to the detailing of new members and the reading of testimony to those members . . . ."

2. *United States v. Bridges*, 58 M.J. 540 (C.G. Ct. Crim. App. 2003). After findings, DC moved to impeach findings due to unlawful command influence (SJA email reporting child sex abuse case). DC claimed that, had she known of email, she would have questioned members about it and "might have elicited some information as to bias." BUT, DC did not challenge any member for cause at that time or specifically ask the military judge to permit additional voir dire on the issue. HELD: The email on its own was not "an apparent ground for challenge for cause." As such, the military judge did not abuse his discretion by failing to sua sponte reopen voir dire.

3. *United States v. Millender*, 27 M.J. 568 (1988) (A.C.M.R. 1988). During break in court-martial, member asked legal clerk if it would be possible to learn the "other sentence." Challenge denied; no exposure to extra-judicial information which could influence deliberations. Court noted the legal clerk did not answer the member's questions and immediately reported the question to the military judge (who properly investigated and found no outside information had been given to the member).

4. *United States v. Arnold*, 26 M.J. 965 (A.C.M.R. 1988). If member recognizes a witness, conduct individual voir dire to test for bias.

D. Challenges after Trial.

1. *United States v. Sonego*, 61 M.J. 1 (C.A.A.F. 2005). Members sentenced the accused after his guilty plea to ecstasy use. During voir dire CPT Bell, a member, stated in response to the MJ's group voir dire questions that he did not have an inelastic predisposition as to punishment. Approximately a month after the accused's court-martial his attorney was representing another airman for drug use. During that court-martial CPT Bell stated that any service member convicted of a drug offense should receive a BCD. A verbatim transcript was not made for this second court-martial because it resulted in acquittal but the defense attorney submitted an affidavit recounting CPT Bell's different responses. On an issue of first impression the CAAF granted review to determine the "measure of proof required to trigger an evidentiary hearing" based on an allegation of juror dishonesty. Noting that the federal circuits differ on this issue, the CAAF adopted a "colorable claim" test requiring "something less than proof of juror dishonesty before a hearing is convened." The court, ordering a DuBay hearing, ruled that the defense attorney's affidavit constituted a "colorable claim" of juror dishonesty to warrant a further evidentiary hearing.

2. *United States v. Humpherys*, 57 M.J. 83 (C.A.A.F. 2002). Defense submitted a post-trial motion for a new trial based on discovery that two members were in the same rating chain, although both answered the military judge's question on that issue in the negative. The military judge held a post-trial 39(a) session and questioned the involved members, during which both responded that they did not remember the military judge asking the question, and their answers were not an effort to conceal the rating chain relationship. The military judge concluded the members' responses during trial were "technically . . . incomplete," but their responses in the Article 39(a) session caused him to conclude he would not have granted a challenge for cause based on the relationship. He denied the defense motion for new trial. HELD: affirmed. In order

to receive a new trial based on a panel member's failure to disclose info during voir dire, defense must make two showings: (1) that a panel member failed to answer honestly a material question on voir dire; and (2) that a correct response would have provided a valid basis for a challenge for cause. "[A]n evidentiary hearing is the appropriate forum in which to develop the full circumstances surrounding each of these inquiries." Appellate court's role in process is to "ensure the military judge has not abused his or her discretion in reaching the findings and conclusions." Here the military judge did not abuse his discretion where he determined that "full and accurate responses by these members would not have provided a valid basis for a challenge for cause against either or both."

3. *United States v. Dugan*, 58 M.J. 253 (C.A.A.F. 2003). The military judge refused to grant a post-trial 39(a) session to voir dire members concerning UCI in deliberations. The CAAF remanded for a DuBay hearing. Under these circumstances, M.R.E. 606(b) "permits voir dire of the members regarding what was said during deliberations about [the alleged UCI comments of a commander], but the members may not be questioned regarding the impact of any member's statements or the commander's comments on any member's mind, emotions, or mental processes."

E. Military Judge's Duty AND Sua Sponte Challenges. Challenges. Under R.C.M. 912(f)(4), a military judge may excuse a member sua sponte for actual or implied bias: "Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie." However, failure to excuse a member sua sponte will normally not require reversal.

1. *United States v. Velez*, 48 M.J. 220 (C.A.A.F. 1998). In a case involving two specifications of rape and two specifications of assault, the MJ did not err by failing, sua sponte, to remove three panel members based on implied bias. The implied bias doctrine was not invoked because the record established the following: the member who admitted knowing one of the rape victims had a tenuous relationship with victim, disavowed that this relationship would influence him, and the defense failed to challenge the member on such grounds; second member disavowed that command relationship with government rebuttal witness would influence him, and the defense counsel failed to challenge the member on that ground; the third member frankly disclosed that he had two friends who were victims of rape, and that he has a 15-year-old daughter he wanted to protect from rape, but disavowed improper influence and stated that he would follow the MJ's instructions.

2. *United States v. Strand*, 59 M.J. 455 (C.A.A.F. 2004). Court member was son of officer who acted as convening authority in the case. The member's father acted to excuse and detail new members in the absence of the regular GCMCA. The defense did not challenge the son for cause. On appeal, the defense contended that the military judge had a sua sponte duty to remove the son for implied bias. The court held that the military judge did not abuse his discretion in declining to sua sponte excuse the member, and declined to adopt a per se "familial relationship" basis for excusal. Here, the government revealed the familial relationship, and the military judge allowed both parties a full opportunity to voir dire the member. Although the military judge may excuse an unchallenged member in the interest of justice, there must be justification in the record for such a drastic action. The record in this case did not reveal an adequate justification for such action.

3. *See also United States v. Collier*, No. NMCCA 200601218 SPECIAL COURT-MARTIAL, 2008 CCA LEXIS 53 (N-M Ct. Crim. App. Feb. 21, 2008) (unpublished). In a bizarre case, trial counsel challenged a member for cause, based on implied bias. Defense counsel objected to the challenge, which the government then withdrew. On appeal, defense argued the military judge should have excused the member sua sponte for implied bias. During voir dire, the member stated

he was an Administration Officer, knew three of the witnesses in the case (he interacted with them on a daily basis and was in the rating chain for two of them), and recognized the accused's name from reviewing personnel rosters. The member had been on a cruise for seven months and had no knowledge of the facts of the case. In response to the government challenge for cause of this member, the defense counsel said: "[W]e feel that there's no problem with him. He's been on [a] cruise and has no knowledge of any of that." The military judge asked defense counsel why he objected to the government challenge and, before counsel could answer, the trial counsel withdrew the challenge for cause, but added, "We were more concerned with appearance. But, we'll withdraw our challenge for cause, if defense objects to that." In affirming the case, the court noted the member's minimal knowledge of the accused was "matter-of-fact and devoid of emotion." The member also stated that his professional relationship with three government witnesses would not affect his assessment of their testimony. Finally, in deciding there was no bias, the court noted "perhaps most tellingly" that the defense counsel at trial objected to the challenge.

X. PEREMPTORY CHALLENGES GENERALLY

Rule: One per side, unless new members are detailed. See Article 41(b)(1), UCMJ.

A. Additional Peremptory. *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988). Judge improperly denied defense request for additional peremptory after panel was "busted" and new members were appointed; however, error was harmless. See also *Rivera v. Illinois*, 556 U.S. (2009) (noting "there is no freestanding constitutional right to peremptory challenges" and a peremptory challenge is "a creature of statute.").

1. No Sixth Amendment right to a peremptory challenge. *Ross v. Oklahoma*, 487 U.S. 81(1988).

2. No Fifth Amendment due process right to peremptory challenge. *United States v. Martinez-Salazar*, 528 U.S. 504 (2000).

3. *But Cf. United States v. Pritchett*, 48 M.J. 609 (A.F. Ct. Crim. App. 1998). Military judge erred to the prejudice of the accused by denying the accused his statutory right to exercise a peremptory challenge against one of the new court members added after the original panel as supplemented fell below quorum. In a forcible sodomy and indecent liberties with a child case, the panel twice fell below quorum. After the third voir dire, the military judge denied both sides the right to exercise peremptory challenges. The defense implied that it desired to exercise the challenge and the MJ replied, "I don't want to hear anymore about it. I ruled." The exercise of a peremptory challenge is a statutory right. Deprivation of that right carries a presumption of prejudice, absent other evidence in the record, requiring automatic reversal.

B. No conditional peremptory challenges. *United States v. Newson*, 29 M.J. 17 (C.M.A. 1989). It was improper for judge to allow trial counsel to "withdraw" peremptory challenge after defense counsel reduced enlisted membership below one-third quorum. *But see United States v. Owens*, No. NMCCA 200100297, 2005 CCA LEXIS 182 (N-M Ct. Crim. App. June 17, 2005) (unpub.). Government exercised its peremptory challenge (PC), defense exercised its PC, and the MJ then asked defense if they had any objection to the government's PC. Defense objected but prior to the MJ's ruling the government withdrew its PC and then the MJ allowed the government to PC a different member to which procedure the defense objected. While "ordinarily" the government must exercise its PC prior to the defense and the MJ cannot alter this procedure "without a sound basis," the N-MCCA reasoned that a sound basis existed because of the defense's untimely objection which if timely made would have allowed the government to exercise its PC prior to the defense. In the alternative, even if the MJ erred no prejudice accrued to the accused particularly where the member, who the government tried to PC with defense o

C. If additional members are detailed (busted quorum). If the exercise of a peremptory reduces court below the minimum required, the parties must use or waive any remaining peremptory challenge against the remaining members of the court before additional members are detailed to the court. *Id.* (unpub.). Government exercised its peremptory challenge (PC), defense exercised its PC, and the MJ then asked defense if they had any objection to the government's PC. Defense objected but prior to the MJ's ruling the government withdrew its PC and then the MJ allowed the government to PC a different member to which procedure the defense objected. While "ordinarily" the government must exercise its PC prior to the defense and the MJ cannot alter this procedure "without a sound basis," N-MCCA reasoned that a sound basis existed because of the defense's untimely objection which if timely made would have allowed the government to exercise its PC prior to the defense. In the alternative, even if the MJ erred no prejudice accrued to the accused particularly where the member, who the government tried to PC with defense objection, ultimately sat on the case.

XI. DISCRIMINATORY PEREMPTORY CHALLENGES – BATSON

A. In General. *Batson v. Kentucky* prohibits the use of unlawful discrimination in the exercise of a peremptory challenge. The Batson case expressly prohibited race-based challenges. Subsequent Supreme Court cases have extended Batson to forbid peremptory challenges based on race or gender.

1. The origin. *Batson v. Kentucky*, 476 U.S. 79 (1986). The Supreme Court held that a party alleging that an opponent was exercising peremptory challenges for the purpose of obtaining a racially-biased jury had to make a prima facie showing of such intent before the party exercising the challenges was required to explain the reasons for the strikes (prosecutor had used peremptory challenges to strike all four of the African-Americans from the venire, with the result that Batson, an African-American, was tried by an all-white jury). The three-part Batson test requires: (1) a prima facie case of discrimination, (2) then the provision of a race neutral reason, and (3) proof of purposeful discrimination.

2. Military application. The Supreme Court has never specifically applied Batson to the military. However, military caselaw has applied *Batson* to peremptory challenges through the Fifth Amendment. Military courts have, in some instances, made Batson even more protective of a member's right to serve. Under *Batson*, counsel cannot exercise a peremptory challenge based on race or gender.

a. *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988) (equal protection right to be tried by a jury from which no racial group has been excluded is part of due process and applies to courts-martial). Court in *Santiago* recognized that "in our American society, the Armed Services have been a leader in eradicating racial discrimination," and held that government's use of only peremptory challenge against minority court member raised prima facie showing of discrimination.

b. In the military, a trial counsel addressing a *Batson* challenge cannot proffer a reason that is "unreasonable, implausible, or that otherwise makes no sense." *See United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997). By contrast, civilian courts only need a reason that is not "inherently discriminatory," even if explanation is not "plausible." *See Rice v. Collins*, 546 U.S. 333 (2006).

c. *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989) adopted a per se rule that "every peremptory challenge by the Government of a member of the accused's race, upon objection, must be explained by trial counsel" This is further expanded by Powers below:

3. Making a *Batson* challenge. If either side exercises a challenge against a panel member who is a member of a minority group, then the opposing side may object and require a race-neutral reason for the challenge.

4. *Batson* applies to defense. *United States v. Witham*, 47 M.J. 297 (C.A.A.F. 1997) (holding *Batson* applicable to defense in courts-martial); *Georgia v. McCollum*, 505 U.S. 42(1992) (holding that the Constitution prohibits a civilian criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges). If the government can show a prima facie case, the burden shifts to the defense to provide a race neutral reason for their peremptory challenge.

B. Parameters of Race-Based Challenges.

1. Accused and member need not be of the same racial group. *Powers v. Ohio*, 499 U.S. 400 (1991). "The Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely on their race. . . ."

a. Court's holding removes the requirement from *Batson* that the accused and challenged juror be of the same race.

b. Court's ruling in *Powers* is very broad. Focuses on both the rights of the accused as well as the challenged member.

c. Prosecutors must now be prepared to articulate a race-neutral reason for all peremptory challenges, regardless of the races of the accused or member.

2. Race defined. *Hernandez v. New York*, 500 U.S. 352 (1991) (extending Batson to potential jurors who were bilingual Latinos, with the Court viewing Latinos as a cognizable race for Batson purposes and referring to Latinos as both a race and as an ethnicity). *See also United States v. Martinez-Salazar*, 528 U.S. 304 (2000) ("a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race"). To date the Supreme Court has applied *Batson* only to classifications which have received heightened scrutiny; race, gender, and ethnic origin (thus far limited to Latinos). *But see Rico v. Leftridge-Byrd*, 340 F.3d 178 (3d Cir. 2003) (Batson prohibits the exercise of peremptory challenges based on ethnic origin of Italian-Americans).

C. Parameters of Gender-Based Challenges. As discussed above, *Batson* applies to gender-based challenges. *J.E.B. v. Ala.*, 511 U.S. 127 (1994). *JEB* held that the Equal Protection Clause prohibits litigants from striking potential jurors solely on the basis of gender. Ruling extends the concept that private litigants and criminal defense attorneys are "state actors" during voir dire for purposes of Equal Protection analysis. *See also United States v. Omoruyi*, 7 F.3d 880 (9th Cir. 1993) (prosecutor claimed that he used peremptory challenges against two single females because he thought they "would be attracted to the defendant" because of his good looks; court finds this was gender-based discrimination).

1. Applies to military. *United States v. Witham*, 47 M.J. 297 (C.A.A.F. 1997) (gender, like race, is an impermissible basis for the exercise of a peremptory challenge by either the prosecution or the military accused).

2. Trial counsel must provide gender-neutral reason for striking member. *United States v. Ruiz*, 49 M.J. 340 (C.A.A.F. 1998) (the per se rule developed in *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989), is applicable to Government peremptory challenges based on gender whether a MJ requests a gender neutral reason or not).

3. Generally, additional voir dire is unnecessary. *United States v. Bradley*, 47 M.J. 715 (A.F. Ct. Crim. App. 1997). Accused charged with rape and assault. Trial counsel's exercise of peremptory challenge against one of two remaining members based on fact that member challenged was investigating officer on a case involving the legal office was gender-neutral and valid under *Batson*, and did not require military judge to grant defense request for additional voir dire to

explore the basis of the trial counsel's supporting reason. Neither *Witham* nor *Tulloch* elevate a peremptory challenge to the level of a causal challenge (party making peremptory challenge need only provide a race neutral explanation in response to a *Batson* challenge).

4. Occupation-based peremptory challenges (subterfuge for gender?). *United States v. Chaney*, 53 M.J. 383 (C.A.A.F. 2000). The government used its peremptory challenge against the sole female member. After a defense objection, TC explained that member was a nurse. Military judge interjected that in his experience TCs "rightly or wrongly" felt members of medical profession were sympathetic to accuseds, but that it was not a gender issue. Defense did not object to this contention or request further explanation from TC. CAAF upheld the military judge's ruling permitting the peremptory challenge, noting that the military judge's determination is given great deference. CAAF noted it would have been preferable for the MJ to require a more detailed clarification by TC, but here DC failed to show that the TC's occupation-based peremptory challenge was unreasonable, implausible or made no sense.

D. Parameters of Race- And Gender-Neutral Reasons. The Supreme Court has held that the "genuineness of the motive" rather than "the reasonableness of the asserted nonracial motive" is what is important. *Purkett v. Elem*, 514 U.S. 765 (1995) (Missouri prosecutor struck two African-American men from panel stating "I don't like the way they looked," and they "look suspicious to me;" this is a legitimate hunch, and the Batson process does not demand an explanation that is "persuasive or even plausible;" only facial validity, as determined by trial judge, is required). *See Rice*, 546 U.S. 333. The prosecutor struck a minority female because (1) she had rolled her eyes in response to a question from the court; (2) she was young and might be too tolerant of a drug crime, and (3) she was single and lacked ties to the community. The trial judge did not observe the eye roll but allowed the challenge based on the second and third grounds. The trial judge noted that the government also used a PC against a white male juror because of his youth. The Supreme Court, citing *Purkett*, 514 U.S. 765, stated that a race neutral explanation "does not demand an explanation that is persuasive, or even plausible, so long as the reason is not inherently discriminatory, it suffices." *See also Hernandez*, 500 U.S. 352 ("[A]n explanation based on something other than the race of the juror. . . Unless a discriminatory intent is inherent in the prosecutor's explanation the reason offered will suffice.").

1. Different standard for trial counsel. Peremptory challenges are used to ensure qualified members are selected, but, in the military, the convening authority has already chosen the "best qualified" after applying Article 25, UCMJ. Therefore, under *Batson*, *Moore*, and *Witham*, trial counsel may not strike a person on a claim that is unreasonable, implausible, or otherwise nonsensical. *Tulloch*, 47 M.J. 283. *Tulloch* is a departure from Supreme Court precedent, which requires only that counsel's reason be "genuine." *Purkett*, 514 U.S. 765.

a. *Tulloch*: Accused was African-American. Trial counsel moved to strike African-American panel member based on "demeanor," claiming member appeared to be "blinking a lot" and "uncomfortable." CAAF held this was insufficient to "articulate any connection" between the purported demeanor and what it indicated about the member's "ability to faithfully execute his duties on a court-martial." Trial counsel's peremptories are assessed under a "different standard."

b. Trial counsel must be able to defend the peremptory challenge as non-pretext.

c. Counsel cannot simply affirm his good faith or deny bad faith in the use of the peremptory.

d. Counsel must articulate a connection between the observed behavior, etc., and a colorable basis for challenge (e.g., "member's answers to my questions suggested to me she was not comfortable judging a case based on circumstantial evidence alone," etc.).

e. Military judge should make findings of fact when the underlying factual predicate for a peremptory challenge is disputed, particularly where the dispute involves in-court observations of the member. The military judge should make "findings of fact that would establish a reasonable, plausible race-neutral explanation for a peremptory challenge by the Government of a member chosen as 'best qualified' by a senior military commander." *Tulloch*, 47 M.J. 283.

2. Fact-specific inquiry and inconsistent results.

a. *United States v. Robinson*, 53 M.J. 749 (A. Ct. Crim. App. 2000). Trial counsel's proffered reason for striking minority member (that he was new to the unit and that his commander was also a panel member) was unreasonable. Counsel did not articulate any connection between the stated basis for challenge and the member's ability to faithfully execute the duties of a court-martial member. Sentence set aside.

b. *United States v. Shelby*, 26 M.J. 921 (1988) (N.M.C.M.R. 1988). Trial counsel peremptorily challenged junior African-American officer in sodomy trial of African-American accused. Inexperience of junior member was accepted racially-neutral explanation, even though other junior enlisted members remained.

c. *United States v. Curtis*, 28 M.J. 1074 (1989) (N.M.C.M.R. 1989), *rev'd on other grounds*, 33 M.J. 101 (C.M.A. 1991). Trial counsel challenged African-American member who stated that serving on court-martial in a capital case would be a good "learning experience." Upheld as a racially-neutral explanation.

d. *United States v. Woods*, 39 M.J. 1074 (1994) (A.C.M.R. 1994). TC says, "We just did not get the feeling that SSG Perez was paying attention and would be a good member for this panel. It had nothing to do with the fact that his last name was Perez. I mean there is no drug stereotype here." Court holds TC's articulated basis (inattentiveness) was not pretext for intentional discrimination.

3. The numbers game and protecting quorum. *United States v. Hurn*, 55 M.J. 446 (C.A.A.F. 2001). The DC objected after the TC exercised the government's peremptory challenge against panel's only non-Caucasian officer. TC's basis "was to protect the panel for quorum." CAAF held the reason proffered did not satisfy the underlying purpose of *Batson*, *Moore*, and *Tulloch*, which is to protect the participants in judicial proceedings from racial discrimination.

a. Case remanded for *DuBay* hearing based on TC's affidavit, filed two and a half years after trial, which set forth other reasons for challenging the member in question.

b. Post-*DuBay*: *United States v. Hurn*, 58 M.J. 199 (C.A.A.F. 2003). In *DuBay* hearing, TC testified he also removed the member because the member had expressed concern about his "pressing workload." MJ determined challenge was race-neutral. CAAF affirmed, finding no clear error: "The military judge's determination that the trial counsel's peremptory challenge was race-neutral is entitled to great deference and will not be overturned absent clear error" (internal quotations and citations omitted). But see *Greene*, below (holding where part of the reason for a challenge is not race-neutral, the entire reason must fail).

4. Valid logistical reasons for using peremptory. *United States v. Clemente*, 46 M.J. 715 (A.F. Ct. Crim. App. 1997). Trial counsel's use of peremptory challenge to remove only Filipino member of panel because member was scheduled to go on leave during the trial was race neutral. Defense counsel acquiesced in objection by stating that "it would accept it and was ready to go ahead and continue.

E. Mixed Motive Challenges Are Improper. *United States v. Greene*, 36 M.J. 274 (C.M.A. 1993). Two reasons for exercise of peremptory challenge: one reason was facially valid and race-neutral; the

second amounted to a "gross racial stereotype" and was clearly not race neutral. Where part of the reason for a challenge is not race neutral, the entire reason must fail. Findings and sentence set aside. *See also McCollu*m, 505 U.S. at 54 (civilian defendant's use of peremptory challenges based on racial consideration was prohibited).

F. Beyond Race/Ethnic Group And Gender, Batson Is Generally Inapplicable.

1. Marital status. Peremptory challenges based on marital status do not violate *Batson*. *United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991).

2. Age. Peremptory challenges based on age do not violate *Batson*. *Bridges v. State*, 695 A.2d 609 (Md. Ct. Spec. App. 1997).

3. Religion. The Supreme Court has not ruled on whether *Batson* extends to religious-based peremptory challenges.

a. *United States v. Williams*, 44 M.J. 482 (C.A.A.F. 1996). Trial counsel peremptorily challenged a member who was the senior African-American officer after he indicated that he was a member of the Masons. The accused was also a Mason. No abuse of discretion for the MJ to grant the peremptory challenge where the TC indicated the race neutral reason was that the member and accused were members of the same fraternal organization. While recognizing that the Supreme Court has not extended *Batson* to religion, the court noted that the record in this case was "devoid of any indication of [the member's] religion." CAAF cites *Casarez v. Texas*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (on rehearing), and *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994), as authority that *Batson* does not apply to religion.

b. Two federal circuits have decided the status of religion-based Batson strikes on the merits.

(1) *United States v. DeJesus*, 347 F.3d 500 (3d Cir. 2003). Court drew a distinction between a strike motivated by religious beliefs and one motivated by religious affiliation. The court found strikes motivated by religious beliefs (i.e. heightened religious activity) were permitted; no occasion to rule on issue of religious affiliation. The Seventh Circuit makes the same distinction in dicta, but did not resolve the issue because the court found no plain error. *United States v. Stafford*, 136 F.3d 1109 (7th Cir. 1998).

(2) *United States v. Brown*, 352 F.3d 654 (2d Cir. 2003). *Batson* applies to challenges based on religious affiliation. "Thus, if a prosecutor, when challenged, said that he had stricken a juror because she was Muslim, or Catholic, or evangelical, upholding such a strike would be error. Moreover, such an error would be plain." Strikes at issue involved heightened religious activity, so did not violate *Batson*.

c. One circuit has not addressed the issue. *United States v. Girouard*, 521 F.3d 110, 113 (1st Cir. 2008) ("We have never held that Batson applies to cases of religious discrimination in jury selection. Even assuming, arguendo, that Batson does apply to claims of religious discrimination, we find no clear error in the district court's action. It is therefore unnecessary to resolve the open question of whether Batson does indeed apply to religious discrimination.").

d. States are split on whether *Batson* extends to religion. *Compare Thorson v. Stat*e, 721 So. 2d 590, 594 (Miss. 1998) (extending Batson to peremptory strikes based on religion); *State v. Purcell*, 18 P.3d 113, 120 (Ariz. Ct. App. 2001) (concluding that Batson extends to peremptory challenges based on religious affiliation); with *Davis*, 504 N.W.2d at 771 (rejecting argument that Batson includes peremptory strikes based on religious affiliation); *State v. Gowdy*, 727 N.E.2d 579, 586 (Ohio 2000) (permitting peremptory challenge based on

juror wearing a cross); *Casarez v. State*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (en banc) (holding that state interests in peremptory challenges warrant excluding jurors based on religious affiliation); *James v. Commonwealth*, 442 S.E.2d 396, 398 (Va. 1994) (same).

4. Membership in organization. *United States v. Williams*, 44 M.J. 482 (C.A.A.F. 1996). Accused and senior officer member of panel were members of the Masons. Peremptory challenge based on "fraternal affiliation" is race-neutral.

G. Recent Application of *Batson*. *Snyder v. Louisiana*, 552 U.S. 472 (2008). A civilian defendant was convicted of first-degree murder and sentenced to death. On appeal, defense argued the trial court erred by allowing the prosecution to use a peremptory challenge against an African-American juror despite a *Batson* challenge. In a 7-2 decision, the Court ruled the trial judge committed "plain error" by denying the *Batson* challenge.

1. Before jury selection, 85 prospective jurors were questioned during normal voir dire. Of those 85, only 36 survived challenges for cause; five of those remaining jurors were black. Under Louisiana practice, each side had 12 peremptory challenges. "[A]ll 5 of the prospective black jurors were eliminated by the prosecution through the use of peremptory strikes." At issue on appeal, the defense lodged a *Batson* challenge against the prosecution's peremptory challenge of one of the five black prospective jurors. Pursuant to *Batson* and its progeny, the prosecution gave two race-neutral reasons for using a peremptory. First, the prospective juror "looked very nervous" during questioning. Second, the prospective juror was a student teacher and said during voir dire that he was concerned jury duty might keep him from completing his requirements for the semester. Based on this second challenge, the prosecution speculated, "[H]e might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase."

2. The Court looked at the other 50 members of the venire who said that jury duty would be an "extreme hardship." Of those 50, there were 2 white members who had serious scheduling conflicts. First, Mr. Laws was a general contractor; he said that he had "two houses that are nearing completion" so if he served on the jury, those people would not be able to move in to their homes. Mr. Laws further said that he his wife recently had a hysterectomy so he was taking care of his children. He added, "[S]o "so between the two things, it's kind of bad timing for me." Second, Mr. Donnes approached the court with an "important work commitment" later that week; though not developed on the record, it was important enough that Mr. Donnes re-raised the conflict on the second day of jury selection.

3. The Court focused on the third *Batson* step, concluding that the prosecution's "pretextual explanation naturally gives rise to an inference of discriminatory intent." During jury selection, the judge's law clerk called the dean at the prospective juror's university, who said he could complete his student teaching observation even if he served on the jury. The Court concluded that the student teaching obligations were not a valid reason for exercising a peremptory, particularly in light of the other conflicts offered by two white jurors who ultimately sat as members.

H. Procedural Issues.

1. Timing. Defense should object to government's peremptory challenge immediately after it has been stated by the government. *See United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). The accused attacked military practice because it unnecessarily permits the Government a peremptory challenge even when it has not been denied a challenge for cause, contrary to *Ford v. Georgia*, 498 U.S. 411 (1991), which states: "The apparent reason for the one peremptory challenge procedure is to remove any lingering doubt about a panel member's fairness . . . ." In the military, accused asserted that "the [unrestricted] peremptory challenge becomes a device subject to abuse." The CAAF noted that Article 41(b) provides accused and the trial counsel one

peremptory challenge. Neither Ford, nor any other case invalidates this judgment of Congress and the President.

2. Privacy. Military judge should use appropriate trial procedures to best protect privacy interest of challenged member.

3. Type of proceedings to substantiate reasons.

a. Argument by defense is typically enough to complete the record. *But see United States v. Downin*g, 56 M.J. 419 (C.A.A.F. 2002). Appellant failed to meet burden of establishing that a court-martial panel member should have been dismissed for cause (bias), so it did not matter that the trial judge may have applied the wrong standard for challenge.

b. Affidavit, adversary hearing, and argument allowed, but evidentiary hearing denied. *United States v. Garrison*, 849 F.2d 103 (4th Cir.), *cert. denied*, 109 S. Ct. 566 (1988). See also *Ruiz* (above).

4. Findings on record.

a. Judge should enter formal findings concerning sufficiency of proffered reasons. MJ should make findings of fact when underlying factual predicate for a peremptory challenge is in dispute. See *Tulloch* above and *United States v. Perez*, 35 F.3d 632, 636 (1st Cir. 1994).

b. Military judge not required to raise the issue sua sponte, question member, or recall member for individual voir dire. See *Clemente* and *Bradley*, above.

5. Waiver. To preserve the *Batson* issue, defense counsel should make timely *Batson* challenge as well as object to the race- and gender-neutral reasons offered by trial counsel. Failure to object at both stages may constitute waiver.

a. *United States v. Galarza*, No. 9800075 (A. Ct. Crim. App. May 31, 2000) (unpub.). Where defense made *Batson* objection to TC's peremptory challenge of a female panel member, and TC stated member showed "indecisiveness" during voir dire, DC's failure to object or to dispute TC's proffered gender-neutral explanation for the peremptory challenge waived issue on appeal).

b. *United States v. Irvin*, No. ACM 35167, 2005 CCA LEXIS 99 (A.F. Ct. Crim. App. Mar. 24, 2005) (unpub.). Trial counsel peremptorily challenged only African-American panel member in a contested rape court-martial. MJ asked the TC for a race-neutral Batson reason, sua sponte, for the challenge. TC responded that the panel member might have preconceived ideas or positions from a rape court-martial she had previously sat on the week prior and she had previously heard testimony from one of the investigators. MJ accepted this reason and defense did not object to the TC's reason or the MJ's ruling. AFCCA held the defense counsel's failure to object waived the issue and further that the MJ did not abuse his discretion in finding no purposeful discrimination by the TC.

6. Making the record of a *Batson* challenge – the outer limits. *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). Military judge erred in not requiring counsel to articulate a "race-neutral" explanation for the Government's use of its peremptory challenge against one of only two African-American panel members. Trial counsel did, however, provide a statement at the next court session, stating a race-neutral explanation for the challenge (claiming the member's responses concerning the death penalty were equivocal). Trial counsel's statement provided a sufficiently race-neutral explanation for the challenge, and the court found that public confidence in the military justice system had not been undermined. The military judge is required to make a determination as to whether trial counsel's explanation was credible or pretextual and, optimally,

an express ruling on this question is preferred. However, here the military judge clearly stated his satisfaction with trial counsel's disavowal of any racist intent in making the challenge.

a. Avoid the issue. Government should use peremptory challenge sparingly and only when a challenge for cause has not been granted. The requirements of *Batson* will likely be satisfied if a facially-valid challenge for cause was denied before trial counsel exercised peremptory challenge:

b. *United States v. Allen*, 59 M.J. 515 (N-M Ct. Crim. App. 2003). Government challenged officer panel member for cause "based on the fact he had previously been a criminal accused in a military justice case and, therefore, would likely hold the Government to a higher standard of proof than required by law." Military judge denied challenge for cause; government exercised its peremptory against the same member and defense made *Batson* challenge. Government gave same reason for peremptory as for challenge for cause. Court held the TC articulated a reasonable, race neutral and plausible basis for challenge.

XII. PRACTICE TIPS: VOIR DIRE GOALS AND HOW TO REACH THEM

A. Information Gathering.

1. The first goal (and the only one officially sanctioned by the Rules for Court-Martial) is information gathering. Panel members cannot sit unless they can be fair and impartial (R.C.M. 912(f)(1)(N)), so you need to be able to gather information on fairness and impartiality in order to make meaningful use of peremptory and causal challenges.

2. In civilian trials, the prospective juror pool is very large and somewhat represents a cross-section of society. Civilian attorneys have a bigger information gathering challenge that military attorneys do. Civilian attorneys really know nothing about these people and one of their primary goals is to get rid of the jerks and weirdos. We don't have that problem. The convening authority has already screened this population and we should not expect jerks and weirdos to make the cut. Therefore, you can really refine your information gathering goals.

3. The problem is that panel members, like most human beings, will not say socially unacceptable things in public. Many psychological studies have shown that when people are put in group settings, they generally will say what they think the group expects them to say. If you ask panel members who are sitting in a formal court-room in their Army Service Uniform and who might themselves be a field-grade officer and whose boss might also be on the panel, "Do you look at pornography," don't expect a lot of hands to go up. If you ask, "Would you be concerned if your daughter dated outside of your race," don't expect a lot of hands to go up.

4. To get responses that will accurately tell you whether a panel member might have a bias or belief that will impact your case, you need to ask those questions in a safe place – written individual voir dire.

a. All of your panel members will have already completed a written questionnaire, but that questionnaire contains vanilla questions and answers. You want the panel members to complete a supplemental questionnaire where you provide them with a forum that will allow them to expose their beliefs without causing themselves personal embarrassment, and where they can have some "outs" (as in, shift the questioned belief or behavior to someone else). Here, you are much more likely to get reflective and accurate answers.

b. You will need to identify what experiences, biases, and beliefs exist that might impact how your panel members will solve the problem in your case. If your case involves homosexual conduct, or pornography, or cross-racial sexual relationships, or cross-racial

violence, or a sexual-assault victim that has behaved in ways that are contrary to traditional sex role expectations, or [add a bias or belief here], then you need to explore that with your panel members.

(1) In a case involving pornography or non-traditional sexual behavior, you might ask: "Have you or someone you are close to (a college roommate, brother or sister, close friend) ever regularly looked at pornography? If someone else did, did your opinion of him or her change after you found out? Explain how it changed."

(2) In a case involving cross-racial sexual relationships, you might ask: "If your son or daughter became romantically involved with someone from another race, how would that concern you? And then have a scale from "0" (not concern me at all) to "10" (concern me greatly)."

(3) You can ask similar questions about homosexuality (if your son or daughter told you he or she was gay, would that concern you, and then a scale). Or, the relationship between race and violence (Imagine that you are at home sleeping in bed with your wife, with the kids in their rooms, when you hear a window break and the unmistakable sounds of someone in your house. Now, what is the color of the skin of the person that you imagined was in your house?) Or, the validity of the mental health field as a real science (In your opinion, are psychology and psychiatry valid sciences or psycho-babble, with a scale). Or, whether they associate a stigma with seeking help for mental health problems (Have your or has someone close to you been to a mental health professional? If someone else, did your opinion of him or her change? How?)

(4) Take a look back at those questions. If they were asked in a group setting, what would the answers have been? Most likely, the socially acceptable answers. So, reduce these types of questions to something that is close to an anonymous survey (the written supplemental) and see if you can get accurate replies. You might even consider having a psychologist or psychiatrist help you to draft the questions. An added benefit of asking the questions via a supplemental questionnaire is that the members won't know which party is seeking the information.

c. You might also look for other indicators of belief systems, like what news shows they watch and what magazines they receive. And you might look for the ways that they learn: "[O]ne of the most important things to look for is how the different jurors learn. Are they more creative or more logical? Would they rather look at a graph or read a book? What magazines to they read? What kind of entertainment do they enjoy? What kinds of games do they like to play?" James McElhaney, Making Limited Time for Voir Dire Count, A.B.A. J., Dec. 1998, at 66.

d. You should also ask about life experiences that might impact how the panel member will approach the problem. The military judge will ask some of these questions in front of everybody. For example, "Has anyone, or any member of your family, or anyone close to you personally ever been the victim of an offense similar to the offense charged?" In a case of child molestation, if a panel member was molested as a child but has not told anyone, do you think he or she will raise her hand and say that he or she has in front of all of these strangers? The better place to ask that question is in written voir dire.

e. As with anything else in trial work, the decision to submit an additional questionnaire needs to be goal oriented. If you don't need to gather information via a supplemental questionnaire in this particular case, don't.

f. And, you need to start working on this early. You need to identify these issues, structure arguments around them, and draft written voir dire questions during the trial preparation

process – not on the day before trial. Generally, to do a written supplemental questionnaire, you will need to distribute the questionnaires a week or two before trial so that they can be sent to the members, the members can complete them, and then the questionnaires can be collected and reviewed by the attorneys. Using this process forces you to get your thoughts together well before trial.

5. Individual spoken voir dire.

a. If the panel member has responded in a way that causes you concern, you should consider challenging them based solely on their written response. If the military judge wants more, then bring the issue up in individual spoken voir dire – not in group spoken voir dire. Give the prospective panel member as much anonymity as you can.

6. Note how using written questionnaires and individual spoken voir dire greatly simplifies the process of voir dire. You don't have to come up with complex charts and try to keep up with who's hands go up when in response to what questions. You get the answers you need ahead of time, on paper, or later when just one person is on the stand. Voir dire can be pretty easy.

7. Again, only do individual spoken voir dire if you need to. If you don't have a good reason for doing it, don't do it.

8. The bottom line is: if you want to learn particular information about this panel member, use written voir dire to discovery that information and then use individual spoken voir dire to follow-up the written voir dire, if needed. Don't waste your group spoken voir dire time doing information gathering.

B. Education

1. The next goal is education – not education on your theory or theme of your case, but education on the counter-intuitive things the panel members will have to deal with.

2. Don't educate on your theory.

a. When you theory-shop or theme-shop with your panel, you might think you are doing what lawyers should be doing, and other lawyers might be impressed, but your panel members will not be impressed. First, you risk coming across as a used-car salesman or as a lawyer trying to pull a lawyer-trick. According to James McElhaney, "Arguing your case before the jury panel members even know what it's about triggers genuine sales resistance. So does trying to push the jurors into making commitments about how they are going to decide the case." James McElhaney, Making Limited Time for Voir Dire Count, A.B.A. J. Dec. 1998, at 66-67.

b. And when you ask questions that you think are related to your case, like, "Would you agree that cops sometimes lie?", you are insulting their intelligence. Of course they know that cops sometimes lie. What they want to know is, did a cop lie in this case. And they want to wait until they hear the case to deal with that issue. They don't want to feel like you are pressuring them to agree with you before they know the facts.

c. Look at these questions, for example:

(1) Do you believe that, under certain circumstances, eyewitness' memory might not be accurate?

(2) How do you feel about witnesses who testify after receiving special treatment from the government?

(3) Do you think criminals might lie in order to get a better deal from the government?

(4) Do you agree that many words of the English language have various meanings?

(5) Do you agree that the mere presence at the scene of the crime does not establish guilt?

d. Each of these questions only has one answer. The panel members know that so they wonder why you are asking them and why you want them to state something so obvious. You might think you are doing something clever, but they are wondering why you are wasting their time and insulting their intelligence with questions like this.

e. As a good rule of thumb, if what you intend to ask is really an inference, then don't ask the question. Note that for all of the questions above, you can just argue that statement. Instead of asking those questions, do what the panel members want you to do: put on the evidence, and then argue the inferences. They will appreciate that.

3. So, if we aren't going to theory-test and theme-test, what are we going to educate the panel members about?

4. Educate them on the counter-intuitive aspects of the law or of your case, and on generally-held beliefs that run counter to your case. This is how you will use group oral voir dire.

a. The judge is going to ask some perfunctory questions that address some of these issues, particularly system bias that runs against the accused. However, all of these questions only illicit the socially acceptable response. There is only one to answer, "The accused has pled not guilty to all charges and specifications and is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt. Does anyone disagree with this rule of law?" No panel member is going to raise her hand while wearing her Army Service Uniform and say, "You know what, your honor? I cannot abide by that fundamental principle of American law." The panel members will only respond with the socially acceptable answer, but you need to be aware that they will still likely solve the problem before them by relying on deeply-embedded generalizations about human behavior.

b. Note, your goal is to educate them about these beliefs, not to challenge them for cause. Some panel members will respond with answers that show that they have beliefs that run counter to your case. That is okay. You are going to make them aware of their beliefs so that they will be more receptive to counter-arguments and other belief structures. (You are not going to win most challenges for cause in this area, anyway, because the other party or the military judge will be able to ask questions that will rehabilitate the panel member).

c. As James McElhaney states, "A sermonette and long strings of questions will not change how anybody feels about basic issues. Even if they seem to go along with you, they will not reject their personal opinions. They will keep their personal opinions and reject you." James McElhaney, Making Limited Time for Voir Dire Count, A.B.A. J., Dec. 1998, at 66.

d. We need to find a way to get them to be aware of their underlying beliefs so that they will not act on them. To do this, you want them to describe the 800-pound gorilla in the room (the belief they would otherwise use to solve the problem). And then you want to kill the gorilla.

e. Kill the gorilla. Don't challenge the panel member.

f. You want them to gain insight on how the natural way that they might have solved the problem contains error. (For a good discussion of the neurological reasons why you explore these beliefs with the panel members, read Jonah Lehrer's book, How We Decide).

g. For the defense counsel, there are several places in the law where the law runs counter to our intuitive problem-solving processes.

(1) For example, if the accused does not testify, we all draw negative inferences from that (he must have something to hide; if I were falsely accused, I would testify to set the

record straight, so so should he – he isn't, so therefore he is guilty). Because normal people draw an inference that runs counter to constitutional protections (here, the right not to testify), the law says, "Don't do that."

(2) Same for the prohibition against drawing a negative inference if the defense does not put on a case (if evidence that said he didn't do it were available, of course he would put it on – so it must not exist), or for the inference that just because the person is sitting at that table, they must have done something wrong (he has been through transmittals from commanders, an Art. 32, and the CG referral – all those people think he did something wrong, or else he would not be sitting at this table). Those last two instances implicate the presumption of innocence, and it turns out that 60-80% of jurors presume guilt.

h. h) From the judge that tells them not to use those generalizations does not mean that they will not use those lifelong-held generalizations to solve the problem. It just means that they will not talk out loud about their use of those generalizations.

i. How to kill the gorilla.

(1) In group voir dire, ask this simple question: "What is the first thing that comes to your mind when you hear that the accused will not testify?" Wait a few moments. There may be some silence. Eventually, someone will say, "He is guilty." Now, don't rush to challenge that person. Instead, say, "Thank you, SFC Jones." And then ask, "Did anyone else think that?" Then say, "Thank you, [Names]." Then, have them describe the elephant. Ask, "Okay, MAJ Smith, why do you think that?" Continue asking questions until the 800-pound gorilla is fully described.

(2) Do not be judgmental with the answers. Instead, validate them. Say, "Thank you, MAJ Smith, I see your point" or variations on that.

(3) Then, ask, "Okay, why would someone who is innocent not take the stand?" Again, wait a few moments. There may be some silence. But then somebody will start finding the swords: "He might not be a good public speaker;" "His attorney might have told him not to;" "He have has some embarrassing skeletons in his closet;" "He might be afraid that a trained federal prosecutor will twist his words;" "He might be really nervous, particularly when this much is at stake." (If no one comes up with a reason after several moments have gone by, then toss them a sword to get them talking.)

(4) The key is to have them list all of the reasons that no one ever wants to testify. Then ask, "Does everyone now see why the military judge told you not to hold it against SGT Adams if he doesn't testify? Please raise your hand if you can see that. Everyone raised their hand. Thank you."

(5) For the presumption of innocence, you might ask, "What is the first thing you think when you see that the government has gone through all this trouble to bring the accused to trial?" The answer will probably be, "He did something wrong." Then you respond with, "Why could it be that innocent people are brought in to court?" Let them grab some swords. ("He was framed." "He was the best of several suspects." "He was in the wrong place at the wrong time." "Someone misidentified him.") If they can't find any, ask them, "Well, have any of you ever been accused of doing something you didn't do? Either recently, or even as a kid?" Have them describe the situations. Then ask, "Now, does everyone see the reason why we have this presumption of innocence? Please raise your hand if you see that. Everyone raised their hand. Thank you."

(6) You killed the gorilla. Now, the panel members are much less likely to rely on the life-long held generalizations that work against your client. Note, you didn't try to challenge anyone.

5. Again, you need to have a good reason for doing group spoken voir dire. If you do not have a good reason for doing it, don't do it. You only need to do this when the bias might exist in your case. If your client is going to testify or put on evidence, then you don't need to explore those system biases. Only have them describe the 800-pound gorillas that need killing.

6. For the trial counsel prosecuting an acquaintance sex assault case where the victim has behaved in ways prior to the assault that are outside of traditional sex-role expectations, you will run into two beliefs that will hurt your case, both of which shift blame to the victim: first, she asked for it, and second, she assumed the risk that this would happen.

a. If slightly more than one-third of your panel members has one of these beliefs (and research shows that these are commonly-held beliefs) and you don't deal with these beliefs, then you may have an acquittal coming.

b. If your victim did something like drink with the accused ahead of time and then consensually engaged in kissing or oral sex, but then claims that the accused forced sexual intercourse on her, then some panel members might think that she asked for it. Essentially, she shares culpability for what happened next. If she had not done all of those things, then this guy would not have lost control of his libido.

c. You can counter that by asking, "Are there circumstances where a woman can get a man so worked up that, even if she says no later, it is too late to say no?" Wait. Someone may raise their hand. Ask why they think that way. Have them describe the 800-pound gorilla and see if other people agree, using the same technique as above.

d. Then, give them a sword. Ask them, "Okay, well, if someone comes up to you and asks to borrow $50, and you say, 'I won't loan you $50, but I will loan you $25,' can that person then go ahead and take the other $25? Who thinks no? Everybody raised their hands."

e. If your victim placed herself in a risky situation, particularly by her own voluntary drinking, then you need to address this assumption of risk. You might first ask, "If a woman does X, Y, and Z, do you think she assumes some risk in what might happen to her?" Wait. You will probably get several people who agree. Ask why they think that way. Describe the 800-pound gorilla.

f. The next step is to see if they think that because she assumed some risk, the offender might be less culpable. Ask, "Well, if someone gets really drunk and stumbles out of a bar, they have placed themselves at risk of getting mugged. If someone does mug them, do we let the mugger go because the victim was drunk?" Or you might ask, "If a well-dressed business man goes to a ATM late at night in a crime-ridden part of town and gets mugged, do we let the mugger go because the victim was in dangerous situation?

7. The bottom line is: describe those generalizations (describe the 800-pound gorilla) and then have the panel members find reasons why those generalizations are dangerous (have them find some swords); then, have them kill the gorilla. Again, you need to have a good reason for doing group spoken voir dire. If you do not have a good reason for doing it, don't do it.

C. Rapport and Persuasion

1. The third and fourth goals of voir dire, rapport and persuasion, are really byproducts of what you have accomplished in written and spoken voir dire. You have established rapport with the panel by not wasting their time; by asking questions that matter; and by showing them that you

are prepared. Don’t ask test-like questions. Show an interest in what they are saying. Don’t ask judgmental questions, and don’t judge their answers. Validate all of their responses.

2. And by addressing the biases and beliefs that run counter to your case, you have made them more open to the case you are about to present.

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CHAPTER 19
SENTENCING & CREDIT

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I. OVERVIEW. R.C.M. 1001(a)(1)

A. Matters to be presented by the government. R.C.M. 1001(b). Counsel may present:

1. Service data relating to the accused from the charge sheet.
2. Personnel records reflecting the character of the accused's prior service.
3. Prior convictions.
4. Circumstances directly relating to or resulting from the offense(s).
5. Opinion evidence regarding past duty performance and rehabilitative potential.

B. Victim impact statement. R.C.M. 1001A (under the MJA 2016, R.C.M. 1001A will disappear as a standalone rule and be merged into R.C.M. 1001 to become the new R.C.M. 1001(c))

C. Defense counsel presents the case in extenuation and mitigation. R.C.M. 1001(c). (under the MJA 2016 this will become R.C.M. 1001(d))

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E. Additional matters. R.C.M. 1001(f). (under the MJA 2016 this will become R.C.M. 1001(g))

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G. Rebuttal argument at MJ's discretion. R.C.M. 1001(a)(1)(F). (under the MJA 2016 this will become R.C.M. 1001(a)(1)(G))

II. THE GOVERNMENT'S CASE. R.C.M. 1001(b)

A. Service data relating to the accused taken from the charge sheet. R.C.M. 1001(b)(1).

1. Name, rank and unit or organization.
2. Pay per month.
3. Current service (initial date and term).
4. Nature of restraint and date imposed.

5. Note: Personal data is ALWAYS subject to change and should be verified PRIOR to trial and announcement by counsel in open court. Consider promotions, reductions, time-in-grade pay raises, calendar year pay changes, pretrial restraint, etc.

B. Personnel records reflecting character of prior service. R.C.M. 1001(b)(2).

1. "*Under regulations of the Secretary concerned,* trial counsel may obtain and introduce from the personnel records of the accused evidence of . . . character of prior service" (emphasis added). These records may include personnel records contained in the Official Military Personnel File (OMPF) *or located elsewhere*, unless prohibited by law or other regulation. Army Regulation (AR) 27-10, para. 5-29*a* (11 May 2016) implements R.C.M. 1001(b)(2).

2. AR 27-10, para. 5-29*a* (11 May 2016) illustrates, in a non-exclusive manner, those items qualifying for admissibility under R.C.M. 1001(b)(2) and (d).

3. Personnel records are NOT limited to matters contained in a service member's Military Personnel Records Jacket (MPRJ), OMPF or Career Management Information File (CMIF). AR 27-10, para. 5-29*a* (11 May 2016). The key is whether the record is maintained IAW applicable departmental regulations.

a) *United States v. Fontenot*, 29 M.J. 244 (C.M.A. 1989). Handwritten statements attached to appellant's DD Form 508s (Report of/or Recommendation for Disciplinary Action) made during the appellant's pretrial confinement not admissible under R.C.M. 1001(b)(2). The miscellaneous pieces of paper that accompanied the DD 508s were not provided for in the applicable departmental regulation, AR 190-47. The Court of Military Appeals (CMA) did not decide whether the DD 508s themselves were admissible. *Id.* at 248 n.2.

b) *United States v. Ariail*, 48 M.J. 285 (1998). National Agency Questionnaire, DD Form 398-2, completed by accused and showing history of traffic offenses, was admissible under R.C.M. 1001(b)(2), where it did not meet admission criteria under R.C.M. 1001(b)(3) [prior conviction].

c) *United States v. Douglas*, III, 57 M.J. 270 (2002). A stipulation of fact from a prior court-martial as evidence of a prior conviction was properly admissible under R.C.M. 1001(b)(2) not R.C.M. 1001(b)(3) as part of a personnel record.

d) *United States v. Lane*, 48 M.J. 851 (A.F. Ct. Crim. App. 1998). AF Form 2098 (reflecting the current AWOL status of the accused who was tried in absentia) was admissible pursuant to R.C.M. 1001(b)(2).

e) *United States v. Reyes*, 63 M.J. 265 (2006). During the sentencing phase, the trial counsel offered into evidence Prosecution Exhibit (PE) 6, which was represented to be "excerpts" from Reyes's Service Record Book. Apparently, neither the defense counsel nor the military judge checked PE 6 to make sure it was free of any defects, as it was admitted without objection. There were a variety of unrelated documents "[t]ucked between the actual excerpts" from the Service Record Book. Such documents included the entire military police investigation, the pretrial advice from the SJA, inadmissible photographs, and appellant's pretrial offer to plead guilty to charges on which the members had just acquitted appellant. The sentence was set aside and a rehearing authorized.

4. Article 15s (formal).

a) Ordinarily, to be admissible in sentencing, the proponent must show the accused had opportunity to consult with counsel <u>and</u> that accused waived the right to demand trial by court-martial. Absent objection by defense counsel, however, Military Rule of Evidence (M.R.E.) 103 does not require the military judge to affirmatively determine whether an

accused had an opportunity to consult with counsel and that the accused waived the right to demand trial by court-martial before admitting a record of nonjudicial punishment (NJP) (an accused's "Booker" rights). *See United States v. Kahmann*, 59 M.J. 309 (2004).

b) *United States v. Rimmer*, 39 M.J. 1083 (A.C.M.R. 1994) (per curiam). Exhibit of previous misconduct containing deficiencies on its face is not qualified for admission into evidence. Record of NJP lacked any indication of accused's election concerning appeal of punishment, and imposing officer failed to check whether he conducted an open or closed hearing.

5. Letters of Reprimand.

a) *United States v. Zakaria*, 38 M.J. 280 (C.M.A. 1993). Applying M.R.E. 403, the court held that the MJ erred in admitting LOR given the accused for sexual misconduct with his teenage stepdaughter and other teenage girls where accused was convicted of larceny of property of a value less than $100.00. "[The reprimand's] probative value as to his military character was significantly reduced because of its obvious reliability problems. In addition, it is difficult to imagine more damaging sentencing evidence to a soon-to-be sentenced thief than also brandishing him a sexual deviant or molester of teenage girls." Id. at 283.

b) *United States v. Clemente*, 50 M.J. 36 (1999). Two letters of reprimand in accused's personnel file properly admitted pursuant to R.C.M. 1001(b)(2), even though letters were for conduct dissimilar to charged offenses. The CAAF noted there was no defense challenge to the accuracy, completeness or proper maintenance of the letters, and the evidence directly rebutted defense evidence. The court applied an abuse of discretion standard and held that the LORs were personnel records that did reflect past behavior and performance, and M.R.E. 403 was not abused.

6. Caveats.

a) No "rule of completeness." Trial counsel cannot be compelled to present favorable portions of personnel records if unfavorable portions have been introduced in aggravation. *See* R.C.M. 1001(b)(2) analysis (MCM 2016 ed.).

b) R.C.M. 1001(b)(2) cannot be used as a "backdoor means" of admitting otherwise inadmissible evidence. *United States v. Delaney*, 27 M.J. 501 (A.C.M.R. 1988) (observing that government cannot use enlistment document (e.g., enlistment contract) to back door inadmissible prior arrests; cannot then use police report to rebut accused's attempted explanations of arrests). Compare with *Ariail*, 48 M.J. 285 (1998) (holding that information on NAQ that had information on prior convictions was admissible under R.C.M. 1001(b)(2)).

c) *United States v. Vasquez*, 54 M.J. 303 (2001). Plea-bargaining statements are not admissible (M.R.E. 410) even if those statements relate to offenses that are not pending before the court-martial at which they are offered. It was error for the judge to admit into evidence a request for an administrative discharge in lieu of trial by court-martial. *See also United States v. Anderson*, 55 M.J. 182 (2001).

7. Defects in documentary evidence.

a) *United States v. Donohue*, 30 M.J. 734 (A.F.C.M.R. 1990). Government introduced document that did not comply with AF Reg. requiring <u>evidence on the document or attached thereto</u> that accused received a copy and had an opportunity to respond. ISSUE: May Government cure the defect with testimony that accused did receive a copy and was offered an opportunity to respond? "The short answer is no." Why – because the applicable AF Reg. required evidence on the document itself. Absent a specific regulatory requirement such as

that in Donahue, live testimony could cure a documentary/procedural defect. *See also United States v. Kahmann*, 58 M.J. 667 (N-M. Ct. Crim. App. 2003), aff'd, 59 M.J. 309 (2004) supra.

b) MJ must apply M.R.E. 403 to R.C.M. 1001(b)(2) evidence. *See United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991) (suppressing a prior "arrest" that was documented in the accused's personnel records). *See also United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993); and *United States v. Zakaria*, 38 M.J. 280 (C.M.A. 1993).

C. Prior Convictions - Civilian & Military. R.C.M. 1001(b)(3).

1. There is a "conviction" in a court-martial case when a sentence has been adjudged. R.C.M. 1001(b)(3)(A). "In a civilian case, a 'conviction' includes any disposition following an <u>initial judicial determination or assumption of guilt</u>, such as when guilt has been established by guilty plea, trial, or plea of nolo contendere, regardless of the subsequent disposition, sentencing procedure, or final judgment. However, a 'civilian conviction' does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated or pardoned because of errors of law or because of subsequently discovered evidence exonerating the accused."

a) *United States v. Caniete*, 28 M.J. 426 (C.M.A. 1989). Convictions obtained between date of offense for which accused was on trial and date of trial were "prior convictions" per R.C.M. 1001(b)(3)(A).

b) Juvenile adjudications are not convictions within the meaning of R.C.M. 1001(b)(3) and are therefore inadmissible in aggravation. *United States v. Slovacek*, 24 M.J. 140 (C.M.A. 1987).

2. Use of prior conviction.

a) *United States v. Tillar*, 48 M.J. 541 (A.F. Ct. Crim. App. 1998). At sentencing, trial counsel offered evidence of 18-year-old special court-martial conviction for larceny of property of value less than $100.00. MJ allowed evidence, but instructed panel not to increase sentence solely on basis of prior conviction. The Air Force Court upheld admission of the conviction, noting only time limitation is whether such evidence is unfairly prejudicial (M.R.E. 403).

b) As with all evidence at trial, the military judge must apply the M.R.E. 403 balancing test. *United States v. Glover*, 53 M.J. 366 (2000).

c) *United States v. Cantrell*, 44 M.J. 711 (A.F. Ct. Crim. App. 1996). "The proper use of a prior conviction . . . is limited to the basic sentencing equation. Evidence is admissible in sentencing either because it shows the nature and effects of the crime(s) or it illumines the background and character of the offender." Id. at 714.

d) "MCM provides only for consideration of prior convictions, and not of any prior criminal record in sentencing." *United States v. Delaney*, 27 M.J. 501 (A.C.M.R. 1988).

3. Pendency of appeal. R.C.M. 1001(b)(3)(B).

a) Conviction is still admissible.

b) Pendency of appeal is admissible as a matter of weight to be accorded the conviction.

c) Conviction by summary court-martial or special court-martial without a military judge is not admissible until review under UCMJ Article 64 or 66 is complete.

4. Authentication under Section IX of M.R.E. required.

5. Methods of proof.

a) DA Form 2-2 (Insert Sheet to DA Form 2-1, Record of Court Martial Convictions).

b) DD Form 493 (Extract of Military Records of Previous Convictions).

c) Promulgating order (an order is not required for a SCM (R.C.M. 1114(a)(3))).

d) Record of trial. DD Form 490 (Record of Trial) or 491 (Summarized Record of Trial) for special and general courts-martial and DD Form 2329 for SCM.

e) Arraignment calendar.

f) State agency records. *United States v. Eady*, 35 M.J. 15 (C.M.A. 1992). Proof of conviction in form of letter from police department and by indictment and offer to plead guilty not prohibited under the M.R.E. *But see United States v. Mahaney*, 33 M.J. 846 (A.C.M.R. 1991). Civilian conviction is not self-authenticating because not under seal.

g) Use of personnel records of the accused. *United States v. Barnes*, 33 M.J. 468 (C.M.A. 1992). Government may use Department of Defense Form 1966/3 to prove accused's prior conviction IAW:

- M.R.E. 803(6), records of regularly conducted activity; or
- M.R.E. 801(d)(2), admission by party opponent.

6. Other considerations

a) So long as only relevant portions are used and the probative value outweighs the prejudicial effect. *United States v. Wright*, 20 M.J. 518 (A.C.M.R. 1985).

b) *United States v. Kelly*, 45 M.J. 259 (1996) (improper for court-martial to consider SCM conviction on sentencing when there was no evidence accused was ever advised of the right to consult with counsel, or to be represented by counsel at his SCM).

D. Aggravation Evidence. R.C.M. 1001(b)(4). A military judge has broad discretion in determining whether to admit evidence under 1001(b)(4). *United States v. Rust*, 41 M.J. 472, 478 (1995); *United States v. Wilson*, 47 M.J. 152, 155 (1997); *United States v. Gogas*, 58 M.J. 96 (2003).

1. ". . . [E]vidence as to any aggravating circumstances *directly relating to or resulting from* the offenses of which the accused has been found guilty" (emphasis added). See *United States v. Hardison*, 64 M.J. 279 (2007)

2. Three components – "Evidence in aggravation includes, but is not limited to":

a) Victim-Impact: "[E]vidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of the offense committed by the accused."

b) Mission-Impact: "[E]vidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense."

c) Hate-Crime Evidence: "[E]vidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."

3. *United States v. Barker*, 77 M.J. 377 (C.A.A.F. 2018). Holding that R.C.M. 1001A belongs to the victim, and is separate and distinct from the *government's* right to offer victim impact statements in aggravation under R.C.M. 1001(b)(4). (emphasis in original)

4. *United States v. Nourse*, 55 M.J. 229 (C.A.A.F. 2001). The CAAF held that it was permissible to admit evidence of other uncharged larcenies of property from the same victim by

the accused because such evidence "directly related to the charged offenses as part of a continuing scheme to steal from the . . . [victim]." This evidence showed the "full impact of appellant's crimes" upon the victim. *See also United States v. Shupe*, 36 M.J. 431 (C.M.A. 1993); *United States v. Mullens*, 29 M.J. 398 (C.M.A. 1990).

5. *United States v. Patterson*, 54 M.J. 74 (C.A.A.F. 2000). Testimony by government expert regarding patterns of pedophiles, to include "grooming" of victims, admissible even though expert did not expressly testify the accused was a pedophile. *Compare with United States v. McElhaney*, 54 M.J. 120 (2000) (holding that the military judge erred when he allowed a child psychiatrist to testify about future dangerousness).

6. *United States v. Sittingbear*, 54 M.J. 737 (N-M. Ct. Crim. App. 2001). Victim's testimony that she sustained a rectal tear during a rape is admissible even where a sodomy charge had been withdrawn and dismissed.

7. *United States v. Alis*, 47 M.J. 817 (A.F. Ct. Crim. App. 1998). Accused's awareness of magnitude of crime, and remorseless attitude toward offenses, is admissible in sentencing.

8. *United States v. Wilson*, 47 M.J. 152 (1997). Accused convicted of disrespect for commenting to another party that, "Captain Power, that f_____g b____h is out to get me." Officer testified at sentencing to "concern" statement caused her. The CAAF held that the testimony was properly admissible.

9. *United States v. Zimmerman*, 43 M.J. 782 (Army Ct. Crim. App. 1996). Evidence that accused was motivated by white supremacist views when he wrongfully disposed of military munitions to what he believed was a white supremacist group constituted aggravating circumstances directly related to the offense.

10. *United States v. Gargaro*, 45 M.J. 99 (1996). Evidence that civilian drug dealer triggered the investigation when he was arrested with an AK-47 that he said he obtained from a Fort Bragg soldier showed the extent of the conspiracy and the responsibility of the accused's commander. Any unfair prejudice stemming from the fact that the weapon was found in the hands of a drug dealer was outweighed by the probative value showing the facts and circumstances surrounding the investigation of the charged offenses.

11. *United States v. Hollingsworth*, 44 M.J. 688 (C.G. Ct. Crim. App. 1996). Testimony of child victim to offense which was the basis of a withdrawn specification admissible when it showed extent of scheme with evidence of other transactions. Also, testimony of expert child psychologist that sexual abuse victim's recovery was affected or hindered by the pendency of legal proceedings admissible where defense raised factors affecting a victim's recovery rate and expert's testimony provided a "more complete" explanation of the victim's prognosis.

12. *United States v. Scott*, 42 M.J. 457 (1995). Initial findings to involuntary manslaughter and assault with a dangerous weapon set aside (accused fired into a crowd). On appeal, the charge that remained was carrying a concealed weapon. Evidence of death and injuries showed circumstances "directly related to or resulting from" the accused's carrying of a concealed weapon.

13. *United States v. Terlep*, 57 M.J. 344 (2002). Appellant, initially charged with burglary and rape, plead to unlawful entry and assault. On sentencing, victim testified she awoke from what she thought was a "sex dream" only to discover the appellant on top of her. She testified, in part, that "when I told him to get off of me, he had to take his private part out of me and get off. . . ." She also testified "He admitted—he said what he had done. He said, 'I raped you.'" The CAAF found that the victim's testimony did not constitute error. The court noted that although the appellant entered into a pretrial agreement to lesser offenses, the victim could testify to "her

complete version of the truth, as she saw it" limited only by the terms of the pretrial agreement and stipulation of fact. Neither the pretrial agreement nor the stipulation of fact limited the evidence the government could present on sentencing. The court noted that "absent an express provision in the pretrial agreement or some applicable rule of evidence or procedure barring such evidence, this important victim impact evidence was properly admitted." R.C.M. 1001(b)(4) provides for "accuracy in the sentencing process by permitting the judge to fully appreciate the true plight of the victim in each case."

14. *United States v. Marchand*, 56 M.J. 630 (C.G. Ct. Crim. App. 2001). Expert testimony describing impact of child pornography upon minors depicted in images admissible notwithstanding that expert did not establish that the particular victims in the images viewed by accused actually suffered any adverse impact, only that there was an increased risk to sexually abused minors generally of developing complications from abuse.

15. *United States v. Smith*, 56 M.J. 653 (Army Ct. Crim. App. 2001). Unwarned testimony by appellant to U.S.D.B. Custody Reclassification Board where appellant said "'it's an inmates duty to try and escape, especially long-termers" and that he is "'an escape risk and always will be'" admissible on aggravation.

16. *United States v. Gogas*, 58 M.J. 96 (2003). Letter from accused to his Congressman complaining about being prosecuted for LSD use admissible under 1001(b)(4) as directly related to the offense of drug use. The letter highlighted the appellant's "indifference to anything other than his own pleasure." The court did not rule on whether the evidence was also admissible on the issue of rehabilitative potential.

17. *United States v. Dezotell*, 58 M.J. 517 (N-M. Ct. Crim. App. 2003). Witness' testimony that appellant's unauthorized absence and missing movement adversely affected ship's mission and efficiency during a period of heightened responsibilities proper testimony despite the fact that the appellant, at the time, was not working for the witness and the witness' testimony was not subject "to precise measurement or quantification." All that is required is a "direct logical connection or relation between the offense and the evidence offered."

18. *United States v. Powell*, 45 M.J. 637 (N.M. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 360 (1998). Uncharged misconduct that accused lost government property, was financially irresponsible, and passed worthless checks was not directly related to offenses of which convicted - *i.e.*, failure to report to work on time and travel and housing allowance fraud - and therefore not admissible at sentencing under R.C.M. 1001(b)(4). The court also noted that "MRE 404(b) does not determine the admissibility of evidence of uncharged misconduct during sentencing . . . admissibility of such evidence is determined solely by R.C.M. 1001(b)(4) . . . ." *Id.* at 640.

19. *United States v. Rust*, 41 M.J. 472 (1995). Prejudicial error to admit suicide note in aggravation phase of physician's trial for dereliction of duty and false official statement. The murder-suicide was too attenuated *even if* the government could establish link between accused's conduct and murder-suicide, and clearly failed M.R.E. 403's balancing test.

20. *United States v. Davis*, 39 M.J. 281 (C.M.A. 1994). Victim's testimony as to how he would feel if the accused received no punishment not admissible as evidence of impact evidence under R.C.M. 1001(b)(4) or as evidence regarding accused's rehabilitative potential under R.C.M. 1001(b)(5).

21. *United States v. Hardison*, 64 M.J. 279 (2007). The military judge committed plain error in admitting evidence of Appellant's pre-service drug use and a service waiver for that drug use. Admissible evidence in aggravation must be "directly related" to the convicted crime.

E. Opinion evidence regarding past duty performance and rehabilitative potential. R.C.M. 1001(b)(5).

1. What does "rehabilitative potential" mean?

a) The term "rehabilitative potential" means potential to be restored to "a useful and constructive place in society." R.C.M. 1001(b)(5).

b) *United States v. Williams*, 41 M.J. 134 (C.M.A. 1994). Psychiatric expert's prediction of future dangerousness was proper matter for consideration in sentencing under rule providing for admission of evidence of accused's potential for rehabilitation under R.C.M. 1001(b)(5).

2. Foundation for opinion testimony. R.C.M. 1001(b)(5)(B).

a) The witness must possess sufficient information and knowledge about the accused's "character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offenses" in order to offer a "helpful," rationally based opinion. R.C.M. 1001(b)(5)(B), codifying *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

b) *United States v. Powell*, 49 M.J. 460 (1998). In laying a foundation for opinion evidence of an accused's rehabilitative potential, a witness may not refer to specific acts.

c) Quality of the opinion depends on the foundation. *United States v. Boughton*, 16 M.J. 649 (A.F.C.M.R. 1983). Opinions expressed should be based on personal observation, but may also be based on reports and other information provided by subordinates.

3. Basis for opinion testimony R.C.M. 1001(b)(5)(C).

a) Opinion evidence of rehabilitative potential may not be based solely on the severity of the offense; must be based upon relevant information and knowledge possessed by the witness of the accused's personal circumstances. R.C.M. 1001(b)(5)(C); *United States v. Horner*, 22 M.J. 294 (C.M.A. 1986).

4. Proper scope of opinion testimony R.C.M. 1001(b)(5)(D).

a) The scope "is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit." R.C.M. 1001(b)(5)(D).

b) It is improper for a witness to use a euphemism for a punitive discharge in commenting on an accused's rehabilitative potential. *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989). *United States v. Warner*, 59 M.J. 590 (C.G. Ct. Crim. App. 2003). On cross-examination of appellant's supervisor (whom the defense called to establish that the appellant had rehabilitation potential), the government asked the witness about the appellant's rehabilitative potential "*in the Coast Guard*, given his drug abuse." The government's questions were improper because they linked the witness' opinion on rehabilitative potential with award of a punitive discharge.

c) The same rules do not apply to the defense.

(1) *United States v. Griggs*, 61 M.J. 402 (2005). Appellant tried and convicted of various drug-related offenses. On sentencing, the DC offered six letters with opinions on to appellant's rehabilitative potential in the Air Force rather than as a productive member of society. The TC objected on the grounds that the statements were recommendations for retention and would confuse the members. The military judge ordered the disputed language redacted. The AFCCA held that the MJ did not abuse his discretion by ordering the redaction and, even if he did, the error was harmless (i.e., there was no prejudice to the appellant). The

court cited confusion in this area of law as to whether such evidence is proper from the *accused* as a basis for its conclusion. The court also noted that the DC conceded that R.C.M. 1001(b)(5) applied to the defense letters. CAAF granted review and concluded "the better view is that R.C.M. 1001(b)(5)(D) does not apply to defense mitigation evidence, and specifically does not preclude evidence that a witness would willingly serve with the accused again." However, CAAF further restated, as in *Aurich*, "if an accused 'opens the door' by bringing witnesses before the court to testify that they want him or her backing the unit, the Government is permitted to prove that that is not a consensus view of the command." 31 M.J. at 96-97.

d) Specific acts? R.C.M. 1001(b)(5)(E) and (F).

(1) On direct, government may not introduce specific acts of uncharged misconduct that form the basis of the opinion. *See United States v. Rhoads*, 32 M.J. 114 (C.M.A. 1991).

(2) If the defense opens the door during cross-examination, on redirect the trial counsel should also be able to address specific incidents of conduct. *United States v. Clarke*, 29 M.J. 582 (A.F.C.M.R. 1989). *See also United States v. Gregory*, 31 M.J. 236 (C.M.A. 1990) (R.C.M. 1001(b)(5) witness cannot testify about specific instance of misconduct as basis for opinion until cross-examined on specific good acts).

e) Future Dangerousness.

(1) *United States v. Williams*, 41 M.J. 134 (C.M.A. 1994). Psychiatric expert's prediction of future dangerousness was proper matter for consideration in sentencing under rule providing for admission of evidence of accused's potential for rehabilitation under R.C.M. 1001(b)(5).

(2) Rebuttal Witnesses. *United States v. Pompey*, 33 M.J. 266 (C.M.A. 1991). The Ohrt/Horner rules apply to government rebuttal witnesses to keep unlawful command influence out of the sentencing proceedings (a rational basis for expressing opinion is still required). But see *United States v. Aurich*, 32 M.J. 95 (C.M.A. 1990) (observing that where defense witnesses testify they want accused back in unit, the government may prove that that is not a consensus of the command).

(3) Absence of rehabilitative potential is a factor for consideration in determining a proper sentence; that absence is NOT a matter in aggravation. *United States v. Loving*, 41 M.J. 213 (C.M.A. 1994), aff'd, 517 U.S. 748 (1996). MJ's characterization of accused's disciplinary record and his company commander's testimony about accused's duty performance as aggravating circumstances was error since lack of rehabilitative potential is not an aggravating circumstance.

F. Matters admitted into evidence during findings. R.C.M. 1001(f).

1. R.C.M. 1001(f)(2). The court-martial may consider any evidence properly introduced on the merits before findings, including evidence of other offenses or acts of misconduct even if introduced for a limited purpose.

2. Statements from providence inquiry.

a) *United States v. Figura*, 44 M.J. 308 (1996). There is no demonstrative right way to introduce evidence from the providence inquiry, but MJ should permit parties to choose method of presentation. How to do it: authenticated copy of trial transcript, witness, tapes. *See United States v. Irwin*, 42 M.J. 479 (1995). Admissibility of various portions of providence inquiry should be analyzed in same manner as any other piece of evidence offered by the government under R.C.M. 1001.

b) *United States v. English*, 37 M.J. 1107 (N.M.C.M.R. 1993). MJ does not have authority to consider statements of accused made during providence inquiry, absent offering of statements, and defense opportunity to object to consideration of any or all of providence inquiry.

G. "Aggravation evidence" in stipulations of fact.

1. *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988). Inadmissible evidence may be stipulated to (subject to R.C.M. 811(b) "interests of justice" and no government overreaching). Stipulation should be unequivocal that all parties agree stipulation is "admissible."

2. *United States v. DeYoung*, 29 M.J. 78 (C.M.A. 1989). Military judge must affirmatively rule on defense objections, even if the stipulation states that the contents are admissible. Parties cannot usurp the MJ's role.

3. *United States v. Vargas*, 29 M.J. 968 (A.C.M.R. 1990). The stipulated facts constitute uncharged misconduct not closely related to the facts alleged; therefore, they were "generally" inadmissible. BUT, the accused agreed to permit their use in return for favorable sentence limits, and there was no evidence of government overreaching.

H. Three-step process for analyzing sentencing matter presented by the prosecution per R.C.M. 1001(b):

1. Does the evidence fit one of the enumerated categories of R.C.M. 1001(b)? Evidence inadmissible under one theory (e.g., prior conviction under 1001(b)(4)) may be admissible under another theory (e.g., personnel record under 1001(b)(2)). *See e.g.*, *United States v. Ariail*, 48 M.J. 285 (1998); *United States v. Douglas*, 57 M.J. 270 (2002); *United States v. Gogas*, 58 M.J. 96 (2003).

2. Is the evidence in an admissible form? *United States v. Bolden*, 34 M.J. 728 (N.M.C.M.R. 1991).

3. Is the probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? M.R.E. 403. *See United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991); *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985).

III. THE DEFENSE CASE. R.C.M. 1001(c)/R.C.M. 1001(d)

A. Matters in extenuation. R.C.M. 1001(c)(1)(A)/R.C.M. 1001(d)(1)(A). Explains circumstances surrounding commission of the offense, including those reasons that do not constitute a legal justification or excuse.

B. Matters in mitigation. R.C.M. 1001(c)(1)(B)/R.C.M. 1001(d)(1)(B).

1. Personal factors concerning the accused introduced to lessen the punishment; *e.g.*, evidence of the accused's reputation or record in the service for efficiency, fidelity, temperance, courage, etc.

2. *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993). Counsel should pay particular attention to awards and decorations based on combat service.

3. *United States v. Bray*, 49 M.J. 300 (1998). Proper mitigation evidence under R.C.M. 1001(c) included the possibility that the accused suffered a psychotic reaction as a result of insecticide poisoning. Such evidence might lessen the adjudged sentence, and is therefore relevant.

4. Retirement benefits.

a) *United States v. Washington*, 55 M.J. 441 (2001). At time of trial, accused was a senior airman (E-4) who could retire during her current enlistment. The military judge excluded defense evidence that estimated the accused's retirement pay if she retired after twenty years in the pay grades of E-4 and E-3. The military judge erred by refusing to admit a summary of expected lost retirement of approximately $240,000.00 if accused was awarded a punitive discharge.

b) *United States v. Boyd*, 55 M.J. 217 (2001). The military judge declined to give a requested defense instruction on the loss of retirement benefits that could result from a punitive discharge. The accused had fifteen and a half years active service. The court held that there was no error in this case, but stated "we will require military judges in all cases tried after the date of this opinion (10 July 2001) to instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction and a party requests it."

c) *United States v. Greaves*, 46 M.J. 133 (1997). The military judge should give some instructions when the panel asks for direction in important area of retirement benefits.

C. Statement by the accused. R.C.M. 1001(c)(2)/R.C.M. 1001(d)(2).

1. Sworn statement. R.C.M. 1001(c)(2)(B)/R.C.M. 1001(d)(2)(B).

a) Subject to cross-examination by trial counsel, military judge, and members.

b) Rebuttable by:

- Opinion and reputation evidence of character for untruthfulness. R.C.M. 608(a).
- Evidence of bias, prejudice, or any motive to misrepresent. R.C.M. 608(c).
- Extrinsic evidence of prior inconsistent statements. R.C.M. 613.

2. Unsworn statement by accused. R.C.M. 1001(c)(2)(C)/R.C.M. 1001(d)(2)(C), <u>not subject to cross</u>

a) May be oral, written, or both.

b) May be made by accused, counsel, or both.

c) Matters covered in unsworn statement.

(1) *United States v. Grill*, 48 M.J. 131 (1998). The right of an accused to make a statement in allocution is not wholly unfettered, but must be evaluated in the context of statements in specific cases. It was error to sustain the government's objection to the accused making any reference to his co-conspirators being treated more leniently by civilian jurisdictions (*i.e*., not prosecuted, deported, probation). "The mere fact that a statement in allocution might contain matter that would be inadmissible if offered as sworn testimony does not, by itself, provide a basis for constraining the right of allocution."

(2) *United States v. Jeffery*, 48 M.J. 229 (1998). An accused's rights in allocution are broad, but not wholly unconstrained. The mere fact, however, that an unsworn statement might contain otherwise inadmissible evidence – *e.g*., the possibility of receiving an administrative rather than punitive discharge – does not render it inadmissible.

(3) *United States v. Britt*, 48 M.J. 233 (1998). There are some limits on an accused's right of allocution, but "comments that address options to a punitive separation from the service . . . are not outside the pale." Error for the military judge to redact portion of the

accused's unsworn statement telling panel that commander intended to discharge him administratively if no punitive discharge imposed by court-martial.

(4) *United States v. Johnson*, 62 M.J. 31 (2005). Prior to trial, Appellant took a privately administered polygraph examination arranged by the defense. The examiner concluded that appellant was not deceptive when he denied knowing that he transported marijuana. During the sentencing hearing he sought to refer to his "exculpatory" polygraph test during his unsworn statement. The military judge ruled that the test results were inadmissible. The CAAF found that polygraph evidence squarely implicates its own admonition against impeaching or relitigating the verdict on sentencing. Furthermore, the court was not persuaded that exculpatory polygraph information qualifies as extenuation, mitigation, or rebuttal under R.C.M. 1001(c).

(5) *United States v. Barrier*, 61 M.J. 482 (2005). The military judge did not err when, over defense objection, he gave the "Friedmann" instruction. During appellant's unsworn statement, the military judge called the panel members' attention to the sentence received in an unrelated similar case. The military judge gave an instruction which essentially told the panel members that that part of the accused's unsworn statement was irrelevant and that they should not consider it in determining an appropriate sentence.

d) *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000), *pet. denied*, 54 M.J. 425 (2001). Proper for military judge to provide sentencing instruction to clarify for the members comments made in the accused's unsworn statement.

3. The defense may not present evidence or argument that challenges or re-litigates the prior guilty findings of the court. *United States v. Teeter*, 16 M.J. 68 (C.M.A. 1983).

4. If accused made an unsworn statement, government may only rebut statements of fact.

a) *United States v. Manns*, 54 M.J. 164 (2000). "I have tried throughout my life, even during childhood, to stay within the laws and regulations of this country," was held to be a statement of fact and could be rebutted by evidence of the accused's admission to marijuana use.

b) *United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996), aff'd, 46 M.J. 258 (1997). Government allowed to rebut accused's expression of remorse with inconsistent statements made previously by accused on psychological questionnaire and audio tape of telephone message to brother of victim.

c) *United States v. Cleveland*, 29 M.J. 361 (C.M.A. 1990). "Although I have not been perfect, I feel that I have served well and would like an opportunity to remain in the service. . . ." The court determined that the statement was more in the nature of an opinion, "indeed, an argument;" therefore, not subject to rebuttal.

d) *United States v. Thomas*, 36 M.J. 638 (A.C.M.R. 1992). Accused's unsworn statement commented on his upbringing, pregnant girlfriend, reasons for enlisting in the Army, and the extenuating circumstances surrounding his offenses. The accused also apologized to the Army and the victim. The court held that it was improper rebuttal to have the 1SG testify that the accused was not truthful since character for truthfulness was not at issue.

5. Relaxed rules of evidence. R.C.M. 1001(c)(3)/R.C.M. 1001(d)(3). *United States v. Saferite*, 59 M.J. 270. The rules of evidence apply at sentencing, but the MJ may relax the rules of evidence upon request of defense counsel. A relaxation of the rules, however, goes toward whether evidence is reliable and authentic; otherwise inadmissible evidence is still not admitted (citing *United States v. Boone*, 49 M.J. 187, 198 n.14 (1998)). *See also United States v. Steward*, 55 M.J. 630 (N-M. Ct. Crim. App. 2001) (observing that relaxed rules of evidence is not limited

to only documentary evidence). Relaxing the rules for defense also relaxes the rules to the same extent for trial counsel.

D. Right to a "Complete Sentencing Proceeding." *United States v. Libecap*, 57 M.J. 611 (C.G. Ct. Crim. App. 2002) [*Libecap I*]. On appeal, the appellant argued that a term of his pretrial agreement that required him to request a punitive discharge was both a violation of R.C.M. 705 and contrary to public policy. The court agreed, setting aside the sentence and authorizing a rehearing on sentence. The court found that the provision violated R.C.M. 705(c)(1)(B) because "as a practical matter, it deprived the accused of a complete sentencing proceeding." The court also found that the provision was contrary to public policy.

E. Mental Impairment. *United States v. Doss*, 57 M.J. 182 (2002). Noting that defense counsel was ineffective for failing to present "extant" psychological evidence.

F. Rebuttal. R.C.M. 1001(d)/R.C.M. 1001(e). Government rebuttal evidence must actually "explain, repel, counteract or disprove the evidence introduced by the opposing party." *United States v. Wirth*, 18 M.J. 214, 218 (C.M.A. 1984).

1. *United States v. Hursey*, 55 M.J. 34 (C.A.A.F. 2001). The military judge abused his discretion when he admitted the testimony of NCOIC of the base Military Justice Division to testify that the accused was late for his court-martial as rebuttal to defense evidence of the accused's dependability at work (where NCOIC unable to say whether the accused was at fault or whether his being late was unavoidable). Testimony had little probative value, was potentially misleading, and time wasting.

2. *Horner* and *Ohrt* apply to government rebuttal witnesses. *See United States v. Pompey*, 32 M.J. 547 (A.F.C.M.R. 1990). The basic foundational requirements from those cases govern rebuttal witnesses who are testifying about rehabilitation potential; R.C.M. 1001(b)(5) does not expressly apply. *United States v. Griggs*, 61 M.J. 402 (C.A.A.F. 2005); United *States v. Eslinger*, 70 M.J. 193 (C.A.A.F. 2011).

3. When to allow rebuttal? *United States v. Tilly*, 44 M.J. 851 (N-M. Ct. Crim. App. 1996). The military judge began to deliberate on sentence, then granted trial counsel motion to reopen sentencing to allow rebuttal with newly-discovered evidence. The court found that the beginning of the judge's deliberation was not a bar to reopening the taking of evidence for rebuttal.

G. Surrebuttal. R.C.M. 1001(d)/R.C.M. 1001(e). *United States v. Provost*, 32 M.J. 98 (C.M.A. 1991). After government rebuttal to accused's first unsworn statement, accused was entitled to make a second unsworn statement. *But see United States v. Satterley*, 55 M.J. 168 (2001).

H. Witnesses. R.C.M. 1001(e)/R.C.M. 1001(f).

1. Who must the government bring?

a) *United States v. Mitchell*, 41 M.J. 512 (A.C.M.R. 1994). The military judge did not err by denying accused's request for Chief of Chaplains as character witness. While acknowledging accused's right to present material testimony, court upheld judge's exercise of discretion in determining the form of presentation. Proffered government stipulation of fact detailed the witness's background, strong opinions favoring the accused, and the government's refusal to fund the witness's travel.

b) *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002). The appellant alleged the military judge erred by not ordering the government to produce the appellant's father as a sentencing witness. The court held that there was no evidence of "extraordinary circumstances" that required the production of a live witness; therefore, the military judge's

ruling, in light of the government's offer to enter into a stipulation of fact, was not an abuse of discretion.

IV. STATEMENTS BY THE VICTIM. R.C.M. 1001A/R.C.M. 1001(c)

A. For purposes of this rule, a "crime victim" is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty. R.C.M. 1001A(b)(1)/R.C.M. 1001(c)(2)(A). This definition touches all classes of victims and is not limited to sexual assault victims.

B. Right to be reasonably heard. R.C.M. 1001A(b)(4)/R.C.M. 1001(c)(2)(D).

1. *Capital cases.* In capital cases, for purposes of this rule, the "right to be reasonably heard" means the right to make a sworn statement.

2. *Non-capital cases.* In non-capital cases, for purposes of this rule, the "right to be reasonably heard" means the right to make a sworn statement, an unsworn statement, or both (the last provision, allowing both, is a MJA 2016 change).

C. Content. R.C.M. 1001A(C)/R.C.M. 1001(c)(3). Can include victim impact or matters in mitigation.

1. *United States v. Hamilton*, 77 M.J. 579 A.F. Ct. Crim. App. 2017), *review granted*, 2018 CAAF LEXIS 241 (C.A.A.F. Apr. 23, 2018). Holding that victim impact statements offered pursuant to R.C.M. 1001A are not evidence, and therefore not subject to M.R.E. 403.

D. Victim may give a sworn or unsworn statement. Under the MJA 2016, the rule will change slightly for unsworn statements. The crime victim will only be required to provide a written proffer (as opposed to a copy of the statement) to both counsel (no longer requires service on the MJ). If the victim's unsworn statement contains factual matter not previously disclosed to both counsel, the MJ may take "appropriate action."

V. SENTENCING DETERMINATION. R.C.M. 1002

A. The MJA 2016 will make substantial changes to Articles 53 and 56 and their implementing Rule, R.C.M. 1002. This includes changes to forum election, and, perhaps most important, unitary sentencing, which will be retained only in cases involving member sentencing. Art. 56 will also include commonly held sentencing principles, referred to as "factors" in the MJA 2016 Executive Summary, to guide the imposition of sentences in a court-martial.

VI. PERMISSIBLE PUNISHMENTS. R.C.M. 1003

A. Reprimand. R.C.M. 1003(b)(1). "A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority [CA]." The reprimand, when issued, is placed in the CA's action.

B. Forfeiture of pay and allowances. R.C.M. 1003(b)(2).

1. Adjudged Forfeitures. At a general court-martial (GCM), the court may adjudge forfeiture of ALL pay and allowances (a.k.a., "total forfeitures"). At a special court-martial (SPCM), the court may adjudge forfeiture of 2/3 pay only. Allowances at a special court-martial are NOT subject to forfeiture.

2. *United States v. Dewald*, 39 M.J. 901 (A.C.M.R. 1994). Forfeitures may not exceed two-thirds pay per month during periods of a sentence when an accused is not in confinement.

Accordingly, during periods that adjudged confinement is suspended, forfeitures are limited to two-thirds pay per month. *See* R.C.M. 1107(d)(2).

3. Partial forfeitures. Unless total forfeitures are adjudged (i.e., forfeiture of ALL pay and allowances), partial forfeitures MUST be stated in whole dollar amounts for a specific number of months and the number of months the forfeitures will last. R.C.M. 1003(b)(2).

4. Forfeitures are calculated at reduced pay grade WHETHER suspended or not. *United States v. Esposito*, 57 M.J. 608 (C.G. Ct. Crim. App. 2002). *See also* R.C.M. 1003(b)(2).

5. *United States v. Stewart*, 62 M.J. 291 (2006). Where a sentence to forfeiture of all pay and allowances is adjudged, such sentence shall run until such time as the Servicemember is discharged or returns to a duty status, whichever comes first, unless the sentencing authority expressly provides for partial forfeitures post-confinement.

C. Fine. R.C.M. 1003(b)(3).

1. *United States v. Tualla*, 52 M.J. 228 (2000). A special court-martial is not precluded from imposing a sentence that includes both a fine and forfeitures as long as the combined fine and forfeitures do not exceed the maximum two-thirds forfeitures that can be adjudged at a special court-martial. (A 2002 amendment to R.C.M. 1003(b)(3) reflects this holding.)

D. Reduction in grade. R.C.M. 1003(b)(4). An enlisted Servicemember may be reduced to the lowest enlisted grade, or any intermediate grade, as part of a sentence. Any automatic reduction of UCMJ Art. 58a is not a part of the sentence.

E. Restriction. R.C.M. 1003(b)(5). No more than 2 months; confinement and restriction may be adjudged in the same case but together may not exceed maximum authorized confinement (where 1 month confinement equals 2 months restriction).

F. Hard labor without confinement. R.C.M. 1003(b)(6). No more than 3 months; confinement and hard labor may be adjudged in the same case but together may not exceed maximum authorized confinement (where 1 month confinement equals 1.5 months hard labor w/o confinement); enlisted members only; court-martial does not prescribe the hard labor to be performed.

G. Confinement. R.C.M. 1003(b)(7).

H. Punitive Separation. R.C.M. 1003(b)(8).

1. Dismissal. Applies to commissioned officers and warrant officers who have been commissioned. *United States v. Carbo*, 37 M.J. 523 (A.C.M.R. 1993).

2. DD is available for non-commissioned warrant officers or enlisted.

3. BCD is available only for enlisted.

4. The 2014 National Defense Authorization Act mandated dishonorable discharge or dismissal for Servicemembers convicted of rape, sexual assault; rape or sexual assault of a child; forcible sodomy, or attempts of any of these offenses. Article 56.

I. Death. R.C.M. 1003(b)(9).

1. Death may be adjudged in accordance with R.C.M. 1004 (mechanics, aggravating factors, votes). *Loving v. United States*, 517 U.S. 748 (1996).

2. Specifically authorized for thirteen different offenses, including aiding the enemy, espionage, murder, and rape. The MJA 2016 will eliminate death for spying in war.

3. Requires the concurrence of all the members as to: (1) findings on the merits of capital offense, (2) existence of at least one aggravating factor under R.C.M. 1004(c), (3) extenuating or

mitigating circumstances are substantially outweighed by any aggravating circumstances, including aggravating factors, and (4) sentence of death.

J. Maximum Punishment. *See* Manual for Courts-Martial, Appendix 12.

1. Generally – lesser of jurisdiction of court or punishment in Part IV.
2. Offenses not listed in the Table of Maximum Punishments.
   a) Included or related offenses.
   b) United States Code.
3. Habitual offenders. R.C.M. 1003(d).
   a) Three or more convictions within one year – DD, TF, one year confinement.
   b) Two or more convictions within three years – BCD, TF, three months confinement.
   c) Two or more offenses which carry total authorized confinement of 6 months automatically authorizes BCD and TF.

K. Article 133 punishment. *United States v. Hart*, 32 M.J. 101 (C.M.A. 1991). In mega-article 133 specification, the maximum possible punishment is the largest maximum punishment for any offense included in the mega-specification.

L. Prior NJP for same offense. *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989). Accused must be given credit for prior Article 15 punishment for same offense: day for day, dollar for dollar, and stripe for stripe.

M. Prior board proceedings. *United States v. Blocker*, 30 M.J. 1152 (A.C.M.R. 1990). Accused entitled to credit for consequences of administrative board proceedings arising from same misconduct that is the subject of the court-martial.

VII. INSTRUCTIONS. R.C.M. 1005

A. *United States v. Boyd*, 55 M.J. 217 (2001). Military judges must instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction and a party requests it.

B. *United States v. Duncan*, 53 M.J. 494 (2000). The members interrupted their deliberations to ask the military judge if rehabilitation/therapy would be required if the accused were incarcerated, and if parole or good behavior were available to someone with a life sentence. Instructions on collateral consequences are permitted, but need to be clear and legally correct. It is appropriate for the judge to answer questions if he/she can draw upon a reasonably available body of information which rationally relates to sentencing considerations (here the panel members' questions related to both aggravation evidence (heinous nature of the crimes) and rehabilitation potential (his potential unreformed release into society).

C. *United States v. Stargell*, 49 M.J. 92 (1998). Court found proper curative instruction by military judge in response to trial counsel argument that accused with nineteen and a half years of service "will get an honorable retirement unless you give him a BCD." In response to defense objection, judge instructed members that their decision "is not a vote to retain or separate the member but whether or not to give the accused a punitive discharge as a form of punishment." The majority cited to common knowledge in the military that an accused at twenty years is eligible to retire, usually under honorable conditions, and if processed for administrative discharge following court-martial would be entitled to special consideration.

D. *United States v. Simmons*, 48 M.J. 193 (1998). Absent direct evidence that the accused was "emotionally or physically abused during his childhood," there was no requirement for the military judge to give an instruction to the panel to consider such information. The court noted a dispute over whether the accused actually suffered such abuse. Therefore, the instruction required modification so the members *could*, not *must*, consider such evidence *if* they found the accused had in fact been abused.

E. *United States v. Thompson*, 43 M.J. 703 (A.F. Ct. Crim. App. 1995). Accused introduced evidence of child's upcoming surgery, and offered medical testimony that accused should be present for surgery and a few weeks thereafter. In response to member question, the military judge informed panel that CA has discretion to defer confinement. No abuse of discretion or improper advice to panel on collateral matters where assisted panel in making informed decision.

VIII. SENTENCE CREDIT

A. *United States v. Rock*, 52 M.J. 154 (1999). The CAAF held the military judge did not err in applying the sentence credit received by the accused for illegal pretrial punishment against the accused's adjudged sentence rather than the approved sentence (accused was awarded 240 days credit against his adjudged confinement as a result of pretrial conditions on his liberty not amounting to confinement; the military judge credited the 240 days against the accused's adjudged sentence not the approved sentence; the accused was sentenced to sixty-one months of confinement, thus the judge only gave the accused fifty-three months; the accused's pretrial agreement further reduced the sentence to thirty-six months, minus three days of actual pretrial confinement). The court distinguished between actual or constructive confinement credit and pretrial punishment credit. Actual confinement credit and constructive confinement credit are administrative credits that come off of the approved sentence. Pretrial punishment credit for something other than confinement (like restrictions on liberty that do not rise to the level of being tantamount to confinement) is generally judicial credit and thus comes off of the adjudged sentence. If the military judge determines that *Allen*, *Mason*, or *Suzuki* credit is warranted, that sentence credit will be tacked on to the sentence after the pretrial agreement is considered.

B. *United States v. Smith*, 56 M.J. 290 (2002). No requirement that accused be given credit for lawful pretrial confinement when no confinement is adjudged.

C. *United States v. Mosby*, 56 M.J. 309 (2002). Solitary confinement, in and of itself, does not equal an intent to punish warranting additional credit under Article 13, UCMJ.

D. *United States v. Bracey*, 56 M.J. 387 (2002). Appellant was not entitled to *Pierce* credit since the offenses in question resulted from separate and distinct incidents despite their occurrence close in time and involving the same officer (i.e., victim). The CAAF, in holding that the appellant was not entitled to *Pierce* credit stated: "Neither the Constitution nor the UCMJ precludes a person from being convicted for multiples offenses growing out of the same transaction, so long as the offenses are not multiplicious . . . . Likewise, although *Pierce* precludes double punishment for the same offense, it does not preclude multiple punishments for multiple offenses growing out of the same transaction when the offenses are not multiplicious."

E. *United States v. Spaustat*, 57 M.J. 256 (2002). Accused sentenced to reduction to the grade of E-1, ten months confinement, and a BCD. The accused's PTA had a confinement limitation of eight months. At trial, the accused successfully brought an Article 13 motion for his treatment while in pretrial confinement and was awarded ninety-two days Article 13 credit (day-for-day) as well as 102 days *Allen* credit, all of which the judge applied against the lesser sentence provided for in the PTA. In announcing the sentence, the judge initially announced a sentence, after incorporating the Article 13 credit of 202 days and then announced another sentence of 212 days after he was advised by the TC that the Article 13 violations did not begin until after day ten of the accused's placement into

pretrial confinement, thus reducing the Article 13 credit from 102 days to ninety-two days. Appellant argued that the judge, in increasing the sentence from 202 days to 212 days, unlawfully reconsidered the sentence. The CAAF held that the judge did not unlawfully reconsider the sentence. The sentence was always ten months. All that the judge did was correct his calculation of sentence credits and clarify his calculations. Further, the judge did not err in applying the sentence credit to the lesser sentence provided for in the PTA. Recognizing the confusion created by its *Rock* decision, the court established a bright line rule for use by all courts effective 30 August 2002:

1. [I]n order to avoid further confusion and to ensure meaningful relief in all future cases after the date of this decision, this Court will require the convening authority to direct application of all confinement credits for violations of Article 13 or R.C.M. 305 and all Allen credit against the approved sentence, i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement, as further reduced by any clemency granted by the convening authority, unless the pretrial agreement provides otherwise.

F. *United States v. Sherman*, 56 M.J. 900 (A.F. Ct. Crim. App. 2002). Time spent in civilian confinement for offenses forming the basis of a subsequent court-martial warrant confinement credit under *Allen*. *See also United States v. West*, 56 M.J. 626 (C.G. Ct. Crim. App. 2001).

IX. DELIBERATIONS. R.C.M. 1006

A. What May be Considered.

1. Notes of the members.

2. Any exhibits.

3. Any written instructions.

a) Instructions must have been given orally.

b) Written copies, or any part thereof, may also be given to the members unless either party objects.

4. Pretrial agreement (PTA) terms. According to the Executive Summary of the MJA 2016, the MJA 2016 will change R.C.M. 705 and R.C.M. 1006 to provide that in a members sentencing case in which the MJ accepts a plea agreement with a sentencing limitation, the members must vote on a sentence in accordance with that limitation.

a) Under the old rules, R.C.M. 705(e) prohibited disclosing the existence of a PTA to members. Under the new provision, R.C.M. 705(f), the members may be informed of a PTA at the request of the accused or when the MJ finds it "manifestly necessary." There is no explicit provision about disclosing the quantum to members.

b) *United States v. Schnitzer*, 41 M.J. 603 (Army Ct. Crim. App. 1994), *aff'd* 44 MJ 380 (1996). Mention of sentencing limitation in co-actor's PTA constituted unlawful command influence and plain error. Rehearing on sentencing required. *See United States v. Royster*, 9400201 (Army Ct. Crim. App. 15 June 1995) (unpub.), limiting *Schnitzer* to its facts.

B. Voting on Sentence. UCMJ art. 52, R.C.M. 1006.

1. Number of votes required:

a) Death – unanimous.

b) All other sentences – at least three-quarters of the members (this is a MJA 2016 change; prior to this any sentence less than confinement for confinement for more than ten years required only two-thirds of the members).

X. ANNOUNCEMENT OF SENTENCE. R.C.M. 1007

A. Sentence worksheet is used to put the sentence in proper form (*See* Appendix 11, MCM, Forms of Sentences).

B. President or military judge makes announcement. *United States v. Dodd*, 46 M.J. 864 (Army Ct. Crim. App. 1997). Announcement by court-martial president of sentence did not include bad conduct discharge, and court adjourned. When president notified the military judge of incorrect announcement within two minutes of adjournment, judge convened a proceeding in revision to include bad conduct discharge. The Army Court noted that proceeding in revision inappropriate where it increases severity of sentence, no matter how clear that announcement was erroneous. NOTE: Court commends to trial judges practice of enforcing requirement that president mark out all inapplicable language on findings and sentence worksheets, rather than pursuing own means to clarify intended sentence of court.

C. Polling prohibited (M.R.E. 606; R.C.M. 1007(c)).

XI. IMPEACHMENT OF SENTENCE. R.C.M. 1008.

A. Policy: Strong policy against the impeachment of verdicts.

1. Promotes finality.

2. Encourages full and free deliberation.

B. General rule: Deliberative privilege – court deliberations are privileged (M.R.E. 509). *United States v. Langer*, 41 M.J. 780 (A.F. Ct. Crim. App. 1995) (observing that post-trial questionnaire purportedly intended for feedback to counsel improperly invaded members' deliberative process).

C. Exceptions: Court members' testimony or affidavits cannot be used to impeach the verdict except in three limited situations. R.C.M. 1008; M.R.E. 606. *See United States v. Loving*, 41 M.J. 213 (C.M.A. 1994).

1. Outside influence (e.g. bribery, jury tampering).

2. Extraneous prejudicial information.

a) *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983) (holding that it was improper for court member visit to crime scene).

b) *United States v. McNutt*, 62 M.J. 16 (2005). The military judge improperly considered the collateral administrative effect of the "good-time" policy in determining Appellant's sentence and this error prejudiced Appellant. "Courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration." *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1998). The general preference for prohibiting consideration of collateral consequences is applicable to the military judge's consideration of the Army "good-time" credits.

3. Unlawful command influence.

a) *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984) (holding that it was unlawful command control for president to order a re-vote after a finding of not guilty had been reached).

b) *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985) (observing that president of court can express opinions in strong terms and call for a vote when discussion is complete or further debate is pointless; but improper for him to use superiority of rank to coerce a subordinate to vote in a particular manner).

c) *United States v. Dugan*, 58 M.J. 253 (2003). Post-trial, member submitted R.C.M. 1105/6 memorandum to defense counsel expressing several concerns, two of which raised potential UCI during the sentencing phase: that some members believed a punitive discharge was "a given" and that mention was made of a commanders call and that the commander (i.e., convening authority) would review the sentence in the case and know what they decided to do. On receipt of the memorandum, the defense counsel sought a post-trial 39a session, which the military judge denied, citing the deliberative privilege, and finding no UCI. The lower court affirmed. The CAAF directed a DuBay hearing to examine the allegation of UCI in the sentencing phase with the following limitations: questions regarding the objective manifestation of the members during deliberations was permitted whereas questions surrounding the subjective manifestations were not.

D. Threshold relatively high. *See United States v. Brooks*, 41 M.J. 792 (Army Ct. Crim. App. 1995) (observing that there must be colorable allegations to justify judicial inquiry, and even then the judge must be very cautious about inquiring into voting procedures).

XII. RECONSIDERATION OF SENTENCE. R.C.M. 1009

A. Time of reconsideration.

1. May be reconsidered any time before the sentence is announced.

2. After announcement, sentence may not be increased upon reconsideration <u>unless</u> sentence was less than mandatory minimum.

3. *United States v. Jennings*, 44 M.J. 658 (C.G. Ct. Crim. App. 1996). Error in sentence may be corrected if announced sentence not one actually determined by court-martial. But confusion of military judge's intended sentence and application of *Allen* credit arose from comments by judge after court closed. If ambiguity exists on record as to sentence, must be resolved in favor of accused.

B. Procedure for reconsideration.

1. Any member may propose reconsideration.

2. Proposal to reconsider is voted on in closed session by secret written ballot.

C. Number of votes required.

1. <u>With a view to increasing sentence</u> – may reconsider only if at least a majority votes for reconsideration.

2. <u>With a view to decreasing sentence</u> – may reconsider if the following vote:

a) For death sentence, only one vote to reconsider required.

b) For all other sentences, the MJA 2016 will change the rule to require more than one-fourth of the members.

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GENERAL PROVISIONS

I. PRINCIPALS, ART. 77

A. Principal Liability Defined.

1. Text. "Any person punishable under this chapter who: (1) commits an offense punishable by this chapter or aids, abets, counsels, commands, or procures its commission; or (2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal." Article 77.

2. Purpose. Article 77 directs that a person need not personally perform the acts necessary to constitute an offense to be guilty of that offense. It eliminates the common law distinctions between principals in the first degree, principals in the second degree, and accessories before the fact. All of these parties to an offense are deemed principals, are equally guilty of the offense, and may be punished to the same extent. MCM, pt. IV, ¶ 1b(1).

B. Who are "Principals?" The MCM creates two categories of individuals that can be guilty of an offense as a principal: 1) Perpetrators & 2) Other Parties.

1. Perpetrators. "A perpetrator is one who actually commits the offense, either by the perpetrator's own hand, or by knowingly or intentionally inducing or setting in motion" acts by an agent or instrument which results in the commission of the offense. MCM, pt. IV, ¶ 1b(2)(a).

a) *United States v. Perry*, 27 M.J. 796 (A.F.C.M.R. 1988) (holding accused liable as a perpetrator where, although accused never touched the stolen property, he directed another airman to grab a paper bag that had been left temporarily unguarded at a local bar).

b) Suppose Person A intentionally causes an innocent Person B to commit an offense's act against Person B's will. The offense's *mens rea* requirement may be satisfied by Person A's criminal intent. In such a case, only Person A is guilty of a crime. *United States v. Minor*, 11 M.J. 608 (A.C.M.R. 1981) (holding accused liable as a principal to sodomy, where accused makes himself a party to the co-accused's threat compelling a victim's boyfriend to commit sodomy on victim).

c) Authority of government "agent" or "decoy," however, may prevent liability as a perpetrator. *United States v. Sneed*, 38 C.M.R. 249 (C.M.A. 1968). Accused proposed theft of military property to two other soldiers. Soldiers informed military authorities and were told to go along with the proposal. Accused subsequently directed one Soldier to load military property on a truck and directed the other Soldier to drive away with the military property. Because the Soldiers were government "agents or decoys," the government never lost control or possession of the military property and their acts did not constitute a wrongful taking. Under the circumstances, the accused never acquired possession, dominion, or control; conviction for larceny reversed, and lesser included offense of attempted larceny affirmed. *See also United States v. Klink*, 14 M.J. 743 (A.F.C.M.R. 1982) (larceny upheld where accused, along with assistance of two government operatives, actually took goods from a government warehouse, carried them to a dock, loaded them into getaway vehicle, and helped drive them away).

2. Other Parties. "If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must" meet the two requirements listed at MCM, pt. IV, ¶ 1b(2)(b).

a) Aider and Abettor. Case law still predominantly describes the MCM's "Other Party" liability as "aider and abettor liability." Aiding and abetting requires the following proof: "(1) the specific intent to facilitate the commission of a crime by another; (2) guilty

knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused assisted or participated in the commission of an offense." *United States v. Pritchett*, 31 M.J. 213 (C.M.A. 1990).

b) Co-conspirators.

(1) Article 77 is broad enough to encompass vicarious liability of co-conspirators. *United States v. Jefferson*, 22 M.J. 315 (C.M.A 1986). Conspiracy does not have to be charged to prove vicarious liability. *United States v. Browning*, 54 M.J. 1, 7 (C.A.A.F. 2000) (holding that prosecution could prove larceny and fraudulent claim charges on theory that accused was perpetrator, aider and abettor, *or* co-conspirator, even though conspiracy was not on the charge sheet).

(2) A conspirator may be convicted of substantive offenses committed by a co-conspirator, provided such offenses were committed in furtherance of the agreement while the agreement continued to exist and the conspirator remains a party to it. MCM, pt. IV, ¶ 5c(5); *Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v. Browning*, 54 M.J. 1 (C.A.A.F. 2000); *United States v. Gaeta*, 14 M.J. 383 (C.M.A. 1983) (members were properly instructed on liability for co-conspirator's drug distribution; *citing Nye and Nissen v. United States*, 336 U.S. 613 (1949)); *United States v. Figueroa*, 28 M.J. 570 (N.M.C.M.R. 1989) (guilty plea to drug distribution by one co-conspirator to another co-conspirator was provident even though accused did not physically participate in the distribution).

c) Basis for Liability: Actus Reus (Assist, encourage, advise, instigate, counsel, command, procure). Article 77 requires an affirmative step on the part of the accused to be liable as an aider and abettor.

(1) *United States v. Thompson*, 50 M.J. 257 (1999). The evidence was legally sufficient for a conviction of rape as a principal where the accused participated in getting the victim helplessly intoxicated, knew a friend was going to have intercourse with the victim, did nothing to dissuade the friend when he looked to the accused for approval, and provided the friend with a condom.

(2) *United States v. Speer*, 40 M.J. 230 (C.M.A. 1994). An accused aids and abets the offense of drug distribution when he verifies purchase price and accepts the cash payment from the buyer, even though the delivery of the drugs has been completed, because he facilitates the "financial climax of the deal." The court adopts the "criminal venture" approach to aiding and abetting.

(3) *United States v. Bolden*, 28 M.J. 127 (C.M.A. 1989). Accused was guilty of larceny as an aider and abettor where he suggested and assisted a "sham" marriage to obtain quarters allowance and a false rental agreement that overstated the monthly rent.

(4) *United States v. Patterson*, 21 C.M.R. 135 (C.M.A. 1956). An accused who blocked a door with the intent of preventing the escape of the victim from his assailant aided and abetted the assailant.

(5) *United States v. Jacobs*, 2 C.M.R. 115 (C.M.A. 1952). Accused and three others broke into a private home and assaulted the occupant. Although the accused did not personally take property from victim, he aided and abetted the others in committing a robbery and was liable as a principal. The "assault provides the necessary act of assistance, and accordingly we have before us much more than mere presence at the scene of the crime."

(6) *United States v. Thomas*, No. ARMY 20150205, 2016 WL 4729442, at *1 (A. Ct. Crim. App. Sept. 9, 2016) (ACCA notes Article 77 would be the preferred way to charge soliciting a child to produce and distribute child pornography, rather than Article 134).

d) Basis for Liability: Mens Rea (Shared Criminal Intent with Perpetrator)

(1) In the case of an accomplice, the intent element may be satisfied with "proof that the accomplice shared in the perpetrator's criminal purpose and intended to facilitate the intent of the perpetrator with respect to the commission of the offense." *United States v. Mitchell*, 66 M.J. 176 (C.A.A.F. 2008) (in a guilty plea for aiding and abetting an indecent assault, the accused admitted to acting with the specific intent to gratify the principal's lust and sexual desires and the court concluded that there was no need to demonstrate that the aider and abettor intended to gratify his own lust and sexual desires).

(2) The requisite *mens rea* for aiding and abetting is sharing the criminal intent or purpose of the active perpetrator of the crime. *United States v. Jacobs*, 2 C.M.R. 115, 117 (C.M.A. 1952) ("[t]he proof must show that the aider or abettor . . . participated in it as in something he wished to bring about, that he sought by his action to make it successful") (prosecution under Articles of War, because offense pre-dated effective date of the UCMJ); *United States v. Bolden*, 28 M.J. 127 (C.M.A. 1989); *United States v. Gosselin*, 62 M.J. 349 (2006) (record did not reflect a shared "criminal purpose" of introducing drugs onto the base).

(3) *United States v. Fullen*, 1 M.J. 853 (A.F.C.M.R. 1976). Accused agreed with two others to lure the victim to a dark area where they would grab and rob the victim. According to the accused, he was unaware that one of his companions was going to strike the victim with a pipe. After the victim fell to the ground, the accused took the victim's wallet, which contained $9. Accused was guilty of robbery, because the intended grabbing would have been an assault sufficient for the compound offense of robbery.

(4) *United States v. Patterson*, 21 C.M.R. 135 (C.M.A. 1956). Accused pulled victim to the floor, and co-accused hit victim with chair. Later the same day, the co-accused struck victim several times in the face with a large belt buckle. Victim tried to flee, but accused blocked access to the door and co-accused bit victim's ear. Notwithstanding accused's claim that he did not intend that an *aggravated* assault be committed, the facts belie his claim and support conviction of aggravated assault. Principals are chargeable with results that flow as natural and probable consequences of the offense subjectively intended. MCM, pt. IV, ¶ 1b(5).

(5) An aider or abettor may be guilty of an offense of greater or lesser seriousness than the perpetrator, depending on his level of intent. MCM, pt. IV, ¶ 1b(4). *United States v. Jackson*, 19 C.M.R. 319 (C.M.A. 1955). Accused and co-accused assaulted the victim. Co-accused stabbed the victim, who subsequently died. Both accused were convicted of premeditated murder at a joint trial. Court affirmed co-accused's conviction but reversed accused's conviction, because of failure to instruct on lesser included offense of involuntary manslaughter. The aider and abettor may be guilty in a different degree from the principal, and the law holds each accountable according to the turpitude of his own motive. *Compare United States v. Richards*, 56 M.J. 282 (C.A.A.F. 2002) (intent to kill or inflict great bodily harm by kicking the victim sufficient to establish guilt as an aider and abettor of voluntary manslaughter even though death caused by co-accused stabbing the victim).

e) Presence at the Scene of the Crime. Appellate courts have considered the extent to which presence at the scene of the crime constitutes a sufficient act or evinces sufficient intent to establish Article 77 liability.

(1) Presence may be a factor in establishing liability. *United States v. Pritchett*, 31 M.J. 213 (C.M.A. 1990).

(2) Presence is not necessary. Presence at the scene of a crime is not necessary to make one a party to the crime and liable as a principal. MCM, pt. IV, ¶ 1b(3)(a). *See United States v. Carter*, 23 C.M.R. 872 (A.F.B.R. 1957) Accused who loaned his car to a friend with the knowledge that it was going to be used in the commission of a larceny was guilty of larceny on aiding and abetting theory, even though he did not know all the details of how the crime was to be committed and was not present at the commission of the crime.

(3) Presence is not sufficient. Mere presence at the scene of crime does not make one a principal. MCM, pt. IV, ¶ 1b(3)(b). *See United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985) (holding that mere presence in a misappropriated vehicle did not make the accused liable as a principal); *United States v. Waluski*, 21 C.M.R. 46 (C.M.A. 1956) (holding that mere presence was insufficient to support finding that accused aided and abetted the driver in the culpably negligent operation of a vehicle); *United States v. Johnson*, 19 C.M.R. 146 (C.M.A. 1955) (holding that mere presence with group of pedestrians who robbed a passerby was insufficient to support conviction as aider and abettor); *United States v. Guest*, 11 C.M.R. 147 (C.M.A. 1953) (holding that evidence was insufficient to support conviction as aider and abettor of murder and larceny, even though the accused was present at the scene of the murder, robbery, and subsequent discussion of the sale of the stolen property, because he did nothing to encourage or aid the murder or the larceny); *United States v. Gosselin*, 62 M.J. 349 (2006) (mere presence in the car with drugs not enough to establish guilt, citing *United States v. Burroughs*, 12 M.J. 380

(4) *United States v. Cobb*, 45 M.J. 82 (C.A.A.F. 1996). Evidence was legally sufficient to support accused's conviction as an aider and abettor to robbery when he was present at crime, fully aware of his companion's impending crime, expected and in fact was offered a share of the proceeds, and may have held perpetrator's feet as he leaned out of vehicle to effect robbery.

(5) *United States v. Pritchett*, 31 M.J. 213 (C.M.A. 1990). The fact that the wife shared an apartment with the accused, the fact that 166 grams of marijuana were stored in a coffee can in a dresser in the only bathroom in the apartment, the fact that the accused knowingly permitted his residence to be used as a repository for the drugs, the fact that the accused was found after the sale in possession of a purse that contained marked bills from the drug sale, and the fact that the appellant's fingerprints were found on several foil wrapped pieces in the can were sufficient to show that the accused aided and abetted his wife's possession with intent to distribute marijuana. Additionally, his immediate presence during the drug sale, "his preliminary drug talk, and his maintenance of a drug-sale safe house" were sufficient to constitute active encouragement and assistance to support a conviction for aiding and abetting his wife's drug distribution. Finally, the accused's facilitation of his wife's drug distribution, the fact that the sale took place in a common area of the home while the accused was at home, and the fact that the money from the controlled buy was found in the accused's possession were sufficient to show that the accused aided and abetted his wife's distribution of marijuana.

(6) When presence is sufficient. Presence is sufficient if presence equals encouragement, support, and protection. *United States v. Void*, 17 M.J. 740 (C.M.A. 1982) (if one knows that his presence will be regarded as encouragement, support and protection, and yet stands idle while his cohort commits crime, then his presence alone renders him criminally liable). *See United States v. Dunn*, 27 M.J. 624 (A.F.C.M.R. 1988) (accused's presence at the scene of a shoplifting, perpetrated as part of the accused's criminal training, sufficient to establish his guilt for larceny as an aider and abettor); *United States v. Hatchett*, 46 C.M.R. 1239 (N.C.M.R. 1973) (Hitchhiker sat in back seat of vehicle between accused and active perpetrator. As car moved along, active perpetrator robbed victim. Accused was guilty of robbery. He was aware the victim was given ride in order to be robbed and his presence in the rear seat of the vehicle "ensured the victim could not escape.).

f) Failure to Stop Crime. Failure to stop a crime does not constitute aiding and abetting unless there is an affirmative duty to interfere (*e.g.*, a security guard). If a person has a duty to interfere, but fails to do so, that person is a party to the crime *if* such noninterference is intended to and does operate as an aid or encouragement to the perpetrator. MCM, pt. IV, ¶ 1b(2)(b). *See United States v. Thompson*, 22 M.J. 40 (C.M.A. 1986) (holding no general duty of NCOs to prevent crime absent "identifiable regulation, directive, or custom of the service."); *United States v. Simmons*, 63 M.J. 89 (2006) (duty of NCO to prevent crime within unit may arise, but failure to act must be accompanied by shared criminal purpose).

(1) Liability found. *See United States v. Shearer*, 44 M.J. 330 (C.A.A.F 1996) (affirming conviction after of guilty plea to aiding and abetting flight from the scene of an accident where accused admitted that he had a duty to report the identity of the driver to Japanese authorities at the scene of the accident); *United States v. Crouch*, 11 M.J. 128 (C.M.A. 1981) (motor pool guard allowed friends to steal tools); *United States v. Ford*, 30 C.M.R. 31 (C.M.A. 1960) (evidence showed that security guard told perpetrators about unsecured building and his failure to interfere was intended to encourage fellow guards to steal unsecured property).

(2) No liability found. *See United States v. Epps*, 25 M.J. 319 (C.M.A. 1987) (under the facts, failure to stop barracks larceny did not make accused an aider and abettor); *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985) (government failed to prove the existence of duty of senior vehicle occupant to ensure the safe operation of the vehicle); *United States v. McCarthy*, 29 C.M.R. 574 (C.M.A. 1960) (after advising subordinates not to steal hubcaps, lieutenant's failure to take active measures to prevent crime committed in his presence did not establish his guilt as a principal); *United States v. Lyons*, 28 C.M.R. 292 (C.M.A. 1959) (holding that a truck guard who accepted money to "see nothing" not liable as an aider or abettor where he was not told why he was offered the money and there was no evidence that he participated in the venture as something he desired to bring about); *United States v. Fuller*, 25 M.J. 514 (A.C.M.R. 1987) (soldier, whose job was fuel handler, had no duty to prevent burning of barracks room).

g) Duty to Report Crime. As a general rule, mere failure to report a crime does not by itself make one an aider and abettor. However, statutory exceptions to this rule may exist in certain circumstances. *See, e.g.*, 18 U.S.C. §793(f) (defining criminal offense to fail to report illegal disposition of national defense information). Also, the services can require that personnel report offenses that they observe. Thus, failure to report a crime may be a dereliction under some circumstances. *See United States v. Heyward*, 22 M.J. 35 (C.M.A. 1985) (Air Force regulation imposing special duty to report drug abuse did not violate the Fifth Amendment, because it did not compel members to report their own illegal acts but only those of other

members) *cert. denied*, 479 U.S. 1011 (1986); *United States v. Bland*, 39 M.J. 921 (N.M.C.M.R. 1994) (upholding Navy regulation imposing a general duty to report crime which has been observed).

C. Principals Are Independently Liable.

1. One may be convicted as a principal, even if the perpetrator is not identified or prosecuted, or is acquitted. MCM, pt. IV, ¶ 1b(6).

2. *Standefer v. United States*, 447 U.S. 10 (1980). A defendant can be convicted of aiding and abetting the commission of a federal offense, despite the prior acquittal of the alleged actual perpetrator of the offense.

3. *United States v. Minor*, 11 M.J. 608 (A.C.M.R. 1981). Co-accused forced victim's boyfriend to commit sodomy on victim by threatening him and accused aided and abetted threat by encouraging victim's boyfriend to comply. The accused was properly convicted of sodomy as a principal, because the amenability of the actual perpetrator to prosecution is not a requirement for criminal liability as an aider and abettor. The actor need not be subject to the UCMJ.

4. *United States v. Crocker*, 35 C.M.R. 725, 739-40 (A.F.B.R. 1964). Accused and Holloway engaged in assault with a knife upon the victim. The evidence established that Holloway fatally stabbed the victim. Holloway was acquitted of murder, and but found guilty of aggravated assault. The accused was convicted of unpremeditated murder, and the court affirmed the conviction. The acquittal of the active perpetrator has no effect on the accused's case.

5. *United States v. Duffy*, 47 C.M.R. 658 (A.C.M.R. 1973) (officer who ordered NCO to kill prisoner guilty as principal despite acquittal of NCO based on lack of mental capacity).

D. Liability for Other Offenses. The statutory principal is criminally liable for all offenses embraced by the common venture and for offenses likely to result as a natural and probable consequence of the offense directly intended. MCM, pt. IV, ¶ 1b(5).

1. *United States v. Knudson*, 14 M.J. 13 (C.M.A. 1982). Accused loaned money to Shaw to buy LSD to be resold at a profit, drove Shaw to off-post residence to buy LSD, and informed prospective buyer that Shaw still had LSD. Evidence was sufficient for conviction of wrongful introduction and wrongful distribution of LSD. If there is a concert of purpose to do a criminal act, all probable results that could be expected are chargeable to all parties concerned. "The fact that the accused did not know in advance of the particular transfers or the parties to whom the transfers would be made does not relieve him of criminal responsibility."

2. *United States v. Waluski*, 21 C.M.R. 46 (C.M.A. 1956). Accused and Hart stole a jeep. Hart drove away from scene at high rate of speed and ran over a pedestrian, killing him. Because there was no evidence that accused actively aided and abetted the operation of the vehicle, accused could not be convicted of involuntary manslaughter.

3. *United States v. Wooten*, 3 C.M.R. 92, 97 (C.M.A. 1952). Aider and abettor of larceny of 250 pairs of Army issue trousers also liable for wrongful disposition of military property, because it was a natural and probable consequence of the theft.

4. *United States v. Self*, 13 C.M.R. 227, 243 (A.B.R. 1953). Accused and two co-accused wrongfully appropriated jeep and drove away. When stopped at a checkpoint, co-accused shot and killed a sentinel. Accused was in the back seat and did nothing during the events at the checkpoint. Where an accused has combined with others in the perpetration of an unlawful act under such circumstances as will, when tested by experience, probably result in the taking of human life, he is equally responsible for a homicide flowing as a natural consequence of such unlawful combination. The court reversed the conviction for murder, because the larceny of the

vehicle, however, was not "so desperate a design that its execution might naturally or probably result in the taking of human life."

E. Withdrawal as a Principal. A person may withdraw from a common venture or design and avoid liability for any offenses committed after the withdrawal. To be effective the withdrawal must:

1. Occur before the offense is committed;

2. Effectively countermand or negate the assistance, encouragement, advice, instigation, counsel, command, or procurement; *and*

3. Be clearly communicated to the would-be perpetrators or to appropriate law enforcement authorities in time for the perpetrators to abandon the plan or for law enforcement authorities to prevent the offense. MCM, pt. IV, ¶ 1b(7).

F. Pleading.

1. All principals are charged as if each was the perpetrator. R.C.M. 307(c)(3) discussion, ¶ H(i).

2. *United States v. Vidal*, 23 M.J. 319 (C.M.A. 1987). Accused and PFC Hunt kidnapped German woman. Accused drove car to secluded area. PFC Hunt and the accused had sexual intercourse with her in the back seat. Accused charged with a single specification of rape, but the specification did not indicate whether he was the perpetrator or an aider and abettor. The court affirmed the conviction, because the standard rape specification is sufficient to charge accused as perpetrator or aider and abettor, and the prosecution is not required to elect between those two theories. *See also United States v. Westmoreland*, 31 M.J. 160 (C.M.A. 1990) (judge can instruct, and accused can be convicted, under an aiding and abetting theory, even though case has not been presented on that theory); *United States v. Dayton*, 29 M.J. 6 (C.M.A. 1989) (government is entitled to prosecute the accused for distribution of LSD on the alternate theories that he is guilty as a perpetrator or as an aider and abettor).

G. Relationship to Inchoate Crimes.

1. Attempts. For an accused to be guilty as an aider and abettor to an attempt, the actual perpetrator must have actually attempted the commission of the underlying offense. *United States v. Jones*, 37 M.J. 459 (C.M.A. 1993). Accused aided and abetted perpetrator who took "substantial step" with intent to distribute cocaine to an undercover officer. Perpetrator's failure to go through with the transaction did nothing to alter her or accused's liability.

2. Solicitation.

a) The crime of solicitation is complete when the solicitation or advice is communicated. Conviction as a principal for aiding and abetting, however, requires that the completion or attempt of a crime.

b) Solicitation pertains to inducing an action in the future; aiding and abetting pertains to involvement in ongoing activity. *United States v. Dean*, 44 M.J. 683 (A. Ct. Crim. App. 1996) (holding that accused's call to her co-conspirator "don't let him get into the door" made during ongoing beating was aiding and abetting rather than solicitation).

c) Solicitation may exist even when the object is predisposed to the crime. *United States v. Hays*, 62 M.J. 158 (C.A.A.F. 2005) (holding that appellant's request for photographs of a sexual encounter between "JD" and a nine-year old girl immediately after the appellant's inquiry into whether JD had engaged in sexual intercourse with the nine-year-old girl was a serious request to commit carnal knowledge). The court further stated that neither the MCM nor the UCMJ precludes a conviction for solicitation because the object is predisposed

towards the crime (rejecting the requirement set forth in *Dean*, 44 M.J. 683 (A. Ct. Crim. App. 1996)).

II. ACCESSORY AFTER THE FACT, ART. 78

A. Introduction.

1. Text. "Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment shall be punished as a court-martial may direct." Article 78.

2. Not a Lesser Included Offense of the Underlying Offense. MCM, pt. IV, ¶ 2(c)(6). *United States v. Price*, 34 C.M.R. 516 (A.B.R. 1963) (holding that neither accessory after the fact nor receiving stolen property were lesser included offenses of larceny); *United States v. Greener*, 1 M.J. 1111 (N.C.M.R. 1977). *But see United States v. Michaels*, 3 M.J. 846 (A.C.M.R. 1977) (permitting accused to enter a substitute plea of accessory after the fact to larceny, even though not a lesser included offense of the referred larceny charge).

3. Acquittal of the Principal Actor Is No Defense. MCM, pt. IV, ¶ 2(c)(5). *United States v. Marsh*, 32 C.M.R. 252 (C.M.A. 1962) (holding that an accused can be convicted of a violation of Article 78 without regard to the separate conviction or acquittal of the principal actor).

4. Principal Offender Need Not Be Subject to the UCMJ. MCM, pt. IV, ¶ 2(c)(4). *United States v. Michaels*, 3 M.J. 846 (A.C.M.R. 1977); *United States v. Blevins*, 34 C.M.R. 967 (A.F.B.R. 1964) (holding that military accused can be convicted of a violation of Article 78 without regard for the amenability of the principal offender to military jurisdiction).

5. Failure to Report Offense. MCM, pt. IV, ¶ 2(c)(2). The mere failure to report an offense will not make one an accessory after the fact. However, such failure may violate a lawful order or regulation and thus constitute an offense under Article 92. See *infra* ¶ XX, this chapter. Also, a positive act of concealment *and* failure to report a serious offense can constitute the offense of misprision of a serious offense under Article 131c. *See infra* ¶ LXXXVII, this chapter.

B. Acts Sufficient for Accessory After the Fact.

1. *United States v. Davis*, 42 M.J. 453 (C.A.A.F. 1995). Accused who falsely informed investigators that he did not know who committed larceny but hinted that someone other than the actual thief was responsible gave "assistance" to the actual offender, thereby making accused an accessory after the fact to larceny.

2. *United States v. Foushee*, 13 M.J. 833 (A.C.M.R. 1982). Providing Q-tips and alcohol to clean blood off the knife used in an assault and to treat offender's injured ankle constituted receipt, comfort, and assistance for the purposes of hindering or preventing the apprehension or trial of the offender. However, where evidence showed only that the accused knew the principal perpetrator had stabbed the victim with the knife but did not know the perpetrator intended to kill or inflict grievous bodily harm, accused could be convicted of being accessory after the fact to assault with a dangerous weapon but not assault with intent to murder. *See also United States v. Marsh*, 32 C.M.R. 252 (C.M.A. 1962) (advising perpetrator of theft to get rid of stolen goods and thereafter consuming liquor bought with proceeds); *United States v. Tamas*, 20 C.M.R. 218 (C.M.A. 1955) (concealing proceeds of a theft for purpose of assisting thief); *United States v. Blevins*, 34 C.M.R. 967 (A.F.B.R. 1964) (concealing and transporting proceeds of theft).

3. *United States v. Michaels*, 3 M.J. 846 (A.C.M.R. 1977). Where accused has responsibility to protect particular property, accused is an accessory after the fact when he accepts money not to disclose completed larcenies.

C. Liability as a Principal Distinguished.

1. The co-perpetrator of the offense of possession of heroin cannot be an accessory after the fact to the same offense. *United States v. McCrea*, 50 C.M.R. 194 (A.C.M.R. 1975).

2. Act of principal must occur before or during the crime. If the act is after the crime, then it must have been part of an agreement or plan before commission of the offense, for the accused to be guilty as a principal rather than an accessory after the fact. *See United States v. Greener*, 1 M.J. 1111 (N.C.M.R. 1977) (one who is not a party to the original larceny scheme but who after the theft removes purloined goods from a cache is an accessory after the fact).

3. One is not an accessory after the fact if the offense is still in progress when the assistance is rendered. Even though the perpetrator of a larceny has consummated the larceny as soon as any taking occurs, others may become aiders and abettors by participating in the continuing asportation of the stolen property. *United States v. Bryant*, 9 M.J. 918 (C.M.R. 1980). *But see United States v. Manuel*, 8 M.J. 822 (A.F.C.M.R. 1979). Notwithstanding that larceny is a continuing offense, accused may be convicted of accessory after the fact when, with the intent to assist the active perpetrator avoid detention and prosecution, he advises the active perpetrator to destroy the stolen property. The purpose of the assistance is critical. If it is to secure the fruits of the crime, he is a principal, but if it is to assist the perpetrator in avoiding detection and punishment, he is an accessory after the fact.

4. Principal of one crime may be liable as an accessory after the fact for a related crime arising from the same actions. *United States v. McCormick*, 74 M.J. 534 (A. Ct. Crim. App. 2014), *rev. denied by* 2015 CAAF LEXIS 680 (C.A.A.F. July 27, 2015) . The accused was a driver in a drive-by shooting in which the shooter fired thirteen shots into an occupied vehicle. While the accused was liable as a principal for aggravated assault for the drive-by shooting, he could have become aware of the shooter's intent to kill the occupants of the vehicle prior to his efforts to conceal the shooting after the crime, making him liable for attempted murder as an accessory after the fact.

D. Liability for Misprision of a Serious Offense Distinguished.

1. One can be an accessory to *any* offense; however, misprision requires an offense punishable by confinement for more than one year. MCM, pt. IV. ¶ 84c(2).

2. An accessory must "receive," "comfort" or "assist" a principal "in order to hinder or prevent his apprehension, trial or punishment." MCM, pt. IV, ¶ 2. Misprision requires a positive act to conceal a felony, but it does not require intent to benefit the principal. MCM, pt. IV, ¶ 84c(1).

3. Act Sufficient for Misprision. *United States v. Sanchez*, 51 M.J. 165 (C.A.A.F. 1999). Disposal of knife used in aggravated assault and formulation of plan to avoid detection amounted to affirmative assistance supportive of a misprision conviction.

4. Acts Insufficient for Misprision. *United States v. Maclin*, 27 C.M.R. 590 (A.B.R. 1958) (reversing conviction for misprision because accused who was burying stolen property did not know the prior theft was a felony); *United States v. Assey*, 9 C.M.R. 732 (A.F.B.R. 1953) (lending money to larceny perpetrator to replace stolen goods was not a "positive act of concealment").

III. CONVICTION OF OFFENSE CHARGED, LESSER INCLUDED OFFENSES, AND ATTEMPTS, ART. 79

A. Introduction.

1. Text. "An accused may be found guilty of any of the following: (1) The offense charged; (2) A lesser included offense; (3) An attempt to commit the offense charged; (4) An attempt to commit a lesser included offense, if the attempt is an offense in its own right." Article 79.

2. The term "Lesser Included Offense" means: "(1) an offense that is necessarily included in the offense charged; and (2) any lesser offense so designated by regulation prescribed by the President." *Id.*

a) "Necessarily included" offenses. Under Article 79(b)(1), an offense is "necessarily included" in a charged offense when the elements of the lesser offense are a subset of the elements of the charged offense, thereby putting the accused on notice to be prepared to defend against the lesser offense in addition to the offense specifically charged.

(1) A lesser offense is "necessarily included" when all of the elements of the lesser offense are included in the greater offense, and (a) the common elements are identical; (b) at least one element is a subset by being legally less serious; or (c) the mental element is a subset by being legally less serious. Article 79(b)(2).

b) Offenses designated by the President. Under Article 79(b)(2), Congress has authorized the President to designate lesser included offenses by regulation, subject to the requirement that any offenses so designated "shall be reasonably included in the greater offense." Article 79(c).

(1) Appendix 12A sets forth the list of Presidentially-designated lesser included offenses. The President may include a "necessarily included offense" in Appendix 12A, but is not required to.

3. Application. Each of the above provisions sets forth an independent basis for providing notice of a lesser included offense. Article 79(b)(1).

a) Thus, a court may identify an offense as a "necessarily included" offense under Article 79(b)(1) regardless of whether the offense is designated in Appendix 12A.

4. Background: Evolution of LIO Doctrine.

a) The Court of Military Appeals formerly construed Article 79 and its "necessarily included" language to mean offenses that are "fairly embraced" in the pleadings and proof of the greater offense. *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983).

b) In 1989, the Supreme Court held that Fed.R.Crim.P. 31(c) should be construed to include only lesser included offenses as established by the statutory elements. *Schmuck v. United States*, 489 U.S. 705 (1989).

c) In *United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993), the Court of Military Appeals stated, "In view of the identity of language of Article 79 and Fed.R.Crim.P. 31(c), we will apply the Supreme Court's more recent holding and abandon the 'fairly embraced' test for determining lesser included offenses as a matter of law."

d) *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994). Citing *Schmuck*, the court held: "One offense is not necessarily included in another unless the elements of the lesser offense are a subset of the elements of the charged offense" (emphasis omitted). This formulation of the test for multiplicity and lesser included offenses created a significant issue for offenses

charged under Art. 134, which requires proof of an element not required for proof of offenses under Arts. 80–132: that the conduct was prejudicial to good order and discipline or service-discrediting. The court held that the phrase "necessarily included" in Art. 79 "encompasses derivative offenses under Article 134." An offense under Art. 134 may, "depending on the facts of the case, stand either as a greater or lesser offense of an offense arising under an enumerated article." This is because "the enumerated articles are rooted in the principle that such conduct *per se* is either prejudicial to good order and discipline or brings discredit to the armed forces; these elements are implicit in the enumerated articles."

e) *United States v. Weymouth*, 43 M.J. 329 (C.A.A.F. 1995). The CAAF refined its holdings in *Teters* and *Foster*, adopting the "pleadings-elements" approach: "In the military, the specification, in combination with the statute, provides notice of the essential elements of the offense" (emphasis omitted). The court cautions that it did not retreat to the "fairly embraced" test rejected in *Teters*: "Either the elements alleging the greater offense (by the statute and pleadings) fairly include all of the elements of the lesser offense or they do not. As alleged, proof of the greater offense must invariably prove the lesser offense; otherwise the lesser offense is not included."

f) *United States v. Jones*¸ 68 M.J. 465 (C.A.A.F. 2010). The CAAF definitively abandoned principles announced in *Foster* and *Weymouth* and returned to the "elements test" announced in *Teters*. In *Jones*, the CAAF held that in order to determine if one offense is "necessarily included" in another, apply the elements test. "Under the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements." *United States v. Jones*¸ 68 M.J. 465, 470 (C.A.A.F. 2010).

g) Whereas previous listings of LIOs in the MCM have not been binding on the Courts, the 2016 MJA revisions to Article 79 statutorily incorporate the *Jones* elements test, while also providing a statutory and regulatory basis for the President to designate additional lesser included offenses.

B. Fair Notice: A Fundamental Principle.

1. The Constitution requires that an accused be on notice as to the offense that must be defended against. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Schmuck v. United States*, 489 U.S. 705 (1989). When one offense is an LIO of another, the accused is on notice that he may be convicted of either offense; thus satisfying the Due Process notice requirement. Language describing the elements need not match verbatim. Courts apply normal rules of statutory interpretation and construction to "determine whether the elements of the [lesser included offense] would necessarily be proven by proving the elements of the greater offense."

2. The previously-employed "closely related offense" doctrine fails to provide the requisite fair notice, and is "no longer viable." *United States v. Morton*, 69 M.J. 12 (C.A.A.F. 2010) (invalidating CCA's affirmance of two specifications of false official statements as a remedy for an improvident guilty plea to two specifications of forgery.)

C. Pleading Issues.

1. Lesser included offenses to the charged offense need not be separately pled. *See* R.C.M. 307(c)(4) discussion (MCM 2016 ed.)

2. However, where it is unclear whether an offense is a lesser included offense, it is prudent to allege both the greater and the purported lesser offenses.

3. If a lesser included offense is separately pled in addition to the greater offense, an accused may not be convicted of both the lesser and greater offense. *See United States v. Hudson*, 59 M.J. 357 (C.A.A.F. 2004).

4. If the MCM suggests that an enumerated article (Articles 82 through 132) has a lesser included offense in Art. 134, counsel should plead both the enumerated offense and the Article 134 offense. *See United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010); *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009); *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008).

5. Application to Article 134.

a) In comparing elements of offenses to determine whether an Article 134 offense stands as a lesser included offense to an offense under Articles 82 through 132, the CAAF has held that the terminal element of Article 134—contained in clauses 1 and 2—causes it to fail the elements test. *United States v. Jones*¸ 68 M.J. 465, 470 (C.A.A.F. 2010). *See also United States v. McMurrin*, 69 M.J. 591 (N.M.Ct.Crim.App. 2010) (applying *Jones* to hold that Negligent Homicide is not a lesser-included offense of Involuntary Manslaughter).

b) Articles 82 through 132 are not *per se* prejudicial to good order and discipline or service discrediting. Accordingly, clauses 1 and 2 of Article 134 are not *per se* included in every enumerated offense. *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009), overruling in part, *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994).

c) Clauses 1 and 2 are not considered LIOs of Clause 3 of Article 134. In order to provide the requisite notice that the Government intends to pursue Clauses 1 and 2 in addition to Clause 3, the charge sheet should allege a violation of all three clauses. This is usually done by adding Clause 1 and/or Clause 2 language (i.e., the terminal element) to a Clause 3 specification. *See United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008).

6. Application to Article 120.

a) 2007 – 2012 Article 120. In determining LIOs for charges under the 2007-2012 Article 120, courts will often have to apply the common and ordinary understanding of the words in the statute.

(1) "Without consent" is not an "implicit element" of aggravated sexual assault. *United States v. Neal*, 68 M.J. 289, 303 (C.A.A.F. 2010).

(2) Aggravated Sexual Assault by bodily harm is a proper LIO of Rape by force. The force required for a charged rape necessarily included the element of "bodily harm" required for a lesser included offense of aggravated sexual assault. *United States v. Alston*, 69 M.J. 214 (C.A.A.F. 2010).

(3) Wrongful sexual contact is an LIO of aggravated sexual contact, because "applying the common and ordinary understanding of these words, an allegation that a victim is compelled to submit to sexual acts by force clearly includes as a subset that the victim is not consenting." *United States v. Pitman*, No. ACM 37453, 2011 CCA LEXIS 93 at *11, 2011 WL 6010897, at *4 (A.F. Ct. Crim. App. May 19, 2011) (unpublished).

(4) Assault Consummated by Battery is a proper LIO of Wrongful Sexual Contact. *United States v. Bonner*, 70 M.J. 1 (C.A.A.F. 2011).

(5) Wrongful Sexual Contact is not an LIO of abusive sexual contact. *United States v. Oliver*, 76 M.J. 271, 274 (C.A.A.F. 2017).

b) Post-2012 Article 120.

(1) Assault consummated by a battery is not a LIO of sexual assault or abusive sexual contact when the sexual act or contact was accomplished by placing the other person in fear that the accused would negatively affect the person's military career. *United States v. Riggins*, 75 M.J. 78 (C.A.A.F. 2016).

(2) Assault consummated by a battery is not a LIO of sexual assault for knowing or should have known the alleged victim was asleep, when the sexual act is not disputed by the defense and there was no evidence that the accused otherwise "touched" the alleged victim's vagina. *United States v. Hackler*, 75 M.J. 648 (N-M. Ct. Crim. App. 2016).

(3) Abusive sexual contact, a specific intent crime, is not a LIO of sexual assault when plead as a general intent crime. *United States v. Marbury*, No. ARMY 20140023, 2016 WL 7011479, at *2 (A. Ct. Crim. App. 2016)

(4) Abusive sexual contact for touching alleged victim's breast is not an LIO of penetrative sexual assault. *United States v. Marbury*, No. ARMY 20140023, 2016 WL 7011479, at *2 (A. Ct. Crim. App. 2016)

c) See 2018 Criminal Law Deskbook for detailed analysis of LIO case law for offenses occurring prior to 2016 MJA.

D. Instructions.

1. A military judge must instruct panel members on lesser included offenses reasonably raised by the evidence. Article 79(b)(4). *See also United States v. Miergrimado*, 66 M.J. 34 (C.A.A.F. 2008); *United States v. Rodwell*, 20 M.J. 264, 265 (C.M.A.1985); *United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000) (reversing involuntary manslaughter conviction for failing to instruct on lesser included offense of negligent homicide); *United States v. Wells*, 52 M.J. 126 (C.A.A.F. 1999) (reversing premeditated murder conviction for failing to instruct on lesser included offense of voluntary manslaughter).

2. If the military judge fails to give an instruction, defense failure to object constitutes waiver, absent plain error. R.C.M. 920(f); *United States v. Pasha*, 24 M.J. 87 , 91 (C.M.A. 1987); *United States v. Mundy*, 9 C.M.R. 130 (C.M.A. 1953). The defense may waive an LIO instruction in order to pursue an "all or nothing" trial strategy and there is no rule that prevents the Government from acquiescing in such a strategy. *See United States v. Upham*, 66 M.J. 83, 87 (C.A.A.F. 2008). The military judge need not oblige, however. As one court observed, "Such a litigation tactic remains viable in military jurisprudence, but it is far from being an absolute right or the unilateral prerogative of the defense." *United States v. Swemley*, 2010 WL 1715921 (N-M. Ct. Crim. App. Apr. 29, 2010) (unpub.).

3. A military judge can only instruct on an LIO where the "greater offense requires the [members] to find a disputed factual element which is not required for conviction of the lesser-included offense." *Sansone v. United States*, 380 U.S. 343, 350 (1965); *United States v. Tunstall*, 72 M.J. 191, 195 (C.A.A.F. 2013); *United States v. Miergrimado*, 66 M.J. 34 (C.A.A.F. 2008); *United States v. Griffin*, 50 M.J. 480 (C.A.A.F. 1999) (holding that factual issue as to whether accused *intended* to stab victim with a knife, which he knowingly held in his hand, did not require an instruction on the lesser included offense of simple battery, because proof of intent to use the dangerous weapon is not required for the greater offense).

INCHOATE OFFENSES

IV. ATTEMPTS, ART. 80

A. Introduction.

1. Text. "An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense." Article 80(a).

2. Elements. MCM, pt. IV, ¶ 4b.

a) The accused did a certain overt act;

b) The act was done with the specific intent to commit a certain offense under the code;

c) The act amounted to more than mere preparation; and

d) The act apparently tended to effect the commission of the intended offense.

3. Advisement of Elements During Guilty Plea. Military judge must adequately advise and explain each of the four elements of attempt to an accused. The record must objectively reflect the Appellant understood that his conduct, in order to be criminal, needed to go beyond preparatory steps and be a direct movement toward the commission of the intended offense. *United States v. Redlinski*, 58 M.J. 117 (C.A.A.F. 2003).

B. Overt Act.

1. Generally.

a) The overt act need not be alleged in the specification. *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990); *United States v. Marshall*, 40 C.M.R. 138 (C.M.A. 1969).

b) The overt act need not be illegal. *United States v. Johnson*, 22 C.M.R. 278 (C.M.A. 1957) (accused guilty of attempted desertion where all acts occurred within limits of legitimate pass).

2. Specific Intent.

a) The overt act must be done with the specific intent to commit an offense under the UCMJ.

b) Applications.

(1) Attempted murder requires specific intent to kill, even though murder may require a lesser intent. *See United States v. Roa*, 12 M.J. 210 (C.M.A. 1982) (explaining that, because an attempt requires a specific intent, there can be no "attempt" to commit involuntary manslaughter "by culpable negligence"); *United States v. Allen*, 21 M.J. 72 (C.M.A. 1985) (finding circumstantial evidence sufficient to prove intent to kill required for attempted murder).

(2) Attempted rape requires specific intent to have sexual intercourse by force and without consent, even though rape is general intent crime. *United States v. Sampson*, 7 M.J. 513 (A.C.M.R. 1979); *cf. United States v. Adams*, 13 M.J. 818 (A.C.M.R. 1982) (assault with intent to commit rape).

(3) In a prosecution for attempted violation of a lawful general regulation, under Article 92(1), the accused must have had the specific intent to commit the proscribed act, and it is immaterial whether the accused knew the act violated any particular provision of any particular regulation. *United States v. Foster*, 14 M.J. 246 (C.M.A. 1982).

(4) No attempted sale of heroin where accused intentionally sold brown sugar. *United States v. Collier*, 3 M.J. 932 (A.C.M.R. 1977).

(5) Transferred or concurrent intent doctrine may be applied to attempted murder. *United States v. Willis*, 43 M.J. 889 (A.F.C.C.A. 1996), *aff'd*, 46 M.J. 258 (C.A.A.F. 1997).

3. More Than Mere Preparation.

a) Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The required overt act must go beyond preparatory steps and be a direct movement towards the commission of the offense. MCM, pt. IV, ¶ 4c(2); *United States v. Jackson*, 5 M.J. 765 (A.C.M.R. 1978) (holding that approaching and asking other soldiers if they want to buy a "bag" or "reefer" was not an attempt, but affirming it as a solicitation).

b) For the accused to be guilty of an attempt, the overt acts tending toward commission of the consummated offense must amount to more than mere preparation and constitute at least the beginning of its effectuation. However, "[t]here is no requirement under the law of attempts that the trip to the doorstep of the intended crime be completed in order for the attempt to have been committed." *United States v. Anzalone*, 41 M.J. 142 (C.M.A. 1994) (affirming assault by attempt, where accused retrieved his rifle, locked and loaded a round in the chamber, and started toward the victim's tent, even though he was stopped before he reached a point where he could have actually inflicted harm); *United States v. Owen*, 47 M.J. 501 (A.C.C.A. 1997) (holding that giving middle-man a map, automobile license number, and guidance on method for "hit man," where accused believed "hit man" had already arrived in town for the job, was sufficient overt act for attempted murder).

c) The line of demarcation between preparation and a direct movement towards the offense is not always clear. Primarily the difference is one of fact, not law. *United States v. Choat*, 21 C.M.R. 313 (C.M.A. 1956) (attempted unlawful entry).

d) After a guilty plea where the accused admits that her acts went beyond mere preparation and points to a particular action that satisfies herself on this point, appellate courts will not find actions that fall within the "twilight zone" between mere preparation and attempt to be substantially inconsistent with the guilty plea. *United States v. Smith*, 50 M.J. 380 (C.A.A.F. 1999) (citing *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993)).

e) Words alone may be sufficient to constitute an overt act. *United States v. Brantner*, 28 M.J. 941 (N.M.C.M.R. 1989) (a recruiter's request to conduct a "hernia examination" was an act deemed more than mere preparation for a charge of attempted indecent assault).

4. "Substantial Step."

a) The overt act must be a "substantial step" toward the commission of the crime. Whether the act is only preparatory or a substantial step toward commission of the crime must be determined on a case-by-case basis. *United States v. Jones*, 32 M.J. 430 (C.M.A. 1991) (holding that soliciting another to destroy car, making plans to destroy it, and finally delivering the car and its keys to that person on the agreed day of the auto's destruction constituted substantial step toward larceny from insurance company); *United States v. Williamson*, 42 M.J. 613 (N.M.C.C.A. 1995) (accused's acts of putting knife in his pocket and "going after" intended victim, without some indication of how close he came to completing the crime or why he failed to complete it, were not factually sufficient to constitute a substantial step toward the commission of the intended crime); *United States v. Church*, 29 M.J. 679 (A.F.C.M.R. 1989), *aff'd*, 32 M.J. 70 (C.M.A. 1991) (planning wife's murder, hiring

undercover agent to kill wife, making payments for killing, and telling agent how to shoot wife constituted substantial step toward murder).

b) The "Test." *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987).

(1) The overt act must be a substantial step and direct movement toward commission of the crime.

(2) A substantial step is one strongly corroborative of the accused's criminal intent and is indicative of resolve to commit the offense.

c) The accused must have engaged in conduct that is strongly corroborative of the firmness of the accused's criminal intent. *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987) (accepting money from undercover agent and riding to an off-post location to purchase marijuana was not strongly corroborative of the firmness of the accused's intent to distribute marijuana); *United States v. Presto*, 24 M.J. 350 (C.M.A. 1987) (after agreeing to try to get marijuana for undercover agent, placing phone calls to drug supplier was not a substantial step toward distribution of marijuana); *United States v. LeProwse*, 26 M.J. 652 (A.C.M.R. 1988) (offering to pay two boys to remove their trousers was strongly corroborative of the firmness of the accused's intent to commit indecent liberties); *see also United States v. Jones*, 32 M.J. 430, 432 (C.M.A. 1991) ("It is not the acts alone which determine the intent of the person committing them. The circumstances in which those acts were done are also indicative of a person's intent.").

5. Tending to Effect the Commission of the Offense.

a) *United States v. McGinty*, 38 M.J. 131 (C.M.A. 1993) (the accused's running his fingers through the victim's hair and hugging him was an affirmative step toward committing indecent acts).

b) The overt act need not be the ultimate step in the consummation of the crime. It is sufficient if it is one that in the ordinary and likely course of events, would, if not interrupted by extraneous causes, result in the commission of the offense itself. *United States v. Johnson*, 22 C.M.R. 278 (C.M.A. 1957) (although within the 50 mile limit of his pass, the accused's walking to within the prohibited distance from the East German border, after unsuccessful attempts to get taxi drivers to cross the border, was sufficient overt act for attempted desertion); *United States v. Gugliotta*, 23 M.J. 905 (N.M.C.M.R. 1987) (overt act sufficient to constitute direct movement to commission of robbery where accused and accomplices made plans, procured implements, and went to the site of the crime with the tools for purpose of robbing exchange).

C. Defenses.

1. Factual Impossibility. Factual impossibility is not a defense to attempt. If the accused's act would constitute a crime if the facts and circumstances were as the accused believed them to be, then he may be found guilty of an attempt to commit the intended crime, even though it was impossible to commit the intended crime under the actual circumstances. MCM, pt. IV, ¶ 4c(3).

a) The defense of factual impossibility does not preclude conviction of attempted conspiracy where the other purported conspirator is an undercover government agent. *United States v. Anzalone*, 43 M.J. 322 (C.A.A.F. 1995) (attempted conspiracy to commit espionage); *see also United States v. Valigura*, 54 M.J. 187 (C.A.A.F. 2000); *United States v. Baker*, 43 M.J. 736 (A.F.C.C.A. 1995) (conspiracy would have been completed, but for the fact that informant did not share accused's criminal intent); *United States v. Roeseler*, 55 M.J. 286 (C.A.A.F. 2001) (factual impossibility not a defense to attempted conspiracy where accused

agreed to murder the fictitious in-laws of a fellow member of his platoon; because the impossibility of the fictitious victims being murdered was not a defense to either attempt or conspiracy, it was not a defense to the offense of attempted conspiracy).

b) *United States v. Thomas*, 32 C.M.R. 278 (C.M.A. 1962). The accused and two companions committed sexual intercourse with a female, whom they believed to be unconscious, under circumstances amounting to rape. The female, however, was dead at the time of the sexual intercourse. Conviction for attempted rape affirmed.

c) *United States v. Dominguez*, 22 C.M.R. 275 (C.M.A. 1957). The accused injected himself with a substance he believed to be a narcotic drug. Regardless of the true nature of the white powdery substance, accused was guilty of attempted use of a narcotic drug.

d) *United States v. Riddle*, 44 M.J. 282 (C.A.A.F. 1996). The accused could be convicted of attempted conspiracy to steal military pay entitlements to which he was entitled by law or regulation, where he did not believe he was married at the time, even if he was married at the time.

e) *United States v. Church*, 29 M.J. 679 (A.F.C.M.R. 1989) *aff'd* 32 M.J. 70 (C.M.A. 1991). Evidence supported the accused's conviction for attempted premeditated murder of his wife, although the person he hired to kill his wife was an undercover agent.

f) *United States v. Wilson*, 7 M.J. 997 (A.C.M.R. 1979). The accused came upon another person who was unconscious. Beside the person was a hypodermic needle and syringe used by him to inject heroin. The accused destroyed the needle and syringe to hinder or prevent the person's apprehension for use and possession of narcotics. Because this person was probably dead at the time the items were destroyed, the accused cannot be found guilty of accessory after the fact in violation of Article 78. Because the accused believed the person was alive at the time he destroyed the needle and syringe, however, he may be found guilty of attempted accessory after the fact.

g) *United States v. Longtin*, 7 M.J. 784 (A.C.M.R. 1979). The accused sold a substance, which he believed to be opium, as opium. The laboratory test was inconclusive, and the Government could not prove it was opium. The court affirmed the conviction for attempted sale of opium. Had the facts and circumstances been as he believed them to be, he could have been convicted of sale of opium.

h) *United States v. Powell*, 24 M.J. 603 (A.F.C.M.R. 1987) (attempted larceny even though bank denied loan application).

2. Voluntary Abandonment.

a) A person who, with the specific intent to commit a crime, has performed an act that is beyond mere preparation and a substantial step toward commission of the offense may nevertheless avoid liability for the attempt by voluntarily abandoning the criminal effort. *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987) (recognizing voluntary abandonment as an affirmative defense in military justice).

b) It is a defense to a completed attempt that the person voluntarily and completely abandoned the intended crime, solely because of the person's own sense that it was wrong, prior to the completion of the crime. MCM, pt. IV, ¶ 4c(4) (added to the MCM in 1995).

c) When the actions of the accused have progressed into their last stages and the victim has already suffered substantial harm, voluntary abandonment is not a defense to attempt. *United States v. Smauley*, 42 M.J. 449 (C.A.A.F. 1995) (upholding guilty plea to attempted carnal knowledge).

d) The defense of voluntary abandonment is "unavailable if the criminal venture is frustrated by any circumstance that was not present or apparent when the actor began his criminal course of conduct that makes the accomplishment of the criminal purpose more difficult." *United States v. Haney*, 39 M.J. 917 (N.M.C.M.R. 1994) (citing *United States v. Rios*, 33 M.J. 436 (C.M.A 1991)).

e) Applications.

(1) *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993) (fact that accused, later the same day, solicited someone to assist him in continuing to pursue the same crime of delivering classified microfiche to the Soviet Embassy undermined his claim that he had completely renounced his criminal purpose).

(2) *United States v. Rios*, 33 M.J. 436 (C.M.A 1991) (accused did not voluntarily abandon attempted robbery where he merely postponed the criminal conduct to a more advantageous time and transferred the criminal effort to a different but similar victim); *see also United States v. Haney*, 39 M.J. 917 (N.M.C.M.R. 1994) (defense of voluntary abandonment not available to an accused where he and another sailor tried to rob a vending machine by drilling a hole in the glass and the glass shattered, "prompt[ing] their conclusion that continuing in the endeavor would be a 'bad idea'").

(3) *United States v. Collier*, 36 M.J. 501 (A.F.C.M.R. 1992) (holding that when an attempted murder has proceeded so far that injury results, abandonment is not available as a defense).

(4) *United States v. Wilmouth* 34 M.J. 739 (N.M.C.M.R. 1991) (accused's failure to deliver classified information because of inability to locate agent could not be attributed to a change of heart).

(5) *United States v. Miller*, 30 M.J. 999 (N.M.C.M.R. 1990) (abandoning a course of action is not voluntary when it is motivated by circumstances that increase the probability of detection and apprehension).

(6) *United States v. Walthers*, 30 M.J. 829 (N.M.C.M.R. 1990) (where the record indicated that the accused abandoned attempt to steal a car stereo, after breaking into the car, because of his own sense that it was wrong, the guilty plea to attempted larceny was improvident).

D. Pleading.

1. Only the elements of the inchoate offense (attempt) need to be alleged – the elements of the attempted offense (also called the "predicate" or "target" offense) need not be plead. "However, sufficient specificity is required so that an accused is aware of the nature of the underlying target or predicate offense." *United States v. Norwood*, ___M.J. ___ (C.A.A.F. 2012).

2. Overt act need not be alleged. *United States v. Marshall*, 40 C.M.R. 138 (C.M.A. 1969).

3. Attempted drug offenses.

a) *United States v. Showers*, 45 C.M.R. 647 (A.C.M.R. 1972). Specification alleging that the accused "did . . . on or about 31 August 1971 attempt to sell some quantity of a habit forming drug, to wit: Heroin" was fatally defective, because it fails to allege that the attempt was wrongful. *Accord United States v. Brice*, 38 C.M.R. 134 (C.M.A. 1967); *but see United States v. Simpson*, 25 M.J. 865 (A.C.M.R. 1988) (omission of the word "wrongful" from one of four drug distribution specifications not a fatal defect where defendant pled guilty), *aff'd*, 27 M.J. 483 (C.M.A. 1988).

b) *United States v. Guevara*, 26 M.J. 779 (A.F.C.M.R. 1988). Conviction for attempted use of a controlled substance, alleged in the generic, affirmed. Accused intended to use some type of controlled substance.

4. Attempted Robbery.

a) All the *essential* elements of robbery must be alleged in an attempted robbery specification. *United States v. Rios*, 15 C.M.R. 203 (C.M.A. 1954) (specification failing to allege the attempted taking was from the person or the presence of the victim was fatally defective).

b) *United States v. Hunt*, 7 M.J. 985 (A.C.M.R. 1979) (specification failing to allege the attempted taking was from the person or the presence of the victims was fatally defective; conviction of attempted larceny affirmed), *aff'd* 10 M.J. 222 (C.M.A. 1981).

c) *United States v. Ferguson*, 2 M.J. 1225 (N.C.M.R. 1976) (specification alleging, in part, that the accused did "attempt to rob a wallet, the property of PFC Hoge," was fatally defective).

d) *United States v. Wright*, 35 C.M.R. 546 (A.B.R. 1964) (specification alleging that accused "attempted to commit the offense of robbery by entering the Wolfgang Roth Insurance and Loan Agency, wearing a mask and armed with a pistol," was fatally defective).

E. Attempt as a Lesser Included Offense.

1. Text. "An accused may be found guilty of any of the following: 1) the offense charged; 2) a lesser included offense; 3) an attempt to commit the offense charged; 4) an attempt to commit a lesser included offense, if the attempt is an offense in its own right." Article 79.

2. *United States v. Banks*, 7 M.J. 501 (A.F.C.M.R. 1979). Attempted destruction of military property was a lesser included offense of sabotage, prosecuted under Article 134(3) and 18 U.S.C. § 2155.

3. The specification alleging the greater offense and the facts of the case put the defense on notice of the existence of the lesser offense of attempt. *See United States v. LaFontant*, 16 M.J. 236 (C.M.A. 1983) (affirming lesser included offense of attempted possession of LSD, even though members had not been instructed thereon, because the accused was convicted of actual possession and there was evidence that accused consciously and intentionally possessed a substance he believed to be LSD); *United States v. Guillory*, 36 M.J. 952 (A.C.M.R. 1993) (plea of guilty to attempted possession provident where inquiry establishes guilt to greater offense of possession with intent to distribute, even though military judge did not advise accused of elements of attempt).

4. Specific intent requirement. *United States v. Roa*, 12 M.J. 210 (C.M.A. 1982) (attempt requires specific intent even where greater offense does not).

F. Attempts Expressly Enumerated in Substantive Offenses.

1. While most attempts should be charged under Article 80, the attempts listed below are specifically addressed under the article defining the primary offense and should be charged accordingly. MCM, pt. IV, ¶ 4c(6).

a) Article 85 (desertion).

b) Article 94 (mutiny and sedition).

c) Article 100 (subordinate compelling surrender).

d) Article 103b (aiding the enemy).

e) Article 103a (espionage).

f) Article 119a (attempting to kill an unborn child).

g) Article 128 (assault).

2. Attempted Conspiracy. Attempted conspiracy is a viable offense under the UCMJ. *United States v. Riddle*, 44 M.J. 282 (C.A.A.F. 1996) (affirming conviction for attempted conspiracy to steal military pay entitlements). Attempted conspiracy is applicable where an accused agrees with an undercover. *United States v. Anzalone*, 43 M.J. 322 (C.A.A.F. 1995) (holding that attempt and conspiracy statutes did not prohibit charge of attempted conspiracy to commit espionage, when other alleged conspirator is an undercover government agent); *United States v. Roeseler*, 55 M.J. 286 (C.A.A.F. 2001) (affirming conviction for attempted conspiracy to murder fictitious in-laws of fellow soldier).

3. Solicitation. "Soliciting another to commit an offense does not constitute an attempt." MCM, pt. IV, ¶ 4c(5).

4. Attempted drug offenses.

a) If the accused believed the substance was an illegal drug, but the prosecution cannot prove it or the substance was actually not an illegal drug, then the accused can be convicted of attempting to commit the drug offense. *United States v. Dominguez*, 22 C.M.R. 275 (C.M.A. 1957) (attempted use of narcotic drug); *United States v. Longtin*, 7 M.J. 784 (A.C.M.R. 1979) (attempted sale of opium, where laboratory test inconclusive); *United States v. Gray*, 41 C.M.R. 756 (N.C.M.R. 1969) (attempted possession of marijuana and mescaline, where substances were not seized).

b) If the accused did not believe the substance was an illegal drug, however, the accused did not attempt to commit a drug offense. *United States v. Collier*, 3 M.J. 932 (A.C.M.R. 1977) (where accused was putting one over on the heroin buyer by selling him brown sugar, guilty plea to attempted transfer of heroin was improvident); *United States v. Giles*, 42 C.M.R. 960 (A.F.C.M.R. 1970) (accused who knows he has been deceived by seller, but nevertheless smokes substance hoping to achieve a "high," was not guilty of attempted use).

c) If the accused sold fake drugs, he can be charged and convicted of larceny by false pretenses, under Article 121. *See United States v. Williams*, 3 M.J. 555 (A.C.M.R. 1977) (sale of fake LSD) *rev'd on other grounds* 4 M.J. 336 (C.M.A. 1978).

5. Attempted Adultery. *United States v. St. Fort*, 26 M.J. 764 (A.C.M.R. 1988) (man returned home unexpectedly and found his wife clad only in bathrobe and the accused naked in a closet).

V. CONSPIRACY, ART. 81

A. Introduction.

1. "Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct." Article 81.

2. Public Policy Rationale. The concerted activity of a conspiracy is much more dangerous to society than the acts of individuals. The criminal enterprise is more difficult to detect because of its secrecy, is more likely to succeed because of the combination of strengths and resources of its members, and may continue to exist even after the initial object of the conspiracy has been

achieved. *See United States v. Feola*, 420 U.S. 671, 693-94 (1975); *United States v. Rabinowich*, 238 U.S. 78, 88 (1915).

3. Elements. MCM, pt. IV, ¶ 5b.

a) The accused entered into an agreement with one or more persons to commit an offense under the code; and

b) While the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

4. Pleading. Only the elements of the inchoate offense (conspiracy) need to be alleged – the elements of the conspired offense (also called the "predicate" or "target" offense) need not be plead. "However, sufficient specificity is required so that an accused is aware of the nature of the underlying target or predicate offense." *United States v. Norwood*, 71 M.J. 204 (C.A.A.F. 2012).

B. Parties to a Conspiracy.

1. Two or more persons are required in order to have a conspiracy. MCM, pt. IV, ¶ 5c(1).

a) Co-conspirators need not be subject to the UCMJ. *United States v. Rhodes*, 29 C.M.R. 551 (C.M.A. 1960) (co-conspirator was a foreign national).

b) At least two parties must be culpably involved. There must be a "meeting of minds" regarding the criminal object of the conspiracy. *United States v. Valigura*, 54 M.J. 187 (C.A.A.F. 2000) (adhering to the traditional "bilateral theory" and rejecting the modern "unilateral theory"; no conspiracy where only co-conspirator was an undercover agent; affirming conviction for attempted conspiracy); *United States v. LaBossiere*, 32 C.M.R. 337 (C.M.A. 1962). ("it is well settled that there can be no conspiracy when a supposed participant merely feigns acquiescence with another's criminal proposal in order to secure his detection and apprehension by proper authorities.").

2. Acquittal of accused's co-conspirators in a separate trial does not preclude conspiracy conviction of the accused. *United States v. Garcia*, 16 M.J. 52 (C.M.A. 1983) (overruling the former "rule of consistency").

C. "Bilateral Theory" of liability.

1. Conspiracy, under Article 81, requires a "meeting of the minds" to achieve the purported criminal goal. *United States v. Valigura*, 54 M.J. 187 (C.A.A.F. 2000); *United States v. LaBossiere*, 32 C.M.R. 337 (C.M.A. 1962) (if only two persons involved, one cannot be a government agent); *United States v. Duffy*, 47 C.M.R. 658 (A.C.M.R. 1973) (mentally incapacitated co-accused not culpably involved).

2. The law does not require 'consistency of verdicts.' If one of two co-conspirators is acquitted of conspiracy in a previous trial, the other co-conspirator may still be tried and convicted of conspiracy. *United States v. Garcia*, 16 M.J. 52, 57 (C.M.A. 1983).

3. An accused may be convicted of attempted conspiracy with an undercover law enforcement agent. *United States v. Anzalone*, 43 M.J. 322 (C.A.A.F. 1995); *United States v. Valigura*, 54 M.J. 187 (C.A.A.F. 2000).

4. Attempted conspiracy does not require an agreement or shared intent among the expected conspirators with respect to the object of the conspiracy. *United States v. Roeseler*, 55 M.J. 286 (C.A.A.F. 2001) (accused agreed to murder fictitious parents-in-law of fellow member of platoon).

D. The Agreement.

1. No particular words or form of agreement are required, only a common understanding to accomplish the object of the conspiracy. This may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play. *United States v. Whitten*, 56 M.J. 234 (C.A.A.F. 2002) (agreement formed by circling back to take a duffel bag after spotting it outside a vehicle while driving through housing area); MCM, pt. IV, ¶ 5c(2).

a) "Object of the conspiracy."

(1) *United States v. Shelton*, 62 M.J. 1 (C.A.A.F. 2005). The MJ instructed on lesser included offenses of unpremeditated murder and conspiracy to commit unpremeditated murder. MJ told the members that they would have to find "that at the time of the killing, the accused had the intent to kill or inflict great bodily harm on PFC Chafin." MJ erred. If the intent of the parties to the agreement was limited to the infliction of great bodily harm, their agreement was to commit aggravated assault, not unpremeditated murder.

(2) *United States v. Denaro*, 62 M.J. 663 (C.G. Ct. Crim. App. 2006). Object must be a UCMJ offense. Interfering with a urinalysis constitutes the Article 134 offense of wrongfully interfering with an adverse administrative proceeding, thereby establishing the unlawful object of the conspiracy.

b) *United States v. Billings*, 58 M.J. 861 (A. Ct. Crim. App. 2003) (evidence established an agreement by the accused to commit robbery where accused was leader of the gang and she silently concurred when a subordinate outlined the robbery plan as a way to make money for the gang and evidence suggested that the accused shared in the proceeds) *aff'd*, 61 M.J. 163 (C.A.A.F. 2005).

c) *United States v. Cobb*, 45 M.J. 82 (C.A.A.F. 1996) (evidence established agreement to commit robbery, where accused brought co-conspirators together, knew of their criminal venture, and expected to share in the proceeds).

d) *United States v. Garner*, 43 M.J. 435 (C.A.A.F. 1996) (affirming conviction for conspiracy to steal insurance funds where accused hired a fellow soldier to kill accused's wife with promise to share her life insurance proceeds).

e) *United States v. Barnes*, 38 M.J. 72 (C.M.A. 1993) ("existence of a conspiracy is generally established by circumstantial evidence and is usually manifested by the conduct of the parties themselves") (citing *United States v. Matias*, 25 M.J. 356 (C.M.A 1987)).

f) *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987) (conduct of accused and roommate was sufficient evidence of an agreement between them to sell marijuana), *cert. denied*, 485 U.S. 968 (1988).

g) *United States v. Jackson*, 20 M.J. 68 (C.M.A. 1985) (without saying a word, the co-conspirator joined the accused in a conspiracy to commit larceny).

h) *United States v. Brown*, 41 M.J. 504 (A. Ct. Crim. App. 1994) (conspiracy to organize a strike manifested by circumstantial evidence) *aff'd*, 45 M.J. 389 (C.A.A.F. 1996).

i) *United States v. Dickey*, 41 M.J. 637 (N-M. Ct. Crim. App. 1994), *vacated and remanded*, 43 M.J. 170 (C.A.A.F. 1995), *aff'd*, 46 M.J. 123 (C.A.A.F. 1996) (agreement to commit rape need not be expressed but only need be implied).

j) *United States v. Pete*, 39 M.J. 521 (A.C.M.R. 1994) (mere involvement in "gripe sessions" at which soldiers discussed leaving post without authority to protest conditions did not amount to a conspiracy).

k) *United States v. Walker*, 39 M.J. 731 (N-M.C.M.R. 1994) (affirming conviction for conspiracy to distribute marijuana where accused acted as a lookout and knew his associates were selling marijuana), *aff'd*, 41 M.J. 79 (C.M.A. 1994).

l) *United States v. Graalum*, 19 C.M.R. 667, 697-98 (A.F.B.R. 1955) ("conduct of the alleged co-conspirators, their declarations to or in the presence of each other, and other circumstantial evidence" clearly manifested agreement to commit bribery).

m) *United States v. Triplett*, 56 M.J. 875 (A. Ct. Crim. App. 2002) (accused's acts of straddling victim's chest and placing hands on her throat to facilitate rape by co-conspirator established that accused and co-conspirator formed an agreement to rape victim).

n) *United States v. Brown*, 9 M.J. 599 (A.F.C.M.R. 1980) (accused's involvement in first two of four thefts was insufficient to establish that the scope and object of the conspiracy, of which the accused was a member, included the last two thefts).

o) *United States v. Broaden*, No. ARMY 20150414, 2016 WL 4145746, at *3 (A. Ct. Crim. App. Aug. 3, 2016): (accused entered an agreement to steal the target's wallet, and the fact that the target had $527 was not enough to convict accused of conspiracy to steal "over $500," as the agreement was not specific as to that amount).

2. Mere presence is insufficient basis for inference of agreement. *United States v. Wright*, 42 M.J. 163 (C.A.A.F. 1995) (evidence that accused agreed to be present to assist if necessary and to assist in disposal of the victim's body was sufficient proof of agreement to commit premeditated murder); *United States v. Mukes*, 18 M.J. 358 (C.M.A. 1984) (conspiracy requires "deliberate, knowing, and specific intent to join the conspiracy, not . . . that [the accused] was merely present when the crime was committed").

3. A conditional agreement is sufficient for conspiracy if the accused believes that the condition is likely to be fulfilled. *United States v. Wright*, 42 M.J. 163, 166-67 (C.A.A.F. 1995) (citing federal case law).

4. Single Agreement to Commit Multiple Crimes. A single agreement to commit multiple offenses is a single conspiracy.

a) *United States v. Mack*, 58 M.J. 413 (C.A.A.F. 2003). Accused was convicted separately of conspiracy to commit check forgery and conspiracy to commit larceny of the check proceeds. On appeal, the government acknowledged there was only one agreement and thus, only one conspiracy. The court consolidated the two conspiracy specifications. "[O]ne agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one."

b) *United States v. Pereira*, 53 M.J. 183 (C.A.A.F. 2000). Accused pled guilty to and was convicted of separate specifications of conspiracy to commit murder, conspiracy to commit robbery, and conspiracy to commit kidnapping. The record established that the accused and his co-conspirators formed only one agreement to commit all the underlying offenses. As a matter of law, there was only one conspiracy, and the court consolidated the three specifications into one specification.

c) *United States v. Inman*, No. ARMY 20150042, 2016 WL 2726276, at *2 (A. Ct. Crim. App. May 4, 2016), *adhered to on reconsideration*, No. ARMY 20150042, 2016 WL 3545504 (A. Ct. Crim. App. June 23, 2016): The court found one conspiracy with diverse means to

effectuate the object of the conspiracy—namely, to fraudulently allow Mrs. K.I. to continue to obtain medical care through TRICARE by falsely claiming she and appellant were still married, and using the dependent ID card to obtain medical benefits. The factors used to determine the number of conspiracies include: "(1) the objectives and (2) nature of the scheme in each alleged conspiracy; (3) the nature of the charge and (4) the overt acts alleged in each; (5) the time and (6) location of each of the alleged conspiracies; (7) the conspiratorial participants in each; and (8) the degree of interdependence between the alleged conspiracies."

5. Complex Conspiracies. The scope and structure of conspiracies will vary considerably. The simplest form is a single bilateral agreement to commit a single crime. From that simple model, conspiracies may evolve into highly complex networks involving agreements between multiple parties to commit multiple crimes. In some cases, separate conspiracies are linked together by one or more common members. The scope and structure of the conspiracy has critical implications for determining liability of co-conspirators for crimes committed in furtherance of the conspiracy, resolving of evidentiary issues, and presenting a coherent theory to the panel. Two common metaphors used to describe complex conspiracies are the "wheel with spokes" conspiracy and the "chain" conspiracy.

a) A "totality of the circumstances" analysis is the correct approach when determining the number of conspiracies in a given case. Federal court decisions have identified a variety of factors that may be relevant to determining whether a single or multiple conspiracies exist. Among such factors are the following: (1) the objectives of each alleged conspiracy; (2) the nature of the scheme in each alleged conspiracy; (3) the nature of the charge; (4) the overt acts alleged in each; (5) the time each of the alleged conspiracies took place; (6) the location of each of the alleged conspiracies; (7) the conspiratorial participants in each; and (8) the degree of interdependence between the alleged conspiracies. *United States v. Finlayson*, 58 M.J. 824 (A. Ct. Crim. App. 2003) (applying the eight factors to find one conspiracy where the accused used two suppliers, one of whom also supplied the other, and later had his wife join him in his drug distributing venture).

b) Under the "wheel" metaphor, establishing a single conspiracy requires that the prosecution prove that the spokes are bound by a "rim," which is the concerted action of all the parties working together with a single design for the accomplishment of a common purpose. The circumstances must lead to an inference that some form of overall agreement existed. This agreement may be inferred from the parties' acts or other circumstantial evidence. *United States v. Kenny*, 645 F.2d 1323, 1334-35 (9th Cir. 1981) (finding a single conspiracy in the form of a "wheel" with the defendant as a central "hub" dealing in individual transactions with the other defendants as "spokes"), *cert. denied*, 452 U.S. 920 (1981).

c) The government need not show direct contact or explicit agreement between the defendants. It is sufficient to show that each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe that their own benefits were dependent upon the success of the entire venture. *United States v. Kostoff*, 585 F.2d 378, 380 (9th Cir. 1978).

d) Once the existence of a conspiracy has been established, evidence of only a slight connection is necessary to convict a defendant of knowing participation in it. *United States v. Dunn*, 564 F.2d 348, 357 (9th Cir. 1977).

E. Overt Act.

1. The overt act must be independent of the agreement, and it must take place during or after the agreement. MCM, pt. IV, ¶ 5c(4)(a). *United States v. Kauffman*, 34 C.M.R. 63 (C.M.A. 1963) (the act of receiving the name and address of his contact, which was not separate from the

agreement, was not a sufficient overt act for conspiracy to wrongfully communicate with agents of East Germany); *United States v. Schwab*, 27 M.J. 559 (A.C.M.R. 1988) (accused's conversations with his alleged co-conspirator, his statement that he put money aside, and co-conspirator's notes and sketches did not satisfy the overt act requirement for conspiracy to commit larceny and wrongful sale of firearms); *United States v. Farkas*, 21 M.J. 458 (C.M.A. 1986), *cert. denied*, 479 U.S. 857 (1986) (act done prior to agreement is not a sufficient overt act).

2. The overt act must be done by one or more of the co-conspirators, but not necessarily the accused. MCM, pt. IV, ¶ 5c(4)(a); *see United States v. Yarborough*, 5 C.M.R. 106 (C.M.A. 1962) (in conspiracy to intentionally inflict self-injury, the government could have alleged overt acts proven to be committed by the co-conspirator, but the government alleged overt acts by the accused that it did not prove).

3. An overt act by one conspirator is the act of all; the overt act may be performed by any member of the conspiracy. Each conspirator is equally guilty even though each does not participate in, or have knowledge of, all of the details. MCM, pt. IV, ¶ 5c(4)(c); *see United States v. Figueroa*, 28 M.J. 570 (N.M.C.M.R. 1989).

4. The overt act need not be criminal. Although committing the intended offense may constitute the overt act, it is not essential. Mere preparation may be enough, as long as it manifests that the agreement is being executed. MCM, pt. IV, ¶ 5c(4)(b); *United States v. Choat*, 21 C.M.R. 313 (C.M.A. 1956) (obtaining crowbar with which to break and enter a store was sufficient overt act for conspiracy to commit larceny); see *United States v. Brown*, 41 M.J. 504 (A.C.C.A. 1994) (agreement may be contemporaneous with the offense itself in a conspiracy to organize a strike), *aff'd*, 45 M.J. 389 (C.A.A.F. 1996).

5. At least one overt act must be alleged and proved; *United States v. McGlothlin*, 44 C.M.R. 533 (A.C.M.R. 1971) (holding that specification alleging conspiracy to commit pandering but not alleging any overt act in furtherance of the conspiracy was fatally defective). Government may allege several overt acts, but need prove only one; *United States v. Reid*, 31 C.M.R. 83 (C.M.A. 1961).) (citing *Fredericks v. United States*, 292 Fed 856 (CA 9th Cir. 1923)).

6. Substitution of proof of an unalleged overt act does not necessarily constitute a fatal variance, as long as there is "substantial similarity" between the alleged overt act and the overt act proven at trial. *United States v. Collier*, 14 M.J. 377 (C.M.A. 1983); see *United States v. Moreno*, 46 M.J. 216 (C.A.A.F. 1997) (where basic facts remain unchanged, amendment of alleged overt act the day before trial was permissible minor change).

F. Wharton's Rule.

1. Some offenses require two or more culpable actors acting in concert. There can be no conspiracy where the agreement exists only between the persons necessary to commit such an offense. Examples include dueling, bigamy, incest, adultery, and bribery. MCM, pt. IV, ¶ 5c(3).

2. *Iannelli v. United States*, 420 U.S. 770, 782-86 (1975). Defendant and seven others were convicted of conspiracy to violate and violating 18 U.S.C. § 1955, a federal statute making it a crime for five or more persons to operate a prohibited gambling business. Convictions for both offenses were affirmed. Wharton's Rule "has current vitality only as a judicial presumption, to be applied in the absence of legislative intent to the contrary. The classic Wharton's Rule offenses—adultery, incest, bigamy, dueling—are crimes that are characterized by the general congruence of the agreement and the completed substantive offense. The parties to the agreement are the only persons who participate in commission of the substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than society at large."

3. Rule does not apply where the substantive offense does not demand concerted criminal activity, such as drug use or distribution. *United States v. Crocker*, 18 M.J. 33, 38-39 (C.M.A. 1984) (drug distribution); *United States v. Johnson*, 58 M.J. 509 (N-M. Ct. Crim. App. 2003) (drug use); *United States v. Osthoff*, 8 M.J. 629 (A.C.M.R. 1979).

4. Rule does not apply when the conspiracy involves the cooperation of a greater number of persons than is required for commission of the substantive offense. *See United States v. Crocker*, 18 M.J. 33, 38 (C.M.A. 1984) (affirming conspiracy conviction where accused accepted money and agreed to buy drugs for another airman on a trip to Amsterdam; Wharton's Rule did not apply because only one party to a drug distribution need have a criminal intent); *United States v. Jiles*, 51 M.J. 583 (N.M. Ct. Crim. App. 1999) (holding Wharton's Rule did not apply to conspiracy to distribute marijuana).

5. *But see United States v. Parada*, 54 M.J. 730 (C.G. Ct. Crim. App. 2001) (Application of Wharton's Rule to drug offenses is a highly fact-dependent determination in which the extent of the enterprise in time and reach are prime considerations. Conspiracy to distribute marijuana where the only parties involved were the accused, who mailed the drugs, and his friend, who received them, was unnecessary "piling-on" of charges); *United States v. Viser*, 27 M.J. 562 (A.C.M.R. 1988) (holding Wharton's Rule does not apply to drug offenses).

6. Wharton's Rule does not apply to conspiracy to violate an anti-black marketing regulation. *United States v. Wood*, 7 M.J. 885 (A.F.C.M.R. 1979) (reasoning that the regulation could be violated by one person).

G. Duration.

1. Termination. A conspiracy terminates when the object of the conspiracy is accomplished, the members withdraw, or the members abandon the conspiracy. *United States v. Beverly*, 14 U.S.C.M.A. 468, 471 (C.M.A. 1964).

a) *United States v. Jimenez Recio*, 537 U.S. 270 (2003). Conspiracy does not automatically terminate simply because the Government has defeated its object. Thus, defendants may be convicted of conspiracy, even absent proof they joined the conspiracy before its defeat.

b) *United States v. Ratliff*, 42 M.J. 797 (N-M.C.C.A. 1995). Accused and four other Marines conspired to rob enough other Marines to finance a trip to Raleigh, North Carolina. After successfully getting money from one robbery victim but then failing to get money from two other victims that ran away, it was obvious that the co-conspirators did not think that they had attained the object of their conspiracy. Therefore, a statement made by a co-conspirator, at that time, was not hearsay, under M.R.E. 801(d)(2)(E).

c) *United States v. Hooper*, 4 M.J. 830 (A.F.C.M.R. 1978). Accused charged with conspiring to violate and violating an Air Force regulation proscribing demonstrations in foreign countries by burning a cross. Later, an alleged co-conspirator stated that the accused lit the fire. The statement was admissible only if it was made during and in furtherance of the conspiracy. "It is well settled that a conspiracy ends when the objectives thereof are accomplished, if not earlier by abandonment of the aims or when any of the members of the joint enterprise withdraw therefrom." The object of the conspiracy was the erection and burning of the cross. When that was accomplished, the conspiracy terminated.

2. Withdrawal.

a) An individual is not guilty of conspiracy if he effectively withdraws before the alleged overt act is committed. An effective withdrawal must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement and that shows that the party

has severed all connection with the conspiracy. A conspirator who effectively withdraws from the conspiracy after the performance of the alleged overt act remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal, but he is not liable for offenses committed by the remaining conspirators after his withdrawal. MCM, pt. IV, ¶ 5c(6).

b) *United States v. Miasel*, 24 C.M.R. 184 (C.M.A. 1957). Accused and six others agreed to commit sodomy upon a fellow soldier in the stockade. The group forced the victim to lie down while the accused climbed on top of the victim. The accused declined to try to commit sodomy. The group took the victim out of the room and committed forcible sodomy upon him, but the accused did not leave the room with the group and had no further participation in the venture. "The failure of the accused to accompany the group when they left the barracks is indicative of an affirmative act on his part to effect a withdrawal and constitutes conduct wholly inconsistent with the theory of continuing adherence."

c) Mere inactivity does not constitute withdrawal. *United States v. Rhodes*, 28 C.M.R. 427 (A.B.R. 1959), aff'd 29 C.M.R. 551 (C.M.A. 1960). From 1951 to 1953, the accused, while stationed at the United States embassy in Moscow, agreed to supply information to Soviet agents. In 1953, he returned to the United States and did not again actively participate in the conspiracy. In 1957, a co-conspirator committed an overt act. Accused was guilty of conspiracy. "[I]t is no defense to the charge of conspiracy that appellant was inactive [in the conspiracy] subsequent to June 1953.

3. A conspiracy is presumed to continue until the contrary is shown. *United States v. Graalum*, 19 C.M.R. 667 (A.F.B.R. 1955) (affirming conviction for conspiracy to commit bribery, where accused did not effectively withdraw prior to the performance of the overt act by the co-conspirator).

H. Vicarious Liability.

1. A co-conspirator may be convicted for substantive offenses committed by another co-conspirator, provided such offenses were committed while the agreement continued to exist and were in furtherance of the agreement. MCM, pt. IV, ¶ 5c(5); *Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v. Browning*, 54 M.J. 1 (C.A.A.F. 2000); *United States v. Gaeta*, 14 M.J. 383 (C.M.A. 1983) (members were properly instructed on liability for co-conspirator's drug distribution); *United States v. Figueroa*, 28 M.J. 570 (N.M.C.M.R. 1989) (guilty plea to drug distribution by co-conspirator was provident).

2. *United States v. Billings*, 58 M.J. 861 (A.C.C.A. 2003) (accused's silent consent as approval authority for all gang activity supported conviction for robbery even though other gang members carried out the crime) *aff'd*, 61 M.J. 163 (2005).

3. *United States v. Finlayson*, 58 M.J. 824 (A.C.C.A. 2003) (dicta) (accused could be criminally liable for the actions of other conspirators before he joined the conspiracy).

4. Article 77 is broad enough to encompass vicarious liability of co-conspirators. *United States v. Browning*, 54 M.J. 1, 7 (C.A.A.F. 2000) (holding that prosecution could prove larceny and fraudulent claim charges on theory that accused was perpetrator, aider and abettor, or co-conspirator, even though conspiracy was not on the charge sheet).

5. A co-conspirator's statement may be admissible under M.R.E. 801(d)(2)(E) even though conspiracy is not a charged offense. *United States v. Knudson*, 14 M.J. 13 (C.M.A. 1982).

I. Punishment.

1. Conspiracy to commit an offense is distinct and separate from the offense that is the object of the conspiracy. The accused can be convicted and punished separately for both the conspiracy and the underlying offense. Also, commission of the intended offense may constitute the overt act required for conspiracy. MCM, pt. IV, ¶ 5c(8); *Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v. Dunbar*, 12 M.J. 218 (C.M.A. 1982); *United States v. Washington*, 1 M.J. 473 (C.M.A. 1976); *United States v. Nagle*, 30 M.J. 1229 (A.C.M.R. 1990).

2. Conspiracy to commit a crime and solicitation to commit the same crime are separate offenses. *See United States v. Ramsey*, 52 M.J. 322 (C.A.A.F. 2000); *United States v. Carroll*, 43 M.J. 487 (C.A.A.F. 1996).

3. Conspiracy to commit a crime and attempted commission of the same crime are separate offenses, because each offense requires proof of a separate element. *United States v. Stottlemire*, 28 M.J. 477 (C.M.A. 1989).

4. Where the theft of two separate items was contemplated by the conspiracy, the value of the items can be aggregated to calculate the maximum punishment available for the conspiracy. *United States v. Crawford*, 31 M.J. 736 (A.F.C.M.R. 1990).

VI. SOLICITING COMMISSION OF OFFENSES, ART. 82

A. Introduction.

1. Article 82(a) covers solicitation to commit offenses under the UCMJ (incorporating the offense of "soliciting another to commit an offense" under Article 134), other than an offense specified in subsection (b) of Article 82.

2. Article 82(b) covers solicitation to commit the offenses of desertion (Article 85), mutiny or sedition (Article 94), or misbehavior before the enemy (Article 99).

B. Discussion.

1. Instantaneous offense. The offense is complete when a solicitation is made or advice given with the specific wrongful intent to influence another or others to commit an offense. It is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice. MCM, pt. IV, ¶ 6c(1).

2. Form of solicitation. Solicitation may be by means other than word of mouth or writing. Any act or conduct that reasonably may be construed as a serious request or advice to commit an offense can be considered solicitation. It is not necessary that the accused act alone; the accused may act through other persons in committing this offense. MCM, pt. IV, ¶ 6c(2).

3. The prosecution must prove the accused had the specific intent that the offense actually be committed. *United States v. Taylor*, 23 M.J. 314 (C.M.A. 1987); *United States v. Benton*, 7 M.J. 606 (N.C.M.R. 1979).

4. An express or implicit invitation to join in a criminal plan is a solicitation. The context in which an alleged statement was made can be considered to determine its criminal nature as a solicitation. *United States v. Williams*, 52 M.J. 218 (C.A.A.F. 2000) (where accused and other person had used drugs together and the other person was informed of the accused's international drug smuggling operation, including the employment of a third party for drug buying trips to Turkey, the accused's statement, "Are you ready to go; you got your passport?" to which the other person promptly answered, "I'm not going to go," could reasonably be construed as an invitation to join the criminal enterprise).

5. The person solicited must know that an offense is contemplated. *United States v. Higgins*, 40 M.J. 67 (C.M.A. 1994) (guilty plea to solicitation improvident where accused asked soldier to withdraw money from ATM machine but did not tell him that the ATM card did not belong to the accused); *United States v. Davis*, 39 M.J. 1110 (A.F.C.M.R. 1994) (plea to solicitation improvident where accused asked person to cash "girlfriend's check," and solicitee believed the act was properly authorized and thus legal).

6. The person solicited cannot be the victim of the offense. *United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010). Overrules *United States v. Conway*, 40 M.J. 859 (A.F.C.M.R. 1994) (accused who requested to see his 15-year-old stepdaughter naked, when child was aware of improper purpose, was guilty of solicitation) and *United States v. Harris*, 2003 C.C.A. Lexis 269 (N-M.C.C.A. 2003).

7. The person solicited may be predisposed toward the crime. *United States v. Hays*, 62 M.J. 158 (2005) (holding neither the MCM nor the UCMJ precludes a conviction for solicitation because the object is predisposed towards the crime). Rejects the requirement set forth in *Dean*, 44 M.J. 683 (Army Ct. Crim. App. 1996)).

C. Miscellaneous Issues.

1. Accomplice liability distinguished. If the solicitee commits the intended offense, the solicitor may be liable for the commission of the crime as a principal under Article 77. MCM, pt. IV, ¶ 1.b.(2)(b).

2. "Solicitation" of a minor to engage in indecent conduct is not solicitation within the inchoate offense meaning of the term. One cannot solicit another individual to commit an offense and simultaneously be the victim of that offense. Such "solicitation" is merely indecent conduct, and if charged as Article 134 solicitation, fails to state an offense. *United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010) (accused responded to a personal advertisement in Craigslist's "women for men" section, and thereafter, communicated via text message with an undercover NCIS agent purporting to be a 14–year-old girl and solicited the production and distribution of child pornography; NMCCA held the accused's mistaken notion regarding the identity of the party he solicited afforded him no defense).

PLACE OF DUTY OFFENSES

VII. MALINGERING, ART. 83

A. General. The essence of this offense is the design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. Whether to avoid all duty, or only a particular job, it is the purpose to shirk which characterizes the offense. Hence, the nature or permanency of a self-inflicted injury is not material on the question of guilt, nor is the seriousness of a physical or mental disability which is a sham. Evidence of the extent of the self-inflicted injury or feigned disability may, however, be relevant as a factor indicating the presence or absence of the purpose. MCM, pt. IV, ¶ 40c(1).

B. Elements.

1. The accused was assigned to, or was aware of prospective assignment to, or availability for, the performance of work, duty, or service.

a) All soldiers are inferred to be aware of their general, routine military duties. *United States v. Mamaluy*, 27 C.M.R. 176 (C.M.A. 1959).

b) With regard to special duties or prospective assignments (*e.g.*, emergency deployment to hostile regions), the government must establish that accused had actual knowledge of such duties.

2. The accused feigned illness, physical disablement, mental lapse or derangement, or intentionally inflicted injury upon himself or herself.

a) *United States v. Pedersen*, 8 C.M.R. 63 (C.M.A. 1953). Accused was charged with intentionally shooting himself in order to be discharged from the Army but testified at trial that the injury was accidentally inflicted. No one witnessed the shooting, and the government had no admissible evidence with which to impeach the accused. As a result, the court held that the prosecution had failed in its proof and dismissed the charges.

b) *United States v. Kisner*, 35 C.M.R. 125 (C.M.A. 1964). Accused was charged with deliberately shooting himself in the foot in order to avoid transfer to Korea. After initially declaring that the injury was accidentally incurred, he confessed to intentionally inflicting the wound in order to avoid deployment to Korea. Because the record was devoid of any independent evidence to corroborate the confession, the Court of Military Appeals reversed the conviction and dismissed the charge.

c) *United States v. Belton*, 36 C.M.R. 602 (A.B.R. 1966). Accused on orders to Vietnam, who refused to eat food over a period of time, resulting in his debility, intentionally inflicted self-injury for purposes of Article 115 (now 83).

d) *United States v. Bowman*, 2012 CCA LEXIS 753 (N-M. Ct. Crim. App. 2012). Accused was charged with having another person shoot him in the leg to avoid deployment. The charge stated an offense under Article 115 (now 83), UCMJ because having the other person shoot him at the accused's request was no different that the accused shooting himself and because the injury was orchestrated by the accused.

3. The accused's purpose or intent in doing so was to avoid the work, duty or service.

a) The words "work," "duty," and "service" are not restricted to one context or sense. The breadth of these terms would seem to cover all aspects of a serviceperson's official existence. Unquestionably, what the law intended to proscribe was a self-inflicted injury, which would prevent the injured party from being available for the performance of all military tasks. *See United States v. Mamaluy*, 27 C.M.R. 176 (C.M.A. 1959) (Cutting his wrist to escape confinement was sufficient to allege a purpose to avoid either work, duty, or service.); *United States v. Guy*, 38 C.M.R. 694 (N.B.R. 1967) (Intentional self-injury for the purpose of avoiding disciplinary action was sufficient to avoid either work, duty, or service); *United States v. Johnson*, 28 C.M.R. 629 (N.B.R. 1959) (a sailor who persuaded a friend to cut off his thumb was convicted of conspiracy to maim himself and malingering when the act was done as a means of avoiding further military duty).

b) Intent or purpose may be established by circumstantial evidence, and it may be inferred that a person intended the natural and probable consequences of an act intentionally performed by him. *United States v. Houghton*, 32 C.M.R. 3 (C.M.A. 1962); *but see United States v. Lawrence*, 10 M.J. 752 (A.C.M.R. 1981) (court held that evidence which established only that the accused injured himself in order to halt an investigation into a false report he had filed was insufficient to support a conviction for malingering).

c) Unsuccessfully attempting to commit suicide to avoid prosecution constitutes malingering. *United States v. Johnson*, 26 M.J. 415 (C.M.A. 1988).

d) Evidence of prior misconduct may be admissible against the accused for the limited purpose of establishing his wrongful intent. *See United States v. Brown*, 38 C.M.R. 445 (A.B.R. 1967) (where the accused was charged with malingering by intentionally shooting himself in the foot while on a combat mission in Vietnam, evidence that he had quit as a point man for a patrol the day before the shooting and had skulked in bringing up the rear and wanted to be evacuated and complained of headaches was relevant on the issue of intent).

C. Defense of Accident. *United States v. Harrison*, 41 C.M.R. 179 (C.M.A. 1970). Where an accused charged with malingering by intentionally shooting himself in the foot for the purpose of avoiding duty in the field testified he had a faulty weapon which discharged accidentally while he was dozing, the instructions on the elements of the offense and the defense of accident were prejudicially inconsistent where the court was advised it must find the accused intentionally inflicted injury upon himself by shooting himself in the foot, but the instructions on accident included the statement that even though the act is unintentional, it is not excusable where it was a result of or incidental to an unlawful act.

D. To Avoid Assigned Duty. *See United States v. Yarborough*, 5 C.M.R. 106 (C.M.A. 1952) (malingering to avoid assigned duty while before the enemy constitutes misbehavior punishable under UCMJ art. 99). *See also*, *United States v. Glover*, 33 M.J. 640 (N.M.C.M.R. 1991) (testimony required from people who knew what restrictions had been placed on accused's activity to show he was attempting to avoid assigned duties.)

E. Without Intent to Avoid Military Duty.

1. *See United States v. Taylor*, 38 C.M.R. 393 (C.M.A. 1968). In *Taylor*, the evidence pertaining to a charge of malingering in violation of UCMJ art. 115 (now 83) showed that the accused superficially slashed his arms with a razor blade in the presence of two cell mates in the brig, representing at the time that he wanted to outdo the performance of another inmate who had done the same thing earlier. The law officer instructed that intentional injury without a purpose to avoid service but under circumstances to the prejudice of good order and discipline was a lesser included offense, and the court could validly find the accused not guilty of the portion of the specification alleging the purpose of the injury to have been avoiding service and the accused guilty of being disorderly to the prejudice of good order and discipline in the armed forces in violation of Article 134, UCMJ. Held: Article 115 (now 83) does not pre-empt the spectrum of self-inflicted injuries. *See also United States v. Ramsey*, 40 M.J. 71 (C.M.A. 1994).

2. *But see* MCM, pt. IV, ¶ 7.c(2) discussion. "Bona fide suicide attempts should not be charged as criminal offenses. When making a determination whether the injury by the service member was a bona fide suicide attempt, the convening authority should consider factors including, but not limited to, health conditions, personal stressors, and DoD policy related to suicide prevention." *See also United States v. Caldwell*, 72 M.J 137 (C.A.A.F. 2016) (discussing bona fide suicide attempts in the context of self-injury without intent to avoid service under Article 134, UCMJ).

F. Unreasonable Multiplication of Charges. False Official Statement and Malingering can both be charged, as each offense is aimed at a separate act. False Official Statement involves intentional deception whereas Malingering involves feigning to receive favor. Additionally, multiple malingering charges may be sustained where events are separated by time and location. *United States v. Tankersley*, No. ARMY 20140074, 2016 WL 4434330, at *2 (A. Ct. Crim. App. Aug. 15, 2016).

G. Pleading. There are two distinct theories of criminal liability for malingering: 1) feigning illness, physical disablement, mental lapse or derangement; and 2) intentionally inflicting self-injury. The alleged theory must be proven and evidence of the non-alleged theory will not sustain a conviction. *United States v. Mandy*, 73 M.J. 619 (A.F. Ct. Crim. App. 2014), as corrected (Apr. 24, 2015), *review*

granted, decision aff'd, (C.A.A.F. Dec. 17, 2014) (Accused's conviction of malingering by feigning injury was overturned because it was different than the specification which alleged malingering by intentionally inflicting self-injury.)

VIII. BREACH OF MEDICAL QUARANTINE, ART. 84

A. General.

1. 2016 MJA migrated this offense from Article 134 (Quarantine: medical, breaking).

2. Elements. MCM, pt. IV, ¶ 8b.

a) That a certain person ordered the accused into medical quarantine;

b) That the person was authorized to order the accused into medical quarantine;

c) That the accused knew of this medical quarantine and the limits thereof;

d) That the accused went beyond the limits of the medical quarantine before being released therefrom by proper authority.

3. Explanation.

a) Each service empowers its installation commanders to declare medical quarantines in the event of a public health emergency. *See* U.S. DEP'T OF DEF. INSTR. 6200.03, PUBLIC HEALTH EMERGENCY MANAGEMENT WITH THE DEPARTMENT OF DEFENSE enclosure 3, ¶2(a) (dated 5 March 2010) (authorizing quarantine and isolation of individuals within the scope of the installation commander's authority in consultation with the Center for Disease Control designated "Quarantine Officer").

b) Distinguishing "quarantine" from "quarters" orders. Putting a person "on quarters" or otherwise excusing a person from duty because of illness does not of itself constitute a medical quarantine. MCM, pt. IV, ¶ 8c.

IX. DESERTION, ART. 85

A. Types of Desertion. Desertion exists when any member of the armed forces:

1. Without authority, goes or remains absent from his or her unit, organization, or place of duty, with intent to remain away permanently. *United States v. Horner*, 32 M.J. 576 (C.G.C.M.R. 1991); or

2. Quits his or her unit, organization or place of duty with intent to avoid hazardous duty or to shirk important service. *United States v. Hocker*, 32 M.J. 594 (A.C.M.R. 1991); or

3. Without being separated from one of the armed forces, enlists or accepts an appointment in the same or another of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States.

4. Additionally, a commissioned officer is guilty of desertion if, after tender of a resignation and before notice of its acceptance, he quits his post or proper duties without leave and with intent to remain away permanently.

B. Elements of Desertion with Intent to Remain Away Permanently. (The most common form of desertion). MCM, pt. IV, ¶ 9.b.(1).

1. The accused absented himself from his unit, organization, or place of duty;

2. That the absence was without authority;

3. That the accused, at the time the absence began or at some time during the absence, intended to remain away from his unit, organization, or place of duty permanently; and

4. The accused remained absent until the date alleged.

5. If the absence was terminated by apprehension, that element is added.

C. Less Common Forms of Desertion.

1. Desertion with intent to avoid hazardous duty or to shirk important service. MCM, pt. IV, ¶ 9b(2).

a) Prospective duty as a medic at Fort Sam Houston during Persian Gulf War qualified as important service. *United States v. Swanholm*, 36 M.J. 743 (A.C.M.R. 1992).

b) Thirty-day sentence to brig did not qualify as important service for purposes of desertion. *United States v. Wolff*, 25 M.J. 752 (N.M.C.M.R. 1987).

c) Being an accused at a special court-martial is not important service. *United States v. Walker*, 26 M.J. 886 (A.F.C.M.R. 1988) (accused still found guilty, however, because he had an intent to remain away permanently). *See* TJAGSA Practice Note, *Being an Accused: "Service," But Not "Important Service*," Army Law., Apr. 1989, at 55 (discussing *Walker*).

2. Desertion before notice of acceptance of resignation. MCM, pt. IV, ¶ 9.b.(3).

D. Desertion Terminated by Apprehension.

1. In addition to the four elements of desertion listed above, if the accused's absence was terminated by apprehension, the Government may allege termination by apprehension as an aggravating factor.

2. If alleged in the specification and proved beyond a reasonable doubt, termination by apprehension increases the maximum confinement from two years to three years. MCM, pt. IV, ¶ 9.e.(2)(a) and (b).

3. Termination by apprehension may apply to all forms of desertion except absence with intent to avoid hazardous duty or to shirk important service, as the maximum punishment for this latter most serious form of desertion is already a DD and five years. MCM, pt. IV, ¶ 9.e.(1).

4. An accused may be convicted of desertion terminated by apprehension even though he was apprehended by civilian authorities for a civilian offense and thereafter notified the civilian authorities of his AWOL status. *United States v. Fields*, 32 C.M.R. 193 (C.M.A. 1962); *United States v. Babb*, 19 C.M.R. 317 (C.M.A. 1955); *United States v. Northern*, 42 M.J. 638 (N-M. Ct. Crim. App. 1995). Apprehension by civilian authorities and the subsequent return to military authorities for an offense unrelated to one's military status does not in and of itself prove that the return was involuntary. *United States v. Washington*, 24 M.J. 527 (A.F.C.M.R. 1987).

E. Termination Generally. Desertion did not terminate when military authorities requested civilian authorities deny a deserter bail until resolution of civilian charges. *United States v. Asbury*, 28 M.J. 595 (N.M.C.M.R. 1989).

F. Attempted Desertion. Attempted desertion should be charged under Article 85 rather than under Article 80. MCM, pt. IV, ¶ 4c(6)(a).

G. *Mens Rea* for Desertion. The offenses of desertion and absence without leave are similar in most respects, except for the intent element involved in desertion. *See United States v. Horner*, 32 M.J. 576 (C.G.C.M.R. 1991).

1. Desertion is a specific intent crime. *United States v. Holder*, 22 C.M.R. 3 (C.M.A. 1956).

2. Evidence of intent may be based upon all the facts and circumstances of the case. Length of absence, actions and statements of the accused, and the method of termination of the absence (apprehension or voluntary surrender) are some factors to be considered. MCM, pt. IV, ¶ 9c(1)(c)(iii). Many of the circumstantial factors listed in the MCM can cut both ways, and may be argued by either side; therefore, in order to sustain a desertion conviction, the Government ought to provide additional context favoring conviction rather than simply raising the circumstances at trial. Ultimately, a conviction for desertion is legally sufficient where, given the circumstances of the particular case, a reasonable factfinder could draw an inference of intent beyond a reasonable doubt. *United States v. Oliver*, 70 M.J. 64 (C.A.A.F. 2011).

3. The determination of whether an accused intended to avoid hazardous duty or shirk important service is subjective, and whether the service is "important" is an objective question dependent upon the totality of circumstances. *United States v. Gonzalez*, 42 M.J. 469 (1995).

4. The length of the absence alone is insufficient to establish an intent to desert; however, in combination with other circumstantial evidence, it may be sufficient. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

5. The totality of circumstances surrounding the offense can negate specific intent to absent oneself permanently. *United States v. Logan*, 18 M.J. 606 (A.F.C.M.R. 1984).

6. Having an understandable or laudable motive to desert is not a defense if the evidence sufficiently establishes the elements. *United States v. Gonzalez*, 39 M.J. 742 (N.M.C.M.R. 1994), *aff'd*. 42 M.J. 469 (1995).

7. Evidence of an accused's motive to quit her unit as gesture of protest because of moral or ethical reservations that the unit might commit war crimes is irrelevant to a charge of desertion with intent to avoid hazardous duty or shirk important service. *United States v. Huet-Vaughn*, 43 M.J. 105 (C.A.A.F. 1995).

8. Evidence of a 26-month absence while accused was on orders for a war zone and where he was apprehended a long distance from his unit was sufficient to establish intent to desert. *United States v. Mackey*, 46 C.M.R. 754 (N.C.M.R. 1972).

9. Evidence of a two-year absence in vicinity of assigned unit, termination by apprehension, and a previous absence, despite retention of an identification card, was sufficient to show an intent to desert. *United States v. Balagtas*, 48 C.M.R. 339 (N.C.M.R. 1972).

10. The intent to remain away permanently need not coincide with the accused's departure. A person must have had, either at the inception of the absence or at some time during the absence, the intent to remain away permanently. MCM, pt. IV, ¶ 9.c.(1)(c)(i).

11. In a case where desertion with intent to shirk important service was charged, infantry service in Vietnam was held to be "important service." *United States v. Moss*, 44 C.M.R. 298 (A.C.M.R. 1971). *See also United States v. Hocker*, 32 M.J. 594 (A.C.M.R. 1991) (accused's plea provident to desertion with intent to avoid hazardous duty where service was duty in Persian Gulf).

H. Pleading.

1. In view of the three types of intent encompassed in Article 85 (*i.e.*, intent to remain away permanently, intent to avoid hazardous duty, intent to shirk important service), the crime of desertion is not alleged unless the specific form of intent is stated in the specification. *United States v. Morgan*, 44 C.M.R. 898 (A.C.M.R. 1971) (the court found the accused guilty of the lesser included offense of AWOL).

2. "Desert" and "desertion" are terms of art which necessarily and implicitly include the requirement that the absence was without authority. *United States v. Lee*, 19 M.J. 587 (N.M.C.M.R. 1984) (specification that alleges that the service member "did desert" is the equivalent of alleging that the service member did without authority and with the intent to remain away permanently absent himself from his unit).

3. AWOL under Article 86 is a lesser included offense of most forms of desertion. MCM, pt. IV, ¶ 9.d.

X. ABSENCE WITHOUT LEAVE, ART. 86

A. Failure to Go to Appointed Place of Duty (Failure to Repair/Report). Article 86(1).

1. Elements. MCM, pt. IV, ¶ 10b(1).

a) A certain authority appointed a certain time and place of duty for the accused;

b) The accused knew of that time and place; and

c) The accused, without authority, failed to go to the appointed place of duty at the time prescribed.

2. Pleadings. The "appointed place of duty" addressed in Article 86(1) refers to a specifically appointed place of duty rather than a general place of duty. A specification listing only the accused's unit does not list a specific place of duty and is fatally defective. *United States v. Sturkey*, 50 C.M.R. 110 (A.C.M.R. 1975). *See also United States v. Watts*, No. ACM S32146, 2014 WL 3032484 (A.F.Ct.Crim.App. 2014) (noting that the specifically-appointed place of duty need not be a different location than the accused's general place of duty). The appointed place need not be alleged with as much specificity in nonjudicial proceedings. *United States v. Atchison*, 13 M.J. 798 (A.C.M.R. 1982).

a) The offense requires that the accused actually knew the appointed time and place. MCM, pt. IV, ¶ 10c(2). *But see United States v. Adams*, 63 M.J. 223 (2006) (holding the Art. 112a theory of "deliberate avoidance" satisfies the knowledge requirement for ALL Art. 86 offenses).

b) The accused need not know the identity of the person appointing the place of duty. *United States v. Fanning*, 69 M.J. 546, (A.F.Ct.Crim.App. 2010).

c) "Appointed place of duty" includes the place(s) where a restricted soldier is required to sign-in. *United States v. High*, 39 M.J. 82 (C.M.A. 1994).

d) Ordinarily, violation of an order to report to a particular place, though charged under Article 92, constitutes no more than a failure to report. The maximum punishment is therefore limited to that for failure to report. *United States v. Hargrove*, 51 M.J. 408 (C.A.A.F. 1999) (accused guilty of failure to go to appointed place of duty, rather than disobeying a lawful order, when order was to sign-in hourly when not working); *United States v. Henderson*, 44 M.J. 232 (C.A.A.F. 1996) (accused's failure to comply with staff sergeant's order to get dressed and be at morning formation 45 minutes later constituted offense of failure to report rather than willfully disobeying an NCO); *United States v. Baldwin*, 49 C.M.R. 814 (A.C.M.R. 1975); MCM, pt. IV, paragraphs 14c(2)(b) and 16e(2).

e) On the other hand, if the order to return to duty was issued in performance of a proper military function and not for the purpose of increasing the punishment, the accused may be convicted and punished for both offenses. *United States v. Pettersen*, 17 M.J. 69 (C.M.A.

1983); *see generally* MCM, pt. IV, paragraph 14c(2)(a)(iv) (stating that an order must have a proper military purpose and not be designed to increase punishment).

3. "Without Proper Authority." *United States v. Duncan*, 60 M.J. 973 (Army Ct. Crim. App. 2005). Appellant told his squad leader that he had to take his son to the hospital, and based on that false information his squad leader gave him permission to miss the formation. Appellant claimed that this evidence was a matter inconsistent with his plea. An absence from a unit, organization, or place of duty is without authority if it is preceded by false statements, false documents, or false information provided by an accused.

B. Leaving Place of Duty. Article 86(2).

1. Elements. MCM, pt. IV, ¶ 10b(2).

a) A certain authority appointed a certain time and place of duty for the accused;

b) The accused knew of that time and place; and

c) The accused, without authority, went from the appointed place of duty after having reported to that place.

2. Pleadings. *See supra* ¶ A.2., this section.

C. Absence Without Leave. Article 86(3).

1. Elements. MCM, pt. IV, ¶ 10.a.(3).

a) The accused absented himself from his unit, organization or place of duty at which he was required to be;

b) The absence was without proper authority from anyone competent to give him leave; and

c) The absence was for a certain period of time.

2. Several aggravated forms of AWOL permit increased punishment. MCM, pt. IV, ¶ 10.d.(2)-(5). Note that two of these aggravated offenses contain an intent element. Unless otherwise indicated, the discussion of AWOL in this section refers to the standard, non-aggravated form of AWOL.

3. Definition of Terms.

a) "Unit" refers to a military element such as a company or battery.

b) "Organization" refers to a larger command consisting of two or more units. One can be AWOL from an armed force as a whole. *United States v. Vidal*, 45 C.M.R. 540 (A.C.M.R. 1972); *see United States v. Brown*, 24 C.M.R. 585 (A.F.B.R. 1957) (holding the United States Air Force was both an organization and a place of duty).

c) "Place of duty at which the accused was required to be" is a generic term designed to broadly cover places such as a command, quarters, station, base, camp or post. *United States v. Brown*, 24 C.M.R. 585 (A.F.B.R. 1957). Note that this definition is different from "a place of duty" under Article 86(1) and 86(2), which refers to a specific "appointed place of duty."

d) An individual may be absent from more than one unit. *United States v. Mitchell*, 22 C.M.R. 28 (C.M.A. 1956); *United States v. Green*, 14 M.J. 766 (A.C.M.R. 1982).

4. A specification alleging the wrong unit requires dismissal. *United States v. Walls*, 1 M.J. 734 (A.F.C.M.R. 1975); *United States v. Riley*, 1 M.J. 639 (C.G.C.M.R. 1975); *United States v. Holmes*, 43 C.M.R. 446 (A.C.M.R. 1970) (holding that dismissal for fatal variance does not preclude retrial for unauthorized absence from correct unit).

5. An Article 86(3) specification must allege the accused was absent from his unit, organization, or other place of duty at which he was required to be. Failure to allege that the accused was required to be there is fatal. *United States v. Kohlman*, 21 C.M.R. 793 (A.F.C.M.R. 1956). Absence from a unit cannot be supported when the member is in fact present in the unit, albeit casually. *United States v. Wargo*, 11 M.J. 501 (N.C.M.R. 1981). *But see United States v. Phillips*, 28 M.J. 599 (N.M.C.M.R 1989) (affirming conviction of accused who remained on the installation but in another unit's barracks and did not go to the training center to which he was assigned). *See also United States v. Cary*, 57 M.J. 655 (N-M. Ct. Crim. App. 2002) (accused was allowed to leave local area and live with cousin, conditioned upon the requirement he call his unit daily to report status; accused's failure was not an unauthorized absence but rather a failure to perform a particular task).

6. The specification must allege that the absence was "without authority." Failure to do so may be a fatal defect. *United States v. Fout*, 13 C.M.R. 121 (C.M.A. 1953), *overruled in part by United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986) (omission not fatal when first challenged on appeal, accused pled guilty, another AWOL specification to which the accused pled guilty contained the phrase "without authority," and no prejudice evident).

7. Mere failure to follow unit checkout procedure by accused who was granted leave does not constitute AWOL. *United States v. Dukes*, 30 M.J. 793 (N.M.C.M.R. 1990).

8. A definitive inception date is indispensable to a successful prosecution for unauthorized absence. *United States v. Hardeman*, 59 M.J. 389 (C.A.A.F. 2004).

9. Computing the Duration of the Absence. MCM, pt. IV, ¶ 10c(9).

a) An unauthorized absence is complete the moment the accused leaves the unit without authority. It is not a continuing offense. *See United States v. Jackson*, 20 M.J. 83 (C.M.A. 1985); *United States v. Lynch*, 47 C.M.R. 498 (C.M.A. 1973); *United States v. Newton*, 11 M.J. 580 (N.C.M.R. 1980) (accused's plea improvident when he admitted his absence actually began before the date alleged in the specification which constituted an admission to an uncharged offense). *But see United States v. Brock*, 13 M.J. 766 (A.F.C.M.R. 1982) (plea to "13 October" absence not improvident as it was embraced by "on or about" 14 October specification). Leave is considered an absence from duty, and one in an AWOL status cannot take leave. *United States v. Kimbrell*, 28 M.J. 542 (A.F.C.M.R. 1989); *United States v. Ringer*, 14 M.J. 979 (N.M.C.M.R. 1982).

b) The duration of an absence must be proved in order to determine the legal punishment for the offense. *United States v. Lynch*, 47 C.M.R. 498 (C.M.A. 1973); *see also United States v. Simmons*, 3 M.J. 398 (C.M.A. 1977).

c) The duration of an absence alleged in a specification may be decreased but not enlarged by the court. *United States v. Turner*, 23 C.M.R. 674 (C.G.B.R. 1957), *rev'd on other grounds*, 25 C.M.R. 386 (C.M.A. 1958). An accused may be found guilty of two or more separate unauthorized absences under one specification provided that each absence is included within the period alleged in the specification and provided that the accused was not misled, but the maximum punishment may not increase. MCM, pt. IV, ¶ 10c(11). *See United States v. Scott*, 59 M.J. 718 (Army Ct. Crim. App. 2004).

d) If a member is released by the civilian authorities without trial, and was on authorized leave at the time of arrest or detention, the member may be found guilty of unauthorized absence only if it is proved that the member actually committed the offense for which detained, thus establishing that the absence was the result of the member's own misconduct. MCM, pt. IV, ¶ 10.c.(5). *But see United States v. Sprague*, 25 M.J. 743 (A.C.M.R. 1987)

(holding guilty plea provident where accused admitted his arrest on a warrant for contempt of court was his own fault, despite the fact that he was released without trial).

e) If a service member is given authorization to attend civilian court proceedings, pursuant to UCMJ Article 14, and is put in civilian jail as a result, the ensuing absence is not unauthorized. *United States v. Urban*, 45 M.J. 528 (N-M. Ct. Crim. App. 1996).

10. Termination of the Absence: Return to Military Control.

a) Surrender to military authority. If an accused presents himself to military authorities and notifies them of his AWOL status, the surrender terminates the absence. MCM, pt. IV, ¶ 10c(10)(a).

(1) *United States v. Coglin*, 10 M.J. 670, 672 (A.C.M.R. 1981) lists three elements required for an effective voluntary termination:

(a) "[T]he absentee must present himself to competent military authority with the intention of returning to military duty;"

(b) "[T]he absentee must identify himself properly and must disclose his status as an absentee;" and

(c) "[T]he military authority, with full knowledge of the individual's status as an absentee, exercises control over him."

(2) Casual presence. Something more than casual presence on a military installation is necessary to terminate an unauthorized absence. *United States v. Coleman*, 34 M.J. 1020 (A.C.M.R. 1992) (holding that the accused's presence in assigned barracks after staying at friend's house off post and missing work on Friday was more than casual and terminated his absence, even though he did not report to someone in authority, where the evidence indicated accused's belief that unidentified sergeant had relieved him of guard duty so he could prepare for deployment and accused's superiors knew he was in his barracks that were located across the street from the accused's normal place of duty). *United States v. Rogers*, 59 M.J. 584 (Army Ct. Crim. App. 2003) (affirming conviction when accused pled guilty and said she was "sometimes" on post during the charged periods but admitted she had no intent to return to military duty and did not turn herself in to her unit; casual presence on post for personal reasons did not voluntarily terminate her absence). The opinion contains a pattern instruction for voluntary termination issues.

(3) Intent to return to duty. The soldier must voluntarily submit or offer to submit to military authorities with a bona fide intention to return to duty. *United States v. Self*, 35 C.M.R. 557 (A.B.R. 1965).

b) Military Control.

(1) Where an accused thwarted an attempt to exercise control by refusing to submit to lawful orders, military control was not established. *United States v. Pettersen*, 14 M.J. 608 (A.F.C.M.R. 1982), *aff'd* 17 M.J. 69 (C.M.A. 1983).

(2) Telephone contact alone will not effect a return to military control. *United States v. Anderson*, 1 M.J. 688 (N.C.M.R. 1975); *see also United States v. Sandell*, 9 M.J. 798 (N.C.M.R. 1980) (rejecting claim of constructive termination where accused informed recruiter by telephone he wished to surrender, but before surrendering to a captain at the reserve center, accused became frightened and departed the center); *United States v. Murat Acemoglu*, 45 C.M.R. 335 (C.M.A. 1972) (going to American embassy and calling attaché to find out information on how to surrender was not enough to terminate AWOL).

(3) Civilian bail/bond. *United States v. Dubry*, 12 M.J. 36 (C.M.A. 1981) (accused's surrender to military authority was not complete because the terms of his civilian bail made him unavailable to return to unrestricted military control).

(4) Where the record reflects the accused 1) may have submitted himself to military authorities, and 2) military authorities failed to exercise control over the accused, a substantial basis in law and fact exists to question the providence of the accused's plea of guilty to unauthorized absence (relative to the calculation of the termination date of the accused's absence). *United States v. Phillipe*, 63 M.J. 307 (C.A.A.F. 2006); *see also United States v. Pinero*, 60 M.J. 31 (C.A.A.F. 2004) (AWOL soldier who returned to his unit to submit to a urinalysis that lasted five hours, and then went AWOL again, terminated his initial AWOL when he returned to submit to the urinalysis).

c) Knowledge of absentee's status.

(1) "[K]nown presence at a military installation will not constitute termination where the absentee, by design and misrepresentation, conceals his identity or duty status." *United States v. Self*, 35 C.M.R. 557 (A.B.R. 1965).

(2) Casual presence at a military installation, unknown to proper authority and primarily for the absentee's own purposes, does not end the unauthorized absence. *United States v. Williams*, 29 M.J. 504 (A.C.M.R. 1989) (if an absentee temporarily submits himself to military control but does not disclose his status as an absentee, the AWOL is not terminated); *United States v. Self*, 35 C.M.R. 557 (A.B.R. 1965); *United States v. Baughman*, 8 M.J. 545 (C.G.C.M.R. 1979).

(3) Constructive knowledge of absentee's status. An unauthorized absence may be terminated by the exercise of control over the absentee by military authorities having a duty to inquire into the absentee's status, if they could have determined such status by reasonable diligence. *United States v. Gudatis*, 18 M.J. 816 (A.F.C.M.R. 1984). *But see United States v. Jackson*, 2 C.M.R. 96 (C.M.A. 1952) (After the accused went AWOL, he was tried by summary court-martial for other offenses in a different area of Korea. During World War II and the Korean Conflict, summary courts-martial were convened in areas where large troop concentrations existed, and courts often did not know the accused soldiers' status. Thus, the AWOL did not terminate in this case, because the accused did not inform the summary court-martial of his status and went AWOL after the court-martial.)

d) Apprehension of a known absentee by military authorities terminates an unauthorized absence.

(1) The authorities need not be of the same armed force as the accused. *United States v. Coates*, 10 C.M.R. 123 (C.M.A. 1953).

(2) Record of trial must evince military authority's knowledge of status and intent to exercise control. *United States v. Gaston*, 62 M.J. 404 (2006) (action by "dorm manager" informing the accused that his squadron was looking for him not enough to constitute termination by apprehension; dorm manager did not indicate why unit was looking for accused and once notified, accused voluntarily surrendered by going to the front of the dorm).

e) Apprehension of a known absentee by civil authorities, acting at the request and on behalf of military authorities, terminates an unauthorized absence. *United States v. Garner*, 23 C.M.R. 42 (C.M.A. 1957); *see also United States v. Hart*, 47 C.M.R. 686 (A.C.M.R. 1973) (holding that the accused's checking into a Veterans Administration hospital and informing

civilian personnel therein of his status as an unauthorized absentee was insufficient to terminate his unauthorized absence since a Veterans Administration hospital is not a military authority and there was no evidence the hospital detained the accused pursuant to military orders, or even that military authorities knew of the accused's location).

(1) Where a service member is apprehended by civilian authorities for a civilian offense, and the authorities indicate a willingness to turn the member over to military control, the failure or refusal of military officials to take control of the member constructively terminates the absence. *United States v. Lanphear*, 49 C.M.R. 742 (C.M.A. 1975). *But see United States v. Bowman*, 49 C.M.R. 406 (A.C.M.R. 1974) (holding that the Army has no affirmative duty to seek the release of a service member it knows is in civilian jail pending civilian charges).

(2) Defense counsel must determine all relevant facts concerning an accused's apprehension by civilian authorities and return to military control to competently advise an accused before entering a guilty plea to an unauthorized absence terminated by apprehension. *United States v. Evans*, 35 M.J. 754, 757 n.1 (N.M.C.M.R. 1992).

f) Delivery to military authority. If a known absentee is delivered by anyone to military authority, this terminates the absence. MCM, pt. IV, ¶ 10.c.(10)(c).

11. For a discussion of trial defense counsel's obligations concerning disclosure of documents, see *United States v. Province*, 45 M.J. 359 (C.A.A.F. 1997) (in which defense counsel, during pretrial negotiations, gave prosecutors a written pass given to the accused, thus allowing the government to sever one long AWOL charge into two AWOL charges; the court held defense counsel was not unethical or ineffective because counsel used the document to secure a favorable deal for his client and because the government could have obtained the document elsewhere).

D. *Mens Rea* Under Article 86, UCMJ.

1. Specific intent is not an element of the Article 86 offenses, but it is necessary to plead and prove specific intent for certain aggravating factors (*e.g.*, intent to avoid field maneuvers or field exercises). MCM, pt. IV, ¶¶ 10c(3) and (4).

2. Unauthorized absence is a general intent crime, whereas desertion under Article 85 requires specific intent. *United States v. Holder*, 22 C.M.R. 3 (C.M.A. 1956).

E. Attempts. Attempted AWOL may be a lesser included offense of desertion and attempted desertion. *United States v. Evans*, 28 M.J. 753 (A.F.C.M.R. 1989), *aff'd*, 29 M.J. 331 (C.M.A. 1989).

F. Multiplicity/Unreasonable Multiplication of Charges.

1. Multiplicity: AWOL & breaking restriction covering same time period. *United States v. Hudson*, 59 M.J. 357 (C.A.A.F. 2004), overruled on other grounds by *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

2. Unreasonable multiplication of charges: multiple failures to repair & dereliction of duty. *United States v. Taylor*, 26 M.J. 7 (C.M.A. 1988).

G. Lesser Included Offenses.

1. Article 86(1) is not a lesser included offense of Article 86(3). *United States v. Reese*, 7 C.M.R. 292 (A.B.R. 1953).

2. Article 86(3) is not a lesser included offense of Article 86(1) or (2). *United States v. Sturkey*, 50 C.M.R. 110 (A.C.M.R. 1975).

XI. DEFENSES TO UNAUTHORIZED ABSENCE.

A. Introduction. This section treats defenses as they relate to unauthorized absence only. For a complete treatment of defenses to court-martial charges, *see* Chapter 22 (Defenses) in this deskbook.

B. Statute of Limitations.

1. In time of war, there is no statute of limitations for AWOL and desertion. Article 43(a). For example:

a) After the armistice on 27 July 1953, hostilities in Korea were no longer "in time of war." *United States v. Shell*, 23 C.M.R. 110 (C.M.A. 1957) (holding that unauthorized absence that began on 4 August 1953 was subject to statute of limitations).

b) After 10 August 1964, hostilities in Vietnam constituted "in time of war" for suspension of the statute of limitations. *United States v. Anderson*, 38 C.M.R. 386 (C.M.A. 1968). "Time of war" ended 27 January 1973. *United States v. Reyes*, 48 C.M.R. 832 (A.C.M.R. 1974); *see United States v. Robertson*, 1 M.J. 934 (N.C.M.R. 1976).

2. If the unauthorized absence begins in time of peace, the statute of limitations, if raised, will bar prosecution if the offense was committed more than 5 years before receipt of sworn charges by the summary court-martial convening authority. UCMJ art. 43(b). The statute of limitations is tolled while the accused is AWOL, beyond the authority of the United States to apprehend him, in custody of civil authorities, or in the hands of the enemy. UCMJ art. 43(c) and (d). However, AWOL is not a continuing offense, so the statute of limitations begins to run as soon as the service member is reported as AWOL. *United States v. Miller*, 38 M.J. 121 (C.M.A. 1993). [Note: Prior to 14 November 1986, the statute of limitations was two years for AWOL and three years for desertion. *See Miller*, 38 M.J. at 122.]

3. Swearing of charges and receipt of the charges by the officer exercising summary court-martial jurisdiction over the unit tolls the statute of limitations for the offenses charged. UCMJ art. 43(b)(1). The critical question is whether the "sworn charges and specifications" are timely received, not whether the same charge sheet received by the summary court-martial convening authority is used at the court-martial. *United States v. Miller*, 38 M.J. 121, 124 (C.M.A. 1993); *United States v. Johnson*, 3 M.J. 623 (N.C.M.R. 1977).

4. Where charges have been preferred and received by the summary court-martial convening authority and the statute of limitations has thus been tolled, minor amendments to the specifications do not void the tolling of the statute. *United States v. Arbic*, 36 C.M.R. 448 (C.M.A. 1966).

5. It is permissible to prefer charges against an accused with an open-ended termination date and forward them to the summary court-martial convening authority (to stop the running of the statute of limitations), and then add a termination date when it is known. *United States v. Reeves*, 49 C.M.R. 841 (A.C.M.R. 1975).

6. Dismissal of charges that are barred by the statute of limitations does not preclude a later trial on a charge sheet that was properly received by the summary court-martial convening authority within the period provided by the statute of limitations. *United States v. Jackson*, 20 M.J. 83 (C.M.A. 1985).

7. Even if the charged offense is not barred by the statute of limitations, the accused cannot be convicted of a lesser included offense that is barred by the statute of limitations, unless there is an affirmative waiver. *United States v. Busbin*, 23 C.M.R. 125 (C.M.A. 1957).

8. If a lesser included offense is barred by the statute of limitations, the military judge must inform the accused and allow the accused to choose between protection under the statute of limitations or the instruction on the lesser included offense. R.C.M. 907(b)(2)(B); *United States v. Cooper*, 37 C.M.R. 10 (C.M.A. 1966); *United States v. Wiedemann*, 36 C.M.R. 521 (C.M.A. 1966) (waiver must be consciously and knowingly made).

9. The military judge has a duty to advise the accused of his right to assert the statute of limitations when it appears that the period of time has elapsed. *United States v. Rodgers*, 24 C.M.R. 36 (C.M.A. 1957); *overruled on other grounds by United States v. Miller*, 38 M.J. 121 (C.M.A. 1993); *United States v. Brown*, 1 M.J. 1151 (N.C.M.R. 1977) (no duty to advise the accused where referred charges mirrored the original charges that were timely received by the summary court-martial convening authority within the period provided by the statute of limitations and the original charge sheet was attached to the referred charge sheet).

10. The rights accorded an accused under the statute of limitations may be waived when the accused, with full knowledge of the privilege, fails to plead the statute in bar of the prosecution or sentence. *United States v. Troxell*, 30 C.M.R. 6 (C.M.A. 1960) (permitting an accused, charged with desertion, to plead guilty to AWOL and not assert the statute of limitations, IAW pretrial agreement).

11. When the statutory period has apparently elapsed, the burden of proof of showing timely charges is on the government. *United States v. Morris*, 28 C.M.R. 240 (C.M.A. 1959) (statute of limitations did not toll because accused was not in territory in which the US had authority to apprehend him).

12. Computation of time. A year is 365 days during regular years and 366 days in leap year. The date of the offense counts as the first day of the running of the statute and the count proceeds forward to the day before receipt by the summary court-martial convening authority. *United States v. Tunnel*, 19 M.J. 819 (N.M.C.M.R. 1984), *aff'd.* 23 M.J. 110 (C.M.A. 1986). *Contra United States v. Reed*, 19 M.J. 702 (N.M.C.M.R. 1984) (begins day after offense and concludes on day necessary action is accomplished to toll statute).

C. Former Jeopardy (Article 44, UCMJ).

1. No person may, without his consent, be tried a second time for the same offense. Article 44(a).

2. When jeopardy attaches.

a) A court-martial with a military judge alone is a trial if, without fault of the accused- after introduction of evidence, and before announcement of findings, the case is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses. A court-martial with a military judge and members is a trial if, without fault of the accused- after the members, having taken an oath as members and after completion of challenges, are impaneled; and before announcement of findings, the case is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses. Article 44(c).

b) Withdrawal of charges after arraignment but before presentation of evidence does not constitute former jeopardy, and denial of a motion to dismiss charges at a subsequent trial is proper. *United States v. Wells*, 26 C.M.R. 289 (C.M.A. 1958).

c) Once tried for a lesser offense, accused cannot be tried for a major offense that differs from the lesser offense in degree only. Trial for AWOL bars subsequent trial for desertion. *United States v. Hayes*, 14 C.M.R. 445 (N.B.R. 1953).

d) "The protection against double jeopardy does not rest upon a surface comparison of the allegations of the charges; it also involves consideration of whether there is a substantial relationship between the wrongdoing asserted in the one charge and the misconduct alleged in the other." *United States v. Lynch*, 47 C.M.R. 498, 500 (C.M.A. 1973) (doctrine of former jeopardy precluded another trial for unauthorized absence from different unit and shorter time period). *But see United States v. Robinson*, 21 C.M.R. 380 (A.B.R. 1956) (permitting, after conviction for an AWOL and after disapproval of findings and sentence by the convening authority, trial for AWOL for the same period but from a different unit than was previously charged); *United States v. Hutzler*, 5 C.M.R. 661, 664 n.3 (A.B.R. 1951).

e) Double jeopardy does not attach when charges are dismissed for violating the statute of limitations. Thus, the government is not barred from prosecuting the accused on a charge sheet that had properly been received by the summary court-martial convening authority within the period of the statute, following dismissal of charges for the same offense (but on a different charge sheet) that was not received within the period of the statute. However, if evidence was introduced in the first proceeding, the first is considered a trial and jeopardy attaches. *United States v. Jackson*, 20 M.J. 83 (C.M.A. 1985).

f) Nonjudicial punishment previously imposed under Article 15 for a *minor* offense and punishment imposed under Article 13 for a *minor* disciplinary infraction may be interposed as a bar to trial for the same minor offense or infraction. R.C.M. 907(b)(2)(D)(iii).

(1) "Minor" normally does not include offenses for which the maximum punishment at a general court-martial could be dishonorable discharge or confinement for more than one year. MCM, pt. V, ¶ 1.e.

(2) If an accused has previously received punishment under Article 15 for other than a minor offense, the service member may be tried subsequently by court-martial; however, the prior punishment under Article 15 must be considered in determining the amount of punishment to be adjudged at trial if the accused is found guilty at the court-martial. *See* UCMJ art. 15(f); R.C.M. 1001(d)(1)(B); *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989) (accused must be given complete credit for any and all nonjudicial punishment suffered—day-for-day, dollar-for-dollar, and stripe-for-stripe).

(3) An AWOL of 5 days, which was accused's first offense, was a "minor offense" that should have been dismissed upon motion, after accused had previously been punished for the same offense under Article 15. *United States v. Yray*, 10 C.M.R. 618 (A.B.R. 1953).

D. Jurisdiction.

1. The mere fact of expiration of enlistment during a status of unauthorized absence did not terminate jurisdiction or the AWOL. *United States v. Klunk*, 11 C.M.R. 92 (C.M.A. 1953).

2. When unauthorized absence has been alleged, an accused's status as a member of the armed forces must be proved beyond a reasonable doubt. *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983).

E. Impossibility: The Inability to Return to Military Control.

1. When a service member is, due to unforeseen circumstances, unable to return at the end of authorized leave through no fault of his own, he has not committed the offense of AWOL as the absence is excused. MCM, pt. IV, ¶ 10c(6); *see also United States v. Lee*, 16 M.J. 278 (C.M.A. 1983) (mechanical problems with automobile); *United States v. Calpito*, 40 C.M.R. 162 (C.M.A. 1969) (transportation denied from overseas back to the United States due to no passport).

2. When a service member, *already in an AWOL status*, is unable to return because of sickness, lack of transportation or other disability, he remains in an AWOL status; however, the disability for part of the AWOL should be considered as an extenuating circumstance. MCM, pt. IV, ¶ 10c(6).

3. Types of impossibility in AWOL situations.

a) Impossibility due to physical disability.

(1) Where accused was ill at the end of his authorized leave and where, on medical advice, he remained in bed for several days before turning himself in to military authorities, the military judge should have given instructions on the defense of physical incapacity. *United States v. Amie*, 22 C.M.R. 304 (C.M.A. 1957); *see also United States v. Irving*, 2 M.J. 967 (A.C.M.R. 1976) ("[s]ickness which amounts to physical incapacity to report or otherwise comply with orders, and which is not self-induced, is a legal excuse"); *United States v. Edwards*, 18 C.M.R. 830 (A.F.B.R. 1955) (exceeding territorial limits of pass is not *per se* unauthorized absence).

(2) Defense of impossibility can be defeated by showing that the accused exerted insufficient effort to overcome the disability. *United States v. Mandy*, 73 M.J. 619 (A.F.Ct.Crim.App. 2014), aff'd, 74 M.J. 179 (C.A.A.F. 2014).

(3) Evidence of accused's dental problems which went untreated because of a difference of professional opinion did not raise the defense of physical incapacity after the accused went AWOL to receive civilian dental treatment. *United States v. Watson*, 50 C.M.R. 814 (N.C.M.R. 1975).

(4) Evidence raised defense of physical inability where accused, returning to his ship, was robbed and knocked unconscious and, upon regaining consciousness the next day, immediately attempted to return to his ship. *United States v. Mills*, 17 C.M.R. 480 (N.C.M.R. 1954).

(5) The accused was robbed the night before he was due to return to his unit and made no effort to return other than to attempt to borrow money (refusing one offer), although he was aware of his duty to return and was physically able to do so. No defense of impossibility was found. In a footnote, the court wrote that the accused was derelict in his responsibilities because he did not contact military authorities or seek the aid of any responsible civilian agency. *United States v. Bermudez*, 47 C.M.R. 68 (A.C.M.R. 1973).

b) Impossibility due to transportation misfortune.

(1) Where second lieutenant's car broke down while he was returning from a weekend pass and he elected to remain with his car until it was repaired, the Manual provision concerning "through no fault of his own" does not apply as his decision was for his own convenience. *United States v. Kessinger*, 9 C.M.R. 261 (A.B.R. 1952).

(2) Where a second lieutenant postponed his return from leave to assist a friend in filing an accident report, the absence was not excusable as involuntary as no inability to return existed. *United States v. Scott*, 9 C.M.R. 241 (A.B.R. 1952).

(3) Where a second lieutenant mistakenly took a "hop" to Washington, D.C. rather than to Atlanta, and thereafter had difficulty obtaining transportation back to his unit, no valid defense was found. Rather, the evidence could be considered in extenuation and mitigation. *United States v. Mann*, 12 C.M.R. 367 (A.B.R. 1953).

c) Impossibility due to acts of God (sudden and unexpected floods; snow; storms; hurricanes; earthquakes; or any unexpected, sudden, violent, natural occurrence) can be a defense. If the particular act of nature may be expected to occur, it is not a defense because it is foreseeable (*e.g.*, a snowstorm after repeated snowstorm warnings in Minnesota in January).

d) Impossibility due to wrongful acts of third parties includes train wrecks, plane crashes, and explosions that are not caused by the accused. These situations present a legitimate defense of impossibility.

e) Impossibility due to civilian confinement.

(1) The inability to return to military control depends on the accused's status at time of confinement and on the results of the civilian trial. The table below summarizes the rule. *See generally* MCM, pt. IV, ¶ 10c(5).

Status of Service Member at Time of Confinement	**Result of Civilian Trial**		**Prosecution for AWOL?**
	Acquittal	***Conviction***	
(a) Delivery of soldier to civilian authorities under Article 14	X	X	No
(b) AWOL	X	X	Yes
(c) Absent with leave	X		No
(d) Absent with leave		X	Yes*
*AWOL begins at expiration of leave			

(2) Adjudication as a youthful offender is tantamount to a conviction within the meaning of MCM, pt. IV, ¶ 10.c.(5). *United States v. Myhre*, 25 C.M.R. 294 (C.M.A. 1958).

(3) A soldier who voluntarily commits an offense while on authorized leave and is apprehended and detained by civilian authorities may be charged with AWOL for the period after his leave expired until his return to military control. *United States v. Myhre*, 25 C.M.R. 294 (C.M.A. 1958).

(4) Where a service member, while AWOL, is apprehended, detained and acquitted by civilian authorities, absent evidence of an attempt to return to military control, the entire period of time is chargeable as AWOL. *United States v. Grover*, 27 C.M.R. 165 (C.M.A. 1958); *United States v. Bowman*, 49 C.M.R. 406 (A.C.M.R. 1974) (while AWOL, accused was arrested and convicted for a civilian offense; civilian authorities did not make the accused available to return to military control; the AWOL continued through the entire time period he was in civilian control).

(5) Where accused was granted "special leave" to answer civilian charges, he could not later be convicted of AWOL for the time spent in civilian jail if convicted by civilian authorities. *United States v. Northrup*, 31 C.M.R. 73 (C.M.A. 1961); *see also United States v. Williams*, 49 C.M.R. 12 (C.M.A. 1974).

(6) Absent an arrest on behalf of the military, an offer to turn the service member over to military authorities, or a notification that the civilian authorities are not going to prosecute, the Army does not have an affirmative duty to seek the release to military authorities of an absent soldier held in a civilian jail on civilian charges. *United States v.*

Bowman, 49 C.M.R. 406 (A.C.M.R. 1974) (distinguishing *United States v. Keaton*, 40 C.M.R. 212 (C.M.A. 1969)).

F. Mistake of Fact.

1. General intent crime: mistake of fact must be both honest and reasonable to constitute a defense. *United States v. Holder*, 22 C.M.R. 3 (C.M.A. 1956); *United States v. Scheunemann*, 34 C.M.R. 259 (C.M.A. 1964).

2. In specific intent crimes, such as desertion, the mistake of fact need only be honest. *United States v. Guest*, 46 M.J. 778 (Army Ct. Crim. App. 1997); R.C.M. 916(j).

3. When the evidence raises the defense of mistake, the government must disprove the defense beyond a reasonable doubt. *United States v. Thompson*, 39 C.M.R. 537 (A.B.R. 1968) (reversing conviction for desertion because the military judge failed to instruct on burden of proof for mistake of fact).

4. Mere speculation by the factfinder as to when an honest and reasonable mistake of fact ended and the unauthorized absence commenced is neither sufficient to sustain a conviction for AWOL nor the basis for a criminal conviction. *United States v. Morsfield*, 3 M.J. 691 (N.C.M.R. 1977).

5. A service member who was ordered to go home to await orders for Vietnam and who waited for 2-1/2 years for the orders that never arrived was not guilty of AWOL. *United States v. Davis*, 46 C.M.R. 241 (C.M.A. 1973); *see also United States v. Hale*, 42 C.M.R. 342 (C.M.A. 1970).

G. Duress.

1. Duress or coercion is a reasonably grounded fear on the part of an actor that he or another innocent person would be immediately killed or would immediately suffer serious bodily injury if he did not commit the act. Duress is a defense to all offenses except where the accused kills an innocent person. R.C.M. 916(h). *United States v. Hullum*, 15 M.J. 261 (C.M.A. 1983) (accused's absence may be excused, if he left because his life was endangered).

2. The defense of duress is not limited to those circumstances where the accused feels that he personally is going to immediately be killed or suffer serious bodily injury. *United States v. Jemmings*, 1 M.J. 414 (C.M.A. 1976) (accused pled guilty to housebreaking and, in the providence inquiry, he testified that he committed the act because he was scared that something would happen to his family if he did not); *see also United States v. Palus*, 13 M.J. 179 (C.M.A. 1982) (reversing conviction where accused wrote bad checks to cover debts because he feared for his wife's safety when evidence raised the duress defense).

3. The need of a service member to absent himself from a perilous situation at his duty station in order to find a safer place from threatened injury is not *normally* a good defense to AWOL. *See United States v. Wilson*, 30 C.M.R. 630 (N.B.R. 1960) (accused went AWOL because another service member threatened his life, but Board of Review affirmed the conviction because he did not eliminate the threat by going AWOL). *But see United States v. Hullum*, 15 M.J. 261 (C.M.A. 1983) (accused's absence may be excused if he left because his life was endangered); *United States v. Roberts*, 15 M.J. 106 (C.M.A. 1983) (summary disposition) (finding that sexual harassment and immediate threat to the physical safety of the accused's wife raised the defense of duress to an unauthorized absence).

4. Although sexual harassment may, in certain circumstances, be a defense to an unauthorized absence, it did not constitute duress when the second lieutenant conceded during the providence inquiry that she did not reasonably fear imminent death or serious bodily injury of her children when she went AWOL. *United States v. Biscoe*, 47 M.J. 398 (C.A.A.F. 1998).

5. An accused's fear that work to which he was assigned in the mess hall would aggravate his eye injury and commander's causing accused to be forcibly evicted from his off-post residence did not constitute the affirmative defense of duress in an AWOL case because accused could not reasonably fear death or serious bodily injury. *United States v. Guzman*, 3 M.J. 740 (N.C.M.R. 1977), *rev'd on other grounds*, 4 M.J. 115 (C.M.A. 1977).

6. The accused must reasonably apprehend immediate threat of death or serious bodily harm, and there must not be alternatives. *United States v. Olinger*, 50 M.J. 365 (C.A.A.F. 1999) (finding no "substantial basis" in law to reject the guilty plea, where accused went AWOL and missed a movement because he felt his wife's depression might kill her; during the providence inquiry, the accused failed to provide enough details of immediate threat of death or serious bodily harm and that there were no alternative sources of assistance for his wife other than going AWOL and missing movement).

7. Accused was not entitled to duress defense because he had a reasonable opportunity to avoid going AWOL. *United States v. Riofredo*, 30 M.J. 1251 (N.M.C.M.R. 1990) (finding that accused should have sought the assistance of the command to stop assaults by noncommissioned officer); R.C.M. 916(h); *see generally* TJAGSA Practice Note, *Duress and Absence Without Authority*, Army Law., Dec. 1990, at 34 (discussing *Riofredo*).

8. *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002) *aff'd*, 58 M.J. 129 (C.A.A.F. 2003). Accused who was ordered and who refused to receive his sixth and final anthrax vaccination could not raise defense of duress. The defense requires an unlawful threat from a human being. Defense of duress is not raised by a reasonable belief that compliance with a lawful order will result in death or serious bodily injury.

XII. MISSING MOVEMENT; JUMPING FROM VESSEL, ART. 87

A. Missing Movement - Background. The offense of missing movement is a relative newcomer to military criminal law, arising from problems encountered in World War II when members of units or crews failed to show up when their units or ships departed. Article 87 was designed to cover offenses more serious than simple AWOL but less severe than desertion. *United States v. Smith*, 2 M.J. 566 (A.C.M.R. 1976), *aff'd*, 4 M.J. 210 (C.M.A. 1978) (not discussing the missing movement offense).

B. Elements. MCM, pt. IV, ¶ 11.b.

1. That the accused was required in the course of duty to move with a ship, aircraft or unit;

2. That the accused knew of the prospective movement of the ship, aircraft, or unit; and

3. That the accused missed the movement through design or neglect.

C. Two Forms of Missing Movement.

1. Through design.

a) "Design" refers to doing an act intentionally, on purpose, or according to plan. It requires specific intent to miss the movement. MCM, pt. IV, ¶ 11.c.(3).

b) Missing movement through design, the more serious offense, has a maximum punishment of dishonorable discharge, total forfeitures, and confinement for two years. MCM, pt. IV, ¶ 11.e.(1).

2. Through neglect.

a) "Neglect" means the omission to take such measures as are appropriate under the circumstances to assure presence with a ship, aircraft, or unit at the time of a scheduled

movement, or doing some act without giving attention to its probable consequences in connection with the prospective movement, such as a departure from the vicinity of the prospective movement to such a distance as would make it likely that one could not return in time for the movement. MCM, pt. IV, ¶ 11.c.(4).

b) The maximum punishment for missing movement through neglect is a bad conduct discharge, total forfeitures, and confinement for one year. MCM, pt. IV, ¶ 11.e.(2).

D. General Requirements.

1. "Movement" includes neither practice marches of short duration with a return to the point of departure nor minor changes in location of a unit such as from one side of a post to another. MCM, pt. IV, ¶ 11c(1). Movement missed must be substantial in terms of duration, distance and mission. Thus, missing a port call for MAC flight constituted missing movement of an aircraft within meaning of Article 87. *United States v. Graham*, 16 M.J. 460 (C.M.A. 1983); *United States v. Blair*, 24 M.J. 879 (A.C.M.R. 1987) *aff'd*, 27 M.J. 438 (C.M.A. 1988). *But see United States v. Gibson*, 17 M.J. 143 (C.M.A. 1984) (failure to report for an ordinary commercial flight does not constitute missing movement as it is not the type of movement contemplated by Article 87).

2. In a missing movement case involving a civilian aircraft, the government must show that the accused was required to travel on that aircraft. *United States v. Kapple*, 40 M.J. 472 (C.M.A. 1994).

3. The accused must have actual knowledge of the prospective movement. Knowledge of the exact hour or even of the exact date of the movement is not required. MCM, pt. IV, ¶ 11c(1)(e).

4. The accused's knowledge may be shown by circumstantial evidence. *United States v. Chandler*, 48 C.M.R. 945 (C.M.A. 1974) (reversing conviction because the evidence was legally insufficient to prove actual knowledge).

5. Some authority supports the proposition that UCMJ Article 87 does not reach every instance in which a service member misses a movement but is applicable only when the accused has an essential mission related to the movement, *e.g.*, is an integral member of the unit or crew whose absence would potentially disrupt the mission. *Compare United States v. Gillchrest*, 50 C.M.R. 832 (A.F.C.M.R. 1975) (finding that service member missing a commercial aircraft to Turkey as part of PCS did not meet Congressional intent behind the missing movement offense) *and United States v. Smith*, 2 M.J. 566 (A.C.M.R. 1976) *aff'd*, 4 M.J. 210 (C.M.A. 1978) (holding that missing movement to site of two-day bivouac area 12 miles downrange did not constitute missing movement; "[h]ard and fast rules relating to the duration, distance and mission of the 'movement' are not appropriate, but rather those factors plus other concomitant circumstances must be considered collectively, in order to evaluate the potential disruption of the unit caused by a soldier's absence"), *with United States v. Lemley*, 2 M.J. 1196 (N.C.M.R. 1976) (holding that accused, who was being escorted from the brig and missed specific civilian flight listed on orders, did miss "movement") *and United States v. St. Ann*, 6 M.J. 563 (N.C.M.R. 1978)(holding that missing a commercial flight while on orders constitutes missing movement even when the accused is not a member of the crew or traveling with his unit).

6. Going AWOL and proceeding to a place more than 1200 miles away was a failure to exercise due care contemplated in missing movement through neglect. *United States v. Mitchell*, 3 M.J. 641 (A.C.M.R. 1977).

7. Missing a two-week winter exercise that took place on the same installation as the unit's location in Alaska supported missing a movement by design. *United States v. Jones*, 37 M.J. 571 (A.C.M.R. 1993).

8. An eight-hour "dependent's cruise" by aircraft carrier is not a "minor" change in the location of the ship. The focus of the statutory prohibition is upon the movement itself, and not its purpose. *United States v. Quezada*, 40 M.J. 109 (C.M.A. 1994).

9. An essential element of missing movement is that the movement actually occurred. This element may be inferred if the accused holds a ticket for a regularly scheduled commercial flight. *United States v. Kapple*, 36 M.J. 1119 (A.F.C.M. R. 1993), *rev'd on other grounds*, 40 M.J. 472 (C.M.A. 1994).

10. Missing the move, rather than a particular mode of travel, is the gravamen of missing movement. *United States v. Smith*, 26 M.J. 276 (C.M.A. 1988). The description of the movement is important; where the movement was charged as missing a specific flight number, the government failed to present evidence of the flight number that the accused missed. The military judge found the accused guilty by exceptions and substitutions of missing his unit's flight, creating a material variance. The variance was nonprejudicial, and therefore nonfatal, because it did not affect the defense's presentation of their case. *United States v. Treat*, 73 M.J. 331 (C.A.A.F. 2014).

11. Military judge erred by using the accused's plea of guilty to AWOL as evidence to establish an essential element of a separate charge of missing movement to which a plea of not guilty had been entered. *United States v. Wahnon*, 1 M.J. 144 (C.M.A. 1975).

E. Multiplicity and Lesser included Offenses.

1. An accused cannot be punished for both AWOL of minimal duration and missing movement through neglect or through design when the same absence forms the basis for both charges. *United States v. Baba*, 21 M.J. 76 (C.M.A. 1985); *United States v. Posnick*, 24 C.M.R. 11 (C.M.A. 1957); *United States v. Bridges*, 25 C.M.R. 383 (C.M.A. 1958). *See also United States v. Traxler*, 39 M.J. 476 (C.M.A. 1994) (finding that missing movement of aircraft and disobedience of an officer's order to board the aircraft were not multiplicious for findings).

2. An AWOL of extended duration is not multiplicious with missing movement. *United States v. Olinger*, 47 M.J. 545 (N-M. Ct. Crim. App. 1997), *aff'd*, 50 M.J. 365 (C.A.A.F. 1999).

3. Unauthorized absence is a lesser included offense of missing movement. *United States v. Smith*, 2 M.J. 566 (A.C.M.R. 1976), *aff'd*, 4 M.J. 210 (C.M.A. 1978).

XIII. RESISTANCE, FLIGHT, BREACH OF ARREST, AND ESCAPE, ART. 87A

XIV. OFFENSES AGAINST CORRECTIONAL CUSTODY AND RESTRICTION, ART. 87B

AUTHORITY OFFENSES

XV. CONTEMPT TOWARD OFFICIALS, ART. 88

XVI. DISRESPECT TOWARD SUPERIOR COMMISSIONED OFFICER; ASSAULT OF SUPERIOR COMMISSIONED OFFICER, ART. 89

A. Disrespect Defined. UCMJ arts. 89 & 91(3).

1. Actions. *United States v. Ferenczi*, 27 C.M.R. 77 (C.M.A. 1958) (subordinate contemptuously turns and walks away from a superior who is talking to him); *United States v. Van Beek*, 47 C.M.R. 98 (A.C.M.R. 1973) (exploding gas grenade in absent officer's quarters – "gravamen of an Article 89 offense is not merely insult, but the undermining of lawful authority.").

2. Words. *United States v. Najera*, 52 M.J. 247 (C.A.A.F. 2000) ("You can't make me, you can give me any type of discharge you want, you can give me a DD, I would rather have a dishonorable discharge than return to training, I refuse"); *United States v. Barber*, 8 M.J. 153 (C.M.A. 1979) ("If you have something to say about me, say it to my face."); *United States v. Montgomery*, 11 C.M.R. 308 (A.B.R. 1953) ("Keep your Goddamn mouth shut, you field grade son-of-a-bitch or I'll tear you apart; I'll beat you to death you. . . . I'll bite your. . . off, you punk, you"); *United States v. Dornick*, 16 M.J. 642 (A.F.C.M.R. 1983) ("Hi, sweetheart").

3. Actions & words are not distinct bases—all circumstances of a case may be considered when determining whether disrespectful behavior in violation of Article 89 has occurred. *United States v. Najera*, 52 M.J. 247 (C.A.A.F. 2000).

B. Knowledge. The accused must be aware of the victim's status. *United States v. Payne*, 29 M.J. 899 (A.C.M.R. 1989); MCM, pt. IV, ¶ 15c(2).

C. Disrespect must be directed *toward* the victim. *United States v. Sorrells*, 49 C.M.R. 44 (A.C.M.R. 1974) (no disrespect when loud profanity was spoken in the presence of the superior but directed toward others present in the room); *see also United States v. Alexander*, 11 M.J. 726 (A.C.M.R. 1981) (accused's plea of guilty to disrespect to his first sergeant was not improvident on ground that his outburst was not directed toward that individual, where facts showed that accused became angry at having to open his locker for the first sergeant to check for contraband and he took his clothes out of his locker and threw them on floor at feet of first sergeant).

D. Pleading.

1. Disrespectful behavior must be alleged. If the words or acts that constitute the disrespectful conduct are innocuous, the pleadings will be fatally defective unless circumstances surrounding the behavior are alleged to detail the nature of insubordination. *United States v. Barber*, 8 M.J. 153 (C.M.A. 1979) (words, "If you have something to say about me, say it to my face," as spoken by a subordinate to a superior noncommissioned officer in the execution of his office, found to be disrespectful on their face; court read the language to constitute a demand by the subordinate that the superior conform his official conduct to a standard imposed by the subordinate); *United States v. Bartee*, 50 C.M.R. 51 (N.M.C.M.R. 1974) (statement to superior commissioned officer, "Man, I ain't getting no haircut," constituted disrespect); *United States v. Sutton*, 48 C.M.R. 609 (A.C.M.R. 1974) (specification alleging accused said, "You had better get out of the man's room" held insufficient); *United States v. Smith*, 43 C.M.R. 796 (A.C.M.R. 1971) (specification alleging that accused referred to a male victim as "man" held insufficient); *United States v. Klein*, 42 C.M.R. 671 (A.C.M.R. 1970) (mere utterance of words, "People get hurt like that," did not constitute, per se, disrespectful language).

2. The alleged victim's status as the Accused's superior commissioned officer must be indicated in some manner. *United States v. Showers*, 48 C.M.R. 837 (A.C.M.R. 1974). Alleging that the victim is "a superior commissioned officer" is inadequate. *United States v. Carter*, 42 C.M.R. 898 (A.C.M.R. 1970). However, the failure to allege "his superior commissioned officer" was not fatal where the specification alleged the officer victim's rank and service, and both the enlisted accused and the officer victim were in the same service. *United States v. Ashby*, 50 C.M.R. 37 (N.C.M.R. 1974).

3. Disrespect, under Article 91, and provoking speech and gestures, under Article 117, are separate offenses and not multiplicious. *United States v. McHerrin*, 42 M.J. 672 (Army Ct. Crim. App. 1995).

E. Additional Requirements for Disrespect to a Noncommissioned, Warrant, or Petty Officer.

1. The offensive words or conduct must be within the hearing or sight of the noncommissioned, warrant, or petty officer victim. This is not required in the case of a commissioned officer victim. MCM, pt. IV, ¶ 17c(5); *United States v. Van Beek*, 47 C.M.R. 98, 99 (A.C.M.R. 1973).

2. The noncommissioned, warrant, or petty officer victim, at the time of the offense, must be "in the execution of his office," to include any act or service required or authorized to be done by him because of statute, regulation, order of a superior or military usage. MCM, pt. IV, ¶ 15f; *United States v. Brooks*, 44 C.M.R. 873 (A.C.M.R. 1971) (holding off-duty NCO working at EM Club as sergeant-at-arms in execution of his office); *United States v. Fetherson*, 8 M.J. 607, 610 (N.M.C.M.R. 1977) (holding off-duty NCO quelling disorderly conduct or maintaining order among subordinates in execution of his office).

3. An NCO of one branch of the armed forces is the "superior NCO" of an enlisted accused of another armed force only when the NCO is in a position of authority over the accused. *United States v. White*, 39 M.J. 796 (N.M.C.M.R. 1994).

4. Commissioned officer is protected even if acting in a private capacity and off duty. *United States v. Van Beek*, 47 C.M.R. 98 (A.C.M.R. 1973); *United States v. Montgomery*, 11 C.M.R. 308 (A.B.R. 1953) (officer victim involved in poker game).

XVII. WILLFULLY DISOBEYING SUPERIOR COMMISSIONED OFFICER, ART. 90

A. Elements.

B. Disobedience to orders. UCMJ ART. 90 & 91(2)

1. The Order.

a) The order must be directed to the accused specifically. It does not include violations of regulations, standing orders, or routine duties. MCM, pt. IV, ¶ 16c(2)(b) & 17c(4); *United States v. Byers*, 40 M.J. 321 (C.M.A. 1994) (order revoking driving privileges signed by JAG was a routine administrative sanction for traffic offenses and was not a personal order by the post commander); *United States v. Ranney*, 67 M.J. 297 (C.A.A.F. 2009) (revocation of driving privileges issued automatically upon drunk driving arrest was not sufficient for purposes of Art. 90, but did support a conviction under Art. 92), overruled on other grounds by *United States v. Phillips*, 74 7M.J. 20 (C.A.A.F. 2015); *United States v. Gussen*, 33 M.J. 736 (A.C.M.R. 1991) (evidence that accused disobeyed an order issued by brigade commander to entire brigade, but relayed to the accused through NCOs, only supports finding of violation of orders in violation of Article 92 and not violation of a superior's personal order); *United States v. Selman*, 28 M.J. 627 (A.F.C.M.R. 1989) (letter to all minimum security prisoners setting forth restrictions was not a personal order to the accused).

b) Form of Order. As long as understandable, the form of the order and the method of transmittal are immaterial. MCM, pt. IV, ¶ 16c(2)(c) & 17c(4); *United States v. McLaughlin*, 14 M.J. 908 (N.M.C.M.R. 1982) (use of the word "please" does not negate the order).

c) Scope of Order. In order to sustain the presumption of lawfulness of an order, the order must have a valid military purpose and must be a clear, narrowly drawn mandate. *United States v. Moore*, 58 M.J. 466 (2003) (holding that a "sufficiently clear, specific, and narrowly drawn" order with a valid military purpose was not unconstitutionally overbroad or vague).

(1) The order must be a specific mandate to do or not to do a specific act. MCM, pt. IV, ¶ 16c(2)(b) & 17c(4); *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989) ("safe sex" order for HIV positive airman was "specific, definite, and certain."); *United States v. Mantilla*, 36 M.J. 621 (A.C.M.R. 1992) (order to "double-time" to barracks to retrieve

gear was positive command rather than advice); *United States v. Claytor*, 34 M.J. 1030 (N.M.C.M.R. 1992) (order to "shut up" on the heels of disrespectful language about a superior commissioned officer was a specific mandate to cease speaking and say nothing further); *but see United States v. Warren*, 13 M.J. 160 (C.M.A. 1982) (statement "settle down and be quiet" was ambiguous and lacked specificity of meaning to determine if it was an order or mere counseling); *United States v. Beattie*, 17 M.J. 537 (A.C.M.R. 1983) (where superiors of intoxicated accused did not want him at his assigned place of duty, which was the motor pool, his lieutenant's order for defendant to report to his place of duty, without further clarification as to where that was, did not provide a clear enough mandate to establish a violation under art. 90).

(2) If the language of a communication lacks specificity of meaning, extrinsic evidence is admissible for the purpose of clarification. *United States v. Warren*, 13 M.J. 160 (C.M.A. 1982)*; United States v. Mitchell*, 20 C.M.R. 295 (C.M.A. 1955).

d) An order requiring the performance of a military duty or act may be inferred to be lawful. Lawfulness of the order is a question of law that must be decided by the military judge. MCM, pt. IV, ¶ 16c(2)(a) & 17c(4); *United States v. Diesher*, 61 M.J. 313 (C.A.A.F. 2005) (holding the legality of an order is an issue of law that must be decided by the military judge (citing *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001)).

2. Knowledge.

a) The prosecution must prove, as an element of the offense, that the accused had actual knowledge of the order. MCM, pt. IV, ¶ 16c(2)(e) & 17c(2); *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985); *United States v. Pettigrew*, 41 C.M.R. 191 (C.M.A. 1970) (although knowledge may be proven by circumstantial evidence, the knowledge must be actual and not constructive).

b) The prosecution must prove that the accused had actual knowledge of the status of the victim. MCM, pt. IV, ¶ 16c(2)(e); *United States v. Young*, 40 C.M.R. 36 (C.M.A. 1060) (voluntary intoxication raised issue of whether accused knew he was dealing with his superior officer); *United States v. Oisten*, 33 C.M.R. 188 (C.M.A. 1963); *United States v. Payne*, 29 M.J. 899 (A.C.M.R. 1989).

3. Willfulness of Disobedience.

a) Disobedience must be intentional defiance of authority. Failure to comply through heedlessness or forgetfulness is not "willful" (but it may violate Article 92). MCM, pt. IV, ¶ 16c(2)(f). *See also •United States v. Gumataotao*, No. ARMY 20150765, 2016 WL 3545492 (A. Ct. Crim. App. June 22, 2016.

b) Intentional noncompliance, not "flaunting of authority," is required. *United States v. Ferenczi*, 27 C.M.R. 77 (C.M.A. 1958).

c) Voluntary intoxication might prevent the accused from having the willful state of mind required by Article 91. *United States v. Cameron*, 37 M.J. 1042 (A.C.M.R. 1993) (where accused was intoxicated and did not complete the assigned task of cleaning room by proscribed deadline, members should have been instructed on lesser included offense of failing to obey lawful order, under Article 92, which does not require willfulness).

4. Origin of the Order.

a) The alleged victim must be personally involved in the issuance of the order. *United States v. Ranney*, 67 M.J. 297 (C.A.A.F. 2009) (revocation of driving privileges issued

without the knowledge or involvement of the Base Traffic Officer was not sufficient for purposes of Art. 90, but did support a conviction under Art. 92).

b) The order must originate from the alleged victim, and not be the order of a superior for whom the alleged victim is a mere conduit. *United States v. Marsh*, 11 C.M.R. 48 (C.M.A. 1953) (specification improperly alleged victim as a captain who was merely transmitting order from the Commanding General); *United States v. Sellers*, 30 C.M.R. 262 (C.M.A. 1961) (major was not a mere conduit, where he passed on order of colonel, threw the weight of his rank and position into the balance, and added additional requirement); *United States v. Wartsbaugh*, 45 C.M.R. 309 (C.M.A. 1972) (setting aside Article 90 violation where the court characterized the company commander's order as "predicated upon…a battalion directive").

5. Time for Compliance. MCM, pt. IV, ¶ 16c(2)(g) &17c(4).

a) When an order requires immediate compliance, accused's statement that he will not obey and failure to make any move to comply constitutes disobedience. *United States v. Stout*, 5 C.M.R. 67 (C.M.A. 1952) (order to join combat patrol). Time in which compliance is required is a question of fact. *United States v. Cooper*, 14 M.J. 758 (A.C.M.R. 1982) (order to go upstairs and change clothes not countermanded by subsequent order to accompany victim to orderly room, because disobedience to first order already complete); *United States v. McLaughlin*, 14 M.J. 908 (N.M.C.M.R. 1982) (order to produce ID card required immediate compliance).

b) Immediate compliance is required by any order that does not explicitly or implicitly indicate that delayed compliance is authorized or directed. MCM, pt. IV, ¶ 16c(2)(g) &17c(4), *United States v. Schwabauer*, 34 M.J. 709 (A.C.M.R. 1992) (direct order to "stop and come back here" clearly and unambiguously required immediate obedience without delay), *aff'd*, 37 M.J. 338 (C.M.A. 1993). However, when time for compliance is not stated explicitly or implicitly, then reasonable delay in compliance does not constitute disobedience. MCM, pt. IV, ¶ 16c(2)(g) and 17c(4). *United States v. Clowser*, 16 C.M.R. 543 (A.F.B.R. 1954) (delay resulting from a sincere and reasonable choice of means to comply with order to "go up to the barracks and go to bed" was not a completed disobedience).

c) When immediate compliance is required, disobedience is completed when the one to whom the order is directed first refuses and evinces an intentional defiance of authority. *United States v. Vansant*, 11 C.M.R. 30 (C.M.A. 1953) (order to return to his platoon and be there in one and a half hours necessitated immediate compliance, and refusal to comply constituted disobedience).

d) For orders that require preliminary steps before they can be executed, the recipient must begin the preliminary steps immediately or the disobedience is complete. *United States v. Wilson*, 17 M.J. 1032 (A.C.M.R. 1984) *pet. denied*, 19 M.J. 79 (C.M.A. 1984) (lieutenant's order to "shotgun" a truck, which entailed preparation prior to travel, was disobeyed when accused verbally refused three times and walked out of lieutenant's office).

e) Apprehension of an accused before compliance is due is a legitimate defense to the alleged disobedience. *See United States v. Williams*, 39 C.M.R. 78 (C.M.A. 1968).

f) If an order is to be performed in the future, the accused's present statement of intent to disobey does not constitute disobedience. *United States v. Squire*, 47 C.M.R. 214 (N.C.M.R. 1973).

6. Matters in Defense.

a) The order cannot lack content and must be a specific mandate. *United States v. Bratcher*, 39 C.M.R. 125 (C.M.A. 1969) (finding disobedience to a nonspecific mandate was not punishable under art. 90; Soldier disobeyed an order that did not contemplate performance or nonperformance of any special function, but rather was an order to do what he was already required to do as a soldier under a superior's command – not an enforceable order.); *United States v. Oldaker*, 41 C.M.R. 497 (A.C.M.R. 1969) (order "to train" given to basic trainee lacked content); *United States v. Beattie*, 17 M.J. 537 (A.C.M.R. 1983) (order to "follow the instructions of his NCO's" lacked content); *but see United States v. Couser*, 3 M.J. 561 (A.C.M.R. 1977) (order to resume training with company that contemplated specific activities had content and was proper).

b) "Ultimate offense" doctrine.

(1) The order requires acts already required by law, regulation, standing orders, or routine (pre-existing) duty. *United States v. Bratcher*, 39 C.M.R. 125 (C.M.A. 1969) (order to "perform duties as a duty soldier, the duties to be performed and to be assigned to him by the First Sergeant" was not a specific mandate but rather an exhortation to do his duty as already required by law; order to obey the law can have no validity beyond the limit of the ultimate offense committed); *United States v. Sidney*, 48 C.M.R. 801 (A.C.M.R. 1974) (officer's order to comply with local regulations on registration and safekeeping of personal weapons should have been charged under Article 92(2)); *United States v. Wartsbaugh*, 45 C.M.R. 309 (C.M.A. 1972) (order to comply with battalion uniform directive should have been charged under Article 92(2)); *but cf. United States v. Traxler*, 39 M.J. 476 (C.M.A. 1994) (commander can lift otherwise routine duty "above the common ruck" to ensure compliance but not to merely enhance punishment); *but see United States v. Phillips*, 74 M.J. 20 (C.A.A.F. 2015) (commander ordered accused who repeatedly absented himself without leave to avoid disciplinary proceedings to remain on post; absent evidence that commander issued the order to escalate the accused's criminal liability, the government was free to choose between charging a violation of the order or breaking restriction).

(2) Minor offenses may not be escalated in severity by charging them as violation of orders or willful disobedience of superiors. *United States v. Hargrove*, 51 M.J. 408 (C.A.A.F. 1999) (failure to report for restriction improperly charged as disobeying order; should have been charged as failure to go to appointed place of duty); *United States v. Quarles*, 1 M.J. 231 (C.M.A. 1975) (holding maximum punishment cannot be increased by charging disobedience rather than failure to repair).

(3) Violation of a personal order is punishable as a separate offense if it is given for the purpose of having the full authority of the superior's position and rank to ensure compliance. *United States v. Traxler*, 39 M.J. 476 (C.M.A. 1994) (willful disobedience of superior commissioned officer and missing movement); *United States v. Landwehr*, 18 M.J. 355 (C.M.A. 1984) (willful disobedience of superior commissioned officer and failure to repair); *United States v. Pettersen*, 17 M.J. 69 (C.M.A. 1983) (willful disobedience of superior noncommissioned officer and AWOL); *United States v. Greene*, 8 M.J. 796 (N.C.M.R. 1980) (willful disobedience of superior of lawful orders from superior petty officer and superior commissioned officer); *United States v. Bivins*, 34 C.M.R. 527 (A.B.R. 1964).

c) Repeated orders.

(1) If the sole purpose of repeated personal orders is to increase the punishment for an offense, disobedience of the repeated order is not a crime. *United States v. Tiggs*, 40 C.M.R. 352 (A.B.R. 1968).

(2) Repeated orders may constitute an unreasonable multiplication of charges. *United States v. Graves*, 12 M.J. 583 (A.F.C.M.R. 1981) (dismissing conviction for willful disobedience of lieutenant's order that immediately followed and was identical to order from sergeant, which was the basis of a separate conviction); *United States v. Greene*, 8 M.J. 796 (N.C.M.R. 1980) (subsequent orders of superior commissioned officers merely reiterating original order of petty officer could not form basis for additional convictions for willful disobedience of superior commissioned officers); *but see United States v. Bivins*, 34 C.M.R. 527 (A.B.R. 1964) (absent a showing of a deliberate design on the part of the Government to exaggerate the accused's alleged wrongs or a lack of legitimate purpose in setting forth the charges, no basis exists to set aside the specifications).

d) Violation of an order that is part of an apprehension constitutes resisting apprehension rather than disobedience of an order. *United States v. Nixon*, 45 C.M.R. 254 (C.M.A. 1974) (officer's order "to leave the . . . room and get into a jeep" was the initial step of an apprehension, and disobedience should have been prosecuted under Article 95 rather than Article 90); *United States v. Burroughs*, 49 C.M.R. 404 (A.C.M.R. 1974). *But see United States v. Jessie*, 2 M.J. 573 (A.C.M.R. 1977) (when already in custody, order to remain in building to reinforce status was independent lawful command).

e) The order is inconsistent with a service regulation. *United States v. Roach*, 29 M.J. 33 (C.M.A. 1989) (Coast Guard regulation on drug and alcohol policy).

f) The defense of conflicting orders. *United States v. Clausen*, 43 C.M.R. 128 (C.M.A. 1971); *United States v. Patton*, 41 C.M.R. 572 (A.C.M.R. 1969) ("criminal prosecution for disobedience of an order cannot be based upon a subordinate's election to obey one of two conflicting orders when simultaneous compliance with both orders is impossible"); *but cf. United States v. Hill*, 26 M.J. 876 (N.M.C.M.R. 1988) (no defense where accused obeyed neither of the conflicting orders but rather remained in his "rack").

g) Orders must not conflict with, or detract from, the scope or effectiveness of orders issued by higher headquarters. *United States v. Clausen*, 43 C.M.R. 128 (C.M.A. 1971); *United States v. Green*, 22 M.J. 711 (A.C.M.R. 1986).

h) Conscientious objection is not a defense to disobedience of lawful orders. *United States v. Johnson*, 45 M.J. 88 (C.A.A.F. 1996); *United States v. Walker*, 41 M.J. 462 (1995); *United States v. Austin*, 27 M.J. 227 (C.A.A.F. 1988).

i) State of mind defenses may apply. *United States v. Young*, 40 C.M.R. 36 (C.M.A. 1969).

XVIII. INSUBORDINATE CONDUCT TOWARD WARRANT OFFICER, NONCOMMISSIONED OFFICER, OR PETTY OFFICER, ART. 91

A. For discussion, see Section XVII .

XIX. PROTECTED STATUS OF CERTAIN MILITARY VICTIMS.

A. General. Articles 89, 90, and 91 cover offenses against superior commissioned officers and noncommissioned and warrant officers in the execution of office. Two conditions—superior status and the performance of the duties of office—provide increased protection to victims and increased punishment to violators of these Articles

B. "Superior Commissioned Officer" Defined. The victim's status as the superior commissioned officer of the accused is an element of crimes involving disrespect (Article 89), assault (Article 128b(3)(a)), and disobedience (Article 90(2)) in which the victim's status as a superior officer enhances the penalty. The following rules are applicable to each of the above offenses.

1. Accused & Victim in Same Armed Service.

a) The victim is the accused's "superior commissioned officer" if the victim is a commissioned officer superior in rank to the accused (not date of rank in the same grade).

b) The victim is the accused's "superior commissioned officer" if the victim is superior in command to the accused, even if the victim is inferior in grade to the accused.

c) The victim is not the accused's "superior commissioned officer" if the victim is superior in grade but inferior in command.

2. Accused & Victim in Different Armed Services.

a) The victim is the accused's "superior commissioned officer" if the victim is a commissioned officer and superior in the chain of command over the accused.

b) The victim is the accused's "superior commissioned officer" if the victim, not a medical officer nor a chaplain, is senior in grade to the accused and both are detained by a hostile entity so that recourse to the normal chain of command is prevented.

c) The victim is not the accused's "superior commissioned officer" merely because the victim is superior in grade to the accused.

d) In *United States v. Merriweather*, 13 M.J. 605 (A.F.C.M.R. 1982), the court disapproved the conviction of an airman of disrespect to two Navy medical officers under Article 89. There was no command relationship where the accused merely spent two hours in a Navy emergency room. The court affirmed a conviction for the lesser included offense of disorderly conduct.

3. Commissioned Warrant Officers.

a) Both trial and defense counsel should be alert as to whether a warrant officer in a particular case is commissioned. Warrant officers are commissioned upon promotion to CW2. 10 U.S.C. § 571. Warrant Officer One (WO1) is not a commissioned officer.

b) "Commissioned officer" includes a commissioned warrant officer. 10 U.S.C. § 101(b)(2). *See also* R.C.M. 103(21) discussion (MCM 2016 ed.).

c) In the Navy, a Chief Warrant Officer is a commissioned officer, the disobedience of whose order constitutes a violation of Article 90. *United States v. Kanewske*, 37 C.M.R. 298, 299 (C.M.A. 1967).

C. "Warrant Officer" or "Noncommissioned Officer" Defined. A victim's status as a WO or NCO is an element of those crimes involving insubordinate conduct toward such individuals, to include: assault (Article 91(1)), disobedience (Article 91(2)), and disrespect (Article 91(3)). Warrant or noncommissioned officer victims must be acting in execution of office.

1. Warrant Officers. Those individuals appointed as warrant officers to meet Army requirements for officers possessing particular skills and specialized knowledge. Although warrant officers usually perform specialized duties within the Army, they may under appropriate circumstances serve in command positions. *See* ¶ VI.B.3 above regarding "commissioned warrant officers."

2. Noncommissioned Officers.

a) Those in the rank of corporal (E-4) and above.

b) Not including a specialist (E-4).

c) Not including a victim of the rank of specialist (E-4) or below who is an "acting" NCO. *United States v. Lumbus & Sutton*, 49 C.M.R. 248 (C.M.A. 1974); *United States v. Evans*, 50 C.M.R. 198 (A.C.M.R. 1975). *See also* MCM, pt. IV, ¶ 15.c.(1).

D. "Superior" WO/NCO.

1. Article 91 protects warrant officers and noncommissioned officers from disrespect, assault, and disobedience when they are in execution of their office. The statute does not require a superior-subordinate relationship within the same service. *See United States v. Diggs*, 52 M.J. 251 (2000) (staff sergeant (E-6) that pushed sergeant (E-5) guilty of assaulting an NCO under Article 91).

2. If pleaded and proven, the fact the victim was superior to the accused and that the accused had knowledge of the victim's superior status is an aggravating factor that exposes the accused a greater maximum punishment. *See* MCM (2016 ed.), pt. IV, ¶ 15c analysis. *See also United States v. White*, 39 M.J. 796 (N.M.C.M.R. 1994) (holding that for Article 91 purposes an NCO is not the superior NCO of an enlisted accused of another armed force merely because the NCO is superior in rank to the accused, however, an NCO may be the superior NCO of an enlisted accused of another armed force when the NCO is in a position of authority over the accused).

E. Divestiture. Misconduct on the part of a superior in dealing with a subordinate may divest the former of his authority and thus destroy his protected status if it was substantial departure from the required standards of conduct. *See* MCM, pt IV, ¶ 15c(2)(d); *see United States v. Collier*, 27 M.J. 806, 810 (A.C.M.R. 1988).

1. Conduct amounting to divestiture. *United States v. Diggs*, 52 M.J. 251 (C.A.A.F. 2000) (striking accused); *United States v. Richardson*, 7 M.J. 320 (C.M.A. 1979) (racial slurs; calling accused "boy"); *United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976) (unlawful apprehension coupled with unwarranted physical assault); *United States v. Hendrix*, 45 C.M.R. 186 (C.M.A. 1972) (exceeded scope of authorized search); *United States v. Struckman*, 43 C.M.R. 333 (C.M.A. 1971) (inviting accused to fight); *United States v. Noriega*, 21 C.M.R. 322 (C.M.A. 1956) (officer victim serving as bartender at enlisted men's party); *United States v. Cheeks*, 43 C.M.R. 1013 (A.F.C.M.R. 1971) (sustained verbal abuse of prisoner); *United States v. Revels*, 41 C.M.R. 475 (A.C.M.R. 1969) (use of brute force on accused by confinement officer).

2. Conduct *not* amounting to divestiture. *United States v. Pratcher*, 17 M.J. 388 (C.M.A. 1984) (involvement in collecting debts contrary to regulation); *United States v. Lewis*, 12 M.J. 205 (C.M.A. 1982) (failure to give proper Article 31(b) warnings); *United States v. Lewis*, 7 M.J. 348 (C.M.A. 1979) (search that was subsequently determined to not be based on probable cause); *United States v. Middleton*, 36 M.J. 835 (A.C.M.R. 1993) (close personal friendship with subordinate); *United States v. King*, 29 M.J. 885 (A.C.M.R. 1989) (striking a prisoner who lunged at a guard); *United States v. Collier*, 27 M.J. 806 (A.C.M.R. 1988) (use of profane language) *rev'd in part on other grounds by*, 29 M.J. 365 (C.M.A. 1990); *United States v. Leach*, 22 M.J. 738 (N.M.C.M.R. 1986) (general allegations of "horseplay"); *United States v. Allen*, 10 M.J. 576 (A.C.M.R. 1980) (addressing accused as "boy" where accused did not regard use of term as racial slur and both the victim and accused were the same race); *United States v. Fetherson*, 8 M.J. 607 (N.M.C.M.R. 1979) (illegal apprehension without any inappropriate conduct); *United States v. McDaniel*, 7 M.J. 522 (A.C.M.R. 1979) (sergeant who placed drunken and protesting soldier in cold shower); *United States v. Vallenthine*, 2 M.J. 1170 (N.C.M.R. 1974) (escorting with one hand on shirt collar and other on seat of trousers); *United States v. Cheeks*, 43 C.M.R. 1013

(A.F.C.M.R. 1971) (verbal abuse alone does not serve to vitiate a legitimate order); *United States v. Montgomery*, 11 C.M.R. 308 (A.B.R. 1953) (playing poker with subordinate officers).

3. If an NCO commits misconduct that divests him of his authority as an NCO, he may regain his protected status by desisting in the illegal conduct and attempting to resolve the matter within appropriate channels. *United States v. Diggs*, 52 M.J. 251 (C.A.A.F. 2000).

4. Divestiture is limited to offenses where the protected status of the victim is an element, but it does not necessarily extend to lesser included offenses. Although the accused may not be convicted of an assault upon a superior under Article 91 when the victim's conduct divests himself of his status, the accused may be found guilty of the lesser included offense of assault under Article 128. *United States v. Richardson*, 7 M.J. 320 (C.M.A. 1979); *United States v. Johnson*, 43 C.M.R. 604 (A.C.M.R. 1970).

5. Members may find "partial" divestiture. *United States v. Sanders*, 41 M.J. 485 (C.A.A.F. 1995) (members found victim was no longer in the execution of his duties based on his language and conduct, but he had not divested himself of his status as a noncommissioned officer).

XX. VIOLATION OF A LAWFUL GENERAL REGULATION/ORDER, ART. 92(1)

A. Authority to Issue a General Order. MCM, pt. IV, ¶ 18c(1)(a).

1. President; Secretary of Defense; Secretary of Homeland Security; and Secretaries of the Army, Navy, and Air Force.

2. A GCM convening authority.

3. A flag or general officer in command.

4. Superior commanders to (2) and (3) above.

5. To be a lawful general order, the order must be issued as the result of the personal decision of the person authorized to issue general orders. *United States v. Ayers*, 54 M.J. 85 (C.A.A.F. 2000) (as long as the decision remains with the commander, the delegated signature authority is ministerial in nature). *United States v. Townsend*, 49 M.J. 175 (C.A.A.F. 1998) (order signed by Acting Chief, Office of Personnel and Training was issued by the Commandant of the Coast Guard); *United States v. Bartell*, 32 M.J. 295 (C.M.A. 1991) (general order signed "By Direction"); *United States v. Breault*, 30 M.J. 833 (N.M.C.M.R. 1990) (general order signed by chief of staff).

B. Regulation Defects.

1. The regulation must prohibit conduct of the nature of that attributed to the accused in the specification. *United States v. Baker*, 40 C.M.R. 216 (C.M.A. 1969) (charged conduct was beyond the scope of the conduct prohibited in the regulation); *United States v. Sweitzer*, 33 C.M.R. 251 (C.M.A. 1963).

2. The regulation must apply to a group of persons that includes the accused. *United States v. Jackson*, 46 C.M.R. 1128 (A.C.M.R. 1973) (finding that regulation was intended to guide military police rather than the individual soldier).

3. The regulation must set the conduct of individual members of a command or delineate a code of conduct rather than provide general guidance. *United States v. Green*, Army 20010446, 2003 Lexis 137 (Army Ct. Crim. App. June 6, 2003) (DoD Directive intended to update policies and responsibilities on drug abuse and prevention held to be general guidance and not punitive in nature); *United States v. Blanchard*, 19 M.J. 196 (C.M.A. 1985) (USAFE customs regulation was directory in nature); *United States v. Scott*, 46 C.M.R. 25 (C.M.A. 1972) (regulation establishing

drug suppression policy was not punitive order); *United States v. Nardell*, 45 C.M.R. 101 (C.M.A. 1972) (SOP for club system was predominantly instructional guidance); *United States v. Hode*, 44 M.J. 816 (A.F. Ct. Crim. App. 1996) (AFI 34-119 on the Alcoholic Beverage Program was not punitive); *United States v. Goodwin*, 37 M.J. 606 (A.C.M.R. 1993) (punitive regulation can refer to provisions in nonpunitive regulation); *United States v. Finsel*, 33 M.J. 739 (A.C.M.R. 1991) (task force commander's "Weapons Safety" letter was punitive in nature), *aff'd*, 36 M.J. 441 (C.M.A. 1993); *United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990) (AR 600-21, including sexual harassment policy provisions, was not a punitive regulation).

4. It is not a defense that the regulation was superseded before the accused's conduct, if a successor regulation contained the same criminal prohibition and it was in force at the time of the accused's conduct, unless it misled the accused. *United States v. Grublak*, 47 C.M.R. 371 (A.C.M.R. 1973).

5. A regulation that is facially overbroad may be salvaged by including a *scienter* or *mens rea* requirement. *United States v. Bradley*, 15 M.J. 843 (A.F.C.M.R. 1983) (regulation prohibiting drug paraphernalia was not vague or overbroad because it required that the product was intended to be used with a controlled substance); *United States v. Cannon*, 13 M.J. 777 (A.C.M.R. 1982).

6. Local regulations must not conflict with or detract from the scope of effectiveness of a regulation issued by higher headquarters. *United States v. Green*, 22 M.J. 711 (A.C.M.R. 1986) (Fort Stewart regulation prohibiting soldiers from "[h]aving any alcohol in their system . . . during duty hours" was not enforceable because it detracted from the effectiveness of Army Regulation 600-85). *But see United States v. Garcia*, 21 M.J. 127 (C.M.A. 1985) (conviction of violating local regulation capping chargeable interest below the cap in a Navy regulation was upheld because the local regulation effectively capped at the rate in the Navy regulation once the Navy regulation was amended).

C. Knowledge.

1. Actual knowledge of the regulation or order is not an element of the crime. *United States v. Tinker*, 27 C.M.R. 366 (C.M.A. 1959); *United States v. Leverette*, 9 M.J. 627 (A.C.M.R. 1980) (knowledge imputed even if the accused soldier is merely visiting the installation and not assigned there), *aff'd*, 9 M.J. 421 (C.M.A. 1980).

2. For knowledge to be presumed, a regulation must be properly published. *United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982) (Eighth Air Force general regulation not properly published because it was never received at base master publications library); *but see United States v Moore*, 55 M.J. 772, (N-M. Ct. Crim. App. 2001) (holding that providing the "potential for knowledge is all that is required to satisfy due process" and publication. "We do not believe our superior court fashioned some inflexible rule regarding the channels to disseminate, or location of the order to achieve proper publication.").

3. To be enforceable against service members, local regulations need not be published in the Federal Register. *United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982); *United States v. Academia*, 14 M.J. 582 (N.M.C.M.R. 1982).

D. *Mens Rea*. Knowledge of the order's existence is a different concept than the government's requirement to prove *mens rea*. General order prohibiting the giving of alcohol to service members under age 21 did not explicitly establish a *mens* rea requirement; as such, the proper standard of *mens* rea was recklessness. Such a general order is not analogous to a public welfare offense and therefore required the accused to at least be reckless as to his knowledge of the age of the recipients of the alcohol. *United States v. Gifford*, 75 M.J. 140 (C.A.A.F. 2016). *See also Elonis v. United States*, 135 S. Ct. 2001 (2015).

E. Pleading.

1. A specification is defective if it fails to allege that the order or regulation is "general." *United States v. Koepke*, 39 C.M.R. 100 (C.M.A. 1969); *United States v. Baker*, 38 C.M.R. 144 (C.M.A. 1967) (specification alleging violation of a specific division regulation fails to state offense under Article 92(1)); *see United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986); *but see United States v. Watson*, 40 C.M.R. 571 (A.B.R. 1969) (specification alleging violation of a specific "Army" regulation was sufficient; distinguishing *Koepke*).

2. The specification need not allege that an accused "wrongfully" violated a lawful general regulation, because the allegation of the violation itself implies the unlawful nature of the conduct. *United States v. Torrey*, 10 M.J. 508 (A.F.C.M.R. 1980).

3. Accused, a recruiter, was charged with violation of a sub-paragraph "6(d)" of lawful general order by providing alcohol to a person enrolled in the Delayed Entry Program (DEP). The panel found him guilty of violating the superior paragraph "6" of the same general order by wrongfully engaging in a non-professional, personal relationship with the same DEP member. Court held this was a fatal variance because the substituted offense was materially different from the one originally charged in the specification, and accused was prejudiced by depriving him the opportunity to defend against the substituted paragraph of the order. *United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003). Additionally, the manner in which the accused violated the regulation *must* be alleged. *United States v. Sweitzer*, 33 C.M.R. 251 (C.M.A. 1963).

F. Proof. At trial, the existence and content of the regulation will not be presumed; it must be proven with evidence or established by judicial notice. *United States v. Williams*, 3 M.J. 155 (C.M.A. 1977). In judge alone trials, failure to prove existence of regulation can be cured by proceeding in revision or by an appellate court taking judicial notice. *United States v. Mead*, 16 M.J. 270 (C.M.A. 1983).

G. Exceptions. The prosecution must prove beyond a reasonable doubt that the accused's conduct did not come within any exceptions to the regulation, once the evidence raises the issue . *United States v. Lavine*, 13 M.J. 150 (C.M.A. 1982); *United States v. Cuffee*, 10 M.J. 381 (C.M.A. 1981).

H. Application. Service member need not be assigned to command of officer issuing general regulation in order to be subject to its proscriptions. *United States v. Leverette*, 9 M.J. 627 (A.C.M.R. 1980) (soldier on leave visiting Fort Campbell convicted of violating local general regulation), *aff'd*, 9 M.J. 421 (C.M.A. 1980).

I. Misconduct Otherwise Proscribed by Punitive Articles. Neither a general regulation nor an order may be used to enhance punishment for misconduct already prohibited by the punitive articles. *United States v. Curry*, 28 M.J. 419 (C.M.A. 1989) (Article 93 preempted conviction under Article 92 for disobedience of an order not to maltreat subordinates). *Cf.* MCM (2016 ed.), pt. IV, ¶ 16e(1), (2) Note.

J. Attempts. Attempt to violate a regulation under Article 80 does not require knowledge of the regulation; the accused need only intend to commit the proscribed act. *United States v. Davis*, 16 M.J. 225 (C.M.A. 1983); *United States v. Foster*, 14 M.J. 246 (C.M.A. 1982).

K. Constitutional Rights. Where a regulation is attacked as unconstitutional or violative of a statute, "a narrowing construction" is mandated, if possible, to avoid the problem. *United States v. Williams*, 29 M.J. 112 (C.M.A. 1989) ("show and tell" regulation, narrowly construed to require service member to show physical possession or documentation of lawful disposition of controlled items, did not violate 5th amendment or Article 31).

XXI. FAILURE TO OBEY OTHER LAWFUL ORDER, ART. 92(2)

A. The Order. Includes all other lawful orders issued by a member of the armed forces that the accused had a duty to obey. MCM, pt. IV, ¶ 18c(2)(a).

B. Limitation on Maximum Punishment. The maximum punishments set out in MCM, pt. IV, ¶ 18.e. include a dishonorable discharge and confinement for two years for violation of general regulations and a bad-conduct discharge and confinement for six months for disobedience of other lawful orders. A note, however, sets out certain limitations in this regard.

1. A note located after MCM (2016 ed.), pt. IV, ¶ 16e(1) and (2) provides that these maximum punishments do not apply in the following cases:

a) If in the absence of the order or regulation which was violated or not obeyed the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed; or

b) If the violation or failure to obey is a breach of restraint imposed as a result of an order.

c) In these instances, the maximum punishment is that prescribed elsewhere for that particular offense.

2. This limitation was commonly known as the "Footnote 5" limitation, because it was Footnote 5 to the Table of Maximum Punishments in older versions of the MCM.

3. This limitation is only operative, however, where the lesser offense is the "gravamen of the offense." *United States v. Timmons*, 13 M.J. 431 (C.M.A. 1982) (gravamen of the offense was not being in the authorized uniform in violation of Article 134 rather than failing to obey order of petty officer); *United States v. Showalter*, 35 C.M.R. 382 (C.M.A. 1965) (gravamen of offense was not being in the authorized uniform in violation of Article 134 rather than failing to obey a general regulation); *United States v. Yunque-Burgos*, 13 C.M.R. 54 (C.M.A. 1953); *United States v. Buckmiller*, 4 C.M.R. 96 (C.M.A. 1952) (seminal case establishing gravamen test and rejecting a "technical and entirely literal interpretation of the footnote").

4. The note's rationale has been applied to offenses other than Articles 92(1) and 92(2). *See United States v. Burroughs*, 49 C.M.R. 404 (A.C.M.R. 1974) (using the maximum punishment provided for resisting apprehension under Article 95 rather than that for willful disobedience of a superior commissioned officer under Article 90, of which the accused was convicted).

C. Source of Order. The order may be given by a person not superior to the accused, but the person giving the order must have a special status that imposes upon the accused the duty to obey. MCM, pt. IV, ¶ 18c(2)(c)(ii); *United States v. Stovall*, 44 C.M.R. 576 (A.F.C.M.R. 1971) (security policeman).

D. Actual Knowledge. The accused must have actual knowledge of the order. MCM, pt. IV, ¶ 18c(2)(b); *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985) (directive by battery commander); *United States v. Curtin*, 26 C.M.R. 207 (C.M.A. 1958) (instruction on constructive knowledge was erroneous); *United States v. Henderson*, 32 M.J. 941 (N.M.C.M.R. 1991) (district order governing use of government vehicles by Marine recruiters), *aff'd*, 34 M.J. 174 (C.M.A. 1992); *United States v. Jack*, 10 M.J. 572 (A.F.C.M.R. 1980) (conviction set aside where accused violated local regulation concerning visiting hours in female barracks where sign posted at building's entrance did not designate issuing authority).

E. Negligent Disobedience Sufficient for Guilt. Failure to comply through heedlessness or forgetfulness can be sufficient for a conviction under Article 92. MCM, pt. IV, ¶ 16c(2)(f); *United States v. Jordan*, 21 C.M.R. 627 (A.F.B.R. 1955).

XXII. THE LAWFULNESS OF ORDERS

A. Presumption of Lawfulness. Orders from superiors requiring the performance of military duties are presumed to be lawful. MCM, pt. IV, ¶ 18c(2)(a)(i), 15c(4), 16c(1)(c); *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001) (order requiring soldier to wear United Nations blue beret and insignia lawful); *United States v. McDaniels*, 50 M.J. 407 (C.A.A.F. 1999) (order to not drive personal vehicle after diagnosis of narcolepsy); *United States v. Nieves*, 44 M.J. 96 (C.A.A.F. 1996) (order prohibiting discussions with witnesses).

B. Disobedience. A superior's order is presumed to be lawful and is disobeyed at the subordinate's peril. To sustain the presumption, the order must relate to military duty, it must not conflict with the statutory or constitutional rights of the person receiving the order, and it must be a specific mandate to do or not to do a specific act. In sum, an order is presumed lawful if it has a valid military purpose and is a clear, specific, narrowly drawn mandate. *United States v. Moore*, 58 M.J. 466 (C.A.A.F. 2003). The dictates of a person's conscience, religion, or personal philosophy cannot excuse disobedience. *United States v. Huet-Vaughn*, 43 M.J. 105 (C.A.A.F. 1995) (accused's philosophical, moral, and religious objections to the Operation Desert Shield/Storm not a defense to desertion with intent to avoid hazardous duty and shirk important service). *United States v. Stockman*, 17 M.J. 530 (A.C.M.R. 1973).

C. Valid Military Purpose. The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a unit and directly with the maintenance of good order in the armed forces. MCM, pt. IV, ¶ 18c(2)(a)(iv). The order can affect otherwise private activity. *United States v. McDaniels*, 50 M.J. 407 (C.A.A.F. 1999) (order to not drive personal vehicle after diagnosis of narcolepsy); *United States v. Hill*, 49 M.J. 242 (C.A.A.F. 1999) (no-contact order issued by military police had valid military purpose of maintaining good order and discipline in the military community and to protect the alleged victim during the investigation); *United States v. Padgett*, 48 M.J. 273 (C.A.A.F. 1998) (order requiring 25-year-old service member to terminate his romantic relationship with 14-year-old girl had valid military purpose); *United States v. Milldebrandt*, 25 C.M.R. 139 (C.M.A. 1958) (order to report financial conditions unrelated to the military while on leave, did not have valid military purpose).

1. An order that has for its sole object a private end is unlawful, but an order that benefits the command as well as serving individuals is lawful. *United States v. Robinson*, 20 C.M.R. 63 (C.M.A. 1955) (use of enlisted personnel in Officers' Open Mess at Fort McNair).

2. Punishment.

a) Orders extending punishments beyond those lawfully imposed are illegal. *United States v. McCoy*, 30 C.M.R. 68 (C.M.A. 1960) (order to continue extra duty after punishment imposed under Article 15 already completed).

b) "Extra training" must be oriented to improving the soldier's performance of military duties. Such corrective measures assume the nature of training or instruction, not punishment. MCM (2016 ed.), pt. V, ¶ 1g; AR 600-20, ¶ 4-6b (6 Nov 2014); *see United States v. Hoover*, 24 M.J. 874 (A.C.M.R. 1987) (requiring accused to live in pup tent for 3 weeks between the hours of 2200 and 0400 was unlawful punishment).

D. Overly Broad Limitation on Personal Right. An order that is "arbitrary and capricious, overly broad in scope, or to impose an unjust limitation on a personal right" is not lawful. *United States v. Milldebrandt*, 25 C.M.R. 139 (C.M.A. 1958) (order to report financial conditions unrelated to the military while on leave, was not lawful); *United States v. Spencer*, 29 M.J. 740 (A.F.C.M.R. 1989) (order to turn over all civilian medical records to military clinic by specific date was unlawful, because

it was broader and more restrictive of private rights and personal affairs than required by military needs and provided for by service regulation); *but see United States v. Jeffers*, 57 M.J. 13 (C.A.A.F. 2002) (no social contact order with female in unit with whom accused had adulterous relationship not overbroad).

1. Marriage. Regulations reasonably restricting marriages of foreign-based service personnel to local nationals are legal. *United States v. Wheeler*, 30 C.M.R. 387 (C.M.A. 1961) ("a military commander may, at least in foreign areas, impose reasonable restrictions on the right of military personnel of his command to marry"); *but see United States v. Nation*, 26 C.M.R. 504 (C.M.A. 1958) (six-month waiting period was unreasonable and arbitrary restraint on the personal right to marry).

2. "Safe sex" order to Servicemember infected with HIV is lawful. *United States v. Dumford*, 30 M.J. 137 (C.M.A. 1990); *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989).

3. A service member who violates the terms of a no-contact order is subject to punishment under either Article 90 or Article 92, without the necessity of proof that the contact was undertaken for an improper purpose. Public policy supports a strict reading of a no-contact order. A military commander who has a legitimate interest in deterring contact between a service member and another person is not required to sort through every contact to determine, after the fact, whether there was a nefarious purpose. *United States v. Thompkins*, 58 M.J. 43 (C.A.A.F. 2003).

4. Personal relationships and contacts. *United States v. Hill*, 49 M.J. 242 (C.A.A.F. 1999) (order to have no contact with alleged victim lawful); *United States v. Padgett*, 48 M.J. 273 (C.A.A.F. 1998) (order requiring 25-year-old service member to terminate his romantic relationship with 14-year-old girl lawful); *United States v. Nieves*, 44 M.J. 96 (C.A.A.F. 1996) (order prohibiting discussions with witnesses, during an investigation, was lawful); *United States v. Aycock*, 35 C.M.R. 130 (C.M.A. 1964) (order prohibiting accused from contacting witnesses concerning the charges was unlawful because it interfered with right to prepare a defense); *United States v. Wysong*, 26 C.M.R. 29 (C.M.A. 1958) (order "not to talk to or speak with any of the men in the company concerned with this investigation except in line of duty" was so broad in nature and all-inclusive in scope that it was illegal); *United States v. Mann*, 50 M.J. 689 (A.F. Ct. Crim. App. 1999) (order to "cease and refrain from any and all contact of any nature" with enlisted member with whom the accused allegedly fraternized, which indicated that accused's counsel had unrestricted access, was lawful); *United States v. Button*, 31 M.J. 897 (A.F.C.M.R. 1990) (order not to go to family quarters, where alleged sexual abuse victim lived, was lawful), *aff'd*, 34 M.J. 139 (C.M.A. 1992); *United States v. Hawkins*, 30 M.J. 682 (A.F.C.M.R. 1990) (order to have no contact with alleged victims and witness, unless by the area defense counsel, was lawful); *United States v. Wine*, 28 M.J. 688 (A.F.C.M.R. 1989) (order to disassociate from neighbor's estranged wife lawful); *United States v. Moore*, 58 M.J. 466 (C.A.A.F. 2003) (order "not to converse with the civilian workers" in the galley was lawful and not over broad when given after the accused violated a policy limiting interaction between civilian employees and Servicemembers).

5. Alcohol.

a) Regulations establishing a minimum drinking age for service personnel in a command abroad are legal. *United States v. Manos*, 37 C.M.R. 274 (C.M.A. 1967).

b) A military member may also be lawfully ordered not to consume alcoholic beverages as a condition of pretrial restriction, if reasonably necessary to protect the morale, welfare, and safety of the unit or the accused; to protect victims or potential witnesses; or to ensure the accused's presence at the court-martial or pretrial hearings in a sober condition. *United States v. Blye*, 37 M.J. 92 (C.M.A. 1993).

c) Order not to consume alcohol must have a reasonable connection to military needs; *United States v. Stewart*, 33 M.J. 519 (A.F.C.M.R. 1991) (order not to consume alcoholic beverages to see if the accused was an alcoholic was invalid); *United States v. Kochan*, 27 M.J. 574 (N.M.C.M.R. 1988) (order not to drink alcohol until 21-years old was illegal).

6. Loans. Orders restricting loans between service members may be lawful, if there is a sufficient connection between the military's duty to protect the morale, discipline, and usefulness of its members. *United States v. McClain*, 10 M.J. 271 (C.M.A. 1981) (upholding conviction for violation of a regulation prohibiting loans between permanent party personnel and trainees at Fort Jackson); *United States v. Giordano*, 35 C.M.R. 135 (C.M.A. 1964) (order fixing a maximum legal rate of interest on loans among military members was lawful); *but see United States v. Smith*, 1 M.J. 156 (C.M.A. 1975) (regulation prohibiting all loans for profit or any benefit without consent of commander, without a corresponding military need, was invalid as too restrictive).

7. Writing checks. *United States v. James*, 52 M.J. 709 (Army Ct. Crim. App. 2000) (order "not to write any more checks" was lawful). *contra United States v. Alexander*, 26 M.J. 796 (A.F.C.M.R. 1988) (order "not to write any checks" was much too broad to be considered valid).

8. Regulations may proscribe the use of customs-free privileges in Korea for personal gain or profit. *United States v. Lehman*, 5 M.J. 740 (A.F.C.M.R. 1978).

9. As long as not unreasonable and not unduly humiliating or degrading, an order to produce a urine specimen under direct observation is lawful. *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989).

10. Order to cooks to shower before reporting to work in the galley was lawful. *United States v. Horner*, 32 M.J. 576 (C.G.C.M.R. 1991).

11. Regulations requiring members of the service to obtain approval from their commanders before circulating petitions on military installations are lawful. *Brown v. Glines*, 444 U.S. 348 (1979) (Air Force had substantial governmental interest in limiting the general circulation of petitions on military installations that are unrelated to the suppression of free expression); *Secretary of the Navy v. Huff*, 444 U.S. 453 (1979) (similar Navy regulation).

E. Litigating the Issue of Lawfulness of the Order. Lawfulness of an order, although an important issue, is not a discrete element of a disobedience offense. Therefore, it is a question of law to be determined by the military judge. MCM pt. IV, ¶ 16c(2)(a)(ii). *United States v. Jeffers*, 57 M.J. 13 (C.A.A.F. 2002); *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001); *But see United States v. Mack*, 65 M.J. 108 (C.A.A.F. 2007) (while the lawfulness of an order is a question of law to be determined by the military judge, submitting the question of lawfulness to a panel is harmless error when the accused fails to rebut the presumption of lawfulness).

XXIII. DERELICTION IN THE PERFORMANCE OF DUTIES, ART. 92(3)

A. Duty.

1. The duty may be imposed by treaty, statute, regulation, lawful order, SOP, or custom of the service. MCM, pt. IV, ¶ 18c(3)(a); *United States v. Dallamn*, 34 M.J. 274 (C.M.A. 1992) (no duty to perform medical examination prior to prescribing drugs to persons not entitled to military medical services), *aff'd*, 37 M.J. 213 (C.M.A. 1993); *United States v. Dupree*, 24 M.J. 319 (C.M.A. 1987) (Air Force regulation imposed duty to report drug abuse, but dereliction could not be sustained where prisoner's marijuana use was inextricably intertwined with accused guard's misconduct in taking prisoners off-base); *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986) (although Air Force regulation imposed duty to report drug abuse, the privilege against self-incrimination excuses non-compliance where, at the time the duty to report arose, the accused

was already an accessory or principal to the illegal activity); *United States v. Grow*, 11 C.M.R. 77 (C.M.A. 1953) (failure of major general to secure classified information, as required by non-punitive Army regulation, constituted dereliction of duty); *United States v. Cross*, 2004 CCA LEXIS 291 (A.F. Ct. Crim. App. 2004) (Failure to observe installation gate access restrictions, established by unit SOP, constituted dereliction of duty); *United States v. Risner*, 2006 CCA LEXIS 226 (N-M. Ct. Crim. App. 2006) (USMC duty to prevent underage consumption of alcohol by subordinate NCO's pursuant to a base order established in part by custom of the service); *United States v. Serianne*, 69 M.J. 8 (C.A.A.F. 2010) (USN duty to report DUI arrest unenforceable where superior regulation—Navy Articles—prohibits requirement for self-reporting imposed by lesser regulation).

2. "Duty" does not include non-military tasks voluntarily performed after regular duty hours for additional pay. *United States v. Garrison*, 14 C.M.R. 359 (A.B.R. 1954) (secretary/treasurer of NCO club).

3. The evidence must prove the existence of the duty beyond a reasonable doubt. *United States v. Hayes*, 71 M.J. 112 (C.A.A.F. 2012) (conviction of dereliction of duty was improvident because the record did not contain specific evidence of a military duty to obey state underage drinking laws).

B. Knowledge.

1. The accused must have known or should have known of the duty. MCM, pt. IV, ¶ 18b(3)(b), 16c(3)(b) (MCM added knowledge as element for negligent dereliction in 1986); *United States v. Pacheco*, 56 M.J. 1, (C.A.A.F. 2001) (accused's knowledge of his duty to safeguard a weapons cache and his willful dereliction of this duty was established by the taking of weapons as trophies); *United States v. Pratt*, 34 C.M.R. 731 (C.G.B.R. 1963) (evidence insufficient to establish that accused reasonably aware of facts necessitating initiation of rescue procedures).

2. Willful dereliction, which has a greater maximum punishment, requires actual knowledge of the duty. *United States v. Ferguson*, 40 M.J. 823, 833-34 (N.M.C.M.R. 1994).

3. There is no requirement that the accused know the source of the duty. *United States v. Markley*, 40 M.J. 581 (A.F.C.M.R. 1993).

C. Standards for Dereliction.

1. Willful nonperformance of duty. "Willful" means intentional. It requires doing an act knowingly and purposely, specifically intending the natural and probable consequences of the act. MCM, pt. IV, ¶ 18c(3)(c).

2. Negligent nonperformance of duty. "Negligence" is the lack of that degree of care that a reasonably prudent person would have exercised under the same or similar circumstances, *i.e.* simple negligence. MCM, pt. IV, ¶ 18c(3)(c); *United States v. Lawson*, 36 M.J. 415 (C.M.A. 1993) (improper posting of road guides in pairs and obtaining a roster of individuals to be posted); *United States v. Rust*, 38 M.J. 726 (A.F.C.M.R. 1993) (medical malpractice by a uniformed service provider can be dereliction of duty to provide medical care); *United States v. Dellarosa*, 30 M.J. 255 (C.M.A. 1990) (weather reporting); *United States v. Kelchner*, 36 C.M.R. 183 (C.M.A. 1966) (evidence insufficient to prove Navy commander negligently failed to supervise and assist subordinate's work); *United States v. Grow*, 11 C.M.R. 77 (C.M.A. 1953) (failure of major general to safeguard classified information); *United States v. Ferguson*, 12 C.M.R. 570 (A.B.R. 1953) (evidence insufficient to prove company commander was derelict in his instructions on safety measures; "in testing for negligence the law does not substitute hindsight for foresight").

3. Culpable inefficiency. "Culpable inefficiency" is inefficiency in the performance of a duty for which there is no reasonable or just excuse. MCM, pt. IV, ¶ 18c(3)(c); *United States v. Nickels*, 20 M.J. 225 (C.M.A. 1985) (not maintaining proper fiscal control over postal account); *see United States v. Dellarosa*, 30 M.J. 255, 259 (C.M.A. 1990) (finding the distinction between nonperformance and faulty performance no longer significant).

D. Ineptitude as a Defense. A person who fails to perform a duty because of ineptitude rather than by willfulness, negligence, or culpable inefficiency is not guilty of an offense. MCM, pt. IV, ¶ 18c(3)(c); *United States v. Powell*, 32 M.J. 117 (C.M.A. 1991) ("ineptitude as a defense is largely fact-specific, requiring consideration of the duty imposed, the abilities and training of the soldier upon whom the duty is imposed, and the circumstances in which he is called upon to perform his duty").

E. Dereliction of Duty as a Lesser Offense to Other Crimes.

1. Dereliction of duty, where the duty is premised upon a regulation or custom of the service, is not a lesser included offense of willful disobedience of a superior officer's order. *United States v. Haracivet*, 45 C.M.R. 674 (A.C.M.R. 1972).

2. Dereliction of duty is not a lesser included offense of failure to obey a general order or regulation or a lawful order, under Article 92. *United States v. Kiriou*, 2010 CCA LEXIS 41 (A. Ct. Crim. App. 2010) (citing *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008)); *but see United States v.* Green, Army 20010446, 2003 Lexis 137 (Army Ct. Crim. App. June 6, 2003) (DoD Directive on possession of drug paraphernalia not punitive, but accused could be guilty of dereliction of duty); *United States v. Shavrnoch*, 49 M.J. 334 (1998) (Air Force regulation on underage drinking not punitive); *United States v. Bivins*, 49 M.J. 328 (1998) (Air Force regulation on underage drinking not punitive); *United States v. Green*, 47 C.M.R. 727 (A.F.C.M.R. 1973) (finding that dereliction of duty was lesser included offense of failure to obey a lawful order of NCO concerning submitting daily urine specimens at treatment center).

F. Pleading.

1. The specification must spell out the nature of the inadequate performance alleged. *United States v. Kelchner*, 36 C.M.R. 183 (C.M.A. 1966); *United States v. Long*, 46 M.J. 783 (C.M.A. 1997) (misuse of credit card for official government travel).

2. The specification need not set forth the particular source of the duty violated. *United States v. Moore*, 21 C.M.R. 544 (N.B.R. 1956).

3. The specification must allege nonperformance or faulty performance of a specified duty, and a bare allegation that an act was "not authorized" is insufficient. *United States v. Sojfer*, 44 M.J. 603 (N-M. Ct. Crim. App. 1996) (specification alleging that accused corpsman committed acts beyond the scope of his duties, *i.e.* breast and pelvic examinations, failed to state the offense of dereliction), *aff'd*, 47 M.J. 425 (C.A.A.F. 1998).

4. Variance between the nature of the inadequate performance alleged and the nature of the inadequate performance proven at trial may be fatal. *United States v. Smith*, 40 C.M.R. 316 (C.M.A. 1969) (accused charged with dereliction by failure to walk his post by sitting down upon his post, but evidence showed he left his post before being properly relieved, in violation of Article 113, and was found asleep in a building off his post); *United States v. Swanson*, 20 C.M.R. 416 (A.B.R. 1950) (accused charged with dereliction by *failure* to forward funds, but finding was failure to *properly handle* funds).

5. For the enhanced maximum punishment for willful dereliction, the specification must allege willfulness, including actual knowledge of the duty. *United States v. Ferguson*, 40 M.J. 823 (N.M.C.M.R. 1994).

G. Examples of Misconduct Constituting Dereliction of Duty.

1. Poor judgment in performance of duties can constitute dereliction. *United States v. Rust*, 41 M.J. 472 (C.A.A.F. 1995) (failure of on-call obstetrician to come to hospital to examine and admit patient showing signs of premature labor); *United States v. Sievert*, 29 C.M.R. 657 (N.B.R. 1959) (navigator, transiting narrow passage at night, failed to use all radars available to him and failed to react when faced with substantial discrepancies in position of ship).

2. Affirmative criminal acts can support a dereliction of duty offense where those acts fall within the scope of the duty. *United States v. Casey*, 45 M.J. 623, 629 (N-M. Ct. Crim. App. 1996) (theft of monies collected for phone charges); *United States v. Bankston*, 22 M.J. 896 (N.M.C.M.R. 1986) (stealing cash collected from video games); *United States v. Taylor*, 13 C.M.R. 201 (A.B.R. 1953) (lieutenant stole from mess fund, of which he was the custodian); *United States v. Voelker*, 7 C.M.R. 102 (A.B.R. 1953) (lieutenant spent money from special services fund provided to cover costs of transportation, food, and lodging for enlisted men on athletic team).

3. Loss to the Government or some other victim is not required for dereliction. *United States v. Nichels*, 20 M.J. 225 (C.M.A. 1985) (dereliction even though accused repaid or arranged to repay the $3,000 lost due to the accused's failure to maintain proper fiscal control over postal account).

4. Failure to maintain alert and responsible watch supports conviction for dereliction of duty. *United States v. Stuart*, 17 C.M.R. 486 (A.B.R. 1954).

5. Willfully failing to properly use official time and government funds during TDY can constitute dereliction. *United States v. Mann*, 50 M.J. 689 (A.F. Ct. Crim. App. 1999) (during 5 duty days of TDY, the only legitimate business the accused Air Force major accomplished was a 45 minute conversation that could have taken place over the telephone; the accused was derelict in his duty to expend official time and funds only for legitimate governmental purposes by remaining TDY for personal reasons).

6. Failure to report changes in marital status affecting pay and allowances constitutes dereliction of duty. *United States v. Markley*, 40 M.J. 581 (A.F.C.M.R. 1994).

7. Even though civilians may have a First Amendment right to blow their nose on the American flag, the accused doing so while on flag-raising detail constituted dereliction of duty. *United States v. Wilson*, 33 M.J. 797 (A.C.M.R. 1991).

8. Failure to report or prevent crime. *See generally United States v. Thompson*, 22 M.J. 40 (C.M.A. 1986); *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986).

9. Failure to provide financial support to spouse constitutes negligent dereliction of duty. *United States v. Shank*, 2015 CCA LEXIS 526 (A.F. Ct. Crim. App. 2015); *United States v. Blanks*, 77 M.J. 239 (C.A.A.F. 2018) (conviction for negligent dereliction of duty upheld for failure to provide adequate financial support; long-standing recognition negligence is appropriate *mens rea* for certain dereliction offenses).

10. Inspector of parachute packers was willfully derelict in the performance of his duties for signing off on packed parachutes without even a cursory inspection in order to go home early. *United States v. Herrmann*, 75 M.J. 672 (A. Ct. Crim. App. 2016).

XXIV. CRUELTY AND MALTREATMENT, ART. 93

A. Introduction.

1. Text. "Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct." Article 93.

2. Elements.

a) That a certain person was subject to the orders of the accused; and

b) That the accused was cruel toward, or oppressed, or maltreated that person.

B. Nature of the Victim. The victim must be subject to the orders of the accused. This includes not only those under the direct or immediate supervision or command of the accused, but also any person (soldier or civilian) who is required by law to obey the lawful orders of the accused. *United States v. Sojfer*, 44 M.J. 603 (N-M. Ct. Crim. App. 1996) (E-3 seeking care at military medical facility could be "subject to the orders of" an E-6 corpsman since there was an important difference in rank which required the victim to obey the accused's orders), *aff'd*, 47 M.J. 425 (C.A.A.F. 1998); *but cf. United States v. Curry*, 28 M.J. 419 (C.M.A. 1989) (requiring more than seniority in rank to implicate Art. 93).

C. Nature of the Act. The cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense. MCM, pt. IV, ¶ 19c(2).

1. Nature of superior's official position could place them in a "unique situation of dominance and control" and therefore bring ostensibly voluntary sexual relationship with a trainee within the definition of oppression and maltreatment, but not all personal relationships between superiors and subordinates, or between drill sergeants and their trainees, necessarily result in physical or mental pain or suffering. The government has the burden of proving that accused's conduct resulted in such physical or mental pain and suffering by an objective standard, and that the appellant's conduct was abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose. *United States v. Johnson*, 45 M.J. 543 (Army Ct. Crim. App. 1997); *but see United States v. Fuller*, 54 M.J. 107 (C.A.A.F. 2000) (comment of sexual nature was not maltreatment by sexual harassment because prosecution failed to prove that it offended the alleged victim; inherently coercive nature of training environment was absent where PFC victim stated she did not feel intimidated by accused platoon sergeant and the accused did not influence or threaten to influence her career in exchange for sexual favors); *U.S. v Goddard*, 54 M.J. 763 (N-.M Ct. Crim. App. 2000).

2. In a prosecution for maltreatment, it is not necessary to prove physical or mental harm or suffering on the part of the victim. It is only necessary to show, as measured from an objective viewpoint in light of the totality of the circumstances, that the accused's actions reasonably could have caused physical or mental harm or suffering. *United States v. Carson*, 57 M.J. 410 (C.A.A.F. 2002) (MP desk sergeant's indecent exposure of his penis to a subordinate female MP constituted maltreatment under Article 93).

D. Select Cases.

1. Silence on *mens rea* does not violate *United States v. Elonis*, 135 S. Ct. 2001 (2015) (statutes must include minimum *mens rea* to distinguish between innocent and criminal conduct). General intent is sufficient to separate wrongful from innocent conduct. Therefore: (1) the accused's knowledge that the victim was his subordinate; (2) his knowledge that his conduct/words were committed toward that subordinate, and (3) such conduct/words were abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose, and caused or could have caused physical or mental harm or suffering. *United States v. Caldwell*, 75 MJ 276 (C.A.A.F. 2016). *See also United States v. Chance*, No. ARMY 20140072, 2016 WL 1587194, at *1 (A. Ct.

Crim. App. Apr. 18, 2016), *review granted, decision aff'd*, (C.A.A.F. June 9, 2016) (Article 93 limits itself to punishing cruel or oppressive conduct or conduct that rises to the level of maltreatment by a leader who has been entrusted with the care of a subordinate.).

2. A consensual sexual relationship between a superior and a subordinate, without more, is not maltreatment. *United States v. Fuller*, 54 M.J. 107 (C.A.A.F. 2000) (even though relationship may have constituted fraternization, evidence did not evince "dominance and control" by the superior).

3. *United States v Goddard*, 54 M.J. 763 (N.M. Ct. Crim. App. 2000). A one-time consensual sexual encounter with a female subordinate on the floor of the detachment's administrative office will not support a conviction for cruelty and maltreatment.

4. Cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. The imposition of necessary or proper duties and the exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both. However, the accused's intrusive body searches of female trainees, objectively viewed, reasonably could have caused mental harm or suffering based on testimony that a person subject to an EPW search could feel "violated," and testimony by a victim that she felt humiliated by the search. *United States v. Springer*, 58 M.J. 164 (C.A.A.F. 2003).). *See, e.g., United States v. Harris*, ARMY 20130310, 2015 CCA LEXIS 70 (A. Ct. C. App. 2015) (finding that the appellant committed the offense of cruelty and maltreatment against a junior enlisted member by pulling his pocket inside-out and telling her to "hold my hands pocket" or word to that effect, then saying "let's go."); *United States v. Sanchez*, ARMY 20140735, 2017 CCA LEXIS 470 (A. Ct. C. App. 2017) (holding that a drill sergeant's sexually explicit comments, such as "show me your tits" to a victim, such that one victim felt that if she failed to cooperate he would jeopardize her military status, constituted cruelty and maltreatment).

5. A superior's mistake of fact as to a victim's consent where the abusive conduct was consciously directed at the subordinate is not a complete or partial defense to maltreatment. *United States v. Patton*, ARMY 20150675, CCA LEXIS 237 (A. Ct. Crim. App. Apr. 7, 2017).

XXV. PROHIBITED ACTIVITIES WITH A MILITARY RECRUIT OR TRAINEE BY PERSON IN POSITION OF SPECIAL TRUST, ART. 93a

A. Two offenses.

1. Abuse of training leadership position.

a) Elements

(1) That the accused was a commissioned, warrant, noncommissioned, or petty officer;

(2) That the accused was in a training leadership position with respect to a specially protected member of the armed forces;

(3) That the accused engaged in prohibited sexual activity with a person the accused knew, or reasonably should have known, was a specially protected junior member of the armed forces.

2. Abuse of position of military recruiter.

a) Elements

(1) That the accused was a commissioned, warrant, noncommissioned, or petty officer;

(2) That the accused was performing duties as a military recruiter; and,

(3) That the accused engaged in prohibited sexual activity with a person the accused knew, or reasonably should have known, was an applicant for military service or;

(4) That the accused engaged in prohibited sexual activity with a person the accused knew, or reasonably should have known, was a specially protected junior member of the armed forces who is enlisted under a delayed entry program.

3. Explanation.

a) The prevention of inappropriate sexual activity by trainers, recruiters, and drill instructors with recruits, trainees, students attending service academies, and other potentially vulnerable persons in the initial training environment is crucial to the maintenance of good order and military discipline. Military law, regulation, and custom invest officers, non-commissioned officers, drill instructors, recruiters, cadre, and others with the right and obligation to exercise control over those they supervise. In this context, inappropriate sexual activity between recruits/trainees and their respective recruiters/trainers are inherently destructive to good order and discipline. The responsibility for identifying by regulation relationships subject to this offense and those outside the scope of this offense (e.g., a "training and leadership position" Servicemember and a "specially protected junior member of the armed forces" who were married prior to assuming those roles as defined by this offense) is entrusted to the individual Services to determine and specify by appropriate regulations.

b) Knowledge. The accused must have actual or constructive knowledge that a person was a "specially protected junior member of the armed forces" or an "applicant for military service" (as those terms are defined in this offense). Knowledge may be proved by circumstantial evidence. Actual knowledge need not be shown if the accused reasonably should have known under the circumstances the status of the person as a "specially protected junior member of the armed forces" or an "applicant for military service." This maybe demonstrated by regulations, training or operating manuals, customs of the Service, or similar evidence.

c) Consent is not a defense to this offense.

XXVI. MUTINY OR SEDITION, ART. 94

ENEMY/POST OFFENSES

XXVII. OFFENSES BY SENTINEL OR LOOKOUT, ART. 95

XXVIII. DISRESPECT TOWARD SENTINEL OR LOOKOUT, ART. 95a

XXIX. RELEASE OF PRISONER WITHOUT AUTHORITY; DRINKING WITH PRISONER, ART. 96

XXX. UNLAWFUL DETENTION, ART. 97

XXXI. MISCONDUCT AS PRISONER, ART. 98

XXXII. MISBEHAVIOR BEFORE THE ENEMY, ART. 99

A. Enemy Defined. Organized forces in time of war or any hostile body, including civilians, that may oppose U.S. forces. *United States v. Monday*, 36 C.M.R. 711 (A.B.R. 1966), *pet. denied*, 37 C.M.R. 471 (C.M.A. 1969).

B. Before The Enemy.

1. A question of tactical relation not of distance. A reasonable possibility of being called into action is sufficient. *United States v. Sperland*, 5 C.M.R. 89 (C.M.A. 1952).

2. Subsequent enemy contact may not be used to establish misconduct before the enemy. *United States v. Terry*, 36 C.M.R. 756 (N.B.R. 1965), *aff'd*, 36 C.M.R. 348 (C.M.A. 1966).

C. Nine Forms of the Offense.

1. Running away.

2. Shamefully abandoning, surrendering, or delivering up command, unit, place, or military property which it is his duty to defend.

3. Through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property.

4. Casting away arms or ammunition.

5. Cowardly conduct.

6. Quitting place of duty to plunder or pillage.

7. Causing false alarms.

8. Willfully failing to do utmost to encounter the enemy.

9. Failure to afford relief and assistance.

D. Elements. Each form has its own set of elements. An example, Article 99(5), is below:

1. That the accused committed an act of cowardice;

2. That this conduct occurred while the accused was before or in the presence of the enemy; and

3. That this conduct was the result of fear.

E. Applications.

1. Cowardice is misbehavior motivated by fear. Fear is the natural feeling of apprehension when going into battle. *United States v. Smith*, 7 C.M.R. 73 (C.M.A. 1953).

2. The mere display of apprehension does not constitute the offense. *United States v. Barnett*, 3 C.M.R. 248 (A.B.R. 1951).

3. An intent to avoid combat does not in itself justify an inference of fear. *United States v. Yarborough*, 5 C.M.R. 106 (C.M.A. 1952).

4. Refusal to proceed against the enemy because of illness is not cowardice unless motivated by fear. *United States v. Presley*, 40 C.M.R. 186 (C.M.A. 1969).

5. Article 99 covers the area of misbehavior before the enemy offenses. Art. 134 is not a catch-all. *United States v. Hamilton*, 15 C.M.R. 383 (C.M.A. 1954).

6. Misbehavior before the enemy which endangers safety may include use of illegal drugs. *United States v. Morchinek*, 2016 WL 3193043 (A.F. Ct. Crim. App. 2016) (accused's use of drugs in Bagram Airfield, Afghanistan, constituted misbehavior before the enemy where airfield was coming under indirect fire during the time period of the drug use and drug use interfered with accused's ability to perform mission and defend airfield).

XXXIII. SUBORDINATE COMPELLING SURRENDER, ART. 100

XXXIV. IMPROPER USE OF COUNTERSIGN, ART. 101

XXXV. FORCING A SAFEGUARD, ART. 102

XXXVI. SPIES, ART. 103

XXXVII. ESPIONAGE, ART. 103a

A. Nature of the Offense. Article 103a establishes a peacetime espionage offense which is different from spying, another wartime offense, under Article 103, UCMJ.

B. Three Theories for Espionage Cases.

1. Violation of general regulations;

2. Assimilation of federal statutes under Article 134, clause 3;

3. Violation of Article 103 or 103a. *See United States v. Baba*, 21 M.J. 76 (C.M.A. 1985).

C. Elements of Art 103a.

1. The accused communicated, delivered, or transmitted information relating to the national defense;

2. Information was communicated, delivered or transmitted to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject or citizen thereof, either directly or indirectly; and

3. That the accused did so with the intent or reason to believe that such matter would be used to the injury of the United States or to the advantage of a foreign nation. MCM, pt. IV, ¶ 32a.b(1).

D. Attempted Espionage. Unlike most UCMJ offenses, Article 103a covers both espionage and any attempted espionage.

1. Accused's actions in enlisting aid of fellow sailor en route to delivering material to foreign embassy, removing classified documents from ship's storage facility and converting them to his own personal possession, and traveling halfway to embassy to deliver went beyond "mere preparation" and guilty plea to charge of attempted espionage was provident. *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993).

2. Where accused took several classified radio messages to Tokyo in order to deliver them to a Soviet agent named "Alex," his conduct was more than mere preparation and constituted attempted espionage in violation of article 106a (now 103a), UCMJ. *United States v. Wilmouth*, 34 M.J. 739 (N.M.C.M.R. 1991).

E. Espionage as a Capital Offense.

1. Accused must commit offense of espionage or attempted espionage; and

2. The offense must concern:

a) Nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack;

b) War plans;

c) Communications intelligence or cryptographic information; or

d) Major weapons system or major elements of defense strategy. MCM, pt. IV, ¶ 32a.b(3).

F. Applications.

1. *United States v. Richardson*, 33 M.J. 127 (C.M.A. 1991) (case reversed because MJ erred in instructing panel that intent requirement for offense of attempted espionage would be satisfied if accused acted in bad faith "or otherwise without authority" in disseminating information).

2. *United States v. Peri*, 33 M.J. 927 (A.C.M.R. 1993) (accused's conscious, voluntary act of conveying defense information across the East German border and then intentionally delivering himself and the information into custody and control of East German authorities constituted "delivery," as required to prove espionage).

3. *United States v. Sombolay*, 37 M.J. 647 (A.C.M.R. 1993) (to be convicted of espionage, information or documents passed by accused need not be of the type requiring a security classification, but gravamen of offense is the *mens rea* with which accused has acted, not impact or effect of act itself, *i.e.*, did accused intend to harm the United States or have reason to believe that his conduct would harm the United States).

XXXVIII. AIDING THE ENEMY, ART. 103b

FALSITY OFFENSES

XXXIX. PUBLIC RECORDS OFFENSES, ART. 104

A. Public Record Offenses. MCM, pt. IV, ¶ 34; UCMJ art. 104.

1. Three requirements must be met before a document qualifies as a "public record." First, it must actually be *a record* or its equivalent. Second, such record must be one *of a public office or agency.* Finally, the "record" must reflect either: (1) the activities of that office or agency; or (2) matters observed and reported pursuant to a lawful duty. *United States v. Abbey*, 63 M.J. 631 (A.Ct.Crim.App. 2006).

2. A "record" is something which is designed to be a historical memorial of past events. See *United States v. Abbey*, 63 M.J. 631 (A.Ct.Crim.App. 2006) (sick slips by their very purpose lack historical value and do not qualify as a record).

3. Even if an item meets the definition of a record, it may not qualify as an offense unless it is also a public record. To be a public record the document must possess an official function. *See United States v. Oglivie*, 29 M.J. 1069 (A.C.M.R. 1990) (unofficial, unauthenticated photocopy of divorce decree was not a public record); *United States v. Isler*, 36 M.J. 1061 (A.F.C.M.R. 1993) (individual copies of PCS orders are not public records); *United States v. Osborn*, 32 M.J. 854 (N-M.C.M.R.1991) ("official" copy of divorce decree was not public record).

4. Mere completion of a blank form indicating graduation for an Army school and presentment of that document to Army officials was not "wrongful alteration of public record," absent additional evidence of intent or attempt to use the document to alter the integrity of official Army record. *United States v. McCoy*, 47 M.J. 653 (Army Ct. Crim. App. 1997).

XL. FRAUDULENT ENLISTMENT, APPOINTMENT, OR SEPARATION, ART. 104a

A. Nature of The Offense. A fraudulent enlistment, appointment, or separation is one procured by either a knowingly false representation as to any of the qualifications or disqualifications prescribed by law, regulation, or orders for the specific enlistment, appointment, or separation, or a deliberate

concealment as to any of those disqualifications. Matters that may be material to an enlistment, appointment, or separation include any information used by the recruiting, appointing, or separating officer in reaching a decision as to enlistment, appointment, or separation in any particular case, and any information that normally would have been so considered had it been provided to that officer. MCM, pt. IV, ¶ 35c(1).

B. Fraudulent Enlistment or Appointment.

1. False Representation or Concealment.

a) Testimony of the accused's recruiters and documentary evidence of his traffic violations proved that the accused willfully concealed offenses, the cumulative number of which would have disqualified him from enlistment, and supported a conviction for fraudulent enlistment. *United States v. Hawkins*, 37 M.J. 718 (A.F.C.M.R. 1993).

b) The accused perpetrated a fraudulent enlistment by enlisting in the Marine Corps using his brother's name. *United States v. Victorian*, 31 M.J. 830 (N.M.C.M.R. 1990) (holding, however, that the statute of limitations barred prosecution for fraudulent enlistment).

c) Falsely misrepresenting educational qualifications and willfully concealing arrest record constituted fraudulent extension of enlistment, which was not preempted by Article 83. *United States v. Weigand*, 23 M.J. 644 (A.C.M.R. 1986).

d) Accused fraudulently entered the Army on several occasions using, at varying times, eleven different names. *United States v. Brown*, 22 M.J. 597 (A.C.M.R. 1986).

e) The accused need not know that the fact he misrepresented was material to his enlistment at the time it was made, only that the fact was untrue. *United States v. Holbrook*, 66 M.J. 31 (C.A.A.F. 2008).

2. Receipt of Pay or Allowances. An essential element of the offense of fraudulent enlistment or appointment is that the accused shall have received pay or allowances thereunder. Accordingly, a member of the armed forces who enlists or accepts an appointment without being regularly separated from a prior enlistment or appointment should be charged under Article 83 only if that member has received pay or allowances under the fraudulent enlistment or appointment. Also, acceptance of food, clothing, shelter, or transportation from the government constitutes receipt of allowances. Whatever is furnished the accused while in custody, confinement, or other restraint pending trial for fraudulent enlistment or appointment, however, is not considered an allowance. MCM, pt. IV, ¶ 35c(2).

XLI. UNLAWFUL ENLISTMENT, APPOINTMENT, OR SEPARATION, ART. 104b

A. Text. "Any person subject to this chapter who effects an enlistment or appointment in or separation from the armed forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct." Article 104b, UCMJ.

B. Explanation. The enlistment, appointment, or separation must have been prohibited by law, regulation, or order, and the accused must have then known that the person enlisted, appointed, or separated was ineligible for the enlistment, appointment, or separation. MCM, pt. IV, 36c.

C. Examples of Effecting an Unlawful Enlistment.

1. Accused recruiter, who had applicants that failed entrance examinations improperly retake the examinations in other jurisdictions, was guilty of effecting unlawful enlistment, under Article 104 (formerly 84). *United States v. Hightower*, 5 M.J. 717 (A.C.M.R. 1978).

2. Accused effected unlawful enlistments and conspired to do so by involvement in a scam that provided ineligible applicants with bogus high school diplomas. *United States v. White*, 36 M.J. 284 (C.M.A. 1993).

XLII. FORGERY, ART. 105

A. Forgery. MCM, pt. IV, ¶ 37; UCMJ art. 105. Two distinct types: making or altering, and uttering.

1. Elements.

a) Forgery: making or altering.

(1) That the accused falsely made or altered a certain signature or writing.

(2) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice; and

(3) That the false making or altering was with the intent to defraud.

b) Forgery: uttering.

(1) That a certain signature or writing was falsely made or altered;

(2) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice;

(3) That the accused uttered, offered, issued, or transferred the signature or writing;

(4) That at such time the accused knew that the signature or writing had been falsely made or altered; and

(5) That the uttering, offering, issuing or transferring was with the intent to defraud.

2. Falsely making checks is a separate offense from uttering them; these actions are not alternative methods of committing the forgery, but distinct types of forgery. *United States v. Albrecht*, 43 M.J. 65 (C.A.A.F. 1995).

3. Forgery and larceny distinguished: The difference between forgery and larceny is that forgery requires falsity in the making. The act is false because it purports to be the act of someone other than the actual signer (the accused). "[T]he crux of forgery is the <u>false</u> making of the writing. The distinction between forgery and 'the genuine making of a false instrument' largely depends on whether the accused impersonates another person. Generally, signing one's own name to an instrument – even with the intent to defraud – is not a forgery. It is larceny." *United States v. Weeks*, 71 M.J. 44 (C.A.A.F. 2012).

4. For either type, the document must have legal efficacy: it must appear either on its face or from extrinsic facts to impose a legal liability on another, or to change a legal right or liability to the prejudice of another. MCM, pt. IV, ¶ 37c(4); *United States v. Hopwood*, 30 M.J. 146 (C.M.A. 1990); *United States v. Thomas*, 25 M.J. 396 (C.M.A. 1988); *see United States v. James*, 42 M.J. 270 (1995) (leave form has "legal efficacy"); *United States v. Ivey*, 32 M.J. 590 (A.C.M.R. 1991) (checking account application has legal efficacy), *aff'd*, 35 M.J. 62 (C.M.A. 1992); *United States v. Victorian*, 31 M.J. 830 (N.M.C.M.R. 1990); *United States v. Johnson*, 33 M.J. 1030 (N.M.C.M.R. 1991) (urinalysis report message from drug lab was not a "document of legal efficacy" and as such could not be subject of forgery).

5. *See generally* TJAGSA Practice Note, *Court Strictly Interprets Legal Efficacy*, Army Law., Aug. 1990, at 35; TJAGSA Practice Note, *Legal Efficacy as a Relative Concept*, Army Law., Jan. 1990, at 34; TJAGSA Practice Note, *Forgery and Legal Efficacy*, Army Law., Jun. 1989, at 40.

6. The instrument "tells a lie about itself." *United States v. Blackmon*, 39 M.J. 705 (N.M.C.M.R. 1993) (signing another's name to "starter" checks from the accused's closed checking account appeared to impose liability upon the third party whose name was being signed) *aff'd*, 41 M.J. 67 (C.M.A. 1994).

7. Significant injury need not result. *United States v. Sherman*, 52 M.J. 856 (Army Ct. Crim. App. 2000) (where the accused and co-conspirator opened savings accounts by falsely and fraudulently signing signature cards, the general bookkeeping, security, and insurance functions inherent in agreeing to maintain a bank account imposed sufficient legal liability on the banks to warrant forgery convictions, even where there was no initial deposit).

8. Maximum Punishment. In cases where multiple, discrete instances of check forgery are joined in one specification the maximum punishment is calculated as if they had been charged separately, extending analysis of *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995) (maximum punishment of a bad-check "mega-specification" is calculated by the number and amount of the checks as if they had been charged separately) to check forgery. *United States v. Dawkins*, 51 M.J. 601 (C.A.A.F. 1999).

9. A credit application itself is not susceptible of forgery under Article 123, because it, if genuine, would not create any legal right or liability on the part of the purported maker. *United States v. Woodson*, 52 M.J. 688 (C.G. Ct. Crim. App. 2000).

10. "Double forgery." Forgery of an endorsement is factually and legally distinct from forgery of the check itself, because the acts impose apparent legal liability on two separate victims; thus, the government may charge the "double forgery" in two separate specifications. *United States v. Pauling*, 60 M.J. 91 (C.A.A.F. 2004) (charging signing front of check and endorsing back of check as two separate specifications not duplicative or unreasonable multiplication of charges).

XLIII. FALSE OR UNAUTHORIZED PASS OFFENSES, ART. 105a

XLIV. IMPERSONATION OF AN OFFICER, NCO, PETTY OFFICER, AGENT, OR OFFICIAL, ART. 106

A. General. The offense does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, but rather upon whether the acts and conduct would adversely influence the good order and discipline of the armed forces. *United States v. Messenger*, 6 C.M.R. 21 (C.M.A. 1952); *United States v. Frisbie*, 29 M.J. 974 (A.F.C.M.R. 1990); Winthrop, Military Law and Precedents 726 (2d ed., 1920 Reprint); MCM, pt. IV, ¶ 86c(1); TJAGSA Practice Note, Impersonating an Officer and the Overt Act Requirement, Army Law., Jul. 1990, at 42 (discussing Frisbie).

B. Intent. Intent to defraud may be plead and proven as an aggravating factor. MCM, pt. IV, ¶ 86b.

C. Factual Sufficiency. Most impersonation cases involve the wearing of a commissioned, warrant, or noncommissioned officer's uniform or insignia, but it is not required. However, the accused's actions must rise to the level of "assuming the role of a commissioned officer, masquerading as a person of high rank, falsely holding himself out as an officer, or pretending to have the authority of an officer." *U.S. v. Sanford*, No. 200500993, 2006 WL 4571896, at *7 (N-M. Ct. Crim. App. 2006) (creating fictitious orders to recall a reserve Servicemember to active duty and signing as a

commissioned officer was not sufficient for impersonation, but accused found guilty of a general disorder under Article 134, UCMJ.)

D. Related Offenses. Impersonation of officer, noncommissioned or petty officer, or agent or official differs from the offense of impersonating a CID agent or other agent of the federal government, in that the accused is not required to act out the part of the officer. Instead, merely posing as an officer is sufficient. *United States v. Felton*, 31 M.J. 526 (A.C.M.R. 1990); *United States v. Wesley*, 12 M.J. 886 (A.C.M.R. 1981); *United States v. Reece*, 12 M.J. 770 (A.C.M.R. 1981); *United States v. Adams*, 14 M.J. 647 (A.C.M.R. 1982); see also TJAGSA Practice Note, Impersonating a CID Agent and the Overt Act Requirement, Army Law., Mar. 1991, at 21 (discusses Felton); Cooper, Persona Est Homo Cum Statu Quodam Consideratus, Army Law., April 1981, at 17.

XLV. WEARING UNAUTHORIZED INSIGNIA, DECORATION, BADGE, RIBBON, DEVICE, OR LAPEL BUTTON, ART. 106a

XLVI. FALSE OFFICIAL STATEMENTS; FALSE SWEARING, ART. 107

A. False Official Statement.

1. Elements of False Official Statement.

a) That the accused signed a certain official document or made a certain official statement;

b) That the document or statement was false in certain particulars;

c) That the accused knew it to be false at the time of signing it or making it; and

d) That the false document or statement was made with the intent to deceive.

2. Relation to Federal Statute. Congress intended Article 107 to be construed *in pari materia* with 18 U.S.C. § 1001. *United States v. Jackson*, 26 M.J. 377 (C.M.A. 1988); *United States v. Aronson*, 25 C.M.R. 29 (C.M.A. 1957). The purpose of Article 107 is to protect governmental departments and agencies from the perversion of its official functions which might result from deceptive practices. *United States v. Jackson*, *supra*; *United States v. Hutchins*, 18 C.M.R. 46, 51 (C.M.A. 1955); *see generally*, TJAGSA Practice Note, *The Court of Military Appeals Expands False Official Statement Under Article 107, UCMJ*, Army Law., Nov. 1988, at 37. However, Article 107 is more expansive than 8 U.S.C. § 1001 "because the primary purpose of military criminal law—to maintain morale, good order, and discipline—has no parallel in civilian criminal law." *See United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003) *United States v. Day*, 66 M.J. 172 (C.A.A.F. 2008).

3. Relation to Perjury. The offense of false official statement differs from perjury in that a false official statement may be made outside a judicial proceeding and materiality is not an essential element. MCM, pt. IV, ¶ 41c. Materiality may, however, be relevant to the intent of the party making the statement. *Id.*; *see also United States v. Hutchins*, 18 C.M.R. 46 (C.M.A. 1955) (accused made a false official statement in connection with a line of duty investigation). Making a false official statement is not a lesser included offense of perjury. *United States v. Warble*, 30 C.M.R. 839 (A.F.C.M.R. 1960).

4. Meaning of "False." *United States v. Wright*, 65 M.J. 373 (C.A.A.F. 2007). While loading equipment for a deployment, the accused and another soldier stole four government computers. An officer investigating the theft of the computers interviewed the accused, who stated: "While loading up the connex's [*sic*], I noticed that four of the computers weren't on top of the box anymore." During the providence inquiry, the accused admitted that his statement was false because it meant that he did not know where the computers went. In fact, the accused knew

exactly where the computers were located. The court found that the statement was false for purposes of Article 107 even though it was misleading, but true. The statement falsely implied that he had no explanation for the absence of the computers. The statement also falsely implied that the computers went missing while he was loading up the connex boxes.

a) If a statement is charged as "totally false," must show that all entries are false. *United States v. Brown*, ARMY 20140346 (Army Ct. Crim. App. June 28, 2016)

5. Meaning of Official Statement. A statement for purposes of Article 107 could be considered official when it fell into one of three categories: (1) where the speaker makes a false official statement in the line of duty or the statement bears a clear and direct relationship to the speaker's official duties; (2) where the listener is a military member carrying out a military duty at the time the statement is made; or (3) where the listener is a civilian who is performing a military function at the time the speaker makes the statement. *United States v. Capel*, 71 MJ 485 (C.A.A.F. 2012).

a) Formerly, a false statement to an investigator, made by a suspect who had no independent duty to account or answer questions, was not official within the purview of Article 107. *United States v. Osborne*, 26 C.M.R. 235 (C.M.A. 1958); *United States v. Aronson*, 25 C.M.R. 29 (C.M.A. 1957); *see also United States v. Davenport*, 9 M.J. 364, 367-68 (C.M.A. 1980).

b) Later, the Court of Military Appeals determined that no independent duty to account was required if the accused falsely reported a crime. *United States v. Collier*, 48 C.M.R. 789 (C.M.A. 1974).

c) In determining whether a statement is "official," courts focus on whether an official governmental function was perverted by a false or misleading statement.

(1) *United States v. Harrison*, 26 M.J. 474 (C.M.A. 1988) (accused's false statement to battalion finance clerk in order to obtain an appointment for payment violates Article 107).

(2) *United States v. Jackson*, 26 M.J. 377 (C.M.A. 1988) (misleading information provided by accused about a murder suspect's whereabouts, voluntarily given to law enforcement agents, constitutes a false official statement).

(3) *United States v. Goldsmith*, 29 M.J. 979 (A.F.C.M.R. 1990) (untrue responses to a civilian cashier constituted a false official statement).

(4) *United States v. Ellis*, 31 M.J. 26 (C.M.A. 1990) (anonymous note can constitute a false official statement); *see generally* TJAGSA Practice Note, *An Anonymous Note Can Constitute a False Official Statement*, Army Law., Mar. 1991, at 24 (discusses *Ellis*).

(5) *United States v. Hagee*, 37 M.J. 484 (C.M.A. 1993) (making and signing false official duty orders in order to deceive a private party who was entitled to rely on their integrity was a violation of Article 107).

(6) *United States v. Dorsey*, 38 M.J. 244 (C.M.A. 1993) (lying to investigator about reason for refusing a polygraph held to be an "official" statement).

(7) *United States v. Smith*, 44 M.J.369 (C.A.A.F. 1996) (falsifying an LES and ID card in order to obtain car loan was violation of Article 107; the official character of a false statement can be based upon its apparent issuing authority rather than the identity of the person receiving it or the purpose for which it is made).

(8) *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App 1999) (when AFOSI agents asked the accused, whom they suspected of threatening victims with guns and

whose apartment they intended to search, whether his firearms were in his apartment, there was a clear governmental function underway), *aff'd*, 55 M.J. 38 (C.A.A.F. 2001).

(9) *United States v. Czeschin*, 56 M.J. 346 (C.A.A.F. 2002). Paragraph 31c(6)(a) of the Manual for Courts-Martial, which provides that a statement by an accused or suspect during an interrogation is not an official statement within the meaning of Article 107 if that person did not have an independent duty or obligation to speak, does not establish a right that may be asserted by an accused who is charged with violating Article 107. Statements to investigators can be prosecuted as false official statements.

(10) *United States v. Melbourne*, 58 M.J. 682 (N-M. Ct. Crim. App. 2003) (ruling that the language in the pre-2002 editions of the MCM, pt. IV, ¶ 31c(6)) is no longer an accurate **statement** of law, at least insofar as it would apply to **statements** made to law enforcement agents conducting **official** investigations).

(11) *United States v. McMahon*, 58 M.J. 362 (C.A.A.F. 2003) (accused convicted of false official statement for falsifying a certificate awarding himself a Bronze Star).

(12) *United States v. Day*, 66 M.J. 172 (C.A.A.F. 2008). False statements made to on-base emergency medical personnel were official for purposes of Art. 107, but false statements made to an off-base, civilian 911 operator were not.

6. Statement to Civilian Law Enforcement Authorities. Official statements include those made "in the line of duty". MCM, Part IV, ¶ 41c(1). An intentionally deceptive statement made by a service member to civilian authorities may be nonetheless "official" and within the scope of Article 107.

a) Analysis for Statements to Civilian Authorities.

(1) Duty status at the time of the statement is not determinative. False official statements are not limited to those made in the line of duty. Statements made outside of a Servicemember's duties may still implicate official military functions. *United States v. Day*, 66 M.J. 172 (2008).

(2) The critical distinction is whether the statements relate to the official duties of the speaker or hearer, and whether those official duties fall within the UCMJ's reach. *United States v. Day*, 66 M.J. 172 (2008).

(3) A statement made to a civilian law enforcement official acting in a civilian capacity cannot be said to purport to be a military function until the law enforcement officer invokes, involves, or transfers the matter to military authorities. *United States v. Spicer*, 71 M.J. 470 , 475 (C.A.A.F. 2013).

(4) The courts have used the following language to link the official duties and the reach of the UCMJ:

(a) Statements are official for purposes of Article 107 where there is a "clear and direct relationship to the official duties" at issue and where the circumstances surrounding the statement "reflect a substantial military interest in the investigation." *United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003).

(b) Statements may be official where there is "a predictable and necessary nexus to on-base persons performing official military functions on behalf of the command." *United States v. Day*, 66 M.J. 172 (C.A.A.F. 2008).

b) Applications of Article 107 to False Statements to Civilian Authorities.

(1) *United States v. Day*, 66 M.J. 172 (C.A.A.F. 2008). False statements made to on-base emergency medical personnel were official for purposes of Art. 107, but false statements made to an off-base, civilian 911 operator were not.

(2) *United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003) (accused made false statements to local civilian police concerning an automobile accident in which a delayed-entry recruit was killed; the entire incident and investigation bore a direct relationship to the accused's duties and status as a recruiter; further, the subject matter of the police investigation was of interest to the military and within the jurisdiction of the courts-martial system).

(3) *United States v. Morgan*, 65 M.J. 616 (N-M. Ct. Crim. App. 2007) (holding statements to civilian authorities were not "official" for Article 107 purposes).

(4) *United States v. Holmes*, 65 M.J. 684 (N-M. Ct. Crim. App. 2007) (holding statements to civilian authorities were not "official" for Article 107 purposes).

(5) *United States v. Caballero*, 65 M.J. 674 (C.G. Ct. Crim. App. 2007) (holding that false statements to civilian police detectives investigating a shooting that had occurred off-post were not official for Article 107 purposes).

(6) *Unites States v. Cofer*, 67 M.J. 555 (C.A.A.F. 2008) (Accused's statement to civilian detective related to official duties and fell within scope of UCMJ's reach, where accused lied about setting his car on fire in an attempt to commit insurance fraud. Accused was placed on convalescent leave for a month after he sustained second degree burns, involved unsuspecting airmen, and the civilian turned over the case to AFOSI agents immediately after the interview.)

(7) *United States v. Spicer*, 71 M.J. 470, 475 (C.A.A.F. 2013) (accused's false statements to civilian law enforcement officials about a purported kidnapping of his infant son were not official in light of the purposes of Article 107, UCMJ; accused did not make the statements in the line of duty; he did not disobey a specific order to provide for his family, and the statements did not bear a clear and direct relationship to his official duties; furthermore, while accused's statements ultimately affected on-base persons performing official military functions, accused made the statements to civilian law enforcement officials who were not conducting any military function at the time the statements were made; and when accused made the statements, the civilian law enforcement officials were not operating a joint investigation with military officials or performing any other military functions).

(8) *United States v. Capel*, 71 M.J. 485 (C.A.A.F. 2014) (accused's statements to a civilian police detective denying that he had used another Servicemember's debit card were not official statements to support a conviction for making false official statements under Article 107, UCMJ, where accused's appearance at the civilian police station and his subsequent statements to the detective were not pursuant to any specific military duties on accused's part and where there was nothing in the record to indicate that at the time accused made the statements, the detective was acting on behalf of military authorities or that he was in any other way performing a military function; while theft among military personnel can certainly impact unit morale and good order and discipline, it is the relationship of the statement to a military function at the time it is made – not the offense of larceny itself – that determines whether the statement falls within the scope of Article 107, UCMJ).

(9) *United States v. Passut*, 73 M.J. 27 (C.A.A.F. 2014) (holding statements to Army Air Force Exchange Service employees were "official" for Article 107 purposes).

7. "Exculpatory No" Doctrine. A number of federal circuit courts apply this doctrine, which stands for the proposition that a person who merely gives a negative response to a law enforcement agent cannot be prosecuted for making a false statement. *See generally United States v. Solis*, 46 M.J. 31 (C.A.A.F. 1997).

a) Statutory and constitutional concerns do not support continued application of the doctrine under the UCMJ. *United States v. Solis*, 46 M.J. 31 (1997); *United States v Black*, 47 M.J. 146 (1997); United *States v. Nelson*, 53 M.J. 319 (C.A.A.F. 2000).

b) The doctrine was traditionally given limited scope under military law, but recent cases placed severe limits on its scope. *See United States v. Prater*, 32 M.J. 433 (C.M.A. 1991); *United States v. Frazier*, 34 M.J. 135 (C.M.A 1992); *United States v. Sanchez*, 39 M.J. 518 (A.C.M.R. 1993).

c) The doctrine does not apply to false swearing offenses under Article 107 (formerly 134), UCMJ. *United States v. Gay*, 24 M.J. 304 (C.M.A. 1987).

d) The doctrine has no legitimate statutory or constitutional basis and is not a defense to 18 U.S.C. § 1001. *Brogan v. United States*, 118 S.Ct. 805 (1998).

8. Multiplicity. *See United States v. McCoy*, 32 M.J. 906 (A.F.C.M.R. 1991) (finding an accused guilty of violating Articles 107 and 131 when he lied to a trial counsel and the next day told the same lie in court is multiplicious for sentencing).

9. Unreasonable Multiplication of Charges (UMC). *United States v. Esposito*, 57 M.J. 608 (C.G. Ct. Crim. App. 2002) (finding charging accused with false official statement and obstructing justice by making the same false statement was UMC. Also, charging accused with soliciting a false official statement and obstructing justice by that same solicitation was UMC).

10. Statute of Limitations. Prosecuting an accused for making a false official statement about instances of deviant sexual behavior that occurred outside the five-year statute of limitations for such offenses did not violate his due process rights. *United States v. Sills*, 56 M.J. 556 (A.F. Ct. Crim. App. 2001), *sentence set aside, rehearing granted by*, 58 M.J. 23 (C.A.A.F. 2002).

11. Statement. A physical act or nonverbal conduct intended by a soldier as an assertion is a "statement" that may form the basis for a charge of making "any other" false official statement under Article 107. *United States v. Newson*, 54 M.J. 823 (A. Ct. Crim App. 2001).

B. False Swearing.

1. Elements. False swearing is the making, under a lawful oath, of any false statement which the declarant does not believe to be true. *United States v. Davenport*, 9 M.J. 364 (C.M.A. 1980). The offense of false swearing has seven elements: (1) that the accused took an oath or its equivalent; (2) that the oath or its equivalent was administered to the accused in a matter in which such oath or equivalent was required or authorized by law; (3) that the oath or equivalent was administered by a person having authority to do so, *United States v. Hill*, 31 M.J. 543 (N.M.C.M.R. 1990); (4) that upon this oath or equivalent the accused made or subscribed a certain statement; (5) that the statement was false; and (6) that the accused did not then believe the statement to be true. MCM, pt. IV, ¶ 41b.

2. Relation to Perjury. Although often used interchangeably, perjury and false swearing are different offenses. Perjury requires that the false statement be made in a judicial proceeding and be material to the issue. These requirements are not elements of false swearing, which is not a

lesser included offense of perjury. *See United States v. Smith*, 26 C.M.R. 16 (C.M.A. 1958); *United States v. Byard*, 29 M.J. 803 (A.C.M.R. 1989); *United States v. Claypool*, 27 C.M.R. 533, 536 (A.B.R. 1958); *United States v. Kennedy*, 12 M.J. 620 (N.M.C.M.R. 1981); *United States v. Galchick*, 52 M.J. 815 (A.F. Ct. Crim. App. 2000)(Article 32 investigation is judicial); MCM, pt. IV, ¶ 41c(1); *but see* MCM, pt. IV, ¶ 81c(1). The drafters make no attempt to reconcile this provision with the authorities cited above. *See* MCM, pt. IV, ¶ 57 analysis at A23-16 (2002 Ed.). This provision, however, may be reconciled with those authorities if read in light of *United States v. Warble*, 30 C.M.R. 839, 841 n* (A.F.B.R. 1967) ("We are not called upon to decide whether the *Smith* case (dealing with *Article 131[1] perjury* and false swearing, as contrasted with *statutory perjury* and false swearing) would be held to be in any wise controlling in a statutory perjury charge")(emphasis in original), *aff'd*, 30 C.M.R. 386 (C.M.A. 1961); UCMJ art. 131(2). False swearing and perjury should thus be pled in alternative specifications when appropriate.

3. A civilian police officer authorized by state statute to administer an oath may satisfy the element of false swearing that requires that the "oath or equivalent was administered by a person having authority to do so." The element does not require that the person administering the oath be authorized to do so under Article 136, UCMJ. *United States v. Daniels*, 57 M.J. 560 (N-M. Ct. Crim. App. 2002).

4. Requirement for Falsity.

a) The primary requirement for false swearing is that the statement actually be false. MCM, pt. IV, ¶ 41c(2)(a). A statement need not be false in its entirety to constitute the offense of false swearing. *Id.*, Part IV, ¶ 41b. *See United States v. Fisher*, 58 M.J. 300 (C.A.A.F. 2003).

b) A statement that is technically, literally, or legally true cannot form the basis of a conviction even if the statement succeeds in misleading the questioner. Literally true but unresponsive answers are properly to be remedied through precise questioning. *United States v. Arondel De Hayes*, 22 M.J. 54 (C.M.A. 1986) (accused lied when he said that the listed items were "missing" as he had an explanation for their absence); *United States v. McCarthy*, 29 C.M.R. 574 (C.M.A. 1960) (accused's friends stole some hubcaps which accused allegedly denied during a subsequent investigation).

c) Doubts as to the meaning of an alleged false statement should be resolved in favor of truthfulness. *United States v. Kennedy*, 12 M.J. 620 (N.M.C.M.R. 1981) (only certain portions of accused's statements to a NIS agent were false).

d) The truthfulness of the statement is to be judged from the facts at the time of the utterance. *United States v. Purgess*, 33 C.M.R. 97 (C.M.A. 1963) (evidence was insufficient in law to establish that accused made a false statement when accused stated that the seat covers in his car came from a German concern where the evidence showed that they did in fact come from a German concern, albeit by way of government purchase and theft from government stock); *see United States v. Arondel De Hayes*, 22 M.J. 54 (C.M.A. 1986).

5. Two Witness Rule. The rule is applicable to false swearing. *United States v. Yates*, 29 M.J. 888 (A.C.M.R. 1989), *aff'd*, 31 M.J. 380 (C.M.A. 1990); *see* TJAGSA Practice Note, *Judge's Incorrect Ruling Correctly Affirmed*, Army Law., Apr. 1990, at 70 (discussing *Yates*).

6. Use of Circumstantial Evidence. *United States v. Veal*, 29 M.J. 600 (A.C.M.R. 1989); *see generally* TJAGSA Practice Note, *Using Circumstantial Evidence to Prove False Swearing*, Army Law., Jan. 1990, at 36 (discusses *Veal*); *United States v. Hogue*, 42 M.J. 533 (A.F. Ct. Crim. App. 1995) (urinalysis result plus expert testimony satisfies direct evidence requirement), *aff'd*, 45 M.J. 300 (C.A.A.F. 1996).

7. "Exculpatory No" Doctrine. The doctrine is not applicable to false swearing, as the primary concern is the sanctity of the oath. *United States v. Gay*, 24 M.J. 304 (C.M.A. 1987); *see United States v. Tunstall*, 24 M.J. 235 (C.M.A. 1987); *United States v. Purgess*, 33 C.M.R. 97 (C.M.A. 1963); *United States v. Kennedy*, 12 M.J. 620 (N.M.C.M.R. 1981).

XLVII. PAROLE VIOLATION, ART. 107a

PROPERTY OFFENSES

XLVIII. MILITARY PROPERTY: LOSS/DAMAGE/DESTROY/DISPOSE, ART. 108

A. "Military Property" Defined.

1. "Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States. Military property is a term of art, and should not be confused with Government property. The terms are not interchangeable. While all military property is Government property, not all Government property is military property. An item of Government property is not military property unless the item in question meets the definition provided in this paragraph. It is immaterial whether the property sold, disposed, destroyed, lost, or damaged had been issued to the accused, to someone else, or even issued at all. If it is proved by either direct or circumstantial evidence that items of individual issue were issued to the accused, it may be inferred, depending on all the evidence, that the damage, destruction, or loss proved was due to the neglect of the accused. Retail merchandise of service exchange stores is not military property under this article." MCM, ¶ 43c(1).

2. For purposes of both Article 108 and Article 121, all appropriated funds belonging to the United States are within the meaning of the term "military property of the United States." *United States v. Hemingway*, 36 M.J. 349 (C.M.A. 1993). *See generally* TJAGSA Practice Note, *Defining Military Property*, Army Law., Oct. 1990, at 44.

3. Myriad items can constitute military property, including: Watches, *United States v. Ford*, 30 C.M.R. 3 (C.M.A. 1960); Examinations, *United States v. Reid*, 31 C.M.R. 83 (C.M.A. 1961); Electric Drill, *United States v. Foust*, 20 C.M.R. 907 (A.B.R. 1955); A gate, *United States v. Meirthew*, 11 C.M.R. 450 (A.B.R. 1953); Sheets, mattress, and mattress cover, *United States v. Burrell*, 12 C.M.R. 943 (A.F.B.R. 1953); Sinks, pipes, and window casements, *United States v. Tomasulo*, 12 C.M.R. 531 (A.B.R. 1953); Camera in ship's store, *United States v. Simonds*, 20 M.J. 279 (C.M.A. 1985); Blankets, *United States v. Blevins*, 34 C.M.R. 967 (A.F.B.R. 1964); Data in the form of computer files on a laptop computer fixed disk drive, *United States v. Walter*, 43 M.J. 879, 880 (N-M. Ct. Crim. App. 1996).

4. Military property does not include:

a) Postal funds. *United States v. Spradlin*, 33 M.J. 870 (N.M.C.M.R. 1991).

b) Nonappropriated fund organization property, which is not furnished to a military service for use by the military service. *United States v. Geisler*, 37 C.M.R. 530 (A.C.M.R. 1965) (property of officer's club); *see United States v. Ford*, 30 M.J. 871 (A.F.C.M.R. 1990) (*en banc*); *United States v. Thompson*, 30 M.J. 905 (A.C.M.R. 1990); *see generally* TJAGSA Practice Note, *Appropriated Funds as Military Property*, Army Law., Jan. 1991, at 44.

c) Army and Air Force Exchange Service (AAFES) property. *United States v. Underwood*, 41 C.M.R. 410 (A.C.M.R. 1969); *United States v. Schelin*, 12 M.J. 575 (A.C.M.R. 1981), *aff'd*, 15 M.J. 218 (C.M.A. 1983). Navy courts have held, however, that property of the Navy

Exchange is military property. *United States v. Mullins*, 34 C.M.R. 694 (N.C.M.R. 1964); *United States v. Harvey*, 6 M.J. 545 (N.C.M.R. 1978).

B. Property Need Not Have Been Personally Issued**.** The purpose of Article 108 is to ensure that all military property, however obtained and wherever located, is protected from loss, damage, or destruction. As such, all persons subject to the UCMJ have an affirmative duty to preserve the integrity of military property. *United States v. O'Hara*, 34 C.M.R 721 (N.B.R. 1964).

C. Pleading. The specification must as a whole or directly state that the property was *military* property of the United States. *United States v. Rockey*, 022 C.M.R. 372 (A.B.R. 1956); *United States v. Schiavo*, 14 M.J. 649 (A.C.M.R. 1982).

D. Multiplicity. Larceny and wrongful disposition of the same property are separately punishable. *United States v. West*, 17 M.J. 145 (C.M.A. 1984); *see also United States v. Harder*, 17 M.J. 1058 (A.F.C.M.R. 1983) (larceny and wrongful sale are separately punishable). *But see United States v. Teters*, 37 M.J. 370 (C.M.A. 1993) (holding that the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not ("elements test")).

E. Unlawful Sale of Military Property.

1. "Sale" defined. The term "sale" means an actual or constructive delivery of possession in return for a "valuable consideration," and the passing of such title as the seller may possess, whatever that title may be. *United States v. Blevins*, 34 C.M.R. 967 (A.F.B.R. 1964).

2. "Sale" distinguished from larceny.

a) The sale of property implies the transfer of at least ostensible title to a purchaser in return for consideration. When the evidence merely shows that the accused, according to prior arrangements, stole property and delivered it to one or more of his fellow principals in the theft, receiving payment for his services, no sale is made. *United States v. Walter*, 36 C.M.R. 186 (C.M.A. 1966).

b) Under proper circumstances, one transaction can constitute both a larceny and wrongful sale of the same property. *United States v. Lucas*, 33 C.M.R. 511 (A.C.M.R. 1962) (Accused, without authority and with intent to steal, took automotive parts out of a government salvage yard and later sold them at a civilian junk yard. The larceny was complete when the automotive parts were taken from the salvage yard; and the act of selling such parts did not constitute the final element of the larceny offense.)

c) Lack of knowledge as defense. Because the offense of wrongful sale of government property involves a general criminal intent, lack of knowledge as to ownership of the property constitutes an affirmative defense provided the accused's actions are based on an honest and reasonable mistake. *United States v. Germak*, 31 C.M.R. 708 (A.F.B.R. 1961); *United States v. Pearson*, 15 M.J. 888 (A.C.M.R. 1983).

d) Multiplicity. An accused can be separately found guilty of wrongful sale under Article 108 and concealment under Article 134 of the same military property. *United States v. Wolfe*, 19 M.J. 174 (C.M.A. 1985). *But see United States v. Teters*, 37 M.J. 370 (C.M.A. 1993) (holding that the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not ("elements test")).

F. Wrongful Disposition of Military Property. Disposing of military property by any means other than sale is an offense under Article 108 if such disposition is made without proper authority. For example, giving military property away without proper authorization constitutes an offense under this

article. It makes no difference if the surrender of the property is temporary or permanent. *United States v. Banks*, 15 M.J. 723 (A.C.M.R. 1983), *aff'd*, 20 M.J. 166 (C.M.A. 1985); *See also United States v. Reap*, 43 M.J. 61 (1995) (accused who gave another marine a starlight scope and tool boxes outside of regular supply channels and without receipts was guilty of violating Article 108 when he had no color of authority to distribute the supplies).

G. Damaging, Destroying, or Losing Military Property.

1. Loss, damage, or destruction of military property under this provision may be the result of intentional misconduct or neglect.

2. Damage.

a) Removing the screws that secure the nose landing gear inspection window of a military aircraft was legally sufficient to support the damage element required under Article 108. The word "damage" must be reasonably construed to mean any change in the condition of the property that impairs its operational readiness. The government was not required to prove that the accused had a motive to wrongfully damage military property in order to secure a conviction for the offense. *United States v. Daniels*, 56 M.J. 365 (C.A.A.F. 2002).

b) Altering or damaging computer files by deletion or otherwise destruction meets destruction requirement under Art. 108. Military property need not be tangible to be subject to damage or destruction. *United States v. Walter*, 43 M.J. 879 (N-M. Ct. Crim. App. 1996).

3. Willfulness. Willful damage, destruction, or loss is one that is intentionally occasioned. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences thereof. *United States v. Boswell*, 32 C.M.R. 726 (C.G.B.R. 1962). Willful damage is a lesser included offense of sabotage under 18 U.S.C. § 2155. *United States v. Johnson*, 15 M.J. 676 (A.F.C.M.R. 1983); *see United States v. Washington*, 29 M.J. 536 (A.F.C.M.R. 1989); TJAGSA Practice Note, *Damaging Property and Mens Rea*, Army Law., Feb. 1990, at 66.

a) *United States v. George*, 35 C.M.R. 801 (A.F.B.R. 1965). Evidence that the accused removed perishable medical serums from a refrigerator in a medical warehouse in the tropics and left them at room temperature was sufficient to establish a willful destruction of government property although the purpose in removing the serums was to steal the refrigerator. The evidence established that the removal was intentional, and showing that the accused had a fully conscious awareness of the probable ultimate consequences of his purposeful act was unnecessary.

b) *United States v. Creek*, 39 C.M.R. 666 (A.C.M.R. 1967). The evidence was insufficient to sustain a conviction of willfully and wrongfully destroying an M26 fragmentation hand grenade, military property of the United States, where evidence existed that some sort of explosive device was detonated and some witnesses expressed the opinion it was a grenade because of the sound and damage done, when they all admitted it could have been anything else and another witness said it sounded like recoilless rifle fire while others declined to express an opinion.

c) *United States v. Barnhardt*, 45 C.M.R. 624 (C.G.C.M.R. 1971). Where the accused placed six metal objects in the starboard reduction gear of the cutter on which he was assigned and later, at the suggestion of a petty officer in whom he had confided, removed only the four objects he could see without reporting the remaining two, which he stated he thought might have fallen into the slump, the accused's plea of guilty to willfully damaging military property was provident; the intentional quality of the accused's conduct had not changed to negligence by his removal of some but not all of the foreign, metal objects from the gear.

d) *United States v. Hendley*, 17 C.M.R. 761 (A.F.B.R. 1954). The accused, who had been drinking, took a military police sedan without authority and was chased at high speed. In trying to evade his pursuers, he weaved in and out of traffic; narrowly missed one oncoming vehicle; subsequently sideswiped another; and finally went out of control, left the road, and smashed into several trees. The Board of Review only approved negligent damage to military property.

e) *United States v. Peacock*, 24 M.J. 410 (C.M.A. 1987). Placing rivets and nuts in an auxiliary fuel tank, thus temporarily impairing the aircraft's operational readiness, constitutes willful damage to military property.

f) *United States v. Marsh*, 2016 WL 3208910 (A. Ct. Crim. App. May 31, 2016) Accused can only be charged with military property he willfully damaged. Where accused intentionally set fire to a table, he could not be found guilty of damage to the doors occasioned when the fire department responded to the fire, as he did not willfully cause that.

4. Negligence. Loss, destruction, or damage is occasioned through neglect when it is the result of a want of such attention of the foreseeable consequences of an act or omission as was appropriate under the circumstances.

a) *United States v. Ryan*, 14 C.M.R. 153 (C.M.A. 1954). The doctrine of *res ipsa loquitur* is not applicable to a prosecution for damaging a military vehicle through neglect, and the mere happening of a collision with resulting damage is not in itself sufficient to support a conviction for violation of Article 108. Negligence must be affirmatively established by the prosecution evidence. Here, the accused was found guilty of damaging a government vehicle through neglect. No evidence indicated that the accused was driving at an excessive speed or in any sort of reckless manner, or that he was under the influence of alcohol, or that at the time of the accident he was engaged in the violation of traffic or other safety regulations of any nature. HELD: The evidence was wholly insufficient to support findings of guilt.

b) *United States v. Foster*, 48 C.M.R. 414 (N.C.M.R. 1973). Conviction based on accused's guilty plea set aside and dismissed where providence inquiry established that accused, while on guard, operated a government forklift without permission and that while he was doing so the hydraulic brake line malfunctioned. No evidence of accused's actual negligence was established by the government.

c) *United States v. Stuck*, 31 C.M.R. 148 (C.M.A. 1961). Although evidence was presented that a Navy vehicle turned over to the accused in good condition was damaged, and witnesses testified they saw the vehicle bump and heard a noise as the accused drove it through a gate, and evidence of paint scratches on the vehicle and the gate post indicated he must have struck the gate post, the evidence was insufficient to establish beyond a reasonable doubt that the vehicle was damaged through the accused's negligence. This is because the accused testified he had driven over a rock, evidence indicated that the road approaching the gate was bumpy and full of holes, and the gate was held open by a rock which could have been moved onto the road.

d) *United States v. Lane*, 34 C.M.R. 744 (C.G.B.R. 1963). The evidence was legally and factually sufficient to sustain findings of guilty of damaging and suffering damage to a Coast Guard vessel through neglect where the accused voluntarily and intentionally turned two wheels controlling flood valves on a floating drydock in which the vessel was berthed, thereby consciously setting in motion a sequence of events which a reasonably prudent man would expect to end in some kind of harm; and if, as the court found, the precise form and shape of the injury to the vessel was not specifically intended, then it was the result of a lack of due solicitude on the part of the accused made punishable under Article 108.

e) *United States v. Traweek*, 35 C.M.R. 629 (A.B.R. 1965). Evidence that a government helicopter in operating condition was parked, tied down, and covered and that it was subsequently found untied, uncovered and turned over on its side and wrecked and that the accused, who was on guard at the helicopter site, was lying unconscious a short distance from it was sufficient to corroborate accused's confession that he entered the helicopter to warm himself and caused the damage when he started the motor to generate heat.

f) *United States v. Miller*, 12 M.J. 559 (A.F.C.M.R. 1981). Article 108 offense made out where accused who had control of a military truck permitted an unlicensed 16-year-old military dependent to operate truck resulting in accident and damage to vehicle.

H. Suffering the Loss, Damage, Destruction, Sale or Wrongful Disposition of Military Property.

1. "To suffer' means to allow or permit. The willful or negligent sufferance specified by this article includes: deliberate violation or intentional disregard of some specific law, regulation, or order; reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; or loaning it to a person, known to be irresponsible, by whom it is damaged." MCM, pt. IV, ¶ 43c(2).

2. In charging an accused with the loss of military property, the word "suffer" may properly be used in alleging willful or intentional misconduct by the accused, as well as negligent dereliction on his part. *United States v. O'Hara*, 34 C.M.R. 721 (N.B.R. 1964); *see also* MCM, pt. IV, ¶ 43c(2).

3. Where a member of the naval service intentionally loses military property by willfully pushing it over the side of his ship, he may be charged under Article 108 of willfully suffering the loss or wrongfully disposing of military property. *United States v O'Hara*, 34 C.M.R. 721 (N.B.R. 1964).

4. Accused's plea of guilty to specification of willfully suffering the sale of military property was improvident where military judge did not elicit any testimony from accused regarding any duty he may have had to safeguard the property, and accused did not articulate such a duty; moreover, accused's stipulation of fact introduced by prosecution did not recognize existence of a duty to safeguard the military property, only an understanding that failure to stop his accomplice from selling the property was wrongful. *United States v. Aleman*, 62 M.J. 281 (C.A.A.F. 2006).

I. Value.

1. Under all theories of prosecution under Article 108, UCMJ, the government must establish as an element of proof the value of the property destroyed, lost, or sold, or the amount of damage to that property. MCM, pt. IV, ¶ 43b.

2. "In the case of loss, destruction, sale, or wrongful disposition, the value of the property controls the maximum punishment which may be adjudged. In the case of damage, the amount of damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by the government agency normally employed in such work, or the cost of replacement, as shown by government price lists or otherwise, whichever is less." MCM, pt. IV, ¶ 43c(3).

3. In the case of the wrongful sale of stolen military property, it is the time of taking at which value is to be determined and the burden is on the prosecution to establish the property condition as of that time. *United States v. Steward*, 20 C.M.R. 247 (C.M.A. 1955).

4. Documents such as accounts receivable are not writings representing value. While they may record or even reflect value, they do not represent value as do negotiable instruments or other documents used to acquire goods or services. *United States v. Payne*, 9 M.J. 681 (A.F.C.M.R.

1980) (Accused who destroyed telephone toll records representing money owed to the Government by telephone users could not be convicted of destroying $4,000 in government property represented by the toll tickets. Instead, only a conviction for destruction of property of "some value" could stand).

5. Various documents have been held to have the value they represent, including checks made out to other payees, *United States v. Windham*, 36 C.M.R. 21 (C.M.A. 1965); money orders, *United States v. Sowards*, 5 M.J. 864 (A.F.C.M.R. 1978); airline tickets, *United States v. Stewart*, 1 M.J. 750 (A.F.C.M.R. 1975); and gasoline coupons, *United States v. Cook*, 15 C.M.R. 622 (A.F.B.R. 1954).

6. A government price list is competent evidence of value, and may be the best method of proving the market value of government property; however, it is an administrative determination of value, not binding on a court-martial, but entitled to its consideration. Value also may be inferred from the nature of property. A court may properly consider other evidence of value; for example, the property's serviceability. *United States v. Thompson*, 27 C.M.R. 119 (C.M.R. 1958); *United States v. Downs*, 46 C.M.R. 1227 (N.C.M.R. 1973).

7. Ammunition is an explosive for purposes of the firearm or explosives sentence aggravator. *United States v. Murphy*, 74 M.J. 302 (C.A.A.F. 2015).

XLIX. CAPTURED OR ABANDONED PROPERTY, ART. 108a

A. Captured Or Abandoned Property.

1. Servicemembers must give notice and turn over to the proper authorities without delay all captured or abandoned enemy property in their possession, custody, or control.

2. Servicemembers can be punished for:

a) Failing to carry out duties described above.

b) Buying, selling, trading or in any way dealing in or disposing of captured or abandoned public or private property whereby he receives or expects any profit, benefit, or advantage to himself or another directly or indirectly connected with himself.

c) Engaging in looting or pillaging.

B. Unlawful Importation, Transfer, and Sale of a Dangerous Firearm. 26 U.S.C. §§ 5844, 5861.

L. PROPERTY OTHER THAN MILITARY PROPERTY: WASTE/ SPOILAGE/ DESTRUCTION, ART. 109

A. Waste, Spoil, or Destruction of Non-Military Property. MCM, pt. IV, ¶ 45; UCMJ art. 109.

1. Elements.

a) Wasting or spoiling of non-military property.

(1) That the accused willfully or recklessly wasted or spoiled certain real property in a certain manner;

(2) That the property was that of another person;

(3) That the property was of a certain value.

b) Destroying or damaging non-military property.

(1) That the accused willfully and wrongfully destroyed or damaged certain personal property in a certain manner;

(2) That the property was that of another person;

(3) That the property was of a certain value or the damage was of a certain amount.

2. Scope of UCMJ art. 109. All property, both real and personal, which is not military property of the United States.

a) Avis rental car, two passenger cars, a fence owned by a German corporation, and a German road marker met the definition of personal property. *United States v. Valadez*, 10 M.J. 529 (A.C.M.R. 1980).

b) Privately owned passenger car. *United States v. Bernacki*, 33 C.M.R. 175 (C.M.A. 1963).

c) Privately owned boat. *United States v. Priest*, 7 M.J. 791 (N.C.M.R. 1979).

d) Real and personal property belonging to officers' club. *United States v. Geisler*, 37 C.M.R. 530 (A.C.M.R. 1965).

e) Real and personal property belonging to the post exchange. *United States v. Underwood*, 41 C.M.R. 410 (A.C.M.R. 1969); *United States v. Schelin*, 12 M.J. 575 (A.C.M.R. 1981), *aff'd*, 15 M.J. 210 (C.M.A. 1983); *contra United States v. Mullins*, 34 C.M.R. 694 (N.C.M.R. 1964) and *United States v. Harvey*, 6 M.J. 545 (N.C.M.R. 1978).

3. Differing Standard for Real and Personal Property. *United States v. Bernacki*, 33 C.M.R. 175 (C.M.A. 1963) (Analysis of the terms of the Article itself indicates two offenses are denounced: the waste or spoliation of real property; and destruction or damage to personal property. As to real property, either willful or reckless waste or spoliation is proscribed. But, as to personal property, we note that the disjunctive alternative of a reckless act is singularly missing; the Code outlaws damage or destruction done "willfully and wrongfully." With regard to personal property, the act denounced must be willful).

4. Real Property. This portion of Article 109 proscribes the willful or reckless waste or spoliation of the real property of another.

a) Real property is defined as land, and generally whatever is erected on or growing on or affixed to land. Black's Law Dictionary 1096 (5th ed. 1979).

b) The term "wastes" and "spoils", as used in this article, refers to such wrongful acts of voluntary destruction of or permanent damage to real property as burning down buildings, burning piers, tearing down fences, or cutting down trees. MCM, pt. IV, ¶ 45c(1).

5. Personal Property. This portion of Article 109 proscribes the willful and wrongful injury to non-military personal property.

a) Violation of this punitive article exists when personal, non-military property is either destroyed or damaged. To be destroyed, the property need not be completely demolished or annihilated, but need only be sufficiently injured to be useless for the purpose for which it was intended. Damage consists of any physical injury to the property. MCM, pt. IV, ¶ 45c(2).

b) Mere negligent or reckless conduct does not satisfy the specific intent necessary to constitute this offense.

(1) Offense of willful and wrongful damage to private property requires proof of an actual intent to damage, as distinguished from a reckless disregard of property. *United States v. Bernacki*, 33 C.M.R. 175 (C.M.A. 1963). Regardless of the intentional nature of the cause precipitating damage to personal, non-military property, in the absence of evidence that the destruction or damage was the intended result of the accused, a

conviction under this portion of Article 109 is not supported. *United States v. Jones*, 50 C.M.R. 724 (A.C.M.R. 1975).

(2) *United States v. Priest*, 7 M.J. 791 (N.C.M.R. 1979) (accused's admission that he acted in grossly negligent or reckless manner in operating a privately owned boat in shallow water was an insufficient basis for conviction of willfully damaging private personal property of another, in that such an offense must be committed "willfully").

(3) *United States v. Youkum*, 8 M.J. 763 (A.C.M.R. 1980) (evidence that accused got into his vehicle in a highly angered, vengeful state of mind, revved engine causing wheels to spin, reached high rate of speed in a short distance, aimed vehicle unerringly at victim as well as at parked vehicle from which victim had dismounted, and made no effort to stop until after he had damaged all three was sufficient circumstantial evidence to sustain conviction of willfully and wrongfully damaging vehicles).

(4) *United States v. Garcia*, 29 M.J. 721 (C.G.C.M.R. 1989). The accused must intend to cause the destruction or damage. Unintentionally breaking a jewelry case to take the contents is insufficient for guilt. *See* TJAGSA Practice Note, *Damaging Property and Mens Rea*, Army Law., Feb. 1990, at 66 (discusses *Garcia*).

(5) *United States v. White*, 61 M.J. 521 (N-M. Ct. Crim. App. 2005) (insufficient proof of *mens rea* in a willful damage to nonmilitary property case where accused threw himself in front of a vehicle driven by a Japanese national; he denied any intention of damaging the property, but rather claimed his purpose in jumping in front of the vehicle was to injure himself).

6. Pleading the offense. When charged with damage or destruction of non-military personal property, the government should allege that the accused acted in a "willful" manner. *But see United States v. Valadez*, 10 M.J. 529 (A.C.M.R. 1980) (inartfully drawn specification alleging the willful and wrongful damage of a private automobile by operating it in a reckless manner was not fatal).

7. Value. As a general rule, the amount of damage is the estimated or actual cost of repair by artisans employed in this work who are available to the community wherein the owner resides, or the replacement cost, whichever is less. See also the discussion of value pertaining to Article 108, UCMJ.

LI. MAIL MATTER: WRONGFUL TAKING, OPENING, ETC., ART. 109a

VESSEL/VEHICLE OFFENSES

LII. IMPROPER HAZARDING OF VESSEL/AIRCRAFT, ART. 110

LIII. LEAVING SCENE OF VEHICLE ACCIDENT, ART. 111

INTOXICATION/DRUG OFFENSES

LIV. DRUNKENNESS AND OTHER INCAPACITATION OFFENSES, ART 112

LV. WRONGFUL USE/POSSESSION/ETC. OF CONTROLLED SUBSTANCES, ART 112a

A. Drug offenses fall into several categories under the UCMJ.

1. UCMJ art. 112a. Covers certain drugs listed in the statutory language of Art. 112a, substances listed under Schedules I through V of the Controlled Substances Act (21 U.S.C. § 812), and any other drugs that the President may see fit to prohibit in the military.

2. AR 600-85, the Army Substance Abuse Program (28 November 2016), para. 4-2p. This is a punitive provision that expands the list of drugs that Soldiers are prohibited from using. Offenses are punished under UCMJ art. 92(1).

3. There are numerous hazardous substances that are not expressly contained in any of the two categories described above. Such substances may be prohibited by operation of other federal statutes, for example 21 U.S.C. § 813. In the absence of such a statute applicable to a particular hazardous substance, the use, possession, distribution, or manufacture or such substances may still be prohibited by other provisions of Title 21 of the U.S. Code. If this is the case, then such misconduct may be prosecuted under clause three of Article 134. *See, e.g., United States v. Reichenbach*, 29 M.J. 128 (C.M.A. 1989)

4. Finally, the abuse of substances not included in the categories described above may also violate clauses 1 and 2 of Article 134. *See generally United States v. Reichenbach*, 29 M.J. 128 (C.M.A. 1989); *see, e.g., United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005) (wrongful inhalation of nitrous oxide that impaired and altered thinking and could damage the brain); *United States v. Glover*, 50 M.J. 476 (C.A.A.F. 1999) (wrongful inhalation of aerosol "dust-off"). **NOTE:** After 2 Feb 09, the conduct in both *Erickson* and *Glover* of these cases would be covered under AR 600-85, para. 4-2m (4-2p after Rapid Action Revision on 2 Dec 09; 4-2p after revision of the regulation on 28 Nov 16).

B. UCMJ art. 112a: The Statutory Framework.

1. Article 112a, UCMJ, provides in part: Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.

2. Types of Controlled Substances Covered by Article 112a. Article 112a, UCMJ, is a statute of limited scope in that it only prescribes conduct relating to three specific categories of controlled substances; it does not purport to "ban every new drug mischief." *United States v. Tyhurst*, 28 M.J. 671, 675 (A.F.C.M.R.), *rev'd in part*, 29 M.J. 324 (C.M.A. 1989). Substances are "controlled" for purposes of this article if:

a) Congress listed them in the text of Article 112a.

b) The President listed them in the MCM for the purposes of Article 112a, UCMJ, or

c) They are listed in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. § 812).

3. Types of Conduct Prescribed by Article 112a, UCMJ. Article 112a prohibits an expansive array of conduct relating to controlled substances. The following types of conduct are expressly prohibited: Possession; Use; Manufacture; Distribution; Import/Export; Introduction; Possession, introduction, or manufacture with intent to distribute.

4. Time of war. When declared by Congress or in accordance with a factual determination by the President. R.C.M. 103(21); *United States v. Avarette*, 41 C.M.R. 363 (C.M.A. 1970); *United*

States v. Anderson, 38 C.M.R. 386 (C.M.A. 1968). If element is alleged, the maximum period of confinement authorized for the offense shall be increased by 5 years. M.C.M., pt. IV, ¶ 50e.

5. Intent to distribute.

a) Intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference of intent to distribute are: possession of a quantity of substance in excess of that which one would be likely to have for personal use; market value of the substance; the manner in which the substance is packaged; and that the accused is not a user of the substance. On the other hand, evidence that the accused is addicted to or is a heavy user of the substance may tend to negate an inference of intent to distribute. MCM, pt. IV, ¶ 50c(6).

b) Possession with intent to distribute does not require ownership. *United States v. Davis*, 562 F.2d 681 (D.C. Cir. 1977). *See also United States v. Wilson*, 7 M.J. 290 (C.M.A. 1979).

c) To convict for possession with intent to distribute, fact finder must be willing, where no evidence is presented of actual distribution, to find beyond a reasonable doubt that the accused would not have possessed so substantial a quantity of drugs if he merely intended to use them himself. *United States v. Morgan*, 581 F.2d 933 (D.C. Cir. 1978); see also *United States v. Turner*, 396 U.S. 398 (1970) (because accused's possession of 14.68 grams of a cocaine and sugar mixture of which 5% was cocaine might have been exclusively for his personal use, evidence was insufficient to support conviction for distribution).

d) Evidence of resale value of drug may support inference of intent to distribute. *United States v. Ramirez-Rodriguez*, 552 F.2d 883 (9th Cir. 1977).

e) Circumstantial evidence of intent to distribute may require expert testimony as to dosage units, street value, and packaging. *See, e.g.*, *United States v. Blake*, 484 F.2d 50 (7th Cir.), *cert. denied*, 422 U.S. 919 (1979) (expert testimony that 14.3 grams of 17.3% pure heroin would make 420 "dime bags" having a St. Louis street value of $4,200); *United States v. Wilkerson*, 478 F.2d 813, 815 n. 3 (8th Cir. 1973) (49 pounds of marijuana worth $58,000 when first broken up and $71,500 if broken into joints); *United States v. Echols*, 477 F.2d 37 (8th Cir.), *cert. denied*, 414 U.S. 825 (1973) (199.73 grams of cocaine worth $200,000); *United States v. Hollman*, 541 F.2d 196 (8th Cir. 1976) (127 foil packets of heroin worth $20 each). *See generally United States v. Gould*, 13 M.J. 734 (A.C.M.R. 1982) (35 individually wrapped pieces of hashish).

f) A finding of addiction may support an inference that a large quantity of drugs were kept for personal use. *See United States v. Raminez-Rodriguez*, 552 F.2d 883 (9th Cir. 1977); *United States v. Kelly*, 527 F.2d 961 (9th Cir. 1976). (wherein the accused had 448 grams of hashish with a market value of $4,000-7,000 when broken into between 4,000 and 18,000 individual dosage units, but there was no evidence the appellant was addicted to hashish or marijuana).

C. Use.

1. Elements.

a) That the accused used a controlled substance; and

b) That the use by the accused was wrongful.

2. Defined.

a) "[T]o inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance." MCM, pt. IV, ¶ 50c(10).

b) Administration or physical assimilation of a controlled substance into one's body or system. *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986).

3. Pleadings.

a) Because it is often impossible to prove the exact date and location of drug use and because time and location are not of the essence of this offense, courts allow some latitude in proving and pleading offenses of this sort. *United States v. Miller*, 34 M.J. 598 (A.C.M.R. 1992).

b) However, where a specification alleges wrongful acts on "divers occasions," the members of a panel must be instructed that any findings by exceptions and substitutions that remove the "divers occasions" language must clearly reflect the specific instance of conduct upon which their modified findings are based by referring to a relevant date or other facts in evidence that will clearly put accused and reviewing courts on notice of what conduct served as basis for the findings. *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003); *United States v. Seider*, 60 M.J. 36 (C.A.A.F. 2004); *United States v. Augspurger*, 61 M.J. 189 (2005) (citing the analysis in *Seider*).

c) The prosecution must nonetheless prove beyond a reasonable doubt that the accused used controlled substance during the period of time alleged in the specification. *United States v. Williams*, 37 M.J. 972 (A.C.M.R. 1993); *United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993).

4. Inferences and Proof of Use.

a) Placebo effect. Expert testimony concerning herbal ecstasy and the effects described by the recipient in this case supported the factfinder's conclusion that this was MDMA rather than herbal ecstasy. In addition, a placebo effect was unlikely in this case because the recipient did not have any preconceived notion of what to expect. Finally, the government produced evidence that the participants used the term "ecstasy" rather than "herbal ecstasy" in referring to the drug. *United States v. Griggs*, 61 M.J. 402 (C.A.A.F. 2005).

b) Permissive inference of wrongfulness drawn from the positive result on urinalysis test is sufficient to support a finding of wrongful use of marijuana. *United States v Pabon*, 42 M.J. 404 (1995); *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987).

c) Laboratory results of urinalysis, coupled with expert testimony explaining the results, constituted sufficient evidence to establish beyond a reasonable doubt that the accused knowingly and wrongfully used marijuana. *United States v Bond*, 46 M.J. 86 (1997); *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986).

d) When the sole evidence of drug use is a positive laboratory test result, knowledge of the presence of the controlled substance may be inferred if the prosecution presents expert testimony explaining the underlying scientific methodology and the significance of the test result, so as to provide a rational basis for inferring that the substance was knowingly and wrongfully used. *United States v. Campbell*, 52 M.J. 386 (C.A.A.F. 2000) (clarifying, on reconsideration, its earlier holding that evidence, in this case, insufficient to permit inference of wrongfulness from concentration of LSD reported through use of GC/MS/MS test); *but see United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001) (positive urinalysis properly admitted under standards applicable to scientific evidence, when accompanied by interpretative expert testimony, provides legally sufficient basis to draw permissive inference of knowing, wrongful use of controlled substance); *but see United States v. Hunt*, 33 M.J. 345 (C.M.A. 1991) (result of urinalysis alone, with no expert testimony explaining the results, is insufficient to establish guilt).

e) Results of urinalysis alone, with no expert testimony explaining the results, are insufficient to establish guilt. *United States v. Hunt*, 33 M.J. 345 (C.M.A. 1991); *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987); *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005) (testimony from witnesses (who knew the accused throughout the charged period) that they had never seen him use drugs or observed him under the influence of drugs goes to the issue of knowing and wrongful use, and could have bolstered an innocent ingestion defense).

f) Manual provision that allows use of a permissive inference to prove wrongful use is constitutional. *United States v. Bassano*, 23 M.J. 661 (A.F.C.M.R. 1986).

g) Conviction for drug use affirmed where government introduced lab report and stipulation explaining the report. *United States v. Spann*, 24 M.J. 508 (A.F.C.M.R. 1987).

h) Hair analysis. Evidence was legally and factually sufficient to sustain conviction for unlawful use of cocaine; hair analysis revealed presence of cocaine in hair shafts, there was expert testimony that presence of cocaine in hair shafts was metabolically explained by ingestion, and that it did not occur as a natural phenomenon, accused's own witness conceded that there was cocaine in the hair sample tested, and chain of custody established that the sample was from the accused. *United States v. Bush*, 44 M.J. 646 (A.F. Ct. Crim. App. 1996), *aff'd*, 47 M.J. 305 (C.A.A.F. 1997).

i) Admissions of accused. M.R.E. 304(c) states that an admission or confession of the accused may be considered as evidence on the question of guilt "only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession." Further, the rule states that other uncorroborated confessions or admissions of the accused cannot be used as that independent evidence. Note, however, that not every element or fact contained in the confession or admission must be independently proven for it to be deemed trustworthy such that it is admissible. Only the military judge can determine whether independent evidence raised is sufficient to corroborate the admission or confession. This rule revision is largely in response to *United States v. Adams*, 74 M.J. 137 (C.A.A.F. 2015).

5. Knowledge.

a) There is no express mention of a mens rea requirement in the text of Article 112a for the use, possession, or distribution of controlled substances; the article merely prohibits the "wrongful" use, possession, or distribution of various controlled substances. *See* UCMJ art. 112a. Likewise the MCM does not identify a mens rea in its description of the elements of these offenses. *See* MCM, pt. IV, ¶ 50b(2). However, the Court of Military Appeals (CMA) has long held that the absence of knowledge as to the presence of the substance in question or its contraband nature may give rise to a mistake or ignorance of fact defense to charges of use or possession of controlled substance. *E.g.*, *United States v. Greenwood*, 19 C.M.R. 335 (C.M.A. 1955). Later, C.M.A. explicitly held that court-martial panels must be instructed that an accused must knowingly possess or use a controlled substance to be criminally liable for such an act. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

b) There are two discrete types of knowledge that are relevant to the offenses in question: knowledge of the very presence of the substance, and knowledge of the physical composition of the substance. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988) *rev'd in part on other grounds*, *United States v. Payne*, 73 M.J. 19 (C.A.A.F. 2014); *United States v. Williams*, 37 M.J. 972 (A.C.M.R. 1993); *United States v. Heitkamp*, 65 M.J. 861 (A. Ct. Crim. App. 2007).

(1) If an accused is unaware of the presence of a controlled substance in another, lawful substance, then the accused may have a defense of ignorance of fact. Such a circumstance may arise when a controlled substance is placed in a drink or other foodstuffs without the knowledge of the accused. The accused would lack the knowledge required for "use" of a controlled substance. *Mance*, 26 M.J. at 253-54 . However, the accused may not 'deliberately avoid" knowledge of the nature of the substance. *United States v. Brown*, 50 M.J. 262 (C.A.A.F. 1999) (defendant must be aware of the high probability that the substance was of a contraband nature and deliberately contrive to avoid knowledge of the substance's nature). MCM pt. IV, ¶ 50c(11).

(2) Alternatively, the accused may be aware of the presence of the substance but incorrectly believe that it is innocuous. This absence of knowledge as to the contraband nature of a substance may give rise to a mistake of fact defense. In this circumstance, the accused lacks the knowledge required to establish that the use was "wrongful." *United States v. Mance*, 26 M.J. 244, 254 (C.M.A. 1988),) *rev'd in part on other grounds, United States v. Payne*, 73 M.J. 19 (C.A.A.F. 2014).

(3) To be guilty of wrongful possession of a controlled substance, the accused need only know about the presence and the identity of the substance. *United States v. Heitkamp*, 65 M.J. 861 (A. Ct. Crim. App. 2007).

c) Intersection with mistake of law. *United States v. Heitkamp*, 65 M.J. 861 (A. Ct. Crim. App. 2007). Accused possessed methandienone, a Schedule III controlled substance, but thought it was legal to possess the steroid. To be guilty of wrongful possession of a controlled substance, the accused need only know about the presence and the identity of the substance. His knowledge of the unlawfulness of the contraband item is not a defense. "[I]f an accused knows the identity of a substance that he is possessing or using but does not know that such possession or use is illegal, his ignorance is immaterial . . . because ignorance of the law is no defense."

d) The presence of the controlled substance gives rise to a permissive inference that an accused possessed both types of knowledge required to establish wrongful possession or use. *Mance*, 26 M.J. at 254.

e) Merely alleging in the pleading that a substance is listed on a federal schedule will not sustain a conviction for those substances not listed in Article 112a. *United States v. Bradley*, 68 M.J. 556 (A. Ct.Crim.App. 2009)(setting aside conviction for possession of "3,4 methylenedioxymethamphetamine," commonly known as "ecstacy," where trial counsel failed to put on any evidence—such as a copy of the Controlled Substances Act—and did not request the military judge to take judicial notice of the matter); *United States v. Paul*, 73 M.J. 274 (C.A.A.F. 2014) (government introduced only evidence that accused used "ecstasy," and no evidence that "ecstasy" was 3,4-methlenedioxymethampetamine; did not ask for judicial notice at trial; court of criminal appeals could not take judicial notice of an element of the offense that the government failed to prove).

6. Applications.

a) Use of leftover prescription drugs for a different ailment than that for which they were prescribed likely constitutes wrongful use as a matter of law. *United States v. Mull*, 76 M.J. 741 (A. F. Ct. C. App. 2017), *overruling United States v. Lancaster*, 36 M.J. 1116 (A.F.C.M.R. 1993). In *Mull*, appellant admitted to using leftover prescription diazepam for a reason it was not prescribed for, to help augment heroin use, and for which he lacked authorization. *See also United States v. Pariso*, 65 M.J. 722 (A. F. Ct. of C. App. 2007).

b) One who knowingly ingests a controlled substance that he believes to be only cocaine, but actually contains cocaine laced with methamphetamine, may be found guilty of wrongful use of *both* substances; an accused need not know the exact pharmacological identity of the substance, but merely that it is contraband. *United States v. Stringfellow*, 32 M.J. 335 (C.M.A. 1991); *see United States v. Miles*, 31 M.J. 7 (C.M.A. 1990) (holding that findings were proper but that, when evidence indicates use of multiple drugs was not separate, the use should be consolidated into a single specification); *United States v. Alexander*, 32 M.J. 664 (A.C.M.R. 1991), *aff'd*, 34 M.J. 121 (C.M.A. 1992). In *United States v. Dillon*, 61 M.J. 221 (2005) (ecstasy and methamphetamine).

c) Accused not guilty of wrongful use of marijuana if he is a law enforcement official conducting legitimate law enforcement activities. *United States v. Flannigan*, 31 M.J. 240 (C.M.A. 1990); *see generally* TJAGSA Practice Note, *Lawfully Using Marijuana to Protect One's Cover*, Army Law., Mar. 1991, at 47 (discusses *Flannigan*). This rule does not apply, however, to possession or use of drugs caused by addiction, incurred as a result of earlier drug use necessitated when supplier forced accused, a drug informant who was not acting with approval of law enforcement authorities, to use drugs to prove that he was not an informer, occurring after accused was no longer an informant and his use was not necessary to protect his life or his cover. *United States v. Wilson*, 44 M.J. 223 (C.A.A.F. 1996).

d) Prosecution may not argue that the defense of innocent ingestion of marijuana should be rejected by court members to discourage other soldiers from raising it. *United States v. Causey*, 37 M.J. 308 (C.M.A. 1993).

e) Use of hemp products may be limited or prohibited by regulation or order as long as the limit or prohibition has a valid military purpose. (*United States v. Pugh*, 77 M.J. 1 (C.A.A.F. 2017) (finding a provision of AFI 90-507 overly broad and lacking a valid military purpose, thus overturning the accused's convictions on that charge). Such use would be prosecuted under Article 92, UCMJ.

D. Possession.

1. Elements.

a) Possession of controlled substance.

b) Knowledge of possession.

c) Knowledge of contraband nature of substance.

d) Possession is wrongful, *i.e.*, without legal justification or authorization.

2. Possession Defined.

a) Possession means the exercise of control over something, including the power to preclude control by others. *United States v. Zubko*, 18 M.J. 378 (C.M.A. 1984); MCM, pt. IV, ¶ 50c(2).

b) More than one person may possess an item simultaneously.

c) Possession may be direct or constructive. Awareness of the presence of a controlled substance may be inferred from circumstantial evidence.

3. Constructive Possession.

a) An accused constructively possesses a contraband item when he is knowingly in a position or had the right to exercise dominion and control over an item, either directly or through others. *United States v. Traveler*, 20 M.J. 35 (C.M.A. 1985).

b) Mere association with one who is known to possess illegal drugs is not sufficient to convict on a theory of constructive possession. *United States v. Seger*, 25 M.J. 420 (C.M.A. 1988) ; *see also United States v Wilson*, 7 M.J. 290 (C.M.A. 1979).

c) Mere presence on the premises where a controlled substance is found or proximity to a proscribed drug is insufficient to convict on a theory of constructive possession. *United States v. Wilson*, 7 M.J. 290 (C.M.A. 1979); *United States v. Corpening*, 38 M.J. 605 (A.C.M.R. 1993) (presence in automobile in which contraband found, without more, legally insufficient to sustain conviction).

4. Innocent Possession.

a) Accused's possession of drugs cannot be innocent if the accused neither destroys the drug immediately nor delivers them to the police. *United States v. Kunkle*, 23 M.J. 213 (C.M.A. 1987).

b) Innocent or "inadvertent" possession. The "inadvertent" possession defense requires that the drugs were planted or left in the accused's possession without his knowledge, coupled with certain subsequent actions taken with an intent to immediately destroy the contraband or deliver it to law enforcement agents. Returning contraband drugs to a prior possessor or owner will not entitle an accused to claim innocent possession unless the accused inadvertently comes into possession of contraband and reasonably believes that he would be exposing himself to immediate physical danger unless he returned it to the prior possessor. *United States v. Angone*, 57 M.J. 70 (C.A.A.F. 2002).

5. Deliberate Avoidance. MCM, pt. IV, ¶ 50c(11).

a) Deliberate avoidance may also be called "deliberate ignorance," or "conscious avoidance." This doctrine allows the fact finder to infer knowledge by the defendant of a particular fact if the defendant intentionally decides to avoid knowledge of that fact. *See generally United States v. Rodriguez*, 983 F.2d 455, 457 (2d Cir. 1993).

b) The rationale for the conscious avoidance doctrine is that a defendant's affirmative efforts to "'see no evil' and 'hear no evil' do not somehow magically invest him with the ability to 'do no evil.'" *United States v. Di Tommaso*, 817 F.2d 201, 218 n.26 (2d Cir. 1987).

c) *United States v. Brown*, 50 M.J. 262 (1999) (military judge erroneously gave deliberate avoidance (a.k.a. "ostrich") instruction when evidence did not reach "high plateau" required for the instruction); *see also United States v. Newman*, 14 M.J. 474 (C.M.A. 1983).

6. Attempted Possession. One who possesses a legal drug believing it to be an illegal drug is guilty of attempted possession. *United States v. Newak*, 15 M.J. 541 (A.F.C.M.R. 1982), *rev'd in part on other grounds*, 24 M.J. 238 (C.M.A. 1987). If the evidence is insufficient to identify the substance beyond a reasonable doubt, the accused may be guilty of attempted possession. *United States v. LaFontant*, 16 M.J. 236 (C.M.A. 1983).

7. Awareness of the presence of a controlled substance may be inferred from circumstantial evidence. MCM, pt. IV, ¶ 50c(2). *United States v. Mahan*, 1 M.J. 303 (C.M.A. 1976); *see generally* DA Pam 27-9, ¶ 7-3; Hug, *Presumptions and Inferences in Criminal Law*, 56 Mil. L. Rev. 81 (1972).

8. Applications.

a) Accused properly convicted of possession with intent to distribute when accused purchased 4.1 grams of marijuana, distributed 2.8 grams, but did not realize that 1.3 grams

leaked out of the bag and remained in his pocket. *United States v. Gonzalez*, No. 20080111 (A. Ct. Crim. App. Jun. 26, 2009).

b) Accused in stockade is in "possession" of package of drugs mailed by him and returned to the stockade for inability to deliver. *United States v. Ronholt*, 42 C.M.R. 933 (N.C.M.R. 1970).

c) Mere speculation as to the identity of a substance by one non-expert witness is not legally sufficient evidence to prove possession of marijuana. *United States v. Nicholson*, 49 M.J. 478 (C.A.A.F. 1998).

d) Accused who comes into possession of drugs and who intended to return them to the original possessor is guilty of wrongful possession unless returning the drugs to the original possessor was motivated by fear for personal safety or to protect the identity/safety of an undercover investigator. *United States v. Kunkle*, 23 M.J. 213 (C.M.A. 1987); MCM (2016 ed.), pt. IV, ¶ 37 (analysis).

e) Possessing drugs for the purpose of giving them over to authorities is not an offense under Art. 112a. *United States v. Grover*, 27 C.M.R. 165 (C.M.A. 1958).

f) No "usable quantity" defense. *United States v. Birbeck*, 35 M.J. 519 (A.F.C.M.R. 1992) (small quantity of cocaine was found in bindle and entire amount consumed in testing; possession of a controlled substance is criminal without regard to amount possessed).

g) An accused who involuntarily comes into possession and intends to give it to authorities, but forgets to do so, has a legitimate defense. *United States v. Bartee*, 50 C.M.R. 51 (N.C.M.R. 1974).

h) An accused who acts on a commander's suggestion to buy drugs in order to further a drug investigation is in innocent possession. *United States v. Russell*, 2 M.J. 433 (A.C.M.R. 1955).

i) Possession is not "wrongful" where an enlisted pharmacy specialist, pursuant to his understanding of local practice and with the knowledge of and under the supervision of his superiors, maintains an average stock of narcotic drugs in order to supply sudden pharmacy needs or fill an inventory shortfall. This is so even though the stock was in his possession outside the pharmacy and its existence was prohibited by regulations. The latter fact might justify prosecution for violation of the regulation. *United States v. West*, 34 C.M.R. 449 (C.M.A. 1964).

j) Specification charging accused with possession of marijuana with intent to distribute was sufficient despite not alleging element of wrongfulness. *United States v. Berner*, 32 M.J. 570 (A.C.M.R. 1991).

k) Possession is a lesser included offense of possession with intent to distribute. *United States v. Gould*, 13 M.J. 734 (A.C.M.R. 1982); *United States v. Burno*, 624 F.2d 95 (10th Cir. 1980).

E. Distribution.

1. MCM, pt. IV, ¶ 50c(3) states: "Distribute" means to deliver to the possession of another. "Deliver" means the actual, constructive, or attempted transfer of an item, whether or not there is an agency relationship.

2. Mens Rea.

a) Distribution is a general intent crime. *United States v. Brown*, 19 M.J. 63 (C.M.A. 1984).

b) The only mens rea necessary for wrongful distribution of controlled substances is the intent to perform the act of distribution. Distribution can occur even if the recipient is unaware of the presence of drugs. *United States v. Sorrell*, 23 M.J. 122 (C.M.A. 1986). (allowing an unknowing party to deliver his controlled substances to a third party with the intent of recovering them later still constituted distribution).

c) Knowledge of the presence and the character of the controlled substance is an essential requirement of wrongful distribution. *United States v. Crumley*, 31 M.J. 21 (C.M.A. 1990).

d) Distribution may continue, for purposes of establishing aider and abettor liability, after the actual transfer if the "criminal venture" contemplates the exchange of drugs for cash. *United States v. Speer*, 40 M.J. 230 (C.M.A. 1994).

3. Pleading. Wrongfulness is an essential element of distribution. Failure to allege wrongfulness may not be fatal if the specifications as a whole can be reasonably construed to embrace an allegation of the element of wrongfulness required for conviction. *United States v. Brecheen*, 27 M.J. 67 (C.M.A. 1988).

4. Applications.

a) Distribution can consist of passing drugs from one co-conspirator to another. *United States v. Tuero*, 26 M.J. 106 (C.M.A. 1988); *see United States v. Figueroa*, 28 M.J. 570 (N.M.C.M.R. 1989).

b) Distribution can consist of passing drugs back to the original supplier. *United States v. Herring*, 31 M.J. 637 (N-M.C.M.R. 1990); *see generally* TJAGSA Practice Note, *Distributing Drugs to the Drug Distributor*, Army Law., Mar. 1991, at 44 (discussing *Herring*).

c) Distribution includes the attempted transfer of drugs. *United States v. Omick*, 30 M.J. 1122 (N-M.C.M.R. 1989); *see generally* TJAGSA Practice Note, *Does Drug Distribution Require Physical Transfer*? Army Law., Nov. 1990, at 44 (discussing *Omick*).

d) The *Swiderski* exception.

(1) Sharing drugs is distribution. *United States v. Branch*, 483 F.2d 955 (9th Cir. 1973); *United States v. Ramirez*, 608 F.2d 1261 (9th Cir. 1979). However, when two individuals simultaneously and jointly acquire possession of a drug for their own use, intending to share it together, their only crime is joint possession. *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977).

(2) The *Swiderski* exception probably does not apply to the military. *See United States v. Manley*, 52 M.J. 748 (N-M. Ct. Crim. App. 2000); *United States v. Ratleff*, 34 M.J. 80 (C.M.A. 1992) (PFC Ratleff went to mess hall with PFC Jaundoo who had hidden hashish in a can; PFC Jaundoo carried the can back to a barracks room and then gave the can to PFC Ratleff who opened the can and gave the hashish back to PFC Jaundoo; PFC Ratleff's distribution conviction affirmed). *United States v. Tingler*, 65 M.J. 545 (N-M.C.C.A 2006) (*Swiderski* decision expressly rejected as applying to courts-martial); *United States v. McCormick*, 2016 CCA LEXIS 384 (A. F. Ct. C. App. 2016) (holding that *Swiderski* does not apply in cases where accused is acting as middleman or facilitator of drug transaction). *But see United States v. Hill*, 25 M.J. 411 (C.M.A. 1988) (dicta).

(3) Examples of cases where evidence did <u>not</u> raise the *Swiderski* exception. *United States v. Hill*, 25 M.J. 411 (C.M.A. 1988); *United States v. Viser*, 27 M.J. 562 (A.C.M.R. 1988); *United States v. Allen*, 22 M.J. 512 (A.C.M.R. 1986); *United States v. Tracey*, 33 M.J. 142 (C.M.A. 1991); *United States v. Lippoldt*, 34 M.J. 523 (A.F.C.M.R. 1991); *United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992).

e) An accused cannot aid and abet a distribution between two government agents, where accused's former "agent" became a government agent and sold to a person known by the accused to be a government agent and the accused did not ratify the sale or accept the proceeds. *United States v. Bretz*, 19 M.J. 224 (C.M.A. 1985); *United States v. Elliott*, 30 M.J. 1064 (A.C.M.R. 1990). *But cf. United States v. Dayton*, 29 M.J. 6 (C.M.A. 1989) (accused guilty of distribution from source of one government agent to another government agent); *United States v. Lubitz*, 40 M.J. 165 (C.M.A. 1994) (accused not a "mere conduit" for drug distribution when he acted as buyer of cocaine with money supplied by government agent and subsequently transferred drugs to another covert government agent).

f) Evidence that the distribution was a sale for profit will normally be admissible on the merits. If not, it may be admissible for aggravation in sentencing in a guilty plea or in a contested case. *United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982); *see United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982).

g) Possession and Distribution. The elements of possession with intent to distribute are "necessarily included" within elements of distribution of a controlled substance, so accused cannot be found guilty of possession of marijuana with intent to distribute and distribution of the same marijuana on the same day. *United States v. Savage*, 50 M.J. 244 (C.A.A.F. 1999); see also *United States v. Scalarone*, 52 M.J. 539 (N-M. Ct. Crim. App. 1999).

5. Use of Firearms. Carrying a firearm during a drug trafficking crime is a violation of 18 U.S.C. § 924(g) and may be separately punished.

6. Use of a communication facility (*e.g.*, telephone, fax, beeper) to facilitate a drug transaction is a violation of 21 U.S.C. § 843(b) and may be separately punished.

F. Manufacture.

1. MCM, pt. IV, ¶ 50c(4) states: "Manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of such substance or labeling or relabeling of its container. The term "production" as used above includes the planting, cultivating, growing, or harvesting of a drug or other substance.

2. The definition is drawn from 21 U.S.C. § 802 (14) and (21).

3. Psilocybin mushrooms. Appellant planted spores from "magic mushroom" kit, but they failed to germinate. For the offense to be complete, the controlled substance must be present in the cultivated planting. Here, appellant is guilty only of an attempt to produce a controlled substance. Appellant ordered the "magic mushroom" kit, followed the instructions, and planted the spores with the specific intent of growing the contraband, acts that amounted to more than mere preparation. *United States v. Lee* , 61 M.J. 627 (C.G. Ct. Crim. App. 2005).

G. Introduction.

1. Introduction means to bring into or onto an installation, vessel, vehicle, or aircraft used by or under control of the Armed Forces. Installation is broadly defined and includes posts, camps, and stations. *See generally United States v. Jones*, 6 C.M.R. 80 (C.M.A. 1952) (Augsburg Autobahn Snack Bar a station).

2. An accused cannot be convicted of aiding and abetting introduction of marijuana by AFOSI agent where accused had already sold marijuana to agent off base and marijuana was agent's sole property when agent brought it onto base. *United States v. Mercer*, 18 M.J. 644 (A.F.C.M.R. 1984).

3. Accused must have actual knowledge that he is entering an installation to be guilty of introduction. *United States v. Thomas*, 65 M.J. 132 (C.A.A.F. 2007).

H. Drug Paraphernalia.

1. Because possession of "drug paraphernalia" constitutes only a remote and indirect threat to good order and discipline, it cannot be charged under Article 134(1) as an offense which is directly and palpably prejudicial to good order and discipline. This offense therefore must be charged under Article 92 as the violation of a general order/regulation or under Article 134(3), assimilating a local state statute under 18 U.S.C. §13. *United States v. Caballero*, 49 C.M.R. 594 (C.M.A. 1975)). The AFCCA has interpreted *Caballero* to mean that when a punitive lawful general order or regulation proscribing the possession of drug paraphernalia exists, the offense must be charged under Art. 92(1), UCMJ, and not Art. 134. *See also United States v. Borunda*, 67 M.J. 607 (A.F. Ct. Crim. App. 2009). In the absence of a lawful general order or regulation, the Government is at liberty to charge the possession of drug paraphernalia under either Art. 92(3) or Art. 134. *Borunda*, 67 M.J. at 607.

2. Most installations have promulgated local punitive regulations dealing with drug paraphernalia.

3. The DEA model statute has come under attack for being unconstitutionally vague and overbroad. *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916 (6th Cir. 1980), *vacated and remanded*, 451 U.S. 1013 (1981). *See generally Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1981) (ordinance requiring a business to obtain a license if it sells any items "designed or marketed for use with illegal cannabis or drugs" upheld; DEA code as adopted in Ohio struck down).

4. Military regulations have been challenged for vagueness and overbreadth. *United States v. Sweney*, 48 C.M.R. 476 (A.C.M.R. 1974) (regulation upheld as being neither vague nor overbroad); *see also United States v. Cannon*, 13 M.J. 777 (A.C.M.R. 1982) (upholding regulation prohibiting possession of instruments or devices that might be used to administer or dispense prohibited drugs). *See generally United States v. Clarke*, 13 M.J. 566 (A.C.M.R. 1982); *United States v. Bradley*, 15 M.J. 843 (A.F.C.M.R. 1983); *United States v. Hester*, 17 M.J. 1094 (A.F.C.M.R. 1984).

5. To show violation of a regulation by possessing drug paraphernalia, the government need only prove that the accused exercised dominion and control over the paraphernalia. *United States v. McKnight*, 30 M.J. 205 (C.M.A. 1990). Prosecutors must also establish a nexus between drug use and an article that is not intrinsically drug-related. *United States v. Camacho*, 58 M.J. 624 (N-M. Ct. Crim. App. 2003) (government failed to show a nexus between use of methamphetamines a butane torch).

6. Applications.

a) Regulations will be closely scrutinized. Bindles, scales, zip-lock bags, and other materials associated with use or ingestion of drugs did not fall within regulatory prohibition of "drug abuse paraphernalia" of Navy Instruction. *United States v. Painter*, 39 M.J. 578 (N.M.C.M.R. 1993) (conviction set aside).

b) Written instructions for producing controlled substances could constitute "drug paraphernalia" within meaning of Air Force Regulation. *United States v. McDavid*, 37 M.J. 861 (A.F.C.M.R. 1993).

I. Multiplicity.

1. Simultaneous possession of different drugs constitutes only one offense for sentencing. *United States v. Hughes*, 1 M.J. 346 (C.M.A. 1976); *United States v. Griffen*, 8 M.J. 66 (C.M.A. 1979). Simultaneous use of two substances is not necessarily multiplicious for findings but may be unreasonable multiplication of charges. United *States v. Ray*, 51 M.J. 511 (N-M. Ct. Crim. App. 1999) *overruled on other grounds by United States v. Quiroz*, 53 M.J. 600 (N-M.C.C.A. 2000). Not multiplicious to charge two separate specifications for the simultaneous use of ecstacy and methamphetamine because one is listed in Article 112a, UCMJ, and the other is found in the schedules of the Controlled Substances Act. *United States v. Dillon*, 61 M.J. 221 (A.F. Ct. C. App. 2005). Simultaneous distribution of two different substances is not multiplicious but may constitute unreasonable multiplication of charges. *See United States v. Inthavong*, 48 M.J. 628 (Army Ct. Crim. App. 1998).

2. No distinction between marijuana and hashish. *United States v. Kelly*, 527 F.2d 961 (9th Cir. 1976); *United States v. Lee*, 1 M.J. 15 (C.M.A. 1975); *United States v. Nelson*, 47 C.M.R. 395 (A.C.M.R. 1973).

3. Sales at the same place between same parties but fifteen minutes apart were separately punishable. *United States v. Hernandez*, 16 M.J. 674 (A.C.M.R. 1983).

4. Possession of drugs from one cache at another time and place constitutes a separate offense warranting separate punishment. *United States v. Marbury*, 4 M.J. 823 (A.C.M.R. 1978).

5. Solicitation to sell and transfer of drugs are separately punishable when respective acts occurred at separate times (four hours apart) and at separate locations. *United States v. Irving*, 3 M.J. 6 (C.M.A. 1977).

6. Use was separately punishable from possession and sale where quantity used was not same as quantity possessed. *United States v. Smith*, 14 M.J. 430 (C.M.A. 1983); *see United States v. Nixon*, 29 M.J. 505 (A.C.M.R. 1989). But if quantity used and possessed is the same, possession charge is multiplicious for findings. *United States v. Bullington*, 18 M.J. 164 (C.M.A. 1984); *see United States v. Hogan*, 20 M.J. 221 (C.M.A. 1985). *See generally United States v. Cumber*, 30 M.J. 736 (A.F.C.M.R. 1990) (use and distribution of same drug not multiplicious for sentencing).

7. Attempted sale of a proscribed drug and possession of the same substance were so integrated as to merge as a single event subject only to a single punishment. *United States v. Smith*, 1 M.J. 260 (C.M.A. 1976); *see also United States v. Clarke*, 13 M.J. 566 (A.C.M.R. 1982).

8. Where charges of possession and transfer of heroin were based on accused's retention of some heroin after transferring a quantity of the drug to two persons who were to sell it on the open market as accused's agents, the two offenses were treated as single for purposes of punishment. *United States v. Irving*, 3 M.J. 6 (C.M.A. 1977).

9. Possession of one packet of drugs and simultaneous distribution of a separate packet of drugs were separately punishable. *United States v. Wilson*, 20 M.J. 3 (C.M.A. 1985) (summary disposition). Possession with intent to distribute 35 hits of LSD was separately punishable from the simultaneous distribution of 15 hits of LSD. *United States v. Coast*, 20 M.J. 3 (C.M.A. 1985) (possession of LSD with intent to distribute was multiplicious with distribution of LSD); *see also United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986); *United States v. Muller*, 21 M.J. 205 (C.M.A. 1986); *United States v. Jennings*, 20 M.J. 223 (C.M.A. 1985). Sale and possession of a separate, cross-town cache were separately punishable. *United States v. Isaacs*, 19 M.J. 220 (C.M.A. 1985). Where the accused bought a large amount of marijuana to be sold in smaller quantities at a profit, where he made a final sale of approximately one eighth of it to a friend, and where the remainder was retained for future sales or other disposition, different legal and societal norms were violated by the sale and possession, and separate punishments were proper. *United States v.*

Wessels, 8 M.J. 747 (A.F.C.M.R. 1980); *accord United States v. Chisholm*, 10 M.J. 795 (A.F.C.M.R. 1981); *United States v. DeSoto*, 15 M.J. 645 (N-M.C.M.R. 1982); *United States v. Anglin*, 15 M.J. 1010 *United States v. Ansley*, 16 M.J. 584 (A.C.M.R. 1983); *United States v. Worden*, 17 M.J. 887 (A.F.C.M.R. 1984).

10. Possession and distribution of cocaine on divers occasions may be separate offenses under certain facts. *United States v. Bowers*, 20 M.J. 1003 (A.F.C.M.R. 1985) (considering guilty plea and facts before the court).

11. Distribution of a controlled substance necessarily includes possession with intent to distribute. *United States v. Savage*, 50 M.J. 244 (C.A.A.F. 1999); *United States v. Scalarone*, 52 M.J. 539 (N-M. Ct. Crim. App. 1999).

12. Introduction of drugs onto military installation and sale of portion on same day not multiplicious for sentencing. *United States v. Beardsley*, 13 M.J. 657 (N.M.C.M.R. 1982). Introduction and possession are, however, multiplicious. *United States v. Decker*, 19 M.J. 351 (C.M.A. 1985); *United States v. Roman-Luciano*, 13 M.J. 490 (C.M.A. 1982) (summary disposition); *United States v. Miles*, 15 M.J. 431 (C.M.A. 1983); *United States v. Hendrickson*, 16 M.J. 62 (C.M.A. 1983). But if the amount possessed is greater than the amount introduced, possession of the excess amount may not be multiplicious for any purpose if the excess amount is explained on the record. *United States v. Morrison*, 18 M.J. 108 (C.M.A. 1984) (summary disposition); *cf. United States v. Hill*, 18 M.J. 459 (possession of excess amount dismissed where not explained on the record). Finally, introduction and possession with intent to distribute are not multiplicious. *United States v. Zupancic*, 18 M.J. 387 (C.M.A. 1984).

13. Introduction with intent to distribute and distribution are multiplicious for findings. *United States v. Wheatcraft*, 23 M.J. 687 (A.F.C.M.R. 1986); *contra United States v. Beesler*, 16 M.J. 988 (A.C.M.R. 1983).

14. Possession and distribution when time, place, and amount are the same are multiplicious for findings. *United States v. Zubko*, 18 M.J. 378 (C.M.A. 1984); *United States v. Brown*, 19 M.J. 63 (C.M.A. 1984).

15. Larceny of and possession of same drugs not multiplicious for sentencing. *United States v. Logan*, 13 M.J. 821 (A.C.M.R. 1982).

16. Possession and possession with intent to distribute are multiplicious for sentencing. The appropriate remedy is dismissal of the possession specification. *United States v. Forance*, 12 M.J. 312 (C.M.A. 1981) (summary disposition); *United States v. Conley*, 14 M.J. 229 (C.M.A. 1982) (summary disposition).

17. Possession of drugs and drug paraphernalia at the same time and place are multiplicious for sentencing. *United States v. Bell*, 16 M.J. 204 (C.M.A. 1983) (summary disposition).

18. Possession with intent to distribute and introduction are multiplicious. *United States v. Antonitis*, 29 M.J. 217 (C.M.A. 1989), *aff'd*, 32 M.J. 315 (C.M.A. 1991).

19. Distribution by injection and distribution of tablets of the same drug are multiplicious. *United States v. Gumbee*, 30 M.J. 736 (A.F.C.M.R. 1990).

20. Use and distribution based upon accused smoking a marijuana cigarette then passing it to a friend were not multiplicious for sentencing purposes. *United States v. Ticehurst*, 33 M.J. 965 (N.M.C.M.R. 1991).

21. For an example of prejudicial multiplicious pleading, see generally *United States v. Sturdivant*, 13 M.J. 323 (C.M.A. 1982) (charges dismissed where accused's phone conversation

arguably setting up buy of his monthly marijuana ration led to 10 specifications being charged, a general court-martial conviction, and a sentence of dishonorable discharge, 3 years confinement and total forfeitures).

22. Simultaneous distribution not multiplicious. *United States v. Inthavong*, 48 M.J. 628 (C.A.A.F. 1998).

23. The offenses of introduction of a controlled substance, with the aggravating factor of intent to distribute, and distribution of the same controlled substance are not multiplicious. *United States v. Monday*, 52 M.J. 625 (Army Ct. Crim. App. 1999).

J. Special Rules of Evidence.

1. The laboratory report qualifies as a business record or public record exception to the hearsay rule and can be admitted into evidence once its authenticity is established. M.R.E. 803(6) and (8); *United States v. Evans*, 45 C.M.R. 353 (C.M.A. 1972); *United States v. Miller*, 49 C.M.R. 380 (C.M.A. 1974); *United States v. Strangstalien*, 7 M.J. 225 (C.M.A. 1979); *United States v. Vietor*, 10 M.J. 69 (C.M.A. 1980).

2. The admission of a laboratory report into evidence as either a business or public record does not give accused an automatic right to the attendance of the person who performed the test. Rather, the accused must make a showing as to the necessity for producing the witness. *United States v. Vietor*, 10 M.J. 69 DA Form 4137 (the chain of custody form) is admissible as either a business record or public record exception to the hearsay rule. M.R.E. 803(6) and (8). *Contra United States v. Nault*, 4 M.J. 318 (C.M.A. 1978); *United States v. Porter*, 7 M.J. 30 (C.M.A. 1979); *United States v. Neutze*, 7 M.J. 32 (C.M.A. 1979); *United States v. Oates*, 560 F.2d 45 (2nd Cir. 1977); *United States v. Helton*, 10 M.J. 820 *United States v. Scoles*, 33 C.M.R. 226 (C.M.A. 1963).

3. In *United States v. Solis*, the Air Force Court of Criminal Appeals held that the Confrontation Clause applies to drug testing reports, rendering them testimonial hearsay and making them inadmissible unless the expert conducting the testing is available for cross examination by the accused. *United States v. Solis*, 2015 CCA LEXIS 309 (A. F. Ct. C. App. 2015); s*ee also Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

4. When dealing with fungible evidence such as drugs, military courts have traditionally required that an unbroken chain of custody be established to show that the drugs seized were in fact the drugs tested at the lab, and that they were not tampered with prior to testing. The Court of Military Appeals broadened this approach and declared that even fungible evidence may be introduced without showing an unbroken chain of custody so long as the government can establish that the substance was contained in a "readily identifiable" package and that the contents of that package were not altered in any significant way. *United States v. Parker*, 10 M.J. 415 (C.M.A. 1981); *United States v. Lewis*, 11 M.J. 188 (C.M.A. 1981); *United States v. Madela*, 12 M.J. 118 (C.M.A. 1981); *United States v. Ettelson*, 13 M.J. 348, 350-51 (C.M.A. 1982). *See generally United States v. Morsell*, 30 M.J. 808 *United States v. Hudson*, 20 M.J. 607 (A.C.M.R. 1985).

5. The chemical nature of a drug may be established without the aid of a laboratory report or expert witness but with the testimony of a lay witness familiar with the physical attributes of the drug. *United States v. Tyler*, 17 M.J. 381 (C.M.A. 1984) (lay witness qualified to testify what used was cocaine despite alcohol intoxication at time of use). Tests administered by investigators to determine lay witness' ability to identify drugs were relevant to ability to identify drugs at time of use. *Id.*; *United States v. Coen*, 46 C.M.R. 1201 (N.C.M.R. 1972) (accused's statement); *United States v. Torrence*, 3 M.J. 804 (C.G.C.M.R. 1977) (accomplice witness); *United States v.*

Watkins, 5 M.J. 612 (A.C.M.R. 1978) (informer and CID agent); *United States v. Jenkins*, 5 M.J. 905 (A.C.M.R. 1978) (accused's admission is not enough to establish nature of drugs without corroborative evidence); *United States v. White*, 9 M.J. 168 (C.M.A. 1980) (accused's corroborated extrajudicial statement); *United States v. Morris*, 13 M.J. 666 (A.F.C.M.R. 1982) (transferee and witness); *United States v. Jessen*, 12 M.J. 122, 126 (C.M.A. 1981) ("simulated smoking" by undercover agent); *cf. United States v. Hickman*, 15 M.J. 674 (A.F.C.M.R. 1983) (witness merely calling the substance "marijuana" at trial insufficient); *but see United States v. LaFontant*, 16 M.J. 236 (C.M.A. 1983) (if evidence insufficient to identify substance beyond a reasonable doubt, accused may be guilty of an attempt).

6. The buyer in a drug sale case is an accomplice, and the defense is entitled to an accomplice instruction. *United States v. Hopewell*, 4 M.J. 806 (A.F.C.M.R. 1978); *United States v. Helton*, 10 M.J. 820 (A.F.C.M.R. 1981); *United States v. Scoles*, 33 C.M.R. 226 (C.M.A. 1963). No such instruction is required if buyer was Government informant. *United States v. Hand*, 8 M.J. 701 (A.F.C.M.R. 1980), *rev'd on other grounds*, 11 M.J. 321 (C.M.A. 1981); *United States v. Kelker*, 50 C.M.R. 410 (A.C.M.R. 1975).

K. Defenses.

1. The fact that the amount of controlled substance involved in any given offense is *de minimis* is no defense except as it may bear on the issues of the accused's knowledge. *United States v. Alvarez*, 27 C.M.R. 98 (C.M.A. 1958); *United States v. Nabors*, C.M.R. 101 (C.M.A. 1958); *see* MCM, pt. IV, ¶ 50c(7).

2. Knowledge, ignorance and mistake defenses.

a) Ignorance of the law (not knowing that the substance was illegal) is no defense. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988); *United States v. Greenwood*, 19 C.M.R. 335 (C.M.A. 1955); *United States v. Heitkamp*, 65 M.J. 861 (A. Ct. Crim. App. 2007) (accused stated that he did not know it was illegal to possess methandienone, a Schedule III controlled substance).

b) Ignorance of the physical presence of the substance is a legitimate defense ("I didn't know there was anything in the box . . . the locker . . . my pocket . . . the pipe."). *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

(1) Ignorance need not be reasonable, only honest. *United States v. Hansen*, 20 C.M.R. 298 (C.M.A. 1955).

(2) Knowledge that a container was present, without knowledge of the presence of the substance within, will not defeat the defense. *United States v. Avant*, 42 C.M.R. 692 (A.C.M.R. 1970).

(3) The accused's suspicion that a substance may be present is insufficient for guilt. *United States v. Whitehead*, 48 C.M.R. 344 (N.C.M.R. 1973); *United States v. Heicksen*, 40 C.M.R. 475 (A.B.R. 1969). *But see United States v. Valle-Valdez*, 554 F.2d 911 9th Cir. 1977). (holding a deliberate avoidance of knowledge was culpable only when coupled with a subjective awareness of high probability).

(4) Under some circumstances deliberate ignorance of a fact can create the same criminal liability as actual knowledge. *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983).

c) Ignorance or mistake as to "the physical composition or character" of the substance is a legitimate defense. ("I thought it was powdered sugar." "I didn't know what it was"). *United*

States v. Mance, supra; *United States v. Greenwood*, 19 C.M.R. 335 (C.M.A. 1955); *United States v. Ashworth*, 47 C.M.R. 702 (A.F.C.M.R. 1973).

(1) The ignorance or mistake need not be reasonable. *United States v. Fleener*, 43 C.M.R. 974 (A.F.C.M.R. 1971).

(2) Knowledge of the name of the substance will not necessarily defeat the defense; to be guilty, the accused must know the "narcotic quality" of the substance. *United States v. Crawford*, 20 C.M.R. 233 (C.M.A. 1955); *United States v. Baylor*, 37 C.M.R. 122 (C.M.A. 1967) (Court approves instruction that accused "must know of the presence of the substance and its narcotic nature").

(3) The mistake must be one which, if true, would exonerate the accused. *United States v. Jefferson*, 13 M.J. 779 (A.C.M.R. 1982) (mistake not exonerating where accused accepted heroin thinking he was getting hashish); *see also United States v. Morales*, 577 F.2d 769, 776 (2nd Cir. 1978); *United States v. Jewell*, 532 F.2d 697, 698 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1978).

3. Defense of innocent ingestion does not require corroborative witnesses or direct evidence. *United States v. Lewis*, 51 M.J. 376 (C.A.A.F. 1999).

4. The defense of innocent possession does not apply in those cases where an accused exercises control over an item for the purpose of preventing its imminent seizure by law enforcement or other authorities, even if he intends to thereafter expeditiously destroy the item. *United States v. Angone*, 54 M.J. 945 (A. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 70 (C.A.A.F. 2002).

5. Regulatory immunity. Issue of whether accused was entitled to regulatory exemptions of Army Regulation 600-85 were waived if not raised at trial. *United States v. Gladdis*, 12 M.J. 1005 (A.C.M.R. 1982); *United States v. Mika*, 17 M.J. 812 (A.C.M.R. 1984).

LVI. DRUNKEN OR RECKLESS OPERATION OF A VEHICLE, AIRCRAFT, OR VESSEL, ART 113

ENDANGERMENT/THREATENING OFFENSES

LVII. ENDANGERMENT OFFENSES, ART 114

A. Article 114 now includes the offenses of: 1) reckless endangerment; 2) dueling; 3) discharging a firearm under circumstances such as to endanger human life; and 4) carrying a concealed weapon.

1. Reckless Endangerment:

a) Elements

(1) That the accused did engage in conduct

(2) That the conduct was wrongful and reckless or wanton; and

(3) That the conduct was likely to produce death or grievous bodily harm to another person.

b) Definitions:

(1) "Likely to produce death or grievous bodily harm," as required for the offense of reckless endangerment, Article 114 does not differ from "likely to produce death or grievous bodily harm" for aggravated assault, Article 128.

(2) Likely to Produce. When the natural or probable consequence of particular conduct would be death or grievous bodily harm, it may be inferred that the conduct is likely to produce that results.

(3) Wantonness. "Wanton" includes "reckless" but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(4) Recklessness. "Reckless" conduct is conduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. The accused need not intentionally cause a resulting harm or know that his conduct is substantially certain to cause that result. The ultimate question is whether, under all the circumstances, the accused's conduct was of that heedless nature that made it actually or imminently dangerous to the rights or safety of others.

c) Cases.

(1) In *United States v. Herrmann*, 75 M.J. 672 (A. Ct. Crim. App. 2016), Herrmann failed to inspect parachutes so he could go home early; ACCA held this satisfied the requisite likelihood of harm. ACCA held for offenses like reckless endangerment, where the harm need not be actually inflicted, the "likelihood" of harm focuses on: (1) on the danger the conduct posed (if the magnitude of the harm is great, evidence is sufficient though the risk is statistically low); (2) the relative needlessness of one's actions (not checking parachutes in order to go home early is reckless; not checking them because of a need for rapid response may not be). Likelihood does not turn on mathematical principles like greater than 50%. "'Ultimately, the likelihood determination must clear a reasonable threshold of probability'"

(2) In *United States v. Gutierrez*, 74 M.J. 61, 66 (C.A.A.F. 2015), an aggravated assault Article 128 case, CAAF overruled the previous standard that the risk of death or grievous bodily harm must be "more than merely a fanciful, speculative, or remote possibility." The Court held the correct standard is, "whether—in plain English—the charged conduct was 'likely' to bring about grievous bodily harm." In *United States v. Odie*, No. ARMY 20130122, 2016 WL 3008136, at *4 (A. Ct. Crim. App. May 13, 2016), *review granted, decision aff'd as modified*, (C.A.A.F. July 20, 2016), ACCA applied the newly announced standard to reckless endangerment. ACCA ultimately held, even though the military judge gave Odie the wrong standard during his guilty plea, the plea could be affirmed applying the new standard to facts admitted by Odie which included that he placed a loaded weapon under a fence near a playground, with a round chambered and the safety on "fire."

2. Discharging a Firearm:

a) Elements.

(1) That the accused discharged a firearm;

(2) That the discharge was willful and wrongful; and

(3) That the discharge was under circumstances such as to endanger human life.

b) Definitions.

(1) Firearm discharge, endangering human life. "Under circumstances such as to endanger human life" refers to a reasonable potentiality for harm to human beings in general. The test is not whether the life was in fact endangered but whether, considering

the circumstances surrounding the wrongful discharge of the weapon, the act was unsafe to human life in general.

3. Carrying a Concealed Weapon

a) Elements.

(1) That the accused carried a certain weapon concealed on or about the accused's person;

(2) That the carrying was unlawful; and

(3) That the weapon was a dangerous weapon.

b) Definitions.

(1) Concealed weapon. A weapon is concealed when it is carried by a person and intentionally covered or kept from sight.

(2) Dangerous weapon. For purposes of this paragraph, a weapon is dangerous if it was specifically designed for the purpose of doing grievous bodily harm, or it was used or intended to be used by the accused to do grievous bodily harm.

(3) On or about. "On or about" means the weapon was carried on the accused's person or was within the immediate reach of the accused.

LVIII. COMMUNICATING THREATS, ART. 115

A. Communicating Threats. MCM, pt. IV, ¶ 53; UCMJ art. 115.

1. Elements.

a) That the accused communicated certain language [that a reasonable person would understand as] expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;

b) That the communication was made known to that person or to a third person; and

c) That the communication was wrongful [in that the speaker intended the statements as something other than a joke or idle banter, or intended the statements to serve something other than an innocent or legitimate purpose].

2. Explanation. This offense consists of wrongfully communicating an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future. It relates to a potential violent disturbance of public peace and tranquility. *United States v. Grembowic*, 17 M.J. 720 (N.M.C.M.R. 1983). The language in brackets in ¶ 1 originates from a CAAF opinion which analyzed the *mens rea* requirement for this offense. *United States v. Rapert*, 75 MJ 164 (C.A.A.F. 2016). This language reflects the CAAF's holding in that case that stated whether the communication is a threat is determined using an objective standard. However, for the threat to be wrongful, it must be judged from the subjective standard (from the accused's perspective).

3. Pleading. *United States v. Wartsbaugh*, 45 C.M.R. 309 (C.M.A. 1972) (pleading sufficient because evidence of surrounding circumstances may disclose the threatening nature of the words).

4. Applications.

a) Avowed present intent or determination to injure.

(1) Accused's statement that "I'd kill [my first sergeant] with no problem," made to health care professional while seeking help for drug addiction and suicidal urges, was not a present determination or intent to kill the putative victim. *United States v. Cotton*, 40 M.J. 93 (C.M.A. 1994); *United States v. Wright*, 65 M.J. 703 (N-M. Ct. Crim. App. 2007) (statements to health care professional not communicating a threat).

(2) Ineffective disclaimer. *United States v. Johnson*, 45 C.M.R. 53 (C.M.A. 1972) ("I am not threatening you . . . but in two days you are going to be in a world of pain," constitutes a threat when considered within the totality of the circumstances).

(3) Conditional threat.

(a) The "impossible" variable. *United States v. Shropshire*, 43 C.M.R. 214 (C.M.A. 1971) (physical threat to guard by restrained prisoner not actionable as no reasonable possibility existed that threat would be carried out); *see also United States v. Gately*, 13 M.J. 757 (A.F.C.M.R. 1982) (upheld lesser included offense of provoking words).

(b) The "possible" variable. *United States v. Phillips*, 42 M.J. 127 (C.A.A.F. 1995) (accused's statement to airman to "keep her damn mouth shut and [she would] make it through basic training just fine" was not premised on an impossible condition, even if the victim was not inclined to report accused's misconduct); *United States v. Brown*, 65 M.J. 227 (2006) (accused could control the contingency, and the combination of words & circumstances could make a contingent threat immediate for purposes of Article 134); *United States v. Holiday*, 16 C.M.R. 28 (C.M.A. 1954) (unrestrained prisoner's threat to injure guard was actionable even though conditioned on guard's not pushing prisoner; the condition was one accused had no right to impose); *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App. 1999) (acts and words may express what accused can and will do in the future), *aff'd*, 55 M.J. 38 (C.A.A.F. 2001); *see United States v. Alford*, 32 M.J. 596 (A.C.M.R. 1991), *aff'd*, 34 M.J. 150 (C.M.A. 1992).

(4) Idle jest, banter, and hyperbole are not threatening words. *United States v. Gilluly*, 32 C.M.R. 458 (C.M.A. 1963). In appraising the legal sufficiency of the evidence to sustain a conviction of communicating a threat, the circumstances surrounding the uttering of the words and consideration of whether the words were stated in jest or seriousness are to be evaluated. *See United States v. Johnson*, 45 C.M.R. 53 (C.M.A. 1972) (Considered in the light of the circumstances of the situation the following was held to be an illegal threat, "I am not threatening you, but I am telling you that I am not personally going to do anything to you, but in two days you are going to be in a world of pain," adding a suggestion that the victim "damn well better sleep light").

(5) The words used by the accused are significant in that they may not evidence a technical threat but rather merely state an already completed act, *e.g.*, "I have just planted a bomb in the barracks." Such a statement may constitute a simple disorder under Article 134 or a false official statement under Article 107 if made to a person in an official capacity (*e.g.*, Charge of Quarters). To meet potential problems of proof, trial counsel should plead such offenses in the alternative. *See United States v. Gilluly*, 32 C.M.R. 458 (C.M.A. 1963).

(6) Lack of intent to actually carry out the threat is not a basis for rejecting a guilty plea. *United States v. Greig*, 44 M.J. 356 (C.A.A.F. 1996) (accused admitted making threats and wished that the individuals who heard the threats believed them).

(7) Consider language and surrounding circumstances to determine whether or not words express a present determination or intent to wrongfully injure. *United States v. Hall*, 52 M.J. 809 (N-M. Ct. Crim. App 1999).

b) Communication to the victim is unnecessary. *United States v. Gilluly*, 32 C.M.R. 458 (C.M.A. 1963).

c) No specific intent is required. The intent which establishes the offense is that expressed in the language of the declaration, not the intent locked in the mind of the declarant. This is not to say the declarant's actual intention has no significance as to his guilt or innocence. A statement may declare an intention to injure and thereby ostensibly establish this element of the offense, but the declarant's true intention, the understanding of the persons to whom the statement is communicated, and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal it to be a mere jest or idle banter. *United States v. Humphrys*, 22 C.M.R. 96 (C.M.A. 1956).

d) A threat to reputation is sufficient. *United States v. Frayer*, 29 C.M.R. 416 (C.M.A. 1960); *see also United States v. Farkas*, 21 M.J. 458 (C.M.A. 1986) (threat to sell victim's diamond ring sufficient).

e) Threats not *directly* prejudicial to good order and discipline nor service discrediting do not constitute an offense. *United States v. Hill*, 48 C.M.R. 6, 7 (C.M.A. 1973) (lovers' quarrel).

f) Merger with an assault crime. *United States v. Metcalf*, 41 C.M.R. 574 (A.C.M.R. 1969) (threat after assault merges with assault for punishment purposes).

g) Threatening a potential witness is a separate offense from and may constitute obstruction of justice in violation of Article 134. *United States v. Oatney*, 41 M.J. 619 (N.M. Ct. Crim. App. 1994), *aff'd*, 45 M.J. 185 (C.A.A.F. 1996); *United States v. Rosario*, 19 M.J. 698 (A.C.M.R. 1984).

B. Communicating Threat to Use Explosive and Communicating False Threat Concerning Use of Explosive. MCM, pt. IV, ¶ 53; UCMJ art. 115(b) and 115(c).

1. Expansion of Offense. In 2005, this offense was expanded from "bomb" threats or hoaxes to include threats and hoaxes of other types, including explosives, weapons of mass destruction, biological agents, chemical agents, and other hazardous material. See MCM, pt. IV, ¶ 53c; MCM, App. 23 ¶ 109.

2. Explanation. "Threat" and "hoax" offenses can be charged under either Article 115, UCMJ, or under Article 134(3), UCMJ, a non-capital federal crime violative of 18 U.S.C.

3. "Innocent Motive." Claim of joking motive is not a defense to "bomb hoax" charge, as the victim's concern, which satisfies the requirement for maliciousness, can be inferred. *United States v. Pugh*, 28 M.J. 71 (C.M.A. 1989); *see* TJAGSA Practice Note, *"I Was Only Joking" Not a Defense to "Bomb Hoax" Charge*, Army Law., Jul. 1989, at 39 (discusses *Pugh*).

4. Similarly to Communicating a Threat, whether the communication is a threat is determined using an objective standard. However, for the threat to be wrongful, it must be judged from the subjective standard (from the accused's perspective). *See United States v. Gebert*, 2016 CCA LEXIS 662 (N-M Ct. Crim. App. Nov. 15, 2016) (*citing United States v. Rapert*, 75 MJ 164 (C.A.A.F. 2016)).

LIX.RIOT OR BREACH OF PEACE, ART. 116

LX. PROVOKING SPEECHES OR GESTURES, ART. 117

A. Provoking Words or Gestures.

1. Elements.

a) That the accused wrongfully used words or gestures towards a certain person;

b) That the words or gestures used were provoking or reproachful; and

c) That the person toward whom the words or gestures were used was a person subject to the UCMJ.

2. *Mens Rea*. No specific intent is required. *United States v. Welsh*, 15 C.M.R. 573 (N.B.R. 1954).

3. Applications.

a) The provoking words must be used in the presence of the victim and must be words which a reasonable person would expect to induce a breach of the peace under the circumstances. MCM, pt. IV, ¶ 55c.

(1) *United States v. Davis*, 37 M.J. 152 (C.M.A. 1993). Accused's statement to MP, "F___ you, Sergeant," and "F___ the MPs" was expected to induce a breach of the peace, even though the MP was not personally provoked and was trained to deal with such comments.

(2) *United States v. Thompson*, 46 C.M.R. 88 (C.M.A. 1972). Because of the physical circumstances, the offensive words to a stockade guard were unlikely to cause a fight.

(3) *United States v. Shropshire*, 34 M.J. 757 (A.F.C.M.R. 1992). Insulting comments to policeman by handcuffed suspect under apprehension were insufficient to constitute provoking words as police are trained to overlook abuse.

(4) *United States v. Meo*, 57 M.J. 744 (C.A.A.F. 2002). Guilty plea improvident when accused told ensign "[T]his is bullshit, I'm going to explode and I don't know when or on who." Although statement was disrespectful, it did not rise to the level of "fighting words."

(5) *United States v. Ybarra*, 57 M.J. 807 (N-M. Ct. Crim. App. 2002) *pet. denied*, 58 M.J. 289 (C.A.A.F. 2003). Accused pled guilty to provoking speech for using racial slurs to an NCO who was trying to restrain him.

(6) *United States v. Killion*, 75 M.J. 209 (C.A.A.F 2016). Military judge erred in instructing members to consider how an average person would react to accused's offensive words, not how hospital staff to whom the words were directed would react. The judge's instruction was incorrect in this case because a violation of Article 117 depended not on the likely reaction of the hypothetical average person but rather on the likely reaction of an objectively reasonable person in the position of the person to whom the words were addressed, and medical personnel who treated the Servicemember had training in dealing with unruly and intoxicated patients.

b) Not necessary that the accused know that the person towards whom the words or gestures are directed is a person subject to the UCMJ. MCM, pt. IV, ¶ 55c(2).

c) Merger with an assault crime. *United States v. Palms*, 47 C.M.R. 416 (A.C.M.R. 1973).

d) Separate offense from disrespect. *United States v. McHerrin*, 42 M.J. 672 (Army Ct. Crim. App. 1995).

E) Whether the speech or conduct is provoking or reproachful is judged by its impact on the actual parties to whom the language or behavior is directed, not the "average person." *United States v. Killion*, 75 MJ 209 (C.A.A.F. 2016).

LXI.WRONGFUL BROADCAST/DISTRIBUTION OF INTIMATE VISUAL IMAGES, ART 117a

MURDER/MANSLAUGHTER/CHILD ENDANGERMENT

LXII. MURDER, ART. 118

A. Common Law Classifications of Homicides.

1. At common law, homicides are classified as justifiable, excusable, or criminal. Justifiable homicides are those commanded or authorized by law; they are not punishable. Excusable homicides are those in which the killer is to some extent at fault but where circumstances do not justify infliction of full punishment for criminal homicide; *i.e.*, the killing remains criminal but the penalty is reduced. Any killing that is not justifiable or excusable is criminal homicide -- either murder, manslaughter, or negligent homicide.

2. "Born Alive" Rule. *United States v. Nelson*, 53 M.J. 319 (C.A.A.F. 2000). The UCMJ does not define "human being" for the purposes of Articles 118 and 119, but Congress intended those articles to be construed with reference to the common law. A child is "born alive" if it: (1) was wholly expelled from its mother's body, and (2) possessed or was capable of an existence by means of a circulation independent of that of the mother. Even if the child never took a breath of air from its own lungs, the child's capability to do so is sufficient. *But see* UCMJ, Article 119a, Death or Injury of an Unborn Child, as cited in *United States v. Boie*, 70 M.J. 585, 2011 CCA LEXIS 422, where conviction was upheld under Article 119a where airman put drugs into his pregnant wife's food causing an abortion.

B. Causation.

1. Generally. *See also* Chapter 5, Defenses.

2. Death From Multiple Causes.

a) *United States v. Gomez*, 15 M.J. 954 (A.C.M.R. 1982) (adopts two-part time of death standard: either irreversible cessation of circulatory and respiratory functions, or irreversible cessation of total brain functions).

b) *United States v. Schreiber*, 18 C.M.R. 226 (C.M.A. 1955) (accused held responsible for death even if his gunshot wound, following a severe beating of the victim by another, only contributed to the death by causing shock).

c) *United States v. Houghton*, 32 C.M.R. 3 (C.M.A. 1962) (in child abuse death, contributing to or accelerating the death of the victim sufficient to establish responsibility).

3. The Fragile Victim. If the wound, though not ordinarily fatal, causes the death of the victim, the accused is responsible. *United States v. Eddy*, 26 C.M.R. 718 (A.B.R. 1958).

4. Negligent or improper medical treatment of the victim will not excuse the accused unless it constitutes gross negligence or intentional malpractice. *United States v. Baguex*, 2 C.M.R. 424 (A.B.R. 1952) (death by asphyxiation from aspiration into lungs of blood from facial injuries); *United States v. Eddy*, 26 C.M.R. 718 (A.B.R. 1958).

5. Accused's act need not be the sole cause of death, or the latest/most immediate cause of death. *United States v. Romero*, 1 M.J. 227 (C.M.A. 1975) (accused guilty of negligent homicide in overdose death after helping victim position syringe); *see also United States v. Mazur*, 13 M.J. 143 (C.M.A. 1982) (accused guilty of involuntary manslaughter by culpable negligence when assisted victim who could no longer inject self with heroin).

6. Accused is responsible if his act caused the victim to kill herself unintentionally or by her negligence. *See United States v. Schatzinger*, 9 C.M.R. 586 (N.B.R. 1953).

7. Intervening cause.

a) An unforeseeable, independent, intervening event that causes the victim's death may negate causation by the accused. *See United States v. Riley*, 58 M.J. 305 (2003) (holding doctors' failure to diagnose appellant's pregnancy was not an intervening cause of the baby's death sufficient to relieve appellant of criminal liability (negligent birthing of child)).

b) Contributory negligence by the victim must loom so large in comparison to the accused's conduct as to be an intervening cause. *United States v. Oxendine*, 55 M.J. 323 (2001) (victim's voluntary participation in a dangerous joint venture, being held outside a third-story window by his ankles, was not an intervening cause).

c) When an accused's wrongful acts set in motion an unbroken, foreseeable chain of events resulting in another's death, his conduct is the proximate cause of the death. *United States v. Stanley*, 60 M.J. 622 (A.F. Ct. Crim. App. 2004) (accused violently shook a 6-week old infant, who was resuscitated at the emergency room but remained in a persistent vegetative state; infant died upon removal of life support; the decision to remove life support did not "loom so large" as to relieve the accused of criminal liability); *see also United States v. Markert*, 65 M.J. 677 (N-M. Ct. Crim. App. 2007) (weapon horseplay resulted in Marine being shot in head; removal of life support was not an intervening cause).

C. Premeditated Murder. UCMJ art. 118(1).

1. Intent. Requires a specific intent to kill *and* consideration of the act intended to bring about death. The intent to kill need not be entertained for any particular or considerable length of time and the existence of premeditation may be inferred from the circumstances surrounding the killing. MCM, pt. IV, ¶ 56c(2)(a). *See generally United States v. Eby*, 44 M.J. 425 (1996).

a) The "premeditated design to kill" does not have to exist for any particular or measurable length of time. *United States v. Sechler*, 12 C.M.R. 119 (C.M.A. 1953).

b) Intent only to inflict grievous bodily harm is insufficient. *United States v. Mitchell*, 7 C.M.R. 77 (C.M.A. 1953).

c) The distinction between premeditated murder and unpremeditated murder is sufficiently clear to withstand constitutional challenge. *United States v. Curtis*, 44 M.J. 106, 147 (C.A.A.F. 1996); *United States v. Loving*, 41 M.J. 213 at 279-80 (C.M.A. 1994), *aff'd*, 517 U.S. 748 (1996).

d) Premeditation is not a question of time but of reflection. *United States v. Cole*, 54 M.J. 572 (Army Ct. Crim. App. 2000), *aff'd*, 55 M.J. 466 (C.A.A.F. 2001).

e) Instructions. Because of the potential confusion to panel members in making the distinction between premeditated and unpremeditated murder, counsel should consider requesting instructions in addition to the pattern instruction in the *Military Judges Benchbook*. *See United States v. Eby*, 44 M.J. 425 (C.A.A.F. 1996); *United States v. Hoskins*, 36 M.J. 343 (C.M.A. 1993), *cert. denied*, 513 U.S. 809 (1994).

2. Proof of Premeditation.

a) The existence of premeditation may be inferred from the circumstances. MCM, pt. IV, ¶ 56c(2)(a). *United States v. Williams*, 39 M.J. 758 (A.C.M.R. 1994).

b) Inferred from the viciousness of the assault. *United States v. Ayers*, 34 C.M.R. 116 (C.M.A. 1964).

c) Inferred from the number of blows and the nature and location of injuries. *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981), *aff'd in part*, 16 M.J. 68 (C.M.A. 1983).

d) Inferred from prior anger and threats against the victim. *United States v. Bullock*, 10 M.J. 674 (A.C.M.R. 1981), *aff'd*, 13 M.J. 490 (C.M.A. 1982).

e) Inferred from the fact that the weapon was procured before killing. *United States v. Mitchell*, 2 M.J. 1020 (A.C.M.R. 1976).

f) Inferred from accused's elaborate preparations preceding the murder, elaborate precautions to avoid detection, and brutal nature of the attack on the victim. *United States v. Matthews*, 13 M.J. 501 (A.C.M.R. 1982), *rev'd as to sentence*, 16 M.J. 354 (C.M.A. 1983).

g) Inferred from lack of provocation; disadvantage of victim; and nature, extent and duration of attack. *United States v. Viola*, 26 M.J. 822 (A.C.M.R. 1988), *cert. denied*, 490 U.S. 1020 (1989).

h) Other circumstances. *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996) (after clearly premeditated murder of first victim accused stabbed victim's wife who came to his aid and then indecently assaulted her); *United States v. Curry*, 31 M.J. 359 (C.M.A. 1990) (violent shaking of child victim, coupled with the accused's demeanor at hospital, prior abuse of child, and incredible explanation of injuries); *United States v. Levell*, 43 M.J. 847 (N-M. Ct. Crim. App. 1996) (opening gun case, walking to victim laying on the ground, saying "what do you think of this," then firing fatal shots showed accused reflected with a cool mind on killing victim); *United States v. Shanks*, 13 M.J. 783 (A.C.M.R. 1982) (homicidal act part of conspiracy); *see also United States v. Cooper*, 28 M.J. 810 (A.C.M.R. 1989), *aff'd*, 30 M.J. 201 (C.M.A. 1990); *United States v. Nelson*, 28 M.J. 553 (A.C.M.R. 1989).

3. Transferred Intent. *See* MCM, pt. IV, ¶ 56c(2)(b).

a) *United States v. Black*, 11 C.M.R. 57 (C.M.A. 1953) (where the accused shot the first victim with intent to murder and the bullet passed through his body striking a second, unintended victim, the accused was properly convicted of murder as to both victims; though the accused was convicted of *unpremeditated* murder for the second victim).

b) *United States v. Willis*, 46 M.J. 258 (C.A.A.F. 1997) (accused's act of pulling trigger three times at nearly point blank range, moving the pistol between each shot with the evident intent of covering small area occupied by intended victim and her husband was sufficient to infer accused's intent to kill intended victim's husband under doctrine of transferred intent).

4. State of Mind Defenses. All state of mind defenses apply to reduce premeditated murder to unpremeditated murder; however,

a) Voluntary intoxication may reduce premeditated murder to unpremeditated murder or murder by murder by inherently dangerous act, but it may not reduce premeditated or unpremeditated murder to manslaughter or any other lesser offense. *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993); M.C.M. pt. IV, ¶ 43c(2)(c).

b) Rage or personality disorder do not necessarily reduce to unpremeditated murder. *United States v. Roukis*, 60 M.J. 925 (Army Ct. Crim. App. 2005) *aff'd*, 62 M.J. 212 (2005) ("The fact that appellant may have been enraged at the time of the killing, whether as a result of his particular personality disorder or the circumstances of his marriage, 'does not necessarily mean that he was deprived of the ability to premeditate or that he did not premeditate.'").

5. Punishment.

a) Maximum: Death. Capital case procedures are set forth in R.C.M. 1004. The M.C.M. capital procedures were held to be constitutional in *Loving v. United States*, 517 U.S. 748 (1996).

b) Mandatory Minimum: Imprisonment for life with eligibility for parole. M.C.M., pt. IV, ¶ 56d(1).

D. Unpremeditated Murder. UCMJ art. 118(2).

1. Nature of Act. The offense can be based on an act or omission to act where there is a duty to act; *United States v. Valdez*, 35 M.J. 555 (A.C.M.R. 1992) (parent's deliberate failure to provide medical and other care to his child which resulted in child's death supported charge of murder), *aff'd*, 40 M.J. 491 (C.M.A. 1994). *See also United States v. Nelson*, 53 M.J. 319 (C.A.A.F. 2000)(holding that a mother who chose to give birth without medical assistance and failed to check on the health of her newborn for over an hour, resulting in the child's death, could be guilty of involuntary manslaughter based on culpable negligence in her duty to care for the child); *but see United States v. Riley*, 47 M.J. 603 (A.F. Ct. Crim. App. 1997) (murder conviction set aside and finding of involuntary manslaughter of an accused who sought no medical attention during pregnancy or delivery), *modified and aff'd*, 58 M.J. 305 (C.A.A.F. 2003) (involuntary manslaughter conviction set aside in favor of negligent homicide conviction because accused's failure to seek medical care was not culpably negligent).

2. Intent. Accused must have either a specific intent to kill or inflict great bodily harm.

a) The inference of intent. A permissive inference is recognized that a person intends the natural and probable consequences of an act purposely done by him. *United States v. Owens*, 21 M.J. 117, 126 (C.M.A. 1985); *United States v. Varraso*, 21 M.J. 129 (C.M.A. 1985) (assisted suicide); *see United States v. Wilson*, 26 M.J. 10 (C.M.A. 1988).

b) Great bodily harm. A serious injury not including minor injuries such as a black eye or bloody nose, but includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injury. MCM, pt. IV, ¶ 56c(3)(b).

c) All state of mind defenses apply except voluntary intoxication. MCM, pt. IV, ¶ 56c(2)(c). Voluntary intoxication cannot defeat capacity of accused to entertain intent to kill or inflict great bodily harm required for unpremeditated murder; one who voluntarily intoxicates himself or herself cannot be heard to complain of being incapable, by virtue of that intoxication, of intentionally committing acts leading to death of another person. *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993).

3. Heat of passion defense reduces unpremeditated murder to voluntary manslaughter. See paragraph H, below.

a) Heat of passion must be caused by adequate provocation. The provocation must be adequate to excite uncontrollable passion in a reasonable person. MCM, pt. IV, ¶56c(1)(b).

4. Transferred intent also applies to unpremeditated murder. MCM. pt. IV, ¶ 56c(3)(a) ("The intent need not be directed toward the person killed"). *See United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996), *aff'd*, 46 M.J. 258 (C.A.A.F. 1997).

5. Maximum Punishment: Life imprisonment, with or without eligibility for parole. MCM, pt. IV, ¶ 43e(2). R.C.M. 1003(b)(7).

E. Murder While Doing An Inherently Dangerous Act. UCMJ art. 118(3).

1. In General. Alternative theory to unpremeditated murder.

2. Intent.

a) Specific intent not required. *United States v. McMonagle*, 38 M.J. 53 (C.M.A. 1993) (firing a weapon indiscriminately in an inhabited area during a sham firefight in Panama during Operation JUST CAUSE).

b) Knowledge. Accused must have known that the probable consequence of his act would be death or great bodily harm. *United States v. Berg*, 30 M.J. 195 (C.M.A. 1990), *aff'd on reconsideration*, 31 M.J. 38, 40 (C.M.A. 1990). Such knowledge may be proved by circumstantial evidence. MCM, pt. IV, ¶ 56c(4)(b).

c) Death-causing act must be intentional. *United States v. Hartley*, 36 C.M.R. 405 (C.M.A. 1966).

d) The act must evidence wanton heedlessness of death or great bodily harm. MCM, pt. IV, ¶ 56c(4)(a).

3. Nature of Act. The conduct of the accused must be inherently dangerous to "another", *i.e.*, at least one other person. This is a change Congress made in the law pursuant to the National Defense Authorization Act for Fiscal Year 1993 in response to *United States v. Berg*, 31 M.J. 38 (C.M.A. 1990), in which the Court of Military Appeals required the accused's conduct to endanger more than one other person.

4. Malice Requirement. For a discussion of the malice required, see *United States v. Vandenack*, 15 M.J. 230 (C.M.A. 1983) ((vehicular homicide case with no defense that accused did not intend to cause death or great bodily injury, provided the act showed wanton disregard of human life).

5. Voluntary intoxication not a defense. MCM, pt. IV, ¶ 56c(3)(c).

6. Examples of Inherently Dangerous Conduct.

a) *United States v. McMonagle*, 38 M.J. 53 (C.M.A. 1993) (firing a weapon indiscriminately in an inhabited area during a sham firefight in Panama during Operation JUST CAUSE).

b) *United States v. Hartley*, 36 C.M.R. 405 (C.M.A. 1966) (shooting into a crowded room).

c) *United States v. Judd*, 27 C.M.R. 187 (C.M.A. 1959) (shooting into a house trailer with two others present).

d) *United States v. Vandenack*, 15 M.J. 230 (C.M.A. 1983) (speeding and intentionally running red light after a prior accident).

F. Felony Murder. UCMJ art. 118(4).

1. Statutory Penalty: death or life imprisonment.

2. In General. Homicide must be committed during the perpetration or attempted perpetration of burglary, sodomy, rape, rape of a child, sexual assault, sexual assault of a child, aggravated

sexual contact, sexual abuse of a child, robbery, or aggravated arson. *United States v. Jefferson*, 22 M.J. 315 (C.M.A. 1986).

3. Intent. No specific intent required, except that of underlying felony. *United States v. Hamer*, 12 M.J. 898 (A.C.M.R. 1982).

4. Causation. Causal relationship between felony and death must be established. *United States v. Borner*, 12 C.M.R. 62 (C.M.A. 1953).

5. Multiplicity. Felony murder is multiplicious with premeditated murder, *United States v. Teeter*, 16 M.J. 68 (C.M.A. 1983), and with unpremeditated murder. *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989).

6. Capital Punishment.

a) In *Enmund v. Florida*, 458 U.S. 782 (1982), the Supreme Court held that to impose the death penalty for felony murder the accused must have killed or have had the intent to kill.

b) *Tison v. Arizona*, 481 U.S. 137 (1987) (expands *Enmund*, holding that the Eighth Amendment does not prohibit the death penalty where the accused is a major participant in a felony that results in murder and "the mental state is one of reckless indifference").

c) R.C.M. 1004(c)(8) allows the death penalty only if the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abused of a child, robbery, or aggravated arson was major and who manifested a reckless indifference for human life. CAAF has held that this factor requires proof of an intent to kill or reckless indifference to human life. *Loving v. Hart*, 47 M.J. 438 (C.A.A.F. 1998).

d) Accused's pleas of guilty to unpremeditated murder and robbery by means of force and violence were, in context, pleas to the capital offense of felony murder and as such violated Article 45(b), UCMJ. *United States v. Dock*, 28 M.J. 117 (C.M.A. 1989).

7. Instructions. Where members could have reasonably found that accused formed the intent to steal from victim either prior to the infliction of the death blows or after rendering him helpless, he was not entitled to an instruction that, to be convicted of felony-murder he had to have the intent to commit the felony at the time of the actions which caused the killing. *United States v. Fell*, 33 M.J. 628 (A.C.M.R. 1991).

G. Attempted Murder. UCMJ art. 80. Attempted murder requires a specific intent to kill.

1. Although a service member may be convicted of murder if he commits homicide without an intent to kill, but with an intent to inflict great bodily harm (UCMJ art. 118(2)) or while engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life (UCMJ art. 118(3)), those states of mind will not suffice to establish attempted murder. *United States v. Roa*, 12 M.J. 210 (C.M.A. 1982).

2. Beyond mere preparation. Where the purported co-conspirator was acting as a government agent at all relevant times, the court would consider only the acts of the accused in determining whether the planned murder-for-hire went beyond mere preparation, so as to constitute attempted murder. *United States v. Owen*, 47 M.J. 501 (Army Ct. Crim. App. 1997).

LXIII. MANSLAUGHTER, ART. 119

A. Voluntary Manslaughter. UCMJ art. 119(a).

1. Defined. An unlawful killing done with an intent to kill or inflict great bodily harm but done in the heat of sudden passion caused by adequate provocation.

a) Article 119(a) as a lesser-included offense. When the evidence places heat of passion and adequate provocation at issue in the trial, the military judge must instruct the members, *sua sponte*, on the lesser included offense of voluntary manslaughter. *United States v. Wells*, 52 M.J. 126 (C.A.A.F. 1999).

b) Objective requirements.

(1) Adequate provocation so as to excite uncontrollable passion in a reasonable man. Adequate provocation is an objective concept. *United States v. Stark*, 17 M.J. 519 (A.C.M.R. 1984) (insulting, teasing, and taunting remarks are inadequate provocation). *But cf. United States v. Saulsberry*, 43 M.J. 649 (Army Ct. Crim. App. 1995) (finding adequate provocation after sustained taunting and simple assault), *aff'd*, 47 M.J. 493 (C.A.A.F. 1998).

(2) Provocation not sought or induced.

(3) Unspent at moment killing occurs. *United States v. Bellamy*, 36 C.M.R. 115 (C.M.A. 1966) (whether a particular provocation has spent its force & what constitutes a reasonable time for cooling off are questions of fact for the panel/fact-finder). The rage must continue throughout the attack. *United States v. Seeloff*, 15 M.J. 978 (A.C.M.R. 1983).

c) Subjective requirements. The accused must in fact have been acting under such a heat of passion, fear, or rage. *See United States v. Staten*, 6 M.J. 275 (C.M.A. 1979); *United States v. Jackson*, 6 M.J. 261 (C.M.A. 1979).

d) Sufficiency of proof. Despite defense claim that accused acted in sudden heat of passion, conviction of premeditated murder of wife's lover was supported by sufficient evidence, including the obtaining of a special knife, decapitation of the victim, and comment to onlookers that "this is what happens when you commit adultery." *United States v. Schap*, 44 M.J. 512 (Army Ct. Crim. App. 1996), *aff'd*, 49 M.J. 317 (C.A.A.F. 1998) (once raised at trial, Gov't must disprove its existence beyond a reasonable doubt).

e) Marital infidelity *alone* is not enough to justify voluntary manslaughter, still need to show accused was deprived of ability to premeditate or that the accused did not premeditate. *United States v. Roukis*, 60 M.J. 925 (Army Ct. Crim. App. 2005) *aff'd*, 62 M.J. 212 (2005).

2. Attempted Voluntary Manslaughter. The offenses of *attempted* voluntary manslaughter and assault with intent to commit voluntary manslaughter require a showing of accused's specific intent to kill. A showing only of a specific intent to inflict great bodily harm will be insufficient to establish these offenses. However, an intent to kill can be inferred from circumstantial evidence. *United States v. Barnes*, 15 M.J. 121 (C.M.A. 1983).

B. Involuntary Manslaughter Resulting From A Culpably Negligent Act. UCMJ art. 119(b)(1).

1. Intent. The standard of culpable negligence applies. MCM, pt. IV, ¶ 57c(2).

2. Culpable negligence. "A degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others." MCM, pt. IV, ¶ 57c(2)(a)(i).

a) Consequences are "foreseeable" when a reasonable person, in view of all the circumstances, would have realized the substantial and unjustifiable danger created by his

acts. *United States v. Oxendine*, 55 M.J. 323 (2001) (holding a drunk victim by his ankles out of a third-story window without safety devices as part of a game of trust).

b) Applications:

(1) Horseplay with Weapon. *United States v. Markert*, 65 M.J. 677 (N-M. Ct. Crim. App. 2007).

(2) Drug overdose death of another. *United States v. Henderson*, 23 M.J. 77 (C.M.A. 1986) (providing drug, encouraging use, providing private room, presence); *United States v. Mazur*, 13 M.J. 143 (C.M.A. 1982) (assisting fellow soldier to inject heroin into his vein); *see generally* Milhizer, *Involuntary Manslaughter and Drug Overdose Death: A Proposed Methodology*, Army Law., Mar. 1989, at 10.

(3) Child Abuse. *United States v. Stanley*, 60 M.J. 622 (A.F. Ct. Crim. App. 2004) (accused violently shook a 6-week old infant, who was resuscitated at the emergency room but remained in a persistent vegetative state; infant died upon removal of life support; the decision to remove life support did not "loom so large" as to relieve the accused of criminal liability); *United States v. Brown*, 26 M.J. 148 (C.M.A. 1988) (violently shaking a child); *United States v. Baker*, 24 M.J. 354 (C.M.A. 1987) (violently throwing child to an unpadded floor); *United States v. Mitchell*, 12 M.J. 1015 (A.C.M.R. 1982) (beating a child who would not stop crying).

(4) Participating in a dangerous joint venture. *United States v. Oxendine*, 55 M.J. 323 (C.A.A.F. 2001) (accused helped hang drunk Marine out of a third story window during thrill-seeking game with other Marines; drunk Marine fell to his death).

(5) Giving car keys to a drunk. *United States v. Brown*, 22 M.J. 448 (C.M.A. 1986) (finding an individual culpably negligent in aiding and abetting involuntary manslaughter by allowing drunk person to his car while remaining as passenger).

(6) Failing to follow safety rules and driving after brakes failed. *United States v. Cherry*, 22 M.J. 284 (C.M.A. 1986).

(7) Culpably negligent surgical procedures. *United States v. Ansari*, 15 M.J. 812 (N.M.C.M.R. 1983); *but see United States v. Billig*, 26 M.J. 744 (N.M.C.M.R. 1988).

(8) Failure of parent to seek medical care for child. *United States v. Martinez*, 48 M.J. 689 (Army Ct. Crim. App. 1998), *aff'd*, 52 M.J. 22 (1999); *United States v. Nelson*, 53 M.J. 319 (C.A.A.F. 2000); *but see United States v. Riley*, 58 M.J. 305 (2003) (intentionally unassisted delivery of a baby where medical care was readily available was not culpably negligent so as to support a finding of involuntary manslaughter; found negligent homicide).

3. Proximate Causation.

a) "To be proximate, an act need not be the sole cause of death, nor must it be the immediate cause--the latest in time and space preceding the death. But a contributing cause is deemed proximate only if it plays a material role in the victim's [death]." *United States v. Cooke*, 18 M.J. 152, 154 (C.M.A. 1984) (quoting *United States v. Romero*, 24 C.M.A. 39, 1 M.J. 227, 230, 51 C.M.R. 133 (C.M.A. 1975)).

b) *United States v. Stanley*, 60 M.J. 622 (A.F. Ct. Crim. App. 2004) (accused violently shook a 6-week old infant, who was resuscitated at the emergency room but remained in a persistent vegetative state; infant died upon removal of life support; the decision to remove life support did not "loom so large" as to relieve the accused of criminal liability).

4. Effect of Contributory Negligence. The deceased's or a third party's contributory negligence may exonerate the accused if it "looms so large" in comparison with the accused's negligence that the accused's negligence is no longer a substantial factor in the final result. *United States v. Cooke*, 18 M.J. 152 (C.M.A. 1984).

5. Charge of involuntary manslaughter based upon culpably negligent failure to act requires, as a threshold matter, proof of a legal duty to act. *United States v. Cowan*, 42 M.J. 475 (C.A.A.F. 1995); MCM, pt. IV, ¶ 57c(2)(a)(ii).

6. Involuntary manslaughter by culpable negligence not raised when death is the result of an intentional assault. *United States v. Wilson*, 26 M.J. 10 (C.M.A. 1988).

7. Pleading. When charged under a culpable negligence theory, an involuntary manslaughter specification must allege that death was a reasonably foreseeable consequence of the accused's misconduct. *United States v. McGhee*, 29 M.J. 840 (A.C.M.R. 1989); *see generally* TJAGSA Practice Note, *The Scope of Assault*, Army Law., Apr. 1990, Oct. 67, 68-70 (discusses *McGhee*).

C. Involuntary Manslaughter While Perpetrating An Offense Directly Affecting The Person Of Another. UCMJ art. 119(b)(2).

1. Requires an act affecting some particular person as distinguished from an offense affecting society in general. MCM, pt. IV, ¶ 57c(2)(b).

2. Applications.

a) Assault. *United States v. Jones*, 30 M.J. 127 (C.M.A. 1990); *United States v. Wilson*, 26 M.J. 10 (C.M.A. 1988); *United States v. Madison*, 34 C.M.R. 435 (C.M.A. 1964); *see generally* TJAGSA Practice Note, *Involuntary Manslaughter Based Upon an Assault*, Army Law., Aug. 1990, at 32 (discusses *Jones*); *but see United States v. Richards*, 56 M.J. 282 (2002) (insufficient evidence to necessitate involuntary manslaughter instruction).

b) Drug Overdose Death of Another. *United States v. Sargent*, 18 M.J. 331 (C.M.A. 1984) (mere sale of drugs is not an offense "directly affecting the person of another"); *see also United States v. Dillon*, 18 M.J. 340 (C.M.A. 1984); *see generally* Milhizer, *Involuntary Manslaughter and Drug-Overdose Deaths: A Proposed Methodology*, Army Law., Mar. 1989, at 10.

LXIV. DEATH OR INJURY OF AN UNBORN CHILD, ART. 119a

A. Death or Injury to an Unborn Child. UCMJ Article 119a.

1. Implementing Executive Order signed 18 April 2007. ISSUES:

a) Article 119a exempts the following individuals from prosecution:

(1) Any person authorized by state or federal law to perform abortions for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(2) Any person for any medical treatment of the pregnant woman or her unborn child; or

(3) Any woman with respect to her unborn child.

b) Intentional Killing of an Unborn Child or Attempts. UCMJ art. 119a specifically states that an individual who intentionally kills an unborn child or attempts to kill an unborn child will be punished under Articles 80, 118, or 119. Nonetheless, Part IV, ¶ 58a.b.(3) & (4)

provide elements for an offense involving the intentional killing of an unborn child as well as elements for an offense involving attempts to do so. These elements require the specific intent to kill the unborn child.

c) Scienter. For injuring or killing an unborn child, the government need not prove: 1) that the accused knew the victim was pregnant, nor 2) that the accused should have known that the victim was pregnant. Additionally, for these two offenses, the government need not prove that the accused specifically intended to cause the death of, or bodily injury to, the unborn child.

d) Punishment. Such punishment, other than death, as a court-martial may direct, but shall be consistent with the offense had it occurred to the unborn child's mother.

2. No reported cases on this offense. *But see United States v. Robbins*, 52 M.J. 159 (1999) (prosecuting accused for involuntary manslaughter by terminating the pregnancy of his wife, in violation of § 2903.04 of the Ohio Revised Code, as assimilated by the Assimilative Crimes Act (ACA)).

LXV. CHILD ENDANGERMENT, ART. 119b

A. Child Endangerment. Article 119b. MCM, pt. IV, ¶ 59.

1. Elements:

a) That the accused had a duty for the care of a certain child;

b) That the child was under the age of 16 years; and

c) That the accused endangered the child's mental or physical health, safety, or welfare through design or culpable negligence.

2. Issues.

a) Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. MCM, pt. IV, ¶ 59(c)(2).

b) There is no requirement of actual physical or mental harm to the child. However, if the accused's conduct does cause actual physical or mental harm, the potential maximum punishment increases. MCM, pt. IV, ¶ 59(c)(3).

c) Age of the victim is a factor in determining the quantum of negligence. The explanation provides several examples of acts to assist in determining whether an act is negligent, and if so, whether the negligence rises to the level of culpable negligence. *See* MCM, pt. IV, ¶ 59(c)(5).

d) The duty of care is determined by the totality of the circumstances and may be established by statute, regulation, legal parent-child relationship, mutual agreement, or assumption of control or custody by affirmative act.

3. Cases

a) In *United States v. Plant*, 74 M.J. 297 (C.A.A.F. 2015, the CAAF held that "endanger" requires proof that the accused's conduct resulted in a reasonable probability that the child would be harmed. The Court found legally insufficient a conviction for child endangerment based on the accused's being intoxicated while responsible for the care of a healthy thirteen-month-old boy because the government established no more than a possibility of harm from the accused's irresponsible behavior.

b) *United States v. Medeiros*, ACM S32289, 2016 LEXIS 338 (A. F. Ct. C. App. 2016) (holding that evidence was insufficient to sustain a conviction of child endangerment when Servicemember used methamphetamine and marijuana with her boyfriend, and knew her boyfriend used methamphetamine and marijuana in the presence of the child, because there was no reasonable probability the child would be harmed).

c) Service member found to have committed child endangerment by culpable negligence when she failed to take her ten year old son to a hospital after he received visible injuries on 8% of his body. Court held this was a general intent crime that could be proven by circumstantial evidence. Evidence that child lived with the service member, that she was familiar with her son's extracurricular activities and the types of injuries he sustained, and that his injuries were visible enough to school staff that they sought immediate medical attention was sufficient. *United States v. Koth*, ARMY 20150179, 2017 CCA LEXIS 145 (A. C. C. A. 2017). *See also United States v. Jackson*, No. 201600299, 2017 CCA LEXIS 758 (N.M.C.C.A. 2017). (holding that accused committed child endangerment by culpable negligence when he placed his four-year-old stepdaughter in a bathtub and ran hot water to punish her, then did not seek immediate medical treatment for the resulting second and third-degree burns to her legs and feet).

d) Evidence that accused left her six-week-old child in a car seat outdoors, during which time he was exposed to 50-degree temperatures and periodic rain for almost seven hours, left her son in soiled diapers for hours at a time, exposed him to animal feces and urine, open trash bags, and dirty diapers because she did not clean her home, was sufficient to sustain a conviction for two counts of child endangerment. *United States v. Lafontaine*, No. ACM 39004, 2017 CCA LEXIS 523 (A. F. Ct. C. App. 2017).

LARCENY/FRAUD OFFENSES

LXVI. LARCENY AND WRONGFUL APPROPRIATION, ART. 121

A. Larceny and Wrongful Appropriation. MCM, pt. IV, ¶ 64; UCMJ art. 121.

1. Elements.

a) Larceny.

(1) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(2) That the property belonged to a certain person;

(3) That the property was of a certain value, or of some value; and

(4) That the taking, obtaining, or withholding by the accused was with the intent *permanently* to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.

(5) [If the property is alleged to be military property, add the following element:] That the property was military property.

b) Wrongful appropriation.

(1) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(2) That the property belonged to a certain person;

(3) That the property was of a certain value, or of some value; and

(4) That the taking, obtaining, or withholding by the accused was with the intent *temporarily* to deprive or defraud another person of the use and benefit of the property or temporarily to appropriate the property for the use of the accused or for any person other than the owner.

2. Types of Property Covered.

a) Must be tangible personal property. Article 121 lists the objects which can be the subject of larceny as "any money, personal property, or article of value of any kind."

(1) Gift cards have tangible value. *United States v Manriquez,* ARMY 20140893 (A. Ct. Crim. App. May 20, 2016) (unauthorized use of a credit or debit card requires the user falsely represent he has the authority to use the card, so it is usually charged as an "obtaining" type larceny by "false pretenses," but gift cards, have value in themselves without any representation. Activated gift cards have a "market value" that is greater than the cost of the plastic used to make the card. An activated gift card, like a movie ticket, sports ticket, or lottery ticket, is an object with a value equal to its market value. When the Accused placed $2,600 worth of money on seven (7) stolen gifts card he committed a larceny in that amount.)

b) Intangible or incorporeal items cannot be the subject of an Article 121 violation. *United States v. Stevens* 75 M.J. 548 (N-M.Ct.Crim.App. 2015)(online "currency" for use in a video game is not tangible or capable of being possessed); *United States v. Mervine*, 26 M.J. 482 (C.M.A. 1988) (held that debt is not the equivalent of money for purposes of Article 121 and, therefore, an attempt to falsify payment records in order to extinguish the debt cannot be the subject of a larceny); *United States v. Dunn*, 27 M.J. 624 (A.F.C.M.R. 1988) (administrative costs incurred by the owner of stolen property cannot be stolen because they are an inherent intangible interest of the owner of the property); *United States v. Ford*, 2000 WL 35801710 (A. Ct. Crim. App. 2000) (Distinguish from *Mervine* in that when the appellant entered a credit to her account via the J.C. Penny system it resulted in her credit card company issuing her a check for the amount of the credit which is a theft of tangible property). *United States. v. Loniak*, 2017 WL 3610472 (A. Ct. Crim. App. 2017 (fraudulent acquisition of store credit can be subject of larceny) .

c) Article 121 does not cover theft of services. Theft of taxicab services, phone services, use and occupancy of government quarters, and use of a rental car cannot be the subject of larceny under Article 121. They may be charged under Article 121b. *United States v. Abeyta*, 12 M.J. 507 (A.C.M.R. 1981); *United States v. Case*, 37 C.M.R. 606 (A.B.R. 1966); *United States v. Jones*, 23 C.M.R. 818 (A.F.B.R. 1956); *United States v. McCracker*, 19 C.M.R. 876 (A.F.B.R. 1955).

d) Theft of services may be prosecuted in any of the following ways: (1) under Article 121b, UCMJ, as obtaining services under false pretenses or as dishonorably failing to pay just debts under Article 134, UCMJ; (2) under 18 U.S.C. § 641 as assimilated into military law by Article. 134(3), UCMJ, if the services taken are property of the United States; (3) as a violation of a state statute assimilated through 18 U.S.C. § 13. *See United States v. Wright*, 5 M.J. 106 (C.M.A. 1978), and *United States v. Herndon*, 36 C.M.R. 8 (C.M.A. 1965); *see also United States v. Hitz*, 12 M.J. 695 (N.M.C.M.R. 1981) (accused was properly charged with and convicted of unlawfully obtaining telephone services of the U.S. Navy in violation of UCMJ art. 134); *United States v. Roane*, 43 M.J. 93 (C.A.A.F. 1995); *United States v. Green*,

44 M.J. 631 (C.G. Ct. Crim. App. 1996) (obtaining rental car services by false pretenses was properly charge as theft of services under Article 134).

e) Larceny involving the misuse of a credit or debit card occurring prior to 1 January 2019, the proper victim is usually either the merchant offering the purchased goods or the entity presenting the money, i.e. the bank or credit card company, not the holder of the misused card. *See United States v. Williams*, MJ (C.A.A.F. 2016) and MCM pt. IV, para. 46.c.(1)(i)(vi)). In some instances, the card holder may be the appropriate victim, but these are rare. *United States v. Cimball Sharpton*, 73 M.J. 299 (C.A.A.F. 2014) (Air Force was proper victim as card agreement between Air Force and U.S. Bank obligated Air Force to make payment for transactions even if they involved misuse or abuse by the cardholder). *United States v. Lubasky*, 68 M.J. 260 (A. Ct. Crim. App. 2010) (When there is a principal-agent relationship between the accused and the debit card holder and the accused obtains access to the account by false pretenses, it is proper to list the account holder as the victim).

3. Element 1: That the accused wrongfully took, obtained, or withheld property (not services) from another. The drafters intended to codify only common law larceny, larceny by false pretenses, and embezzlement. *United States v. Williams*, 75 MJ 129 (C.A.A.F. 2016); *United States v. Lubasky*, 68 MJ 260 (C.A.A.F. 2010).

a) Wrongful taking. Requires dominion, control, and asportation. *See generally United States v. Carter*, 24 M.J. 280 (C.M.A. 1987); *United States v. Pacheco*, 56 M.J. 1 (C.A.A.F. 2001) (stealing war trophies). The taking, obtaining or withholding is wrongful if done without the knowing consent of the owner or other lawful authority. MCM, pt. IV, ¶ 64c(1)(d); *See also United States v. McGowan*, 41 MJ 406 (C.A.A.F. 1995).

(1) *United States v. Sneed*, 38 C.M.R. 249 (C.M.A. 1968). Where accused's accomplices were government agents, larceny of government property could not stand as no taking ever occurred, *i.e.*, articles were never out of government control. *See United States v. Cosby*, 14 M.J. 3 (C.M.A. 1982) (accused can be guilty of wrongful taking even though property was released to him by competent authority); *see also United States v. Cassey*, 34 C.M.R. 338 (C.M.A. 1964) (OSI authorized accomplices to proceed with delivery of government property and then apprehended accused after delivery as he attempted to leave base).

(2) Asportation.

(a) Larceny by taking continues as long as asportation of the property continues. The original asportation continues as long as the perpetrator is not satisfied with the location of the goods and causes the flow of their movement to continue relatively uninterrupted. *United States v. Escobar, 7 MJ 197 (M.C.A. 1979).*

(b) Larceny continues as long as the asportation continues. *United States v. Escobar*, 7 M.J. 197 (C.M.A. 1979) (considering duration of larceny/asportation in context of establishing court-martial jurisdiction; accused stole jacket off post and carried it onto post, thus providing court-martial jurisdiction over the offense); *see also United States v. Henry*, 18 M.J. 773 (N.M.C.M.R. 1984) (accused's mistaken claim-of-right defense negated during asportation phase) *aff'd in part, rev'd in part on multiplicity grounds*, 21 M.J. 172 (C.M.A. 1985). *See also United States v. Whitten*, 56 M.J. 234 (C.A.A.F. 2002) (an accused's actions in joining an ongoing conspiracy to steal a duffel bag before two co-conspirators completed asportation of the property was legally sufficient to sustain convictions of conspiracy to commit larceny and larceny).

(c) Because the crime of larceny continues through the asportation phase, anyone who *knowingly* assists in the actual movement of the stolen property is a principal in the larceny. No distinction is made whether the continuation of the asportation by one other than the actual taker was prearranged or the result of decisions made on the spur of the moment. *United States v. Escobar*, 7 M.J. 197 (C.M.A. 1979). See also *United States v. Ramirez*, 2015 WL 5610416 (N-M.Ct.Crim.App. 2015).

(d) Person who participates in on-going larceny may simply be an accessory after the fact, not a principal, depending upon the purpose of his participation. If participant's motive is to secure the fruits of the crime, the aider becomes a participant in the larceny and is chargeable with larceny; but if his motive is to assist the perpetrator to escape detection and punishment, he is properly charged as an accessory after the fact. *United States v. Manuel*, 8 M.J. 823 (A.F.C.M.R. 1979).

(e) Larceny complete when soldier having custody over items moved them to another part of central issue facility with felonious intent. As such, when accused received the property it was already stolen, his actions did not make him a principal to larceny but rather only a receiver of stolen property under Article 134. *United States v. Henderson*, 9 M.J. 845 (A.C.M.R. 1980).

(f) When asportation is ongoing and the accused helps the perpetrator of the larceny he is guilty of larceny as an aider or abettor. *United States v. Cannon*, 29 M.J. 549 (A.C.M.R. 1989). *See generally* TJAGSA Practice Note, *Larceny and Proving Asportation*, Army Law., Feb. 1990, at 67 (discusses *Cannon*). *See generally* TJAGSA Practice Note, *Aiding and Abetting Larceny*, Army Law., Nov. 1990, at 40 (discussing *Keen*).

(3) Lost or abandoned property. Abandoned property has no owner and cannot be stolen. *United States v. Meeks*, 32 MJ 1033 (A.F.C.M.R. 1991). Additionally, as larceny requires the specific intent to steal, if accused had an honest belief that the property was abandoned he has a complete defense. *United States v. Turner*, 27 M.J. 217 (C.M.A. 1988).

(4) Electronic transfers as a "taking."

(a) *United States v. Meng*, 43 M.J. 801 (A.F. Ct. Crim. App. 1995), *rev. denied*, 44 M.J. 47 (C.A.A.F. 1996) (data entries made by accused in his computerized finance records to pay himself more BAS than he was eligible for was larceny).

(b) Where accused never took, obtained, withheld, or possessed the fees, guilty pleas to so much of larceny specifications as pertained to credit card and automatic teller machine (ATM) processing fees were legally improvident. *United States v. Sanchez*, 54 M.J. 874 (A. Ct. Crim. App. 2001) (court notes in dicta that the appellant would have been provident to obtaining services under false pretenses as to the bank processing fees).

b) Obtaining by false pretenses. A false pretense is a false representation of past or existing fact, which may include a person's power, authority or intention. The pretense must be false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief in its truth. Although the pretense need not be the sole cause inducing the owner to part with the property, it must be an effective and intentional cause of the obtaining. MCM, pt. IV, ¶ 64c(1)(e).

(1) Debit Card and ATM Transactions. *United States v. Lubasky*, 68 M.J. 260 (C.A.A.F. 2010) (accused obtained access to account by false pretenses, representing that

he would use the funds only for the purposes victim authorized; evidence was legally sufficient to support a larceny). However, see *United States v. Helfer*, 2003 WL 25945577 (A. Ct. Crim. App. 2003) (ATM processing fees/surcharges are not included in the amount of the theft from an ATM).

(2) In loan application, false promises to repay may support larceny by false pretenses. *United States v. Cummins*, 26 C.M.R. 449 (C.M.A. 1958).

(3) Knowledge of fraud not imputed between government agents. *United States v. Williams*, 3 M.J. 555 (A.C.M.R. 1977), *rev'd on other grounds*, 4 M.J. 336 (1978).

(4) Insurance fraud larceny not complete until accused cashed settlement check. *United States v. Seivers*, 8 M.J. 63 (C.M.A. 1979), *aff'd*, 9 M.J. 397 (C.M.A. 1980).

(5) Sham marriage to obtain monetary benefits may support larceny by false pretenses. *United States v. Bolden*, 28 M.J. 127 (C.M.A. 1989).

(6) Obtaining services by false pretenses (long-distance telephone services) is charged under Article 121b (previously Article 134). *United States v. Flowerday*, 28 M.J. 705 (A.F.C.M.R. 1989); *United States v. Perkins*, 56 M.J. 825 (A. Ct. Crim. App. 2001).

(7) False pretenses and unauthorized pay/allowances.

(a) When Congress authorized basic allowance for housing for service members with "dependents," it did not intend to include a person linked to a service member only by a sham marriage. A marriage, as intended by Congress, is an undertaking by two parties to establish a life together and assume certain duties and obligations. A marriage entered into solely for the purpose of obtaining government benefits is a sham marriage and not entitled to BAH. *United States v. Phillips*, 52 M.J. 268 (C.A.A.F. 2000). *United States v. Windham*, 77 M.J. 543 (A.Ct.Crim.App. 2017) (the determinative issue is not whether the appellant's marriage certificate is or is not valid, but rather whether the appellant's sole purpose in entering into the marriage was to obtain government funds to which he was not otherwise entitled due to entering into a sham marriage).

(b) A false pretense may exist by one's silence or by a failure to correct a known misrepresentation. The accused obtained use of government quarters at Fort Stewart, Georgia between 4 November 1994 and 14 January 1998 by misrepresenting that he was married, when in fact he was divorced. Even though he made no affirmative misrepresentation, his silence when his divorce became final and subsequent failure to correct a known misrepresentation constituted false representation sufficient to establish that he wrongfully obtained services under false pretenses, an Article 134 offense. The court specifically analogized obtaining services by false pretenses (Article 134) with larceny by false pretenses (Article 121). *United States v. Perkins*, 56 M.J. 825 (A. Ct. Crim. App. 2001) (ACCA formally adopted the position already taken by NMCCA and AFCCA).

(c) Procuring casual pay by misrepresentation or failing to inquire into legitimacy of casual pay does not amount to larceny by false pretenses. *United States v. Johnson*, 30 M.J. 930 (A.C.M.R. 1990).

(d) *United States v. Johnson*, 39 M.J. 707 (N.M.C.M.R. 1993), *aff'd*, 40 M.J. 318 (C.M.A. 1993) (larceny of BAQ and VHA by false pretenses when accused divorced his wife, knew that he was under a duty to report his change in marital

status, but remained silent and exploited government reliance on his previous statement of marital status in order to continue receiving pay).

(e) *United States v. Bulger*, 41 M.J. 194 (C.M.A. 1994) (Larceny by false pretenses includes those instances where a service member has dependents, but, while drawing BAH based on those dependents, does not provide financial support to them).

(8) Defrauding insurance company by killing insured or intentionally destroying property in order to collect insurance proceeds is larceny by false pretenses. *United States v. Garner*, 43 M.J. 435 (C.A.A.F. 1996).

(9) *United States v. Fenner*, 53 M.J. 666 (A.F. Ct. Crim. App. 2000) (sole lessee collected $225 from his 3 roommates for rent and utilities. After his roommates paid him one month, he told them that someone had stolen all the money, which was a lie. Each of the roommates agreed to pay an extra $75 per month for the next three months to replace the stolen money. The court affirmed the part of a specification that alleged larceny of $75 that one of the roommates paid the accused toward the supposedly stolen rent as the roommate paid the accused $75 under the false pretense that the money had been stolen).

c) Withholding. A "withholding" may arise as a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property; or it may arise as a result of devoting property to a use not authorized by its owner. Generally this is so whether the person withholding the property acquired it lawfully or unlawfully. MCM, pt. IV, ¶ 64c(1)(b). This theory encompasses the common law offenses of embezzlement and conversion.

(1) *United States v. Moreno*, 23 M.J. 622 (A.F.C.M.R.), *pet. denied*, 24 M.J. 348 (C.M.A. 1986) (accused wrote checks against money erroneously deposited in his account; intent to steal (withholding) may be formed after the property is obtained).

(2) Embezzlement requires a fiduciary relationship and a lawful holding. *United States v. Castillo*, 18 M.J. 590 (N.M.C.M.R. 1984); *see also United States v. McFarland*, 23 C.M.R. 266 (C.M.A. 1957).

(3) Wrongful conversion requires an accounting to the owner. *United States v. Paulk*, 32 C.M.R. 456 (C.M.A. 1963).

(4) *United States v. Head*, 6 M.J. 840 (N.C.M.R. 1979) (larceny by withholding when a victim mistook accused to be a robber and handed his wallet to the accused who, at that time, formed the intent and took money from the wallet. Though he abandoned the wallet, the accused was responsible for larceny of the sum he took).

(5) Neither a receiver of stolen property nor an accessory after the fact can be convicted of larceny on the theory that, with knowledge of the identity of the owner, he withheld the stolen property from the owner. *United States v. Sanderson*, CM 438057 (A.C.M.R. 29 Jun. 79) (unpub.); *see also United States v. Jones*, 33 C.M.R. 167 (C.M.A. 1963).

(6) *United States v. Bilbo*, 9 M.J. 800 (N.C.M.R. 1980). Accused who lawfully obtained loans from fellow Marines but then failed to repay those loans was found guilty of wrongful appropriation, not larceny.

(7) *United States v. Hale*, 28 M.J. 310 (C.M.A. 1989). Retention of rental car beyond period contemplated by rental contract constitutes wrongful appropriation (unless intent to permanently deprive the owner of the property can be proven).

(8) Withholding of unauthorized pay or allowances. These cases differ from the cases annotated above in which unauthorized pay and allowances are *obtained* by false pretenses. The withholding cases discussed here involve either government error or a change in the serviceman's status, which effects his continued entitlement to the pay or allowance. The property is obtained lawfully.

(a) In the absence of a fiduciary duty to account, a withholding of funds otherwise lawfully obtained is not larcenous. *United States v. Watkins*, 32 M.J. 327 (A.C.M.R. 1990); *United States v. Johnson*, 39 M.J. 707 (N.M.C.M.R. 1993); *but see United States v. Thomas*, 36 M.J. 617 (A.C.M.R. 1992) (accused had a duty to inform government of change in circumstances, by failing to do so he is guilty of larceny of funds); *cf. United States v. Markley*, 40 M.J. 581 (A.F.C.M.R. 1994) (failure of duty to report change in marital status effecting entitlement to allowances may support conviction for dereliction of duty); *United States v. Antonelli*, 43 M.J. 183 (C.A.A.F. 1995) (allowances, including BAQ and VHA, remain the property of the United States unless they are used for their statutory or regulatory purposes), *aff'd*, 45 M.J. 12 (C.A.A.F. 1996).

(b) Once service member realizes that he or she is erroneously receiving pay or allowances and forms the intent to steal that property, the service member has committed larceny even without an affirmative act of deception or a duty to account for the funds. *United States v. Helms*, 47 M.J. 1 (C.A.A.F. 1997) (unanimously resolving issue left open in *United States v. Antonelli*, 43 M.J. 183 (C.A.A.F. 1995), *aff'd*, 45 M.J. 12 (C.A.A.F. 1996)); *United States v. Perkins*, 56 M.J. 825 (Army Ct. Crim. App. 2001).

(c) *United States v. Gray*, 44 M.J. 585 (N-M. Ct. Crim. App. 1996) (accused's silence after he discovered error of housing office and finance to continue his BAQ and VHA payments after government quarters were assigned was insufficient to support conviction for larceny by wrongful withholding absent any affirmative steps by accused to ensure that he would continue to be overpaid. Further, the accused fully expected the Navy to recoup overpayments eventually, without disciplinary action, as it had done in the past).

(d) *United States v. Stadler*, 44 M.J. 566 (A.F. Ct. Crim. App. 1996) (larceny of OHA and COLA allowances where accused continued to collect these allowances after his family returned to CONUS and he moved into government quarters), *aff'd*, 47 M.J. 206 (C.A.A.F. 1997).

(e) Evidence insufficient to establish that accused's spouse had possessory or ownership rights to BAQ at w/dep rate and thus failed to establish that accused had stolen BAQ from his wife. *United States v. Evans*, 37 M.J. 468 (C.M.A. 1993).

(f) Excess BAQ was "military property of the United States." *United States v. Dailey*, 37 M.J. 463 (C.M.A. 1993).

(9) Conversion. The wrongful possession or disposition of another's property as if it were one's own. Additionally, the act of appropriating the property of another to one's own benefit or the benefit of another. Black's Law Dictionary (8th Ed. 2004).

(a) *United States v. Antonelli*, 35 M.J. 122 (C.M.A. 1992). Conversion theory of larceny may apply to accused who receives BAQ and VHA allowances to support his dependents, but who does not actually provide support.

4. Element 2: That the property described belonged to a person other than the accused.

a) The "owner" refers to the person who, at the time of the taking, obtaining, or withholding, had the superior right to possession of the property in light of all conflicting interests therein which may be involved in the particular case. MCM, pt. IV, ¶ 46c(1)(c)(ii). *See United States v. Evans*, 37 M.J. 468 (C.M.A. 1993) (evidence insufficient to establish that accused's spouse had possessory or other ownership right to BAQ and, thus, failed to establish that accused stole BAQ from his spouse); *United States v. Cohen*, 12 M.J. 573 (A.F.C.M.R. 1981) (even though the checks were intended for various banks and credit unions, the United States had possession of the checks while they were in the mail; thus the charge of larceny from the United States was proper); *United States v. Jett*, 14 M.J. 941 (A.C.M.R. 1982) (victim is anyone with a superior right of possession to the accused, regardless of who has title); *United States v. Meadows*, 14 M.J. 1002 (A.C.M.R. 1982) (can commit larceny or wrongful appropriation by taking military equipment from one unit to another); *United States v. Lewis*, 19 M.J. 623 (A.C.M.R. 1984) (government retains ownership in TDY advance).

b) To be guilty of larceny, accused must take property from one having a superior possessory interest. *United States v. Faircloth*, 45 M.J.172 (C.A.A.F. 1996) (accused forged endorsement in financing company's behalf on insurance check issued to accused and financing company as co payees to auto damage; during providency, accused admitted financing company had superior possessory interest). *See also United States v. Faggiole*, 2016 WL 6426694 (N-M.Ct.Crim.App. 2016) (bank account holder had superior possessory interest in funds than did bank as bank account holder withdrew the money from his own account and possessed it prior to giving it the appellant).

5. Element 3: That the property in question was of a value alleged, or of some value.

a) Ordinarily the value of stolen property is determined by its market value at the time of the theft. *United States v. Smith*, 1960 WL 4439 (C.A.A. 1960). *See also United States v. Lewis*, 13 M.J. 561 (A.F.C.M.R. 1982) (accused properly convicted of full value of item where he switched price tags and paid the lower price).

(1) Government item. Government price lists can be used to establish value. *See* M.R.E 803(17).

(2) Non-government item. Average retail selling price established by recent purchase price of like item, testimony of market expert, testimony of owner's opinion as to value, etc.

b) Value tokens. Writings representing value may be considered to have the value which they represent, even though contingently, at the time of the theft. MCM, pt. IV, ¶ 64c(1)(g)(iii). *See United States v. Windham*, 36 C.M.R. 21 (C.M.A. 1965); *United States v. Riverasoto*, 29 M.J. 594 (A.C.M.R. 1989) (drafted check—face value);*United States v. Cook*, 15 C.M.R. 622 (A.F.B.R. 1954) (gasoline coupons—face value); *United States v. Frost*, 46 C.M.R. 233 (C.M.A. 1973) (blank check—nominal value); *see also United States v. Falcon*, 16 M.J. 528 (A.C.M.R. 1983); *United States v. Stewart*, 1 M.J. 750 (A.C.M.R. 1973) (airline ticket—face value); *United States v. Payne*, 9 M.J. 681 (A.F.C.M.R. 1980) (accounts receivable—nominal value); *United States v. Sowards*, 5 M.J. 864 (A.F.C.M.R. 1978) (money orders—face value); *but see United States v. McCollum*, 13 M.J. 127 (C.M.A. 1982) (value can include what items might bring in illegal channels—"thieves value").

c) Value of property must reasonably approximate the loss. *United States v. Eggleton*, 47 C.M.R. 920 (C.M.A. 1973).

d) Operating a scheme that results in the taking or diversion of money on a recurring basis (i.e. housing allowance fraud) results in one crime and the value of the taken money can be aggregated. *United States v. Hines*, 73 M.J. 119 (C.A.A.F. 2014).

e) For larceny and sale of military property under Article 108, the same aggregation principles apply as for standard larceny: values can be aggregated for items stolen or sold at the same time and place. *United States v. Fiame*, 74 M.J. 585 (A. Ct. Crim. App. 2015).

f) In *United States v. Batiste*, 11 M.J. 791 (A.F.C.M.R. 1981), the court held that urine, which was to be sent to the laboratory for testing, was an article of value for purposes of larceny prosecution and the immediate substitution by accused of a like quantity of urine did not diminish the offense of wrongful appropriation.

6. Element 4: That the taking, obtaining, or withholding by the accused was with the intent [permanently/temporarily] to deprive or defraud another person of the use and benefit of the property or [permanently/temporarily] to appropriate the property for the use of the accused or for any other person other than the owner.

a) Concurrence of intent and wrongful act. The wrongful taking, obtaining or withholding must be accompanied by the intent to steal or wrongfully appropriate the property. Although a person gets property by a taking or obtaining which was not wrongful or which was without a concurrent intent to steal, a larceny is nevertheless committed if an intent to steal is formed after the taking or obtaining and the property is wrongfully withheld with that intent. MCM, pt. IV, ¶ 64c(1)(f)(i).

b) Intent may be proved by circumstantial evidence. *United States v. Zaiss*, 42 M.J. 586 (Army Ct. Crim. App. 1995) (intent to steal may be inferred when accused secretly takes property, hides it, and denies knowing anything about it).

c) Wrongful appropriation of government property requires a specific intent to deprive the government or a unit thereof of more than mere possession of its property. *United States v. McGowan*, 41 M.J. 406 (C.A.A.F. 1995). Taking military equipment for maintenance does not constitute wrongful appropriation. *United States v. Taylor*, 44 C.M.R. 274 (C.M.A. 1972). Similarly, the incidental use of a government vehicle for private purposes does not constitute misappropriation, provided the vehicle is also used for authorized purposes without diversion or deviation. *United States v. Lutgert*, 40 C.M.R. 94 (C.M.A. 1969).

d) Mere borrowing without consent is not always an offense. *United States v. Harville*, 14 M.J. 270 (C.M.A. 1982); *United States v. Thomas*, 34 C.M.R. 3 (C.M.A. 1963) (borrowing clothes from barracks occupant can be defense to wrongful appropriation).

e) There may be a limited right of self-help to seize another's property in order to satisfy a debt or acquire security for it, if there is a prior agreement between the parties providing for such recourse, or if the soldier takes property honestly believing he has a superior claim of right to that specific property. *United States v. Jackson*, 50 M.J. 868 (Army Ct. Crim. App. 1999), *aff'd*, 53 M.J. 220 (C.A.A.F. 2000); *United States v. Gunter*, 42 M.J. 292 (C.A.A.F. 1995); *United States v. Smith*, 14 M.J. 68 (C.M.A. 1982).

(1) Self-help is not justified where the debt is uncertain; and the value of the property taken must reasonably approximate the loss. *United States v. Cunningham*, 14 M.J. 539 (A.C.M.R. 1982), *rev'd and remanded on other grounds*, 15 M.J. 282 (C.M.A. 1983); *United States v. Kelley*, 39 M.J. 1011 (A.C.M.R. 1994); *see also United States v. Eggleton*, 47 C.M.R. 920 (C.M.A. 1973).

(2) Honest mistake of fact by accused that he was entitled to receive property may be a defense to larceny. *United States v. Turner*, 27 M.J. 217 (C.M.A. 1988).

(3) "Claim of Right." A defense exists for a soldier who takes property from another honestly believing that he has a superior claim of right to that specific property. *United States v. Gunter*, 42 M.J. 292 (1995); *United States v. Jackson*, 50 M.J. 868 (Army Ct. Crim. App. 1999) (engagement ring and exercise bike given to fiancé).

(4) No right of retrieval is recognized for contraband. *United States v. Petrie*, 1 M.J. 333 (C.M.A. 1976).

(5) No right of accused to unilaterally elevate himself to position of secured creditor by grabbing at will chattels belonging to service member. *United States v. Martin*, 37 M.J. 546 (N.M.C.M.R. 1993)(taking of ring from service member who owed money as security for debt was wrongful taking).

f) Motive does not negate intent. For example, if the accused took an item as a joke or to teach the owner a lesson about security, the taking is nonetheless wrongful if, viewed objectively, harm was caused (*i.e.*, the owner is permanently or temporarily deprived of the use or benefit of the property). MCM, pt. IV, ¶ 64c(1)(f)(iii); *United States v. Kastner*, 17 M.J. 11 (C.M.A. 1983); *United States v. Johnson*, 17 M.J. 140 (C.M.A. 1984).

g) An accused that believes property to be abandoned lacks the *mens rea* required for larceny. *United States v. Malone*, 14 M.J. 563 (N.M.C.M.R. 1982); *see also* MCM, pt. IV, ¶ 46c(1)(h)(i); *see also United States v. Turner*, 27 M.J. 217 (C.M.A. 1988); *United States v. Jones*, 26 M.J. 1009 (A.C.M.R. 1988). *But see United States v. Clark*, 2014 WL 1725799 (N-M.Ct.Crim.App. 2014) (willful ignorance of the status of the property will not be construed as mistake of fact as to its status).

h) Intent to pay for, replace, or return property is not a defense. MCM, pt. IV, ¶ 64c(1)(f)(iii)(A)-(B); *see United States v. Brown*, 30 M.J. 693 (A.C.M.R. 1990); *United States v. Woodson*, 52 M.J. 688 (C.G. Ct. Crim. App. 2000). *But see United States v. Boddie*, 49 M.J. 310 (C.A.A.F. 1998) (in dicta, the CAAF states that an intent to pay for property *may* be a defense if there is "a substantial ability to do so").

i) Intent to pay for, replace, or return money or a negotiable instrument having no special value above its face value, with the intent to return an equivalent amount, is a defense to larceny. *United States v. Hegel*, 52 M.J. 778 (C.G. Ct. Crim. App. 2000) (accused stole CitiBank Visa card and used it, but because the accused claimed he intended to pay the bill in full when due, the plea of guilty to larceny of funds from CitiBank was improvident).

j) Overdraft protection may negate intent to steal in cases of larceny by false pretenses involving bad checks. *United States v. McCanless*, 29 M.J. 985 (A.F.C.M.R. 1990); *see United States v. McNeil*, 30 M.J. 648 (N.M.C.M.R. 1990); *see generally* TJAGSA Practice Note, *Overdraft Protection and Economic Crimes*, Army Law., Jul. 1990, at 45.

k) Where transfer of possession occurred prior to act of accused, no wrongful taking or withholding has occurred. *United States v. Hughes*, 45 M.J. 137 (C.A.A.F. 1996)(accused merely placed lock on his assigned wall locker which contained property belonging to another soldier that was stored there without the permission of the accused).

7. Multiplicity.

a) When a larceny of several articles is committed at substantially the same time and place, it is a single larceny, even though the articles belong to different persons. MCM, pt. IV, ¶ 64c(1)(h)(ii); *United States v. Warner*, 33 M.J. 522 (A.F.C.M.R. 1991); *United States v. Ruiz*,

30 M.J. 867 (N.M.C.M.R. 1990); *United States v. Miller*, 2000 C.A.A.F. LEXIS 207 (Feb. 24, 2000) (contemporaneous theft of two different victims' checks, which the accused found in one victim's drawer, constituted a single larceny); *United States v. LePresti*, 52 M.J. 644 (N-M. Ct. Crim. App. 1999).

b) *United States v. Florence*, 5 C.M.R. 48 (C.M.A. 1952). Without evidence to justify joining larcenies into one specification and thereby increasing the penalty, the Government should have charged separately. *See also United States v. Armstrong*, 2003 WL 21511139, (A.F.Ct.Crim.App. 2003).

c) *United States v. Gillingham*, 1 M.J. 1193 (N.C.M.R. 1976). Theft of calculator from one office was not multiplicious with theft of second calculator, moments later, from adjoining office.

d) *United States v. Alvarez*, 5 M.J. 762 (A.C.M.R. 1978). Housebreaking and larceny in the same transaction were not multiplicious.

e) *United States v. Burney*, 44 C.M.R. 125 (C.M.A. 1971). Larceny and wrongful appropriation of a truck to transport stolen goods were not multiplicious.

f) *United States v. Harrison*, 4 M.J. 332 (C.M.A. 1978). Six larcenies and six facilitating false official statements were not multiplicious for sentencing purposes.

8. Divisible Property. *United States v. Pardue*, 35 C.M.R. 455 (C.M.A. 1965). Where the accused is charged only with larceny of an automobile, he may not be found not guilty of wrongful appropriation of the automobile but guilty of larceny of an essential part (*i.e.*, the tires). *See also United States v. Jones*, 13 M.J. 761 (A.F.C.M.R. 1982).

9. Permissive Inferences.

a) Inference of wrongfulness arising out of possession of recently stolen property. If the facts establish that property was wrongfully taken from the possession of the owner and that shortly thereafter the property was discovered in the knowing, conscious, exclusive, and unexplained possession of the accused, the fact-finder at trial may infer that the accused took the property. *United States v. Pasha*, 24 M.J. 87 (C.M.A. 1987); *United States v. Hairston*, 26 C.M.R. 334 (C.M.A. 1958); *United States v. Morton*, 15 M.J. 850 (A.F.C.M.R. 1983).

b) Passing cash register without offering to pay for an item concealed in the accused's pocket creates a permissive inference of intent to steal. *United States v. Wynn*, 23 M.J. 726 (A.F.C.M.R. 1986), *sentence vacated and remanded by*, 26 M.J. 232 (C.M.A. 1988).

10. Variance.

a) Because the identity of the victim is not an essential element of either larceny or wrongful appropriation, a variance in establishing ownership of the item taken will not always be fatal to the government's case. *United States v. Craig*, 24 C.M.R. 28 (C.M.A. 1957) (variance regarding victim in larceny case not prejudicial error); *United States v. Davis*, 31 C.M.R. 486 (C.G.B.R. 1962) (identity of victim of wrongful appropriation not an essential element); *United States v. Roberto*, 31 C.M.R. 349 (A.B.R. 1961) (variance as to ownership of funds in larceny case not fatal).

b) Variance in the date of the larceny may be fatal when the theory of larceny also changes. *United States v. Wray*, 17 M.J. 735 (C.M.A. 1984) (change of dates and theory from taking to taking and withholding was fatal variance).

11. Larceny of Mail Matter. Theft of misaddressed mail is included within the offenses of stealing mail under Article 109a (formerly Article 134). MCM, pt. IV, ¶ 93; UCMJ art. 109a; *United States v. Fox*, 50 M.J. 444 (C.A.A.F. 1999).

12. Credit Card/Automatic Teller Machine Offenses under Article 121 (for offenses occurring before 1 January 2019; for offenses occurring after 1 January 2019, see UCMJ art. 121a).

a) "Wrongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense. Such use to obtain goods is usually a larceny of those goods from the merchant offering them." *See* MCM (2008 ed.), pt. IV, ¶ 46.c(1)(h)(vi).

b) *United States v. Lubasky*, 68 M.J. 260 (C.A.A.F. 2010). The accused, under the guise of assisting the elderly victim with her finances, used her credit cards, ATM cards, and debit cards, for his own benefit.

(1) Credit card transactions. Under the facts of the case, the unauthorized use of credit cards to obtain cash advances and unspecified goods of a certain value, was not a larceny from the cardholder herself. In using the credit cards in this case, the accused did not obtain anything from the cardholder, but instead obtained items of value from other entities. As such, the court concluded that the proper subject of the credit-card-transaction larcenies in this case was not the cardholder.

(2) Debit/ATM Transactions. The accused obtained access to the victim's account by false pretenses, representing that he would use the funds only for the purposes she authorized. Any authority he had to access the victim's funds was limited by his "beneficiary status and [the accused's] fiduciary role." Although he had access to the account, his authority to use funds from the account was limited to purchasing items for the cardholder's benefit. Therefore, the evidence was legally sufficient to show that the accused wrongfully obtained money from her with the intent to permanently deprive her of it.

c) Larceny of another soldier's ATM card and the use of the card to make withdrawals are separate crimes and are separately punishable. *United States v. Garner*, 28 M.J. 634 (A.F.C.M.R. 1989); *United States v. Abendschein*, 19 M.J. 619 (A.C.M.R. 1984); *United States v. Jobes*, 20 M.J. 506 (A.F.C.M.R. 1985).

d) Withdrawals from several different accounts using one banking machine are separate crimes. *United States v. Aquino*, 20 M.J. 712 (A.C.M.R. 1985).

e) Misuse of Gov't travel card.

(1) Dereliction of duty. Article 92(3). *United States v. Long*, 46 M.J. 783 (Army Ct. Crim. App. 1997).

(2) Violation of general regulation. Article 92(1). *United States v. Hughey*, 46 M.J. 152 (1997) (Air Force base regulation restricting use of government charge cards and establishing payment requirements was lawful general regulation).

13. Military Property As An Aggravating Factor For Larceny. *See supra* ¶ XLVIII for a discussion of military property under Article 108.

14. *See* Captain David O. Anglin, *Service Discrediting: Misuse, Abuse, and Fraud in the Government Purchase Card Program,* Army Law., August 2004, at 1.

LXVII. FRAUDULENT USE OF CREDIT CARDS, DEBIT CARDS, AND OTHER ACCESS DEVICES, ART 121a

A. Elements.

1. That the accused knowingly used a stolen credit card, debit card, or other access device; or

2. That the accused knowingly used a revoked, cancelled, or otherwise invalid credit card, debit card; or

3. That the accused knowingly used a credit card, debit card, or other access device without the authorization of a person whose authorization was required for such use;

4. That the use was to obtain money, property, services, or anything else of value; and

5. The use by the accused was with the intent to defraud.

B. Explanation.

1. In general. This offense focuses on the intent of the accused and the technology used by the accused.

2. Intent to defraud. "Intent to defraud" means an intent to obtain, through a misrepresentation, an article or thing of value and to apply it to one's own use and benefit or to the use and benefit of another, either permanently or temporarily.

3. Inference of intent. An intent to defraud may be proved by circumstantial evidence.

4. Use of a credit card, debit card, or other access device without the authorization of a person whose authorization was required for such use. This provision applies to situations where an accused has no authorization to use the access device from a person whose authorization is required for such use, as well as situations where an accused exceeds the authorization is required for such use.

LXVIII. FALSE PRETENSES TO OBTAIN SERVICES, ART. 121b

LXIX. ROBBERY, ART. 122

A. Robbery. MCM, pt. IV, ¶ 67; UCMJ art. 122.

1. Elements.

a) That the accused wrongfully took certain property from the person or from the possession and in the presence of a person named or described;

b) That the taking was against the will of that person;

c) That the taking was by means of force, violence, or force and violence, or putting the person in fear of immediate or future injury to that person, a relative, a member of the person's family, anyone accompanying the person at the time of the robbery, the person's property, or the property of a relative, family member, or anyone accompanying the person at the time of the robbery.

d) That the property belonged to a person named or described; and

e) That the property was of a certain or of some value;

f) [If the robbery was committed with a dangerous weapon , add the following element:] That the means of force or violence or of putting the person in fear was a dangerous weapon.

2. Pleading.

a) Failure to allege ownership of the property. *United States v. Smith*, 40 C.M.R. 432 (A.B.R. 1968) (no error); *United States v. Goudeau*, 44 C.M.R. 438 (A.C.M.R. 1971) (implied from allegation that item was taken from the purse of a named victim).

b) Failure to allege a taking from the person or in the presence of the victim is fatal, but the specification may be sufficient to allege larceny. *United States v. Rios*, 15 C.M.R. 203 (C.M.A. 954); *United States v. Dozier*, 38 C.M.R. 507 (A.B.R. 1967); *United States v. Hunt*, 7 M.J. 985, 988 (A.C.M.R. 1979), aff'd, 10 M.J. 222 (C.M.A. 1981).

c) Failure to allege a taking "against his or her will." *United States v. Smith*, 40 C.M.R. 432 (A.B.R. 1968) (no defect; implied from allegation that taking was by means of force and violence).

3. Robbery has two theories: taking by force and/or violence, *or* taking by putting in fear. The alleged theory must be proved; evidence of the non-alleged theory will not suffice. *See United States v. Hamlin*, 33 C.M.R. 707 (A.F.B.R. 1963). Consequently, most prosecutors allege both theories.

a) Theory 1: Taking by force and/or violence.

(1) Victim's fear unnecessary.

(2) Amount of force required:

(a) Overcomes actual resistance, or

(b) Puts victim in a position not to resist, or

(c) Overcomes the restraint of a fastening (*e.g.*, in snatching purse the thief breaks strap of purse).

(3) The sequence and relationship of application of force and the intent to steal. Force and intent must be contemporaneous, but need not be simultaneous. If the accused's force and violence place the victim in vulnerable circumstances, this is sufficient for robbery if thereafter, while the victim is still vulnerable, the accused formulates the intent and takes the property. *United States v. Chambers*, 12 M.J. 443 (C.M.A. 1982); *United States v. Washington*, 12 M.J. 1036 (A.C.M.R. 1982).

(4) Picking a victim's pocket by stealth is not sufficient force for robbery; however, jostling a victim in conjunction with picking his pocket is sufficient force for robbery. *United States v. Reynolds*, 20 M.J. 118 (C.M.A. 1985).

b) Theory 2: Taking by putting in fear.

(1) Demonstration of force or menaces.

(2) Victim placed in fear of death or bodily injury in the present or future to himself, relative, or anyone in his company at the time.

(a) Reasonable fear. The test for its existence is objective. *United States v. Bates*, 24 C.M.R. 738 (A.F.B.R. 1957).

(b) Sufficient to warrant giving up property.

(c) Sufficient to warrant making no resistance.

(3) Taking while fear exists.

4. Wrongful taking must be from the person or in the presence of the victim. It is not necessary that the property taken be located within any certain distance of the victim.

a) "Presence" for purposes of robbery means that possession or control is so imminent that force or intimidation is required to remove the property. *United States v. Cagle*, 12 M.J. 736 (A.F.C.M.R. 1982).

b) "In the presence" is satisfied where victim held by force while his property is secured from another building and destroyed before him. *United States v. Maldonado*, 34 C.M.R. 952 (A.B.R.), *rev'd on other grounds*, 35 C.M.R. 257 (C.M.A. 1964).

c) Property taken need not be from person of victim, but may be from victim's immediate control. *United States v. Hamlin*, 33 C.M.R. 707 (A.F.B.R. 1963).

d) No fatal variance exists between specification and proof where the former alleges "from the person" but evidence shows "in the presence." *United States v. McCray*, 5 M.J. 820 (A.C.M.R. 1978).

5. Robbery is a composite offense combining larceny with assault. *United States v. Chambers*, 12 M.J. 443 (C.M.A. 1982) (force applied after taking effected sufficient for robbery); *United States v. Brown*, 33 C.M.R. 17 (C.M.A. 1963).

6. Robbery requires a larceny by wrongful taking. The other theories of larceny, wrongful withholding or obtaining, will not suffice. *United States v. Brazil*, 5 M.J. 509 (A.C.M.R. 1978).

7. Intent.

a) Robbery is a specific intent crime and mental impairment short of legal insanity is relevant to the accused's formation of the requisite intent. *See United States v. Carver*, 19 C.M.R. 384 (C.M.A. 1955); *United States v. Thomson*, 3 M.J. 271 (C.M.A. 1977).

b) The intent to rob need not be focused upon specific property. An intent to deprive the victim of whatever is in a pocket or purse is sufficient. *United States v. Davis*, 6 M.J. 669 (A.C.M.R. 1978).

c) The intent to rob need not precede or be simultaneous with the taking of the property. It must only be contemporaneous with such taking. *United States v. Fell*, 33 M.J. 628 (A.C.M.R. 1991); *see also United States v. Washington*, 12 M.J. 1036 (A.C.M.R. 1982); *United States v. Henry*, 18 M.J. 773 (N.M.C.M.R. 1984) (intent to steal formulated during asportation phase) *aff'd in part, rev'd in part on multiplicity grounds*, 21 M.J. 172 (C.M.A. 1985).

d) Claim of Right defense. The intent to take one's own property, or property one believes is one's own, is not sufficient to form the specific intent required for robbery. *United States v. Mack*, 6 M.J 598 (A.C.M.R. 1978). *But see United States v. Cunningham*, 14 M.J. 539 (A.C.M.R. 1979) (Claim of right defense is unavailable to an accused who takes money or valuables in liquidation of an uncertain obligation or debt for money.)

8. Forcible taking of property belonging to one entity from multiple persons constitutes one robbery. *United States v. Szentmiklosi*, 55 M.J. 487 (2001), *aff'd*, 57 M.J. 103 (C.A.A.F. 2002).

9. Lesser included Offenses.

a) Assaults under Article 128 are lesser included offenses of robbery when the assault offense is the force alleged to have been used to accomplish the gravamen robbery offense. *United States v. Johnson*, No. ARMY 20140480, 2015 CCA LEXIS 569 (A. Ct. Crim. App. 2015); *United States v. Franklin*, No. 2013 CCA LEXIS 72, 2013 WL 416027 (A. Ct. Crim. App. 2013.)

b) Receipt of Stolen Property is a lesser included offense of robbery. *United States v. Michelena*, No. NMCCA 201400376, 2015 CCA LEXIS 463 (N-M. Ct. Crim. App. 2015.)

c) Under the "elements test," the federal offense of bank larceny was not a lesser included offense of the federal offense of bank robbery, so the defendant was not entitled to a jury instruction on it. A textual comparison of the elements of the two offenses in 18 U.S.C. § 2113 demonstrates that bank larceny requires three elements not required for bank robbery: (1) intent to steal; (2) asportation; and (3) value exceeding $1,000. *Carter v. United States*, 120 S.Ct. 2159 (2000) (although larceny is a lesser included offense of robbery under the UCMJ, the significance of this 5-4 decision is how a majority of the Court mechanically applied the "elements test" by comparing the statutory text).

LXX. RECEIVING STOLEN PROPERTY, ART. 122a

A. Receiving Stolen Property. MCM, pt. IV, ¶ 68; UCMJ art. 122a.

1. Elements:

a) That the accused wrongfully received, bought, or concealed certain property of some value.

b) That the property belonged to another person.

c) That the property had been stolen.

d) That the accused then knew the property had been stolen.

2. Acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property or of being an accessory after the fact are not included within the meaning of 'withholds.' Therefore, neither a receiver of stolen property nor an accessory after the fact can be convicted of larceny [or wrongful appropriation] on that basis alone. As such, the actual thief cannot be a receiver of the goods he has stolen. MCM (2016 ed.), pt. IV, ¶ 106(c)(1); *United States v. Ford*, 30 C.M.R. 3 (C.M.A. 1960); *United States v.* Mazzullo, ARMY 20000629, 2002 CCA LEXIS 369 (A.Ct.Crim.App. 2002). Thus, the original asportation (carrying away) of the property must be completed by the thief before another can be found guilty of receiving stolen property. *United States v. Graves*, 20 M.J. 344 (C.M.A. 1985).

3. The soldier who receives stolen property innocently and later discovers that it is stolen cannot be guilty of receiving stolen property. *United States v. Rokoski*, 30 C.M.R. 433 (A.B.R. 1960); *United States v. Lowery*, 19 M.J. 754 (A.C.M.R. 1984).

4. Although a principal who is not the actual thief may be liable as a principal or receiver of stolen property, he may not be found guilty of both as the President has clearly expressed his intent to limit the general article offense of receipt of stolen property by prohibiting conviction both for it and for larceny of the same property. *United States v. Cartwright*, 13 M.J. 174 (C.M.A. 1982); MCM, pt. IV, ¶ 106(c)(1); *United States v. Michelena*, NMCCA 201400376, 2015 CCA LEXIS 463, (N-M.Ct.Crim.App. 2015).

5. A conspirator to the larceny may not be found guilty of being an accessory after the fact or a receiver of the stolen property. *United States v. Lampani*, 14 M.J. 22 (C.M.A. 1982).

LXXI. OFFENSES CONCERNING GOVERNMENT COMPUTERS, ART. 123

A. Three offenses.

1. Unauthorized distribution of classified information obtained from a government computer.

a) Elements.

(1) That the accused knowingly accessed a government computer with an unauthorized purpose;

(2) That the accused obtained classified information;

(3) That the accused had reason to believe the information could be used to injury the United States or benefit a foreign nation; and

(4) That the accused intentionally communicated, delivered, transmitted, or caused to be communicated, delivered, or transmitted, such information to any person not entitled to receive it.

2. Unauthorized access of a government computer and obtaining classified or other protected information.

a) Elements.

(1) That the accused intentionally accessed a government computer with an unauthorized purpose; and

(2) That the accused thereby obtained classified or other protected information from any such government computer.

3. Causing damage to a government computer.

a) Elements.

(1) That the accused knowingly accused the transmission of a program, information, code, or command; and

(2) That the accused, as a result, intentionally and without authorization caused damage to a government computer.

B. Explanation.

1. "Access" means to gain entry to, instruct, cause input to, cause output from, cause data processing with, or communicate with, the logical, arithmetical, or memory function resources of a computer.

2. The phrase "with an unauthorized purpose" may refer to more than one unauthorized purpose, or an unauthorized purpose in conjunction with an authorized purpose. The phrase covers persons accessing Government computers without any authorization, i.e., "outsiders," as well as persons with authorization who access Government computers for an improper purpose or who exceed their authorization, i.e., "insiders." The key criterion to determine criminality is whether the person intentionally used the computer for a purpose that was clearly contrary to the interests or intent of the authorizing party.

3. Classified information is defined at 10 U.S.C. § 801(15).

4. Non-classified protected information includes Personally Identifiable Information (PII), as well as information designated as Controlled Unclassified Information (CUI) by the Secretary of Defense, and information designated as For Official Use Only (FOUO), Law Enforcement Sensitive (LES), Unclassified Nuclear Information (UCNI), and Limited Distribution.

5. The definition of "damage" is taken from 18 U.S.C. § 1030 and means any impairment to the integrity or availability of data, a program, a system, or information.

6. The definition of "computer" is taken from 18 U.S.C. § 1030 and means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility

directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device. A portable computer, including a smartphone, is a computer.

LXXII. MAKING, DRAWING, OR UTTERING CHECK, DRAFT, OR ORDER WITHOUT SUFFICIENT FUNDS, ART. 123A

A. Article 123a

1. Making, drawing or uttering check, draft or order with intent to defraud or deceive.

a) Elements:

(1) The accused made, drew, uttered or delivered a check/draft/order for payment of money payable to a named person or organization.

(2) The accused did so for the purpose of procuring an article or thing of value.

(3) That the act was committed with intent to defraud; and

(4) That at the time of making drawing, uttering, or delivery of the instrument the accused knew that the accused or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

b) For a good discussion and application of these elements, see *United States . Carter*, 32 M.J. 522 (A.C.M.R. 1990).

2. For the payment of any past due obligation, or for any other purpose, with intent to deceive.

a) Elements:

(1) That the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money payable to a named person or organization;

(2) That the accused did so for the purpose or purported purpose of effecting the payment of a past due obligation or for some other purpose;

(3) That the act was committed with the intent to deceive; and

(4) That at the time of making, drawing, uttering, or delivering of the instrument, the accused knew that the accused or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

b) Definitions. MCM, pt. IV, ¶ 70c.

(1) Written instruments covered. Includes any check, draft, or order for payment or money drawn upon any bank or other depository. *See, e.g., United States v. Palmer*, 14 M.J. 731 (A.F.C.M.R. 1982) (union share drafts).

(2) "Bank" or "other depository". Includes any business regularly but not exclusively engaged in public banking activities.

(3) "Making" and "drawing." Synonymous words and refer to act of writing and signing instrument.

(4) "Uttering" and "delivering." Both mean transferring instrument to another, but "uttering" includes offering to transfer.

(5) "For the procurement." Means for purpose of obtaining any article or thing of value.

(6) "For the payment." Means for purpose of satisfying in whole or part any past due obligation.

(7) "Sufficient funds." Means account balance at presentation is not less than face amount of check.

(8) "Upon its presentment." The time the demand for payment is made upon presentation of the instrument to the depository on which it was drawn.

(9) "For any other purpose." For any other purpose includes all purposes other than the payment of a past due obligation or the procurement of any article or thing of value.

(10) "Article or thing of value." Article or thing of value extends to every kind of right or interest in property, or derived from contract, including interests and rights which are intangible or contingent or which mature in the future.

(11) "Past due obligation." A past due obligation is an obligation to pay money, which obligation has legally matured before making, drawing, uttering, or delivering the instrument.

c) *Mens Rea*.

(1) "Intent to defraud" (UCMJ art. 123a(1)). An intent to obtain through misrepresentation, an article or thing of value with intent permanently or temporarily to apply it to one's own use or benefit. MCM, pt. IV, ¶ 70c(14). *See United States v. Sassaman*, 32 M.J. 687 (A.F.C.M.R. 1991). (Drawer cannot be convicted of writing bad checks with intent to defraud if drawer can show reasonable expectation that check would be paid as result of arrangement or understanding with bank or expectation to be able to make deposit sufficient to cover check before it is presented for payment).

(2) "Intent to deceive" (UCMJ art. 123a(2)). An intent to mislead, cheat, or trick another by means of a misrepresentation made for the purpose of gaining an advantage or of bringing about a disadvantage to another. MCM, pt. IV, ¶ 70c(15).

(3) "Intent to deceive" is not the same as "intent to defraud." *United States v. Wade*, 34 C.M.R. 287 (C.M.A. 1964) (specification fails to state offense which alleges "making a check with intent to deceive for the purpose of obtaining lawful currency").

d) Articles or thing of value.

(1) Need not actually be obtained. *United States v. Cordy*, 41 C.M.R. 670 (A.C.M.R. 1967).

(2) Includes every right or interest in property or contract, including intangible, contingent, or future interests. *United States v. Ward*, 35 C.M.R. 834 (A.F.B.R. 1965) (check used to procure auto insurance).

(3) Includes checks given as a gift. *United States v. Woodcock*, 39 M.J. 104 (C.M.A. 1994) (only advantage secured by accused was temporary aggrandizement in the eyes of the person to whom the checks were given).

e) "Past due obligation" or "any other purpose".

(1) "Past due obligation." Obligation to pay money which has legally matured prior to the making or uttering.

(2) "Any other purpose."

(a) Includes all purposes other than payment of past due obligation or the procurement of any article or thing of value, *e.g.*, paying an obligation not yet past due.

(b) Excludes checks made for the purpose of obtaining any article or thing of value covered by Article 123a(1), UCMJ. *United States v. Wade*, 34 C.M.R. 287 (C.M.A. 1964).

f) Knowledge.

(1) Requires present knowledge that bank account is presently, or will be, insufficient at time of presentment. *See United States v. Crosby*, 22 M.J. 854 (A.F.C.M.R. 1986); *United States v. Matthews*, 15 M.J. 622 (N.M.C.M.R. 1982).

(2) "Sufficient funds" relates to time of presentment.

(3) Neither proof of presentment nor refusal of payment is necessary, if it can otherwise be shown that accused had requisite intent and knowledge at time of making or uttering. For example: (a) drawn on nonexistent bank or (b) drawn on overdrawn or closed account.

(4) Conviction does not require proof that the accused knew that the account holders (from whom accused had stolen and used starter checks) had insufficient funds in their bank account. Proof of the accused's knowledge that he was not the owner of the account satisfies the knowledge requirement. *United States v. Guess*, 48 M.J. 69 (C.A.A.F. 1998).

(5) Past "floating" of checks several days before payday does not negate proof of intent. *United States v. Smith*, 49 M.J. 279 (C.A.A.F. 1998).

g) Post-dated check. *Compare United States v. Hodges*, 35 C.M.R. 867 (A.F.B.R. 1965) (check made with requisite knowledge and intent; conviction affirmed), *with United States v. Birdine*, 31 M.J. 674 (C.G.C.M.R. 1990) (post-dated check did not support conviction, because no intent to deceive by accused; accused believed the checks would be covered).

h) Statutory 5-day notice. MCM, pt. IV, ¶ 70c(17).

(1) Failure of maker to pay holder within 5 days after notice of non-payment is prima facie evidence that:

(a) Maker had intent to defraud or deceive.

(b) Maker had knowledge of insufficiency of funds.

(2) The above inference is only permissive and is rebuttable.

(3) Either failure to give notice or payment by accused within 5 days precludes prosecution use of inference, but it does not preclude conviction if elements are otherwise proved.

(4) Notice. *United States v. Jarrett*, 34 C.M.R. 652 (A.B.R. 1964) (reading of bad check charges to an account drawer by his detachment commander does not fulfill the statutory requirement of notice of dishonor); *United States v. Cauley*, 9 M.J. 791 (A.C.M.R. 1980), *rev'd on other grounds*, 12 M.J. 484 (C.M.A. 1982) (introduction at trial of letter from bank to accused's CO seeking his assistance in effecting payment of

accused's dishonored checks did not alone constitute proper notice even though letter contained a notation indicating that a copy was to be forwarded to the accused).

(5) Period of redemption. The 5-day redemption period means 5 calendar days and is not limited to ordinary business days, at least when the terminal date is not a Sunday or holiday. Days are computed by excluding the first day and including the last day. *United States v. O'Briant*, 32 C.M.R. 933 (A.F.B.R. 1963).

i) Pleading check offenses.

(1) Specification charging that the accused, on divers occasions, uttered worthless checks was legally sufficient to protect the accused from subsequent prosecutions. *United States v. Carter*, 21 M.J. 665 (A.C.M.R. 1985); *see also United States v. Krauss*, 20 M.J. 741 (N.M.C.M.R. 1985).

(2) "Mega-specs" permitted, and maximum punishment is determined by the number and amount of the checks as if they had been charged separately. *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995) (*overruling United States v. Poole*, 26 M.J. 272 (C.M.A. 1988)).

(3) Failure to object to duplicitous pleading of bad-check offenses waives any complaint that accused might have had about the pleadings. *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995).

j) Defenses.

(1) Honest mistake of fact. *United States v. Callaghan*, 34 C.M.R. 11 (C.M.A. 1963) (belief funds credited to account a legitimate defense).

(2) Redemption beyond 5-day period. *United States v. Broy*, 34 C.M.R. 199 (C.M.A. 1964) (no defense).

(3) "The Gambler's Defense." The Gambler's Defense is no longer recognized for check offenses arising under UCMJ art. 123a. *United States v. Falcon*, 65 M.J. 386 (C.A.A.F. 2008) (declining to apply *United States v. Allbery*, 44 M.J. 226 (C.A.A.F. 1996) and *United States v. Wallace*, 36 C.M.R. 148 (C.M.A. 1966) to the Article 123a line of cases which held 1) that transactions designed to facilitate gambling are against public policy and 2) that courts will not enforce obligations arising therefrom).

(4) Overdraft protection, relied upon by the accused without false pretenses, constitutes a defense to larceny and related bad check offenses. *United States v. McCanless*, 29 M.J. 985 (A.F.C.M.R. 1990); *see United States v. Crosby*, 41 C.M.R. 927 (A.F.C.M.R. 1969). Unilateral action by a bank in honoring checks, unknown to the accused, does not constitute a defense. *United States v. McNeil*, 30 M.J. 648 (N.M.C.M.R. 1990); *see generally* TJAGSA Practice Note, *Overdraft Protection and Economic Crimes*, Army Law., Jul. 1990, at 45.

(5) Reasonable expectation of payment. *United States v. Webb*, 46 C.M.R. 1083 (A.C.M.R. 1972) (accused who writes overdrafts but reasonably expects to have funds to deposit before presentment has a legitimate defense).

(6) Compulsive gambling not a defense where accused hoped to win large sums to redeem worthless checks. *United States v. Zojak*, 15 M.J. 845 (A.F.C.M.R. 1983).

k) See generally Richmond, Bad Check Cases: A Primer for Trial and Defense Counsel, Army Law., Jan. 1990, at 3.

LXXIII. FRAUDS AGAINST THE UNITED STATES, ART. 124

A. Frauds Against The United States. MCM, pt. IV, ¶ 71; UCMJ art. 124.

1. Merely creating a fraudulent document does not, by itself, constitute "making a claim;" some act, not necessarily amounting to presentment for payment, is necessary before a writing is considered a claim. See *United States. v. Thomas*, 31 M.J. 517 (A.C.M.R. 1990); *United States v. Thomas*, 31 M.J. 517 (A.C.M.A 1990). See also False Claims, 57 C.J.S. Military Justice § 97.

2. Submission of a travel voucher for a TDY trip "concocted" to primarily conduct personal business is a false claim under Article 124 (formerly 132). *United States v. Mann*, 50 M.J. 689 (A.F. Ct. Crim. App. 1999).

3. Forgery is a lesser included offense of this Article 124 (formerly 132), UCMJ. See *U.S. v. Morita*, 73 M.J. 548 (A.F.Ct.Crim.App. 2014).

LXXIV. BRIBERY, ART. 124a

LXXV. GRAFT, ART. 124b

OFFENSES AGAINST PERSONS

LXXVI. KIDNAPPING, ART. 125

A. Elements.

1. That the accused seized, confined, inveigled, decoyed, or carried away a certain person;

2. That the accused then held such person against that person's will; and

3. That the accused did so wrongfully.

B. Theories of Prosecution.

1. If the misconduct occurred in an area over which the United States exercises exclusive or concurrent jurisdiction, the accused may be charged with violating state penal law as assimilated into federal law by the Assimilative Crimes Act, 18 U.S.C. § 13, which, in turn, is incorporated into military law under the Clause 3 of Article 134.

2. If it meets the jurisdictional requirements of the Federal Kidnapping Act, 18 U.S.C. § 1201, which is also assimilated into military law by Clause 3 of Article 134, the crime may be prosecuted under that statute.

C. Nature of Detention. In order to convict accused of kidnapping, there must be more than "incidental" detention.

1. Factors to consider in determining whether the detention was incidental include, *U.S. v. Barnes*, 38 M.J. 72 (C.M.A. 1993):

a) Whether there was an unlawful seizure, confinement, inveigling, decoying, kidnapping, abduction or carrying away and holding for a period of time. Both elements must be present;

b) The duration of detention. Is it appreciable or de minimis? This determination is relative and turns on the established facts;

c) Whether the detention occurred during the commission of a separate offense;

d) The character of any separate offense in terms of whether the detention/asportation is inherent in the commission of that kind of offense, at the place where the victim is first encountered, without regard to the particular plan devised by the criminal to commit it;

e) Whether the detention or asportation exceeded that which was inherent in any separate offense and, in the circumstances, showed a voluntary and distinct intention to move/detain the victim beyond that necessary to commit the separate offense at the place where the victim was first encountered; and

f) The existence of any significant additional risk to the victim beyond that inherent in the commission of the separate offense at the place where the victim is first encountered. It is immaterial that the additional harm is not planned by the criminal or that it does not involve the commission of another offense.

2. *United States v. Seay*, 60 M.J. 73 (C.A.A.F. 2004). Accused and accomplice removed victim from his home, strangled, and pinned victim to ground before stabbing victim to death. These acts of restraint and asportation (removing the victim from his home) occurred prior the actual murder and exceeded the acts inherent to the commission of the murder.

3. *United States v. Newbold*, 45 M.J. 109 (C.A.A.F. 1996) (victim was moved no more than 12 feet and was detained only long enough to complete the multiple indecent and aggravated assaults; however, movement of the victim limited the possibility of escape, and once the detention began, the subsequent offenses necessarily were "fed" by the increasingly more heinous actions of the assailants; thus, asportation was not merely incidental to other charged offenses, and evidence was sufficient to sustain guilty plea).

4. *United States v. Jeffress*, 28 M.J. 409 (C.M.A. 1989) (detention of victim consisted of moving her some 15 feet; she was moved from traveled area into greater darkness; there was increased risk of harm to the victim; dragging victim away from beaten path was not inherent in offense of forcible sodomy; factually sufficient to sustain a guilty plea to kidnapping).

5. *United States v. Broussard*, 35 M.J. 665 (A.C.M.R. 1992) (accused grabbed his wife from behind, dragged her into the bedroom, bound her arms and legs to furniture, and held her for a sufficient period of time).

6. *United States v. Caruthers*, 37 M.J. 1006 (A.C.M.R. 1993) (accused's asportation and holding of his wife were more than incidental; accused conceded his wife was seized or held when she was grabbed from behind, gagged, tied and dragged short distance away where she was held for two to three-hour period during commission of sexual assaults).

7. *United States v. Sneed*, 74 M.J. 612 (A. Ct. Crim. App. 2015) (accused's locking his pregnant girlfriend in a closet for approximately ten minutes was not incidental to the attempted robbery of her debit card and supported a conviction for kidnapping; kidnapping was not inherently necessary for the attempted robbery of her debit card that the accused also committed).

D. Inveigling. "Inveigle" means to lure, lead astray, or entice by false representations or other deceitful means. MCM, pt. IV, ¶ 74c(1).

1. *United States v. Blocker*, 32 M.J. 281 (C.M.A. 1991) (kidnapping conviction affirmed where accused inveigled 17-year-old victim to remain in car when he drove off highway and down dirt hiking path before raping her).

2. *United States v. Mathai*, 34 M.J. 33 (C.M.A. 1992) (NCO accused inveigled victim into his office by stating, "Follow me, Private," after which he prevented her from leaving the room several times and held her against her will).

3. *United States v. Acevedo*, 77 M.J. 185 (C.A.A.F. 2018) (a reasonable trier of fact could find beyond a reasonable doubt that the E-6 accused inveigled an E-2 victim by mentally coercing victim into a taxi by threatening her with disciplinary action and mentally coerced victim into staying in the taxi against her will).

E. The involuntariness of the seizure and detention is the essence of the offense of kidnapping. Once the offense is complete, the duration of the restraint is not germane, except for sentencing purposes. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App. 1999) (victim did not tell the accused she wanted to go home, and after initially getting out of the accused's truck and being carried back, she did not try to get out of the truck again; however, a victim is not required to voice lack of consent under the law; once the accused carried the unwilling victim back to his truck, the offense of kidnapping was complete), *aff'd*, 55 M.J. 38 (C.A.A.F. 2001).

F. Lesser Included Offenses.

1. The elements test determines if one offense is a lesser included offense of another. *See United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010) (*abrogating United States v. Virgilito*, 47 C.M.R. 331 (C.M.A. 1973)).

2. Reckless endangerment is not a lesser included offense of kidnapping. *United States v. Thompson*, 67 M.J. 106 (C.A.A.F. 2009).

3. Unlawful detention, Article 97, is a lesser included offense of kidnapping. *United States v. McCuistion*, 47 C.M.R. 379 (A.C.M.R. 1973).

LXXVII. ARSON; BURNING PROPERTY WITH INTENT TO DEFRAUD, ART. 126

A. Arson and Burning Property with Intent to Defraud.

1. Elements.

a) Aggravated arson.

(1) Inhabited dwelling.

(a) That the accused burned or set on fire an inhabited dwelling; and

(b) That the act was willful and malicious.

(2) Structure.

(a) That the accused burned or set on fire a certain structure;

(b) That the act was willful and malicious;

(c) That there was a human being in the structure at the time;

(d) That the accused knew that there was a human being in the structure at the time; and

b) Simple arson.

(1) That the accused burned or set fire to certain property of another;

(2) That the act was willful and malicious.

(3) (If the property is of a value of more than $1,000, add the following element) That the property is of a value of more than $1,000.

c) Burning with the intent to defraud.

(1) That the accused burned or set fire to certain property;

(2) That the act was willful and malicious; and

(3) That such burning or setting on fire was with the intent to defraud a certain person or organization.

2. *Mens Rea*.

a) All degrees of arson require proof of willfulness and maliciousness; that is, not merely negligence or accident. MCM, pt. IV, ¶ 75c. Specific intent is not an element of aggravated or simple arson. *United States v. Acevedo-Velez*, 17 M.J. 1 (C.M.A. 1983) (intent requirement for aggravated arson met where accused set fire to a coat where there was a great possibility the building would catch on fire even though accused did not intend to burn the building); *see United States v. Marks*, 29 M.J. 1 (C.M.A. 1989); *United States v. Banta*, 26 M.J. 109 (C.M.A. 1988) (voluntary intoxication is not a defense); *United States v. Acevedo-Velez*, 17 M.J. 1 (C.M.A. 1983); *United States v. Caldwell*, 17 M.J. 8 (C.M.A. 1983).

b) In the offense of aggravated arson by setting fire to an inhabited dwelling, the accused's knowledge of the type or purpose of structure is not required. *United States v. Duke*, 37 C.M.R. 80 (C.M.A. 1966) (intoxication no defense). *See also United States v. Jones*, 2 M.J. 785 (A.C.M.R. 1976. Accused properly convicted of aggravated arson for burning his own residence that he intended to abandon and from which his family had moved . *United States v. Dasha*, 23 M.J. 66 (C.M.A. 1986).

c) Intentionally starting a fire and negligently failing to ensure it is extinguished is arson. *United States v. Crutcher*, 49 M.J. 236 (C.A.A.F. 1998) (accused made some effort to put out the fire he had started).

d) In burning with intent to defraud, it is the fraudulent intent motivating the burning of any property that is the essential element. MCM, pt. IV, ¶ 75c.

3. Actual burning or charring of alleged property or structure is required, and mere scorching or discoloration is insufficient. MCM, pt. IV, ¶ 75c(2)(c); *United States v. Littrell*, 46 C.M.R. 628 (A.B.R. 1972) (burning of desk within building insufficient to prove aggravated arson; affirmed lesser included offense of attempted aggravated arson).

4. Disorderly conduct as lesser included offense. *United States v. Evans*, 10 M.J. 829 (A.C.M.R. 1981) (accused could be convicted of disorderly conduct as a lesser included offense of arson where specification alleged that accused was disorderly in quarters by setting fire to commode seat in latrine of his billets room and proof reasonably established all elements of disorderly conduct).

5. Simple arson is a lesser included offense of attempted aggravated arson. *United States v. Dorion*, 17 M.J. 1064 (A.F.C.M.R. 1984). *But see United States v. Langhorne*, No. ACM 39047, 2017 CCA LEXIS 746 (A.F. Ct. Crim. App.) (finding that the evidence adduced at trial on an aggravated arson offense did not reasonably raise the lesser included offense of simple arson because this issue of whether the structure in question was an "inhabited dwelling" was not in dispute and the defense conceded in closing argument that the accused knew it was the victim's house.)

6. Burning with intent to defraud is now a violation of UCMJ art. 126. *See generally United States v. Banta*, *supra* at H.2.a.; *United States v. Fuller*, 25 C.M.R. 405 (C.M.A 1958); *United States v. Snearley*, 35 C.M.R. 434 (C.M.A. 1965); *United States v. Colyon*, 35 C.M.R. 870 (A.F.C.M.R. 1965). *United States v. Falcone*, No. 20110297, . 20110297 (A. Ct. Crim. App. 2013).

LXXVIII. EXTORTION, ART. 127

A. Extortion.

1. Elements.

a) That the accused communicated a certain threat to another; and

b) That the accused intended to unlawfully obtain something of value, or any acquittance, advantage, or immunity. MCM, pt. IV, ¶ 76(b).

2. Applications.

a) *United States v. McCollum*, 13 M.J. 127 (C.M.A. 1982). (holding the element of value or advantage is sufficiently alleged if any reasonable person would be compelled to conclude that the object of extortion had some value or constituted some advantage).

B) *United States v. Brown*, 67 M.J. 147 (C.A.A.F. 2009). Accused threatened to release videotape depicting the victim's sexual acts unless she engaged in sexual intercourse with him. The specification alleged that "with intent unlawfully to obtain an advantage, to wit: sexual relations, [the accused] communicate[d] to [PFC RA] a threat to expose to other members of the military their past sexual relationship and to use his rank, position, and connections to discredit her and ruin her military career." The CAAF held that the specification in this case was legally sufficient. The specification described the "advantage" that he accused sought to receive: sexual relations with the victim. By seeking to have her engage in sexual relations with him, the accused intended to "obtain an advantage." The specification also described the threat the accused communicated in an effort to obtain the stated advantage: to expose their past sexual relationship in a manner that would harm the victim's military career.

LXXIX. ASSAULT, ART. 128

A. Simple Assault / Battery. Under the UCMJ, assault is defined as an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. An assault can therefore be committed in one of three separate ways: **by offer, by attempt, or by battery**. UCMJ art. 128.

1. Assault by Offer.

a) An act or omission that foreseeably puts another in reasonable apprehension that force will immediately be applied to his person is an assault by offer provided the act or omission involved is either intentional or culpably negligent. The gravamen of this offense is the placing of the victim in reasonable apprehension of an immediate unlawful touching of his person. The fact that the offered touching cannot actually be accomplished is no defense provided the victim is placed in reasonable apprehension. MCM, pt. IV, ¶ 77c(2)(b)(ii).

b) Victim's apprehension of harm.

(1) The ability to inflict injury need not be real but only reasonably apparent to the victim. Thus, the test to determine whether an assault is an offer-type assault is a subjective test. For example, pointing an unloaded pistol at another in jest constitutes an assault by intentional offer if the victim is aware of the attack and is placed in reasonable apprehension of bodily injury. *United States v. Bush*, 47 C.M.R. 532 (C.G. Ct. Crim. App. 1973) (*citing United States v. Gallines*, 8 C.M.R. 606 (C.G. Ct. Crim. App. 1963).

(2) The victim's belief that the accused does not intend to inflict injury vitiates the offense under the theory of offer. *United States v. Norton*, 4 C.M.R. 3 (C.M.A. 1952).

(3) The victim's apprehension of impending harm must be reasonable. *See United States v. Hernandez*, 44 C.M.R. 500 (A.C.M.R. 1971).

c) Mere words or threats of future violence are insufficient to constitute an offer-type assault. *United States v. Hines*, 21 C.M.R. 201 (C.M.A. 1956) (operating the bolt of a loaded weapon so that it was ready for instant firing, coupled with a statement indicating a present intent to use the weapon, was more than mere preparation and constituted an act of assault, despite the fact that the accused did not point the weapon at any person); *see also United States v. Milton*, 46 M.J. 317 (C.A.A.F. 1997) (holding that words alone are generally not sufficient to constitute an assault by offer, but assault may occur where circumstances surrounding threat may constitute assault if victim feels "reasonable apprehension").

d) An accused who tries but fails to offer violence to frighten a victim may be guilty of an attempt to commit an assault by offer under UCMJ art. 80. *United States v. Locke*, 16 M.J. 763 (A.C.M.R. 1983). Whether an "attempted offer to batter" is an offense under the UCMJ remains an open question. *See United States v. Anzalone*, 41 M.J. 142 (C.M.A. 1994) (discussing in dicta the completed nature of an attempted offer type assault where the victim failed to apprehend the danger vice the inchoate nature of an attempted battery type assault). *Cf. United States v. Williamson*, 42 M.J. 613 (N-M. Ct. Crim. App. 1995).

e) The culpably negligent offer. Culpable negligence is defined is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. *United States v. Pittman*, 42 C.M.R. 720 (A.C.M.R. 1970); *United States v. Gibson*, 39 M.J. 1043 (A.C.M.R. 1994), *aff'd*, 43 M.J. 343 (1995). "The actor need not actually intend or foresee those consequences: it is only necessary that a reasonable person in such circumstances would have realized the substantial and unjustified danger created by his act." *United States v. Baker*, 24 M.J. 354, 356 (C.M.A. 1987). The absence of intent to do bodily harm is not a defense. *United States v. Redding*, 34 C.M.R. 22 (C.M.A. 1963). An example of such an assault would be a situation wherein the accused knowingly conducts rifle target practice in a built up area and thus frightens innocent bystanders into a reasonable belief of imminent injury.

2. Assault by Attempt.

a) An overt act that amounts to more than mere preparation and is done with apparent present ability and with the specific intent to do bodily harm constitutes an assault by attempt. MCM, pt. IV, ¶ 77c(2)(b)(i).

b) More than mere preparation to inflict harm is required. *United States v. Crocker*, 35 C.M.R. 725 (A.F.B.R. 1965) (where the accused with open knife advances towards his victim at the time when an affray is impending or is in progress and comes within striking distance, this amounts to more than mere preparation and is sufficient to complete the offense).

(1) Words alone, or threats of future harm, are insufficient. *United States v. Hines*, 21 C.M.R. 201 (C.M.A. 1956).

(2) An apparent ability to inflict bodily harm must exist. *United States v. Hernandez*, 44 C.M.R. 500 (A.C.M.R. 1971) (no offense where Government failed to prove that instrument used under the circumstances was likely to result in harm); *United States v. Smith*, 15 C.M.R. 41 (C.M.A. 1954) (accused need not be within actual striking distance of victim to constitute apparent ability to inflict harm).

c) *Mens Rea*. Attempt-type assault requires a specific intent to inflict bodily harm upon the victim. MCM, pt. IV, ¶ 77c(2)(b)(i).

(1) Victim's apprehension of impending harm is unnecessary. MCM, pt. IV, ¶ 77c(2)(b)(i). *See United States v. Anzalone*, 41 M.J. 142 (C.M.A. 1994); *United States v. Van Beek*, 47 C.M.R. 99 (A.C.M.R. 1973).

(2) *United States v. Davis*, 49 C.M.R. 463 (A.C.M.R. 1974). Firing pistol over the heads of victims, without the intent to injure them, is insufficient for assault by attempt.

3. Battery.

a) An intentional or culpably negligent application of force or violence to the person of another by a material agency constitutes a battery. MCM, pt. IV, ¶ 77c(3). *See generally United States v. Schoolfield*, 40 M.J. 132 (C.M.A. 1994) (discussing alternative theories of battery in the context of an HIV case).

b) Any offensive touching will suffice. *See United States v. Sever*, 39 M.J. 1 (C.M.A. 1994) (nonconsensual kiss); *United States v. Bonano-Torres*, 29 M.J. 845 (A.C.M.R. 1989), *aff'd*, 31 M.J. 175 (C.M.A. 1990) (nonconsensual kiss on the cheek); *United States v. Madigar*, 46 M.J. 802 (C.G. Ct. Crim. App. 1997) (unnecessary exposure to X-ray radiation was sufficient physical touching); *United States v. Banks*, 39 M.J. 571 (N.M.C.M.R. 1993), *aff'd*, 40 M.J. 320 (C.M.A. 1994) (smoke inhalation).

c) The unit of prosecution for an ongoing assault under Article 128 – as opposed to Articles 120 or 134 – with multiple blows united in time, circumstance, and impulse, is the number of beatings the victim endured, not the number of blows inflicted. *United States v. Clarke*, 74 M.J. 627 (A. Ct. Crim. App. 2015).

d) *Mens Rea*.

(1) Unlawful touching must be the result of an intentional or culpably negligent act. A culpably negligent act requires a negligent act/omission coupled with a culpable disregard for the foreseeable consequences to others. *See United States v. Turner*, 11 M.J. 784 (A.C.M.R. 1981) (contrasting an intentional battery with a culpably negligent battery; the court agreed that the accused who threw a rake at an MP, hitting him on the arm, had in fact committed a battery, but it split on whether the violent act was intentional or culpably negligent).

(2) *United States v. Gibson*, 43 M.J. 343 (C.A.A.F. 1995) (playing with and dropping a 40mm grenade round was a culpably negligent act sufficient to support a charge of aggravated assault (by battery); a reasonable soldier should have known what the object was and that dropping it would create a substantial and unjustified danger to bystanders).

(3) *United States v. Banks*, 39 M.J. 571 (N.M.C.M.R. 1993) (finding the accused was culpably negligent when he consumed alcohol while cooking and passed out, thereby causing stove to catch fire and causing smoke inhalation injury to his infant son), *aff'd*, 40 M.J. 320 (C.M.A. 1994).

(4) *United States v. Mayo*, 50 M.J. 473 (C.A.A.F. 1999) (intentionally throwing a 19-month-old child, while playing, with sufficient force and from sufficient height to fracture the child's femur could be a culpably negligent act).

e) Consent is not always a defense. *United States v. Arab*, 55 M.J. 508 (A. Ct. Crim. App. 2001) (consent not a defense where the accused's subjective belief that the victim consented was not objectively reasonable; consent was not a defense to assault consummated by battery arising from sadomasochistic activities involving an accused's wife, where the nature of injuries and means used suggested the wife was subjected to extreme pain); *United States v. Wilhelm*, 36 M.J. 891 (A.F.C.M.R. 1993) (consent not a defense when parties are engaged in a

mutual affray); *United States v. Dumford*, 28 M.J. 836 (A.F.C.M.R. 1989), *aff'd*, 30 M.J. 137 (C.M.A. 1990), *cert. denied*, 498 U.S. 854 (1990) (consent not a defense to assault for sexual activity where the accused has the AIDS virus); *United States v. Bygrave*, 46 M.J. 491 (1997) (holding that a person cannot consent to an assault that involves means likely to produce death or grievous bodily harm; victim's informed consent is no defense to a charge of aggravated assault for unprotected intercourse by HIV-infected accused); *United States v. Brantner*, 28 M.J. 941 (N.M.C.M.R. 1989) (consent not a defense to assault by using unsterilized needles); *United States v. Holmes*, 24 C.M.R. 762 (A.F.B.R. 1957) (consent not a defense if the injury more than trifling or there is a breach of public order); *United States v. Rath*, 27 M.J. 600 (A.C.M.R. 1988) (child may consent to some types of assault, but mere submission does not constitute consent); *United States v. Serrano*, 51 M.J. 622 (N.-M. Ct. Crim. App. 1999) (act likely to produce grievous bodily harm or death); *United States v. Booker*, 25 M.J. 114 (C.M.A. 1987) & *United States v. Outhier*, 45 M.J. 326 (C.A.A.F. 1996) (consent invalid where obtained by fraud).

f) Notice of Lack of Consent. *United States v. Johnson*, 54 M.J. 67 (2000) (where there was a friendly relationship involving touchings that were not offensive and the victim never protested against backrubs, the government had to prove that the accused was on notice of lack of consent), *aff'd by* 55 M.J. 243 (C.A.A.F. 2001).

g) Justification. *See also* Chapter 5, Defenses.

(1) Certain persons may be justified in touching others even without their permission. *See, e.g.*, *United States v. McDaniel*, 7 M.J. 522 (A.C.M.R. 1979) (no assault for NCO to place drunk and protesting soldier in a cold shower to sober him up). *See* R.C.M. 916(c).

(2) Parental discipline defense. *See generally United States v. Rivera*, 54 M.J. 489 (2001); *United States v. Robertson*, 36 M.J. 190 (C.M.A. 1991); *United States v. Brown*, 26 M.J. 148 (C.M.A. 1988). Requirements:

(a) Proper parental purpose. Force used for safeguarding or promoting the welfare of the minor, including prevention or punishment of misconduct.

(b) Reasonable force. Force must not be intended, or known to create a substantial risk of, serious bodily injury, disfigurement, extreme pain or mental distress, or gross degradation.

B. Aggravated Assault With a Dangerous Weapon.

1. Aggravated assault with a dangerous weapon includes the assault theories of offer, attempt, and battery. MCM, pt. IV, ¶ 77b(4)(a).

2. Dangerous. A means/force/weapon is dangerous when used in a manner capable of inflicting death or grievous bodily harm. What constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use, to kill or inflict grievous bodily harm. Thus, a bottle, beer glass, a rock, a bunk adaptor, a piece of pipe, a piece of wood, boiling water, drugs, or a rifle butt may be used in a manner capable of inflicting death or grievous bodily harm. Furthermore, under the appropriate circumstances, fists, teeth, feet, elbows, etc. may be considered a dangerous weapon when employed in a manner capable of inflicting death or grievous bodily harm. MCM, pt. IV, ¶ 77c(5)(a)(iii).

3. Grievous bodily harm means a bodily injury that involves: 1) a substantial risk of death; 2) extreme physical pain; 3) protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. MCM, pt. IV, ¶ 77c(1)(c).

4. An assault and threat, which occur at the same time, are multiplicious. *United States v. Morris*, 41 C.M.R. 731 (A.C.M.R. 1970); *United States v. Metcalf*, 41 C.M.R. 574 (A.C.M.R. 1969); *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012).

C. Aggravated Assault By Inflicting Substantial Bodily Harm or Grievous Bodily Harm.

1. Assault in which substantial or grievous bodily harm is inflicted is a general intent crime which requires that the accused assaulted another person and that the assault resulted in substantial or grievous bodily harm. The offense does not require specific intent to cause substantial or grievous bodily harm. The focus of the offense is the degree of bodily harm resulting from an assault. This contrasts with the offense of assault with a dangerous weapon, where the focus of the offense is the accused's intent to do bodily harm and the use of a dangerous weapon, regardless of whether any bodily harm results. MCM, pt. IV, ¶ 77b(4)(b)-(c).

2. Aggravated assault by intentionally inflicting grievous bodily harm is multiplicious with maiming under Article 124 when the same actions give rise to both convictions. *United States v. Allen*, 59 M.J. 515 (N-M. Ct. Crim. App. July 30, 2003).

3. When committed on a child under 16 years of age, the maximum punishment is increased. Knowledge that the person assaulted was under the age of 16 years is not an element of the offense.

4. When committed on a spouse, intimate partner, or an immediate family member, the maximum punishment is increased.

D. Assault and Communication of Threat Distinguished. An assault (UCMJ art. 128) is an attempt or offer to do bodily harm with unlawful force or violence. Communication of a threat (UCMJ art. 115) embraces a declaration or intent to do bodily harm. Both offenses therefore relate to infliction of physical injury. When committed simultaneously upon the same victim, they are properly a single offense for punishment purposes. *United States v. Lockett*, 7 M.J. 753 (A.C.M.R. 1979); *United States v. Morris*, 41 C.M.R. 731 (A.C.M.R. 1970); *United States v. Conway*, 33 C.M.R. 903 (A.F.C.M.R. 1963).

LXXX. MAIMING, ART. 128a

A. Elements.

1. That the accused inflicted a certain injury upon a certain person;

2. That this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor by the injury to an organ or member; and

3. That the accused inflicted this injury with an intent to cause some injury to a person.

B. Nature of Offense. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature. However, the offense is complete if such an injury is inflicted even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery. MCM, pt. IV, ¶ 78c(1).

C. Intent. Maiming is a specific intent crime. The government must prove a specific intent to injure a person; not the specific intent to maim. MCM, pt. IV, ¶ 78(c)(3).

1. The 1969 Manual described maiming as a general intent crime. MCM, 1969, ¶ 203. This interpretation was based on *United States v. Hicks*, 20 C.M.R. 337 (C.M.A. 1956). *See also United States v. Tua*, 4 M.J. 761 (A.C.M.R. 1977).

2. The 1984 Manual, however, also relying on *Hicks*, describes maiming as requiring a specific intent to injure generally, not a specific intent to maim. MCM, pt. IV, ¶ 50c, analysis. *See United States v. Berri*, 33 M.J. 337 (C.M.A. 1991).

3. When grievous bodily harm has been inflicted by means of intentionally using force in a manner likely to achieve that result, it may be inferred that grievous bodily harm was intended. MCM, pt. IV (2016 ed.), ¶ 54c(4)(b)(ii); *United States v. Allen*, 59 M.J. 515 (N-M. Ct. Crim. App. 2003) (circumstantial evidence of injury to infant victim sufficient to support inference of accused's intent to injure; affirmed conviction for maiming), *aff'd*, 59 M.J. 478 (C.A.A.F. 2004). [NOTE: Intent to inflict grievous bodily harm is not required for maiming, but the facts of this case supported that finding].

D. Injury.

1. Must be a serious injury of a substantially permanent nature.

2. Maiming may exist even if the injury can be cured by surgery, or if the disfigurement would not be visible under everyday circumstances. *United States v. Spenhoff*, 41 M.J. 772 (A.F. Ct. Crim. App. 1995) (scar on victim's buttocks). *But see United States v. McGhee*, 29 M.J. 840 (A.C.M.R. 1989) (where the scars to the victim's face and body, predominately on the buttocks, were not easily detectable to the casual observer, the injury was insufficient to support a maiming charge), *rev'd in part on other grounds*, 32 M.J. 322 (C.M.A. 1991).

3. Disfigurement need not mutilate an entire body part, but it must cause visible bodily damage and significantly detract from the victim's physical appearance. *United States v. Outin*, 42 M.J. 603 (N-M. Ct. Crim. App. 1995) (scars sustained by child victim who was immersed in scalding water were clearly visible at trial and substantially permanent in nature supported conviction for maiming, even though doctor testified that scars would become less visible with passage of time); *United States v. Morgan*, 47 M.J. 644 (Army Ct. Crim. App. 1997) (permanent scarring and de-pigmentation of the infant victim's groin and buttocks, caused by the accused's immersing him in scalding water, was "perceptible and material" disfigurement within the meaning of Article 128a, even though the injury would normally be covered from public view by clothing and affected a relatively small area of the child's skin).

E. Unreasonable Multiplication/Lesser Included.

1. Aggravated assault with intent to inflict grievous bodily harm is not a lesser included offense of maiming because of the different mens rea for each offense. *United States v. Hanks*, 74 M.J. 556 (A. Ct. Crim. App. 2014). Charging both was not an unreasonable multiplication of charges because of the different mens reas.

2. Unreasonable multiplication of charges to charge both maiming and attempted murder if both are aimed at the same criminal act. *United States v. Sanks*, No. 20130085, 2016 WL 1179191, at *4 (A. Ct. Crim. App. Mar. 23, 2016), *review denied*, 75 M.J. 399 (C.A.A.F. July 11, 2016).

LXXXI. DOMESTIC VIOLENCE, ART. 128b

LXXXII. BURGLARY; UNLAWFUL ENTRY, ART. 129

A. Burglary and Unlawful Entry.

1. Elements.

a) Burglary.

(1) That the accused unlawfully broke and entered the building or structure of another; and

(2) That the breaking and entering were done with the intent to commit an offense punishable under the UCMJ

(3) (If the breaking and entering were with the intent to commit an offense punishable under Articles 118-120, 120b-121, 122, 125-128a, and 130, add the following element) That the breaking and entering were done with the intent to commit an offense punishable under Article 118-120, 120b-121, 122, 125-128a, and 130.

b) Unlawful entry.

(1) That the accused entered 1) the real property of another, or 2) certain personal property of another which amounts to a structure usually used for habitation or storage; and

(2) That such entry was unlawful.

2. "Breaking" requirement applies only to burglary.

a) Burglary requires that a "breaking" occur. This element demands a substantial and forcible act. More than the passing of an imaginary line is required. A breaking, removing, or putting aside of something material constituting a part of a dwelling house and relied on as a security against invasion is required. *United States v. Hart*, 49 C.M.R. 693 (A.C.M.R. 1975). A breaking may be either actual or constructive. A constructive breaking occurs when the entry is gained by trick, false pretense, or by intimidating the occupants through violence or threats. MCM, pt. IV, ¶ 79c(2).

b) Pushing aside closed Venetian blinds and entering through an otherwise open window constitutes a breaking. *United States v. Thompson*, 29 M.J. 609 (A.C.M.R. 1989), *aff'd*, 32 M.J. 65 (C.M.A. 1991); *see generally* TJAGSA Practice Note, *Burglary and the Requirement for a Breaking*, Army Law., Jan. 1990, at 32 (discussing the A.C.M.R. opinion in *Thompson*).

c) Specification failing to allege "break and" prior to "enter" was fatally defective. *United States v. Hoskins*, 17 M.J. 134 (C.M.A. 1984).

d) No such breaking is required unlawful entry. An unauthorized entry of the protected area is sufficient.

3. Intent requirements.

a) Burglary requires that at the time of the breaking the accused possess the specific intent to commit an offense under the UCMJ.

LXXXIII. STALKING, ART. 130

A. Stalking defined. UCMJ, art. 130.

1. The criminal act is a "course of conduct" which is:

a) A repeated maintenance of visual or physical proximity to a specific person, or

b) A repeated conveyance of verbal threat, written threats, or threats implied by conduct, or a combination of such threats, directed at or towards a specific person.

c) A pattern of conduct composed of repeated acts evidencing a continuity of purpose.

2. "Repeated," in the definition of "course of conduct," means two or more occasions.

a) Be alert to the implications of these statutory definitions for conduct occurring in barracks, or on a ship, or in a deployed environment where soldiers are compelled to be in close visual or physical proximity to one another.

3. Conduct must cause a reasonable person to fear death or bodily harm to himself/herself, to a member of his/her immediate family, or to his or her intimate partner;

a) Immediate family is defined as spouse, parent, child, sibling, or other person to whom he or she stands in loco parentis; or any person living in his or her household and related to him or her by blood.

b) Intimate partner is defined as a former spouse of the specific person, a person who shares a child in common with the specific person, or a person who cohabits with or has cohabited as a spouse with the specific person; or a person who has been in a social relationship of a romantic or intimate nature with the specific person, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

4. Accused engaging in conduct must have knowledge or should have knowledge that the specific person would be put in such fear; and

5. Reasonable fear must actually be induced in that specific person.

6. Threats communicated via computer and text message may be considered "written" for purposes of the statute, at least when combined with other threats. *See generally United States v. Gutierrez*, 73 M.J. 172 (C.A.A.F. 2014).

7. Though acquitted of a concomitant rape, evidence of that alleged rape may properly be considered in assessing whether the evidence of stalking was factually sufficient. *See id*.

8. Stalking conviction that consisted of accused co-worker and former intimate partner calling victim's cellular phone, yelling at her, following her during off-duty hours, and placing a weapons target outside her residence, which began weeks after victim was sexually assaulted by accused, was held to be legally sufficient. While victim refused a no-contact order that was offered, the court held this was not dispositive in assessing the reasonable fear she felt, given the fact that she had expressed to accused that his behavior placed her in fear. *United States v. Condon*, 2017 CCA LEXIS 187 (2017).

OBSTRUCTION OFFENSES

LXXXIV. PERJURY, ART. 131

A. Perjury.

1. Elements.

a) Giving false testimony.

(1) That the accused took an oath or affirmation in a certain judicial proceeding or course of justice;

(2) That the oath or affirmation was administered to the accused in a matter in which an oath or affirmation was required or authorized by law;

(3) That the oath or affirmation was administered by a person having authority to do so;

(4) That upon the oath or affirmation that accused willfully gave certain testimony;

(5) That the testimony was material;

(6) That the testimony was false; and

(7) That the accused did not then believe the testimony to be true.

b) Subscribing false statement.

(1) That the accused subscribed a certain statement in a judicial proceeding or course of justice;

(2) That in the declaration, certification, verification, or statement under penalty of perjury, the accused declared, certified, verified, or stated the truth of that certain statement;

(3) That the accused willfully subscribed the statement;

(4) That the statement was material;

(5) That the statement was false; and

(6) That the accused did not then believe the statement to be true.

2. Distinguished From False Swearing and False Official Statement.

a) Although often used interchangeably, perjury and false swearing are different offenses. The primary distinctions are that perjury requires that the false statement be made in a judicial proceeding and be material to the issue, whereas these matters are not part of the offense of false swearing. As such, false swearing is not a lesser included offense of perjury. *United States v. Smith*, 26 C.M.R. 16 (C.M.A. 1958).

b) The offense of false official statement (UCMJ art. 107) differs from perjury in that such a statement can be made outside a judicial proceeding and materiality is not an essential element, but bears only on the issue of intent to deceive. It, too, is not a lesser included offense of perjury. *United States v. Warble*, 30 C.M.R. 839 (A.F.B.R. 1960).

3. "Judicial proceeding" includes a trial by court-martial and "course of justice" includes an investigation under Article 32, UCMJ. MCM, pt. IV, ¶ 81c(1).

4. Discussion of Elements for Subsection 1 – False Testimony.

a) That the accused took an oath or its equivalent in a judicial proceeding or at an Article 32 investigation.

(1) The oath must be one required or authorized by law. MCM, pt. IV, ¶ 81c(2)(d).

(2) Article 42(b), UCMJ, requires that each witness before a court-martial be examined under oath. R.C.M. 405(j)(2)(A) provides that all witnesses who testify at an Article 32 investigation do so under oath.

(3) R.C.M. 807 lists the various forms of oaths to be used at courts-martial and Article 32 investigations. A literal application of such formats is not essential. The oath is sufficient if it conforms in substance to the prescribed form. At the request of the party being sworn an affirmation may be substituted for an oath.

(4) DA Pam 27-9, Military Judges' Benchbook, ¶ 3-149, defines an "oath" as a formal, external pledge, coupled with an appeal to the Supreme Being, that the truth will be stated. An "affirmation" is a solemn and formal, external pledge, binding upon one's conscience that the truth will be stated.

(5) The oath must be duly administered by one authorized to administer it. MCM, pt. IV, ¶ 81c(2)(d).

(6) Articles 41(c) and 136(a), UCMJ, along with R.C.M. 405 and R.C.M. 807, set out in detail those persons authorized to administer oaths at judicial proceedings and Article 32 investigations.

(7) The president, military judge, trial counsel and assistant trial counsel for all general and special courts-martial, along with all investigating officers and judge advocates, are included in this group.

(8) If the accused is charged with having committed perjury before a court-martial, the jurisdictional basis of the prior court-martial must be proved beyond a reasonable doubt.

(a) Ordinarily this may be shown by introducing in evidence pertinent parts of the record of trial of the case in which the perjury was allegedly committed or by the testimony of a person who was counsel, the military judge, or a member of the court in that case to the effect that the court was so detailed and constituted. *See United States v. Giles*, 58 M.J. 634 (N-M. Ct. Crim. App. 2003) *rev'd on other grounds and remanded by*, 59 M.J. 374 (C.A.A.F. 2004).

(b) Where (1) the evidence at trial on charges of perjury before another court-martial did not identify the convening authority of that court-martial; (2) no appointing order was either recited or introduced; and (3) no other evidence providing a factual basis for concluding the prior court was properly detailed and constituted is presented, the evidence was insufficient despite lack of objection by the defense at the trial level. *United States v. McQueen*, 49 C.M.R. 355 (N.C.M.R. 1974).

b) That the accused willfully gave what he believed to be false testimony at the proceeding in question.

(1) A witness may commit perjury by testifying that he knows a thing to be true when in fact he either knows nothing about it at all or is not sure about it, and this is so whether the thing is true or false in fact. MCM, pt. IV, ¶ 81c(2)(a).

(2) A witness may also commit perjury in testifying falsely as to his belief, remembrance, or impression, or as to his judgment or opinion. Thus, if a witness swears that he does not remember certain matters when in fact he does or testifies that in his opinion a certain person was drunk when in fact he entertained the contrary opinion, he commits perjury if the other elements of the offense are present. MCM, pt. IV, ¶ 81c(2)(a).

(3) To undermine the willfulness and knowledge elements of this offense the following defenses are available:

(a) Voluntary intoxication. Intoxication may so impair the mental processes as to prevent a person from entertaining a particular intent or reaching a specific state of mind. To successfully argue this defense in a perjury prosecution, the evidence must show that the accused was intoxicated at the time he testified. Evidence that he was intoxicated at the time of the event about which he testified is immaterial insofar as raising this defense is concerned. *United States v. Chaney*, 30 C.M.R. 378 (C.M.A. 1961).

(b) Mistake of fact. Evidence that an accused charged with perjury was intoxicated at the time of the events about which he testified raises the defense of mistake since

such evidence relates to his ability to see and recall what transpired. *United States v. Chaney*, 30 C.M.R. 378 (C.M.A. 1961).

(c) That the false testimony provided was not in respect to a material matter.

(4) Material Matter. Determination of whether the false testimony was with respect to a material matter is a question of fact to be determined by the fact-finder. *United States v. Gaudin*, 515 U.S. 506 (1995); *see Johnson v. United States*, 520 U.S. 461, 463-66 (1997).

(5) To constitute a "material matter", the matter need not be the main issue in the case. The test is whether the false statement has a natural tendency to influence, or be capable of influencing, the decision of the tribunal in making a determination required to be made. *United States v. McLean*, 10 C.M.R. 183 (A.B.R. 1953). Materiality must be judged by the facts and circumstances in the particular case. The color of an accused's hair may be totally immaterial in one case, but decisively material in another. *Weinstock v. United States*, 231 F.2d 699 (D.C. Cir. 1956).

(a) False denial of prior convictions by a witness in response to cross-examination conducted to impeach him and attack his credibility constitutes perjury, as such false testimony relates to a material matter. *State v. Swisher*, 364 Mo. 157, 260 S.W.2d (1968).

(b) *United States v. Martin*, 23 C.M.R. 437 (A.B.R. 1956) (accused's testimony at a previous trial that he was authorized to wear certain decorations, which was not in fact the case, was a material matter for purposes of sustaining a charge of perjury).

(6) Even inadmissible evidence may be material and therefore the subject of a perjury charge. Where a court improperly admits evidence, such impropriety is not per se evidence of immateriality if the evidence goes to the jury. *See United States v. Whitlock*, 456 F.2d 1230 (10th Cir. 1972); *United States v. Parker*, 447 F.2d 826 (7th Cir. 1971).

5. Discussion of Elements for Subsection 2 – False Statement

a) Article 131 reads, in pertinent part: "Any person subject to this chapter who in a judicial proceeding or in a course of justice willfully and corruptly. . . (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, subscribes any false statement material to the issue or matter of inquiry; is guilty of perjury and shall be punished as a court-martial may direct."

b) Under this subsection, the false statement must expressly contain language that the statement is being made under penalty of perjury. MCM, pt. IV, ¶ 81c(3).

c) "As permitted under section 1746 of title 28" applies to the whole of subsection (2), not just the "statement" portion. *United States v. Tauala*, 75 M.J. 752, 756 (A. Ct. Crim. App. 2016). Thus, to convict an accused of perjury, pursuant to subsection (2), based on false statements in declaration, certificate, or verification, prosecutors must prove such statements were submitted in a federal proceeding under penalty of perjury. Submission of a false document in a state court proceeding, does not qualify as a "false statement" under subsection (2). *United States v. Tauala*, 75 M.J. 752, 756 (A. Ct. Crim. App. 2016.)

6. Corroboration: Special Evidentiary Rules.

a) A unique characteristic of Article 131 is that it contains a quantitative norm as to what evidence must be presented to establish a crucial element of falsity. A mere showing of guilt beyond a reasonable doubt is not enough. Specifically:

(1) "Two witness rule." The falsity of accused's statement must be shown by the testimony of at least two witnesses or by the testimony of one witness which directly contradicts accused's statement plus other corroborating evidence. *See United States v. Olivero*, 39 M.J. 246 (C.M.A. 1994) (circumstantial evidence of marijuana use insufficient; must have at least one corroborated witness with direct proof of such use). *United States v. Tunstall*, 24 M.J. 235 (C.M.A. 1987) (where alleged false oath relates to two or more facts that one witness contradicts accused as to the one fact and another witness as to another fact, the two witnesses corroborate each other in the fact that accused swore falsely, and their testimony will authorize conviction); *United States v. Lowman*, 50 C.M.R. 744 (A.C.M.R. 1975) (accused's testimony contradicted by two witnesses); *United States v. Jordan*, 20 M.J. 977 (A.C.M.R. 1985) (two witnesses rule not applicable where falsity of accused's oath is directly proved by documentary testimony).

(2) Direct proof required. No conviction may be had for perjury, regardless of how many witnesses testify as to falsity and no matter how compelling their testimony may be, if such testimony is wholly circumstantial. *See Olivero*, 39 M.J. 246 (C.M.A. 1994).

b) Documentary evidence directly disproving the truth of accused's statement need not be corroborated if the document is an official record shown to have been well known to the accused at the time he took the oath or if the documentary evidence appears to have sprung from the accused himself -or had in any manner been recognized by him as containing the truth - before the allegedly perjured statement was made. *See generally* Hall, *The Two-Witness Rule in Falsification Offenses*, Army Law., May 1989, at 11.

c) With the passage of Title IV of the Organized Crime Control Act of 1970 (18 U.S.C. § 1623), Congress eliminated application of the two witnesses rule in federal court and grand jury proceedings. In its stead was adopted a beyond a reasonable doubt standard. This statute, however, has not been made applicable to the military. *See United States v. Lowman*, 50 C.M.R. 744 (A.C.M.R. 1975).

d) Inconsistent Sworn Statements. Because of the requirements of the "two witness rule," contradictory sworn statements made by a witness cannot by themselves be the basis of a perjury prosecution under Article 131. For example, X testifies under oath that on 15 March he was in a certain bar with accused from 1900-2100. At the same or subsequent trial he again testifies under oath, but this time states that although he was in the bar from 1900-2100, he never saw the accused. Under military law, insufficient evidence exists to prosecute X for perjury.

7. Application of evidentiary rules.

a) *United States v. Downing*, 6 C.M.R. 568 (A.F.B.R. 1952). Mere circumstantial evidence showing nonpresence at a hospital by nonexistence of entry in hospital records held to be insufficient.

b) *United States v. McLean*, 10 C.M.R. 183 (A.B.R. 1953). Weighty direct and circumstantial evidence of drinking which accused denied found sufficient.

c) *United States v. Taylor*, 19 C.M.R. 71 (C.M.A. 1955). Directly contradictory testimony of prosecution witness corroborated by strong circumstantial evidence held sufficient.

d) *United States v. Walker*, 19 C.M.R. 284 (C.M.A. 1955). Proof by circumstantial evidence alone of falsity of accused's negative assertion of what he saw - something by its nature not susceptible of direct proof - was held to be sufficient.

e) *United States v. Guerra*, 32 C.M.R. 463 (C.M.A. 1963). Contradictory testimony held not directly so, therefore insufficient.

f) *United States v. Martin*, 23 C.M.R. 437 (A.B.R. 1956). Documentary evidence directly disproving accused's assertion of holding various decorations insufficient where uncorroborated.

g) *United States v. Anders*, 23 C.M.R. 448 (A.B.R. 1956). Facts similar to those in *United States v. Martin, supra*. Documentary evidence properly corroborated by testimony negating claim of awards.

h) *United States v. Giles*, 58 M.J. 634 (N-M. Ct. Crim. App. 2003)(accused's testimony that she "did not believe she was purchasing LSD" was sufficiently contradicted by her prior confession to CID that she knew she was buying LSD, her own handwritten note stating that she got "acid" and from the observations of an informant; totality of the evidence supports conviction for perjury) *rev'd on improper joinder grounds, remanded by*, 59 M.J. 374 (C.A.A.F. 2004).

8. *Res Judicata* is No Longer a Defense for Perjury at a Separate Court-Martial.

a) The defense of *res judicata* is no longer a valid defense for accused being prosecuted for committing perjury after testifying at their previous court-martial. Earlier case law that recognized the defense of *res judicata*, were based on paragraph 71b of the 1951 Manual for Courts-Martial. *see United States v. Martin*, 24 C.M.R. 156 (C.M.A. 1957); *United States v. Hooten*, 30 C.M.R. 339 (C.M.A. 1961). *United States v. Harris*, 67 M.J. 611, 613-615 (A.F. Ct. Crim. App 2009).

b) R.C.M. 905(g) replaced paragraph 71b in 1984. R.C.M. 905(g). The drafters' analysis to R.C.M. 905(g) cites two major differences between it and Paragraph 71b. First, the broad term "res judicata" is no longer part of the rule. Drafters' Analysis, MCM, A21–54 (2008 ed.). Second, the doctrine of collateral estoppel is recognized and applied so that "parties are not bound by determinations of law when the causes of action in the two suits arose out of different transactions." *United States v. Harris*, 67 M.J. 611 (A.F. Ct. Crim. App 2009).

LXXXV. SUBORNATION OF PERJURY, ART. 131a

LXXXVI. OBSTRUCTING JUSTICE, ART. 131b

A. Obstructing Justice.

1. Elements.

a) That the accused wrongfully did a certain act;

b) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending; and

c) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice.

2. Scope. Obstructing justice under Article 131b is much broader than under the United States Code. *See United States v. Jones*, 20 M.J. 38 (C.M.A. 1985). It proscribes efforts to interfere with the administration of military justice throughout the investigation of a crime, not simply at pending judicial proceedings. The crime can be constituted where the accused had reason to believe that criminal proceedings were or would be pending. *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987); *United States v. Bailey*, 28 M.J. 1004 (A.C.M.R. 1989); *United States v.*

Chodkowski, 11 M.J. 605 (A.F.C.M.R. 1981), *aff'd*, 14 M.J. 126 (C.M.A. 1982); *but cf. United States v. Kellough*, 19 M.J. 871 (A.F.C.M.R. 1985) (not obstruction to "plant" evidence where no proceeding pending; offense was a disorder under Article 134). Criminal proceedings are broadly defined to include nonjudicial punishment. MCM, pt. IV, ¶ 83c. An official act, inquiry, investigation, or other criminal proceeding with a view toward possible disposition in the military justice system is required. *United States v. Gray*, 28 M.J. 858 (A.C.M.R. 1989). MCM 1984, pt. IV 96F is amended by Change 5 by making wrongfulness a required element.

3. Applications.

a) Assault on witness who had testified at summary court-martial. *United States v. Long*, 6 C.M.R. 60 (C.M.A. 1952).

b) Intimidating witnesses who were to testify at a summary court-martial. *United States v. Rossi*, 13 C.M.R. 896(A.F.B.R. 1953).

c) Intimidating a witness who was to appear before an Article 32 investigating officer. *United States v. Daminger*, 31 C.M.R. 521 (A.F.B.R. 1961). *But see United States v. Chodkowski*, 11 M.J. 605 (A.F.C.M.R. 1981) (arguing that *Daminger* no longer accurately represents controlling law on obstruction issue and that such a charge does not require that charges had been preferred in the underlying case or investigation).

d) Attempt to influence and intimidate a witness to retract a statement made during course of an Article 15 hearing. *United States v. Delaney*, 44 C.M.R. 367 (A.C.M.R. 1971).

e) MP tried to conceal money which came into his possession in the course of official duty when the money was possible evidence pertaining to an alleged criminal offense by another person. *United States v. Favors*, 48 C.M.R. 873 (A.C.M.R. 1974).

f) Communications among co-conspirators not embraced by the conspiracy. *United States v. Williams*, 29 M.J. 41 (C.M.A. 1989); *see United States v. Dowlat*, 28 M.J. 958 (A.F.C.M.R. 1989).

g) Endeavoring to impede trial by soliciting a murder. *United States v. Thurmond*, 29 M.J. 709 (A.C.M.R. 1989).

h) Accused's threat to airman, which airman understood as an inducement to testify falsely if he were called as a witness at the accused's trial, constituted offense even if accused was not on notice that airman would be a witness. *United States v. Caudill*, 10 M.J. 787 (A.F.C.M.R. 1981); *United States v. Rosario*, 19 M.J. 698 (A.C.M.R. 1984).

i) Attempt to have witness falsely provide an alibi. *United States v. Gomez*, 15 M.J. 954 (A.C.M.R. 1983).

j) Accused's act of simultaneously soliciting false testimony from two potential witnesses constituted a single obstruction of justice. *United States v. Guerro*, 28 M.J. 223 (C.M.A. 1989).

k) Asking witnesses to withdraw statements. *United States v. Latimer*, 30 M.J. 554 (A.C.M.R. 1990).

l) Accused's statement "don't report me" did not constitute obstruction of justice. *United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990).

m) Tampering with own urine sample during command-directed urinalysis of unit to avoid detection of cocaine use is not obstructing justice. At the time of the inspection, accused was not a suspect in any crime or part of any criminal investigation. There were no other criminal

proceedings or other official acts taking place that would lead to disciplinary action. *United States v. Turner*, 33 M.J. 40, 43 (C.M.A. 1991).

n) Seeking to have minor daughter's boyfriend influence daughter to change her testimony at a state court proceeding, in exchange for consenting to daughter's marriage to boyfriend. *United States v. Smith*, 32 M.J. 567 (A.C.M.R. 1991) *rev'd on other grounds* 39 M.J. 448 (C.M.A. 1994) (merely requesting a soldier to contact a witness in a state proceeding, without evidence that accused also asked him to convince the witness to change her testimony, is not sufficient to sustain conviction for obstruction of justice).

o) No obstruction of justice where accused's conduct consisted only of calling friends and begging them not to press charges. *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992).

p) Staging firefight to conceal loss of commander's pistol constitutes obstruction of justice, since accused had reason to believe there would be criminal proceedings pending for his loss of superior's pistol. *United States v. Finsel*, 36 M.J. 441 (C.M.A. 1993).

q) Making false and misleading statement to investigators may constitute obstruction of justice. *United States v. Arriaga*, 49 M.J. 9 (1998).

r) A senior drill instructor's attempt to get two trainees to change their story regarding a sexual assault against one of the trainees was legally sufficient to sustain convictions for two specifications of obstruction of justice. The accused's statement, "I'll do anything if you don't tell," and its converse implication of more severe treatment if the trainee did not accede was inconsistent with the duties of a senior drill sergeant. Additionally, the accused knew his offense against the trainee had been reported and that the trainee was pursuing the matter. *United States v. Barner*, 56 M.J. 131 (2001).

s) An interested party who advises, with a corrupt motive, a witness to exercise a constitutional right may obstruct the administration of justice. *United States v. Reeves*, 61 M.J. 108 (2005) (accused, a tech school instructor, told a trainee not to speak to investigators and to seek counsel once the accused came under suspicion for several offenses).

4. Applies to state court proceedings. *United States v. Smith*, 32 M.J. 567 (A.C.M.R. 1991), *rev'd on other grounds*, 39 M.J. 448 (C.M.A. 1994).

5. Nonjudicial punishment procedure is a criminal proceeding, for purpose of obstructing justice. *United States v. Larson*, 39 M.J. 516 (A.F.C.M.R. 1993).

6. Communications between accomplices are subject to obstruction-of-justice charges so long as particular communications do not embrace objects of original conspiracy. *United States v. William*s, 29 M.J. 41 (C.M.A. 1989).

7. Requisite intent not found unless accused aware that there is or possibly could be an investigation. *United States v. Athey*, 34 M.J. 44 (C.M.A. 1992).

8. It is not necessary that the potential evidence be within the control of authorities or already seized when destroyed by the accused in order to be considered obstruction of justice. *United States v. Lennette*, 41 M.J. 488 (1995).

9. An accused can be convicted of obstruction of justice, even if the court-martial acquits him of the offense for which he was under investigation. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App. 1999), *aff'd*, 55 M.J. 38 (C.A.A.F. 2001).

10. Fact that Servicemember has general legal right to dispose of property that he or she owns is not defense to obstruction of justice if property is evidence of crime and Servicemember purposefully disposes of it to conceal crime with intent of influencing, impeding, or otherwise

obstructing investigation of crime or due administration of justice. *United States v. Davi*s, 62 M.J. 691 (A.C.C.A. 2006), set aside, remanded 64 M.J. 173 (C.A.A.F. 2006), and corrected, adopted on remand, 64 M.J. 663 (A. Ct. Crim. App. 2007).

11. If the conduct at issue falls under obstructing justice, then government cannot charge a novel specification under Article 134 instead of obstructing justice. Novel specifications under article 134 cannot be used to relieve the government of proving elements they would otherwise need to prove under the enumerated offense. *United States v. Reese*, 76 M.J. 297 (C.A.A.F. 2017).

12. Using the U.S. Code.

a) A more restrictive, and thus generally less desirable, way to charge this offense is under Article 134(3), UCMJ, as a violation of one of the below-listed sections of the U.S. Code:

(1) 18 U.S.C. § 1503 (1982) - Obstruction of proceedings before any federal court, commissioner, magistrate, or grand jury. *United States v. Aguilar*, 115 S. Ct. 2357 (1995) (adopting the "nexus" requirement - that the conduct in question had the natural and probable effect of interfering with the due administration of justice).

(2) 18 U.S.C. § 1505 (1982) - Obstruction of proceedings before departments, agencies and committees.

(3) 18 U.S.C. § 1510 (1982) - Obstruction of criminal investigations. *See generally United States v. Casteen*, 17 M.J. 580 (A.F.C.M.R. 1983) (not intended to deal with communications between accomplices) *reconsidered on other grounds*, 17 MJ 800 (1983), *rev'd. in part*, 24 MJ 62 (C.M.A. 1987). *But see United States v. Williams*, 29 M.J. 41 (C.M.A. 1989) (disapproving of *Casteen* and stating that communications to an accomplice will be subject to obstruction charge under either Article 134(1) or 134(2)).

(4) 18 U.S.C. § 1511 (1982) - Obstruction of state or local law enforcement.

b) *See* Annot., 18 A.L.R. Fed. 875 (1974).

c) If the offense is charged under the U.S. Code, the military judge must instruct on the elements set out in the statute and the Government must prove the same. *United States v. Canter*, 42 C.M.R. 753 (A.C.M.R. 1970); *see generally United States v. Ridgeway*, 13 M.J. 742 (A.C.M.R. 1982).

d) The MCM obviates the need for proceeding under some of these statutes as Article 131g provides the offense of "Wrongful Interference With An Adverse Administrative Proceeding." *See* MCM, pt. IV, ¶ 88.

LXXXVII. MISPRISION OF SERIOUS OFFENSE, ART. 131c

A. Misprision of a Serious Offense.

1. Elements.

a) That a certain serious offense was committed by a certain person;

b) That the accused knew that the said person had committed the serious offense; and

c) That, thereafter, the accused wrongfully concealed the serious offense and failed to make it known to civilian or military authorities as soon as possible.

2. Taking affirmative steps to conceal the identity of the offender constitutes misprision; conviction of misprision of serious offense does not violate Fifth Amendment right against self-incrimination. *United States v. Sanchez*, 51 M.J. 165 (C.A.A.F. 1999) (accused took affirmative steps to conceal the identity of the offender).

3. *See supra*, ¶ II.D, this chapter, for a discussion of differences between Misprision of a Serious Offense and Accessory After the Fact.

B. Lesser Included Offenses and Multiplicity. If properly pleaded, communicating a threat ay be a lesser included offense of obstruction of justice. *United States v. Benavides*, 43 M.J. 723 (Army Ct. Crim. App. 1995) (relying on "pleading elements" analysis of *United States v. Weymouth*, 43 M.J. 329, 340 (1995)); *United States v. Craft*, 44 C.M.R. 664 (A.C.M.R. 1971). *But see United States v. Oatney*, 41 M.J. 619 (N-M. Ct. Crim. App. 1994) (relying on strict "statutory elements" analysis of *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993), the Navy-Marine Court held that communication of a threat and obstruction of justice are not multiplicious, even in a particular case where the threat factually must be proved in order to prove the obstruction of justice), *aff'd*, 45 M.J. 185 (C.A.A.F. 1996).

LXXXVIII. WRONGFUL REFUSAL TO TESTIFY, ART. 131d

LXXXIX. PREVENTION OF AUTHORIZED SEIZURE OF PROPERTY, ART. 131e

A. Prevention of authorized seizure of property MCM, pt. IV, ¶ 86; UCMJ art. 131e.

1. Elements.

a) That one or more persons authorized to make searches and seizures were seizing, about to seize, or endeavoring to seize certain property;

b) That the accused destroyed, removed, or otherwise disposed of that property with intent to prevent the seizure thereof; and

c) That the accused then knew that persons(s) authorized to make searches were seizing, about to seize, or endeavoring to seize certain property.

2. The offense has no requirement that criminal proceedings be pending or that the accused intended to impede the administration of justice. *Cf. United States v. Ridgeway*, 13 M.J. 742 (A.C.M.R. 1982). The crime is constituted where the accused intended to prevent the seizure of certain property that the accused knew persons authorized to make seizures were endeavoring to seize.

3. Not a defense that the search or seizure was technically defective. MCM, pt. IV, ¶ 89.

4. Application.

a) Throwing marijuana out the window as military policemen enter the accused's barracks room to seize it is a punishable offense. *United States v. Fishel*, 12 M.J. 602 (A.C.M.R. 1981).

b) Throwing and kicking a bottle of LSD while the executive officer conducts search of accused's wall locker after smelling marijuana. *United States v. Rengel*, 15 M.J. 1077 (N-M.C.M.R. 1983).

XC. NONCOMPLIANCE WITH PROCEDURAL RULES, ART. 131f

XCI. WRONGFUL INTERFERENCE WITH ADVERSE ADMINISTRATIVE PROCEEDING, ART. 131g

XCII. RETALIATION, ART 132

A. Two offenses.

1. Retaliation

a) Elements.

(1) That the accused wrongfully

(a) took or threatened to take an adverse personnel action against any person, or

(b) withheld or threatened to withhold a favorable personnel action with respect to any person; and

(2) That, at the time of the action, the accused intended to retaliate against any person or reporting or planning to report a criminal offense, or for making or planning to make protected communication.

2. Discouraging a report of criminal offense or protected communication.

a) Elements.

(1) That the accused wrongfully

(a) took or threatened to take adverse personnel action against any person, or

(b) withheld or threatened to withhold a favorable personnel action with respect to any person; and

(2) That, at the time of the action, the accused intended to discourage any person from reporting a criminal offense or making a protected communication.

3. Definitions.

a) "Protected communication" means:

(1) A lawful communication to A Member of Congress or an Inspector General.

(2) A communication to a covered individual or organization in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:

(a) A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination.

(b) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

b) "Covered individual or organization" means

(1) a Member of Congress

(2) an Inspector General

(3) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization;

(4) any person or organization in the chain of command;

(5) a court-martial proceeding; or

(6) any other person or organization designated pursuant to regulations or other established administrative procedures for such communications.

4. Explanation.

a) In general. This offense focuses upon the abuse of otherwise lawful military authority for the purpose of retaliating against any person for reporting or planning to report a criminal offense or for making or planning to make a protected communication or to discourage any person from reporting a criminal offense or for making or planning to make a protected communication. The offense prohibits personnel actions, either favorable or adverse, taken or withheld, or threatened to be taken or withheld, with the specific intent to retaliate against any person for reporting or planning to report a criminal offense or for making or planning to make a protected communication or to discourage any person from reporting a criminal offense or for making or planning to make a protected communication. The offense may be committed by any person subject to the UCMJ with the authority to initiate, forward, recommend, decide, or otherwise act on a favorable or adverse personnel action who takes such action wrongfully and with the requisite specific intent. This offense does not prohibit the lawful and appropriate exercise of command authority to discipline or reward Servicemembers.

b) For purposes of this offense, "personnel action" means any action taken on a Servicemember that affects, or has the potential to affect, that Servicemember's current position or career, including promotion, disciplinary or other corrective action, transfer or reassignment, performance evaluations, decisions concerning pay, benefits, awards, or training, relief and removal, separation, discharge, referral for mental health evaluations, and any other personnel actions as defined by law or regulation, such as 5 U.S.C. § 2302 and DoD Directive 7050.06 (17 April 2015).

c) An action is taken with the intent to retaliate when the personnel action taken or withheld, or threatened to be taken or withheld, is done for the purpose of reprisal, retribution, or revenge for reporting or planning to report a criminal offense or for making or planning to make a protected communication.

d) Threatens to take or withhold. This offense requires that the accused had the intent to retaliate, but proof that the accused actually intended to take an adverse personnel action, or to withhold a favorable personnel action, is not required. A declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving a favorable or adverse personnel action.

e) Criminal offense for purposes of this offense includes violations of the UCMJ, the United States Code, or state law.

f) Taking or threatening to take adverse personnel action, or withholding or threatening to withhold favorable personnel action, is wrongful when used for the purpose of reprisal, rather than for purposes of lawful personnel administration.

g) Other retaliatory actions. This offense does not prohibit the Secretary of Defense and Secretaries of the Military Services from proscribing other types or categories of prohibited retaliatory actions by regulation, which may be punished as violations of Article 92.

OFFENSES OF GENERAL APPLICATION

XCIII. CONDUCT UNBECOMING AN OFFICER, ART. 133

A. Conduct "must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or

committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." William Winthrop, *Military Law and Precedents* 711-12 (2d ed.1920)).

B. "Unbecoming conduct" means conduct morally unfitting and unworthy, rather than merely inappropriate or unsuitable. It is misbehavior which is more than merely a lack of good taste or propriety. *United States v. Rogers*, 54 M.J. 244, 255-256 (C.A.A.F. 2000).

C. Private conduct may constitute an offense under Article 133, UCMJ, and there is no requirement that the conduct be otherwise criminal. *United States v. Moore*, 38 M.J. 490 (C.M.A. 1994); *United States v. Norvell*, 26 M.J. 477, 481 (C.M.A.1988). Conduct which violates Article 133 may constitute an offense elsewhere under the UCMJ. *United States v. Taylor*, 23 M.J. 314, 318 (C.M.A.1987).

D. Applies to female officers. *United States v. Norvell*, 26 M.J. 477 (C.M.A.1988).

E. Acts Covered. Includes acts punishable under other articles of the UCMJ and offenses not so listed, except for minor derelictions that do not satisfy the requirements of Article 133. *United States v. Taylor*, 23 M.J. 314 (C.M.A. 1987) (UCMJ art. 133 conviction affirmed even where misconduct does not violate a punitive article); *United States v. Wolfson*, 36 C.M.R. 722 (A.B.R. 1965) (not every deviation in conduct constitutes unbecoming conduct; to be actionable conduct must be morally unbefitting and unworthy). Examples include:

1. Child Pornography. *United States v. Forney*, 67 M.J. 271 (C.A.A.F. 2009). Conduct involving child pornography, including receipt and possession, can constitute conduct unbecoming an officer. This can include both actual and virtual child pornography. *But see United States v. Amazaki*, 67 M.J. 666 (A. Ct. Crim. App. 2009) (holding that, where accused received disk which he did not know contained images of child pornography, as a matter of due process, the accused was not "on fair notice that his unwitting possession of child pornography…was negligent or that his conduct in failing to discover, delete, or secure these images amounted to conduct unbecoming an officer and gentleman."). See also section XXVIII, Para. G and H.

2. Drugs. *United States v. Maderia*, 38 M.J. 494 (C.M.A. 1994) (publicly associating with person known by the accused to be a drug smuggler and discussing drug use and possibility of assistance in drug smuggling operations). *United States v. Harrell*, 75 M.J. 359, 361 (C.A.A.F 2016) (noting without comment that possession of marijuana and drug paraphernalia resulted in violation of Article 133).

3. Sex. *United States v. Coronado*, 11 M.J. 522 (A.F.C.M.R. 1981) (even though the offense occurred off the military installation, jurisdiction was properly exercised by general court-martial which convicted accused of conduct unbecoming an officer and gentleman by performing acts of sodomy on an enlisted man); *United States v. Jefferson*, 21 M.J. 203 (C.M.A. 1986) (adultery and fraternization); *United States v. Shobar*, 26 M.J. 501 (A.F.C.M.R. 1988) (sexual exploitation of civilian waitress under the accused's supervision); *United States v. Frazier*, 34 M.J. 194 (C.M.A. 1992) (officer's engaging in open and intimate relationship with wife of enlisted soldier constituted conduct unbecoming an officer).

4. Sexual Harassment. *United States v. Lofton*, 69 M.J. 386 (C.A.A.F. 2011) (a senior male officer made repeated, unwanted comments in attempts to establish a personal and unprofessional relationship with a senior female noncommissioned officer, who was not his immediate subordinate). *But see United States v. Brown*, 55 M.J. 375, 386-87 (C.A.A.F. 2001) (holding that sexual remarks towards female officers of similar rank may not violate Article 133 for sexual harassment if accused is never informed that conduct may be offensive).

5. Indecent language and conduct. *United States v. Parini*, 12 M.J. 679 (A.C.M.R. 1981) (colonel attempted to extract sexual favors from subordinates in return for favorable treatment);

United States v. Hartwig, 35 M.J. 682 (A.C.M.R. 1992) (officer was properly convicted of conduct unbecoming based on his letter containing sexually suggestive comments to 14 year-old girl in response to her letter of support for Operation Desert Storm), *aff'd*, 39 M.J. 125 (C.M.A. 1994); *United States v. Moore*, 38 M.J. 490 (C.M.A. 1994) (private remarks to sex partner in adulterous relationship regarding oral and anal sex were indecent and degrading and not protected by First Amendment); *see also United States v. Mazer*, 58 M.J. 691 (N-M. Ct. Crim. App. 2003) (making suggestive, explicit and indecent statements on an internet chat room to someone the accused believed to be a 14-year old girl), *set aside on other grounds, remanded by*, 60 M.J. 344 (C.A.A.F. 2004).

6. Lying and breaches of trust. *United States v. Lindsay*, 11 M.J. 550 (A.C.M.R. 1981) (lying to a criminal investigator about a subject of official investigation is conduct unbecoming an officer and gentleman. Even though making a false statement to a CID agent was, at the time, generally not an offense absent an independent duty to account the special status of an officer and the position of trust he occupies makes the intentional deceit a crime under Article 133); *United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984) (forging false PCS orders); *United States v. Gunnels*, 21 C.M.R. 925 (A.B.R. 1956) (taking money to procure a discharge); *United States v. Rushatz*, 30 M.J. 525 (A.C.M.R. 1990) (advising junior officers how to overstate rent for off-post housing using backdated receipts), *aff'd*, 31 M.J. 450 (C.M.A. 1990).

7. Financial impropriety. *United States v. Brunson*, 30 M.J. 766 (A.C.M.R. 1990) (failing to pay a just debt); *United States v. Jenkins*, 39 M.J. 843 (A.C.M.R. 1994) (negligently writing 76 dishonored checks and six false letters purportedly from bank officials).

8. Physical contact. *United States v. Isaac*, 59 M.J. 537 (C.G. Ct. Crim. App. 2003) (officer pled guilty to three specifications of Art. 133 for "forcefully" picking up and carrying three different female enlisted personnel on three separate occasions).

9. Obstruction of Justice. Can include obstruction of foreign criminal investigations or proceedings. *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009); *United States v. Schweitzer*, 68 M.J. 133 (C.A.A.F. 2009).

10. Miscellaneous conduct. *United States v. Schumacher*, 11 M.J. 612 (A.C.M.R. 1981) (officer's public intoxication in uniform); *United States v. Bonar*, 40 C.M.R. 482 (A.B.R. 1969) (affirming conviction for driving in violation of a state justice of the peace's court order); *United States v. Norvell*, 26 M.J. 477 (C.M.A. 1988) (dishonorable catheterization to avoid giving a valid urine sample, and then informing an enlisted person of this); *see* TJAGSA Practice Note, *Drugs, Sex and Commissioned Officers: Recent Developments Pertaining to Article 133, UCMJ*, Army Law., Feb. 1989, at 62 (discusses *Norvell*); *United States v. Lewis*, 28 M.J. 179 (C.M.A. 1989) (charging a fellow officer approximately $2,000 for tutoring in leadership after the battery commander had directed all officers to assist the junior officer in their professional performance); *see* TJAGSA Practice Note, *Charging "Tuition" Can Constitute Conduct Unbecoming an Officer and a Gentleman*, Army Law., Aug. 1989, at 36 (discusses *Lewis*); *United States v. Bilby*, 39 M.J. 467 (C.M.A. 1994) (soliciting someone to violate a federal statute); *United States v. Miller*, 37 M.J. 133 (C.M.A. 1993) (failing to report child abuse by spouse and failing to obtain necessary medical care for abused child).

F. Examples of Acts not Covered. Conviction reversed for visiting legal brothel with enlisted members where the accused did not seek or engage in sex, *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988); *see generally* TJAGSA Practice Note, *Drugs, Sex, and Commissioned Officers: Recent Developments Pertaining to Article 133, UCMJ*, Army Law., Feb. 1989, at 62 (discusses *Guaglione*), and for merely loaning money to a subordinate. *United States v. Smith*, 16 M.J. 694 (A.F.C.M.R. 1983).

G. Article 133 is not unconstitutionally void for vagueness. *Parker v. Levy*, 417 U.S. 733 (1974).

H. Pleadings.

1. Referencing an unconstitutional statutory definition of child pornography in the pleadings and instructing the members using the unconstitutional statutory definition created instructional error in an Article 133 child pornography case. *United States v. Forney*, 67 M.J. 271 (C.A.A.F. 2009) (Effron, C.J., concurring in the result) (Erdmann, J., dissenting). "(Stucky, J. writing for the court and joined by Baker, J. held that there was no error and Officer could be convicted under Article 133 for possessing images which were constitutionally protected for civilians. Effron, C.J., concurring in the result found that despite instructional error, it was harmless beyond a reasonable doubt in this case) (Erdmann, J., joined by Ryan, J., dissenting)."

2. Allegations of "undue familiarity" and "excessive social contacts" with married female service members were legally insufficient. *United States v. Kroop*, 38 M.J. 470 (C.M.A. 1993). *But cf. United States v. Boyett*, 42 M.J. 150 (C.A.A.F. 1995) (affirming conviction for unprofessional close personal relationship, including sexual intercourse, with enlisted person not under accused's supervision); *United States v. Rogers*, 54 M.J. 244 (C.A.A.F. 2000) (specification that LTC had "unprofessional relationship of undue familiarity" with LT in his command did state an offense).

3. LIOs.

a) Where the underlying acts of misconduct are the same, a service disorder or discredit under Article 134 is a lesser included offense of conduct unbecoming an officer under Article 133. *United States v. Cherukuri*, 53 M.J. 68 (C.A.A.F. 2000), *aff'd by* 54 M.J. 448 (C.A.A.F. 2001); *see also United States v. Conliffe*, 67 M.J. 127 (C.A.A.F. 2009); *United States v. Harwood*, 46 M.J. 26 (C.A.A.F. 1997); *United States v. Rodriguez*, 18 M.J. 363, 368-369 n. 4 (C.M.A. 1984).

b) Where the underlying act of misconduct is the same, larceny under Article 121 is a lesser included offense of conduct unbecoming an officer under Article 133. *United States v. Frelix-Vann*, 55 M.J. 329 (C.A.A.F. 2001) (Army captain pled guilty to one specification of conduct unbecoming and one specification of larceny for same underlying misconduct), *aff'd by* 56 M.J. 458 (C.A.A.F. 2002). *See also United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984) (violation of punitive article, such as art. 123, forgery, is lesser included offense of conduct unbecoming when same underlying misconduct at issue).

4. Multiplicity. While any misconduct may be charged as an article 133 offense—even when chargeable as a violation of one of the other punitive articles—findings for both an article 133 offense and the same underlying offense may not stand. *United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984); *United States v. Frelix-Vann*, 55 M.J. 329 (C.A.A.F. 2001); *United States v. Cherukuri*, 53 M.J. 68 (C.A.A.F. 2000); *United States v. Mathis*, No. ARMY 20140473, 2016 WL 1553126 (A. Ct. Crim. App. Apr. 13, 2016), r*eview denied*, (C.A.A.F. June 27, 2016). Where service court found conduct unbecoming charge and obstructing justice charge multiplicious, no error in allowing the government to elect which finding to retain. *United States v. Palagar*, 56 M.J. 294 (C.A.A.F. 2002).

5. Unreasonable Multiplication of Charges (UMC). Four specifications of communicating sexually suggestive and sexually explicit language to a minor via e-mail, in violation of Art. 133, did not represent UMC, because they did not reflect the same act or transaction. Each specification identified a discrete and unique communication. *United States v. Mazer*, 58 M.J. 691 (N-M. Ct. Crim. App. 2003), *set aside on other grounds, remanded by* 60 M.J. 344 (C.A.A.F. 2004).

I. Punishment.

1. Maximum punishment is a dismissal, forfeiture of all pay and allowances, and confinement for a period not in excess of that authorized for the most analogous offense for which a punishment is prescribed by the MCM, or, if none is prescribed, for one year. MCM, pt. IV, ¶ 90e.

2. The maximum sentence that may be adjudged for a duplicitously pled specification under Article 133 will be that imposable for "the most analogous offense" with the greatest maximum punishment. *United States v. Hart*, 32 M.J. 101 (C.M.A. 1991).

XCIV. GENERAL ARTICLE, ART. 134

A. Three Bases of Criminal Liability.

1. Conduct Prejudicial to Good Order and Discipline.

2. Conduct of a Nature to Bring Discredit upon the Armed Forces.

3. Conduct Constituting a Non-capital Crime.

B. Offenses Listed in MCM, pt. IV, ¶¶ 91-108.

1. Require proof of prejudice to good order and discipline *or* tendency to bring discredit upon the armed forces.

2. This list is nonexhaustive. Other novel offenses may be charged, provided the alleged misconduct satisfies the standard in one of the three clauses of Article 134 and the misconduct cannot be prosecuted under another article of the UCMJ.

C. Conduct Prejudicial to Good Order and Discipline (Clause 1).

1. Not every irregular, mischievous or improper act is a court-martial offense. MCM, pt. IV, ¶ 91c(2)(a). *United States v. Sadinsky*, 34 C.M.R. 343 (C.M.A. 1964); *United States v. Rowe*, No. 32852, 1999 CCA LEXIS 125 (A.F. Ct. Crim. App. Apr. 7, 1999)(unpublished) (allegation of knowing and willful harassment by repeated contact causing substantial emotional stress and reasonable fear of bodily harm was legally sufficient).

2. Conduct must be *directly* and *palpably* prejudicial to good order and discipline. *United States v. Sadinsky*, 34 C.M.R. 343 (C.M.A. 1964); *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989) (unprotected sexual intercourse where the accused has the HIV virus); MCM, pt. IV, ¶ 91c(2)(a).

3. A breach of custom may result in a violation of clause one of Article 134. MCM, pt. IV, ¶ 91c(2)(b). *United States v. Smart*, 12 C.M.R. 826 (A.F.B.R. 1953). It must satisfy the following requirements: (1) long established practice; (2) common usage attaining the force of law; (3) not contrary to military law; and (4) ceases when observance has been abandoned.

4. Conduct of soliciting a prostitute was not shown to be prejudicial to good order and discipline, but the offense could be affirmed as it was service discrediting. *United States v. Mullings*, No. ARMY 20140079, 2016 WL 234634 (A. Ct. Crim. App. Jan. 14, 2016), *review denied*, (C.A.A.F. Apr. 19, 2016).

D. Conduct of a Nature to Bring Discredit upon the Armed Forces (Clause 2).

1. Conduct must have the tendency to bring the service into disrepute or tend to lower it in public esteem. MCM, pt. IV, ¶ 91c(3); *United States v. Sullivan*, 42 M.J. 360 (C.A.A.F. 1995) (any reasonable officer would have known that asking strangers of the opposite sex intimate questions about their sexual activities, while using a false name and a fictional publishing company as a cover, was service discrediting conduct) overruled on other grounds by *United States v. Reese, 76 M.J. 297 (C.A.A.F. 2017)*; *United States v. Sanchez*, 29 C.M.R. 32 (C.M.A. 1960) (sex act with chicken; "[W]hen an accused performs detestable and degenerate acts which clearly evince a

wanton disregard for the moral standards generally and properly accepted by society, he heaps discredit on the . . . Government he represents.”).

2. Considering “open and notorious” conduct. The time and place of conduct is considered by the finder of fact in weighing whether it is service-discrediting. For cases of this type, it is not necessary to prove that a third person actually observed the act, but only that it was reasonably likely that a third person would observe it. *United States v. Izquierdo*, 51 M.J. 421 (C.A.A.F. 1999) (sexual intercourse in barracks room while two roommates also in room, even though accused hung sheet that substantially blocked roommates’ side of room); *United States v. Sims*, 57 M.J. 419 (2002) (not open and notorious when appellant was in his unlocked private dorm room, with a greater expectation of privacy than a shared room, and neither party had disrobed); *United States v. Carr*, 28 M.J. 661 (N.M.C.M.R. 1989) (intercourse on a public beach at night not likely to be seen); *but see United States v. McLeod*, 67 M.J. 501, 504 (C.G. Ct. Crim. App. 2008) (early morning sexual activity in unlocked but empty chapel was open and notorious when there was no expectation of privacy because any person could have entered at any time).

3. Public knowledge not necessary. *United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2011)(“The statute, which requires proof of the ‘nature’ of the conduct, does not require the government to introduce testimony regarding views of ‘the public’ or any segment thereof.”) O*verruling sub-silentio United States v. Green*, 39 M.J. 606 (A.C.M.R. 1994)(holding that conduct will be service discrediting where civilians are aware of both the military status and the discrediting behavior; *see also United States v. Kirksey*, 20 C.M.R. 272 (C.M.A. 1955).

4. Violations of state or foreign law is not *per se* service discrediting. *United States v. Sadler*, 29 M.J. 370 (C.M.A. 1990).

5. Proof of the underlying criminal conduct may be sufficient to establish its service-discrediting nature. *United States v. Norman*, 74 M.J. 144 (C.A.A.F. 2015) (while the only testimony on the terminal element was erroneously admitted – because it simply restated the element without providing any reasoning supporting the conclusion that the accused’s conduct satisfied that element – the accused’s actions of leaving his ten-month-old son unattended in a bathtub with running hot water was sufficient to meet the government’s burden of proof on that element).

E. Conduct Punishable Under First Two Theories. Prosecutors often charge and courts often affirm various offenses invoking both the language of Clause 1 and of Clause 2. When using the list below, be sure to distinguish whether the specific court treated the conduct as both PGO&D and SD, or exclusively as one or the other.

1. Historically, other offenses have also been prosecuted. *United States v. Light*, 36 C.M.R. 579 (A.B.R. 1965) (borrowing money from subordinates); *United States v. Baur*, 10 M.J. 789 (A.F.C.M.R. 1981) (obstruction of justice); *United States v. Pechefsky*, 13 M.J. 814 (A.F.C.M.R. 1982) (forging credit recommendations).

2. These listings are not exhaustive and other novel offenses may be charged under the first two theories of the article, providing the offenses are not prosecutable elsewhere in the UCMJ. *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978).

a) *United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005) (inhalation “huffing” nitrous oxide); *United States v. Glover*, 50 M.J. 476 (C.A.A.F. 1999) (inhaling Dust-Off, a cleaning product).

b) *United States v. Choate*, 32 M.J. 423 (C.M.A. 1991) (“mooning,” under some circumstances, can be PGO&D).

c) *United States v. Kopp*, 9 M.J. 564 (A.F.C.M.R. 1980) (wrongfully writing profanity on barracks doors and setting off a false alarm in a residential building at Air Force base).

d) *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989) (unprotected sexual intercourse where the accused has the AIDS virus); *see also United States v. Morris*, 30 M.J. 1221 (A.C.M.R. 1990).

e) *United States v. King*, 34 M.J. 95 (C.M.A. 1992); *United States v. Perez*, 33 M.J. 1050 (A.C.M.R. 1991) (adultery); *See also* M.C.M. pt. IV, ¶ 62.

f) *United States v. Sullivan*, 42 M.J. 360 (C.A.A.F. 1995) (non-consensual, obscene phone calls).

g) *United States v. Warnock*, 34 M.J. 567 (A.C.M.R. 1991) (photographing nude female officer with her consent and showing negatives to enlisted paramour NOT prejudicial to good order and discipline under the circumstances).

h) *United States v. Henderson*, 32 M.J. 941 (N.M.C.M.R. 1991), *aff'd*, 34 M.J. 174 (C.M.A. 1992) (sexually exploiting recruits).

i) *United States v. Stone*, 40 M.J. 420 (C.M.A. 1994) (falsely claiming during a speech to high school students to have been a Special Forces leader in Iraq).

j) *United States v. Vaughan*, 58 M.J. 29 (C.A.A.F. 2003) (child neglect where soldier-mom left infant at home, unattended for several hours).

k) *United States v. Saunders*, 59 M.J. 1 (C.A.A.F. 2003) (harassment/stalking). Be cognizant of preemption concerns (Art. 120a, Stalking).

l) *United States v. Farence*, 57 M.J. 674 (C.G. Ct. Crim. App. 2002), *pet. denied*, 58 M.J. 203 (2003) (displaying images depicting bestiality to subordinates while on duty).

m) Child Pornography. *See* M.C.M. pt. IV, ¶ 91b; ¶ 95.

(1) *United States v. Irvin*, 60 M.J. 23 (C.A.A.F. 2004) (child pornography).

(2) *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004) (virtual, as well as actual, child pornography).

(3) *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006) (knowing possession of images depicting sexually explicit conduct by minors, whether actual or virtual).

3. Speech Offenses.

a) *Parker v. Levy*, 417 U.S. 733 (1974) (upholding application of Article 134 to "a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat," and finding that such conduct "was unprotected under the most expansive notions of the First Amendment.")

(1) "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." *Id.* at 758.

(2) "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Id.* at 758.

b) *United States v. Priest*, 45 C.M.R. 338 (C.M.A. 1972) (upholding the accused's conviction under Article 134 for making disloyal statements, including statements protesting U.S. involvement in Vietnam, in a publications where copies were made available to

Servicemembers at the Navy Exchange, the Washington Navy Yard, and at a Pentagon newsstand).

(1) "[T]he right of free speech in the armed services is not unlimited and must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country." *Id.* at 344.

(2) "Our inquiry, therefore, is whether the gravity of the effect of accused's publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction." *Id.* at 344–45.

(3) Because of the court's veneration for free speech under the First Amendment, misconduct involving speech or publication must palpably and directly affect military order and discipline to be punishable under the general article. *Id.* at 346.

c) *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008). In determining whether speech can be punished under Article 134 as prejudicial to good order and discipline, or service-discrediting, a balance must be struck "between the essential needs of the armed forces and the right to speak out as a free American." Before reaching this balancing test, though, there are two threshold determinations: (1) whether the speech is otherwise protected under the First Amendment, and (2) whether the government proved the elements of the Article 134 offense. In addressing the first prong, certain types of speech lack protection under the First Amendment. They include fighting words, dangerous speech, and obscenity. In the military, dangerous speech is that which "interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops." *See United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996). In addressing the second prong, the CAAF stated that in order to prove the element of an Article 134 offense involving speech where the question is whether the conduct is prejudicial to good order and discipline, the government must prove that there is a "direct and palpable connection between speech and the military mission." *See Priest, supra*, at 343. In order to prove that the conduct is service-discrediting, there must be "a direct and palpable connection between [the] speech and the military mission or military environment." In *Wilcox*, the court held that the accused's statements on the Internet were not unprotected speech. The postings were not dangerous speech because the language did not "interfere[ ] with or prevent[ ] the orderly accomplishment of the mission or present[ ] a clear danger to loyalty, discipline, mission, or morale of the troops." Furthermore, the court concluded that the language did not constitute fighting words and was not obscene. As the language was protected speech, the court next addressed the connection between the speech and the military. The court found that the connection between the accused's statements and the military was so "tenuous and speculative as to be legally insufficient to support the conclusion" that his conduct was either prejudicial to good order and discipline or service discrediting. Concluding that the speech is protected and that the government did not prove the elements of an Article 134 charge, the court did not conduct the balancing test between the First Amendment protections and the needs of the military.

d) *United States v. Blair*, 67 M.J. 566 (C.G. Ct. Crim. App. 2009). Accused, while in civilian clothes, posted Ku Klux Klan recruiting flyers in an airport bathroom. Plea to "wrongfully recruit[ing] for, solicit[ing] membership in, and promot[ing] the activities of the Ku Klux Klan," "while publicly displaying an affiliation with the Armed Services," which conduct was of a nature to bring discredit to the Armed Forces, was provident. The court concluded that "publicly displaying an affiliation with the Armed Services" includes conduct that takes place in an area available to the public, whether or not another person is actually present. In this case, there was a sufficient factual basis for his plea because there was the

possibility that a member of the public who knew him to be in the Coast Guard could have readily seen him posting the flyers. Next, the court applied the test in *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008), and found that the conviction was warranted despite First Amendment concerns. Considering matters presented at sentencing, including the airport director's testimony that it "made [him] sick" when he found out that the source of the flyers was an active duty Coast Guardsman, the CGCCA found that "the potential effects, both stated and inherent, of [the accused's] conduct on the Coast Guard's reputation outweigh [his] interest in his right to speak out while on government business at the airport."

F. Crimes and Offenses Not Capital (Clause Three).

1. Specific Federal Statute.

a) Example: Threat Against the President Under 18 U.S.C. § 871. *United States v. Ogren*, 54 M.J. 481 (C.A.A.F. 2001) (threat made while in pretrial confinement for unrelated charges: " . . . I'm going to find Clinton and blow his f_____ brains out"), should be viewed with objective rather than subjective test); *But see United States v. Rapert*, 75 M.J. 164 (C.A.A.F. 2016) (offense of communicating a threat against the President requires wrongfulness, which must be understood to reference the accused's subjective intent. This prevents the criminalization of otherwise innocent conduct and places the case at bar beyond the reach of *United States v. Elonis*, 135 S.Ct. 2001 (2015)).

b) For offenses occurring prior to 1 January 2019, the offense must occur in a place where the law in question applies. MCM (2016 ed.), pt. IV, ¶ 60c(4)(c)(i); *see United States v. Williams*, 17 M.J. 207 (C.M.A. 1984); *United States v. Martinelli*, 62 M.J. 52, 59 (C.A.A.F. 2005) (federal child porn statute does not apply extraterritorially to offenses Servicemember committed in Germany). However, for offenses occurring after 1 January 2019, Clause Three applies extraterritorially to any conduct engaged in outside the United States that would constitute a federal crime or offense not capital if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. § 5.

c) Elements of the federal statute are controlling. *United States v. Ridgeway*, 13 M.J. 742 (A.C.M.R. 1982).

d) A Servicemember can be convicted of an attempt to commit a federal offense under clause three, even if the underlying federal statute has no attempt provision. *United States v. Craig*, 19 M.J. 166 (C.M.A. 1985).

e) Examples.

(1) Soliciting a minor (or not). *United States v. Brooks*, 60 M.J. 495 (C.A.A.F. 2005). Appellant was convicted of violating 18 U.S.C. § 2422(b) under Article 134, Clause 3, for attempting to commit the offense of carnal knowledge with a victim under the age of twelve, and wrongfully soliciting an individual under the age of eighteen to engage in a criminal sexual act. Appellant never communicated directly with a minor or a person he believed was a minor. A conviction under Sec. 2422(b) does not require direct inducement of a minor, nor does it require an actual minor. The relevant intent is the intent to persuade or to attempt to persuade, not the intent to commit the actual sexual act. In this case appellant acted with the intent to induce a minor to engage in unlawful sexual activity, and then completed the attempt with actions that strongly corroborated the required culpability. *See also United States v. Amador*, 61 M.J. 619 (A.F. Ct. Crim. App. 2005).

(2) Storing stolen explosives. *United States v. Disney*, 62 M.J. 46 (C.A.A.F. 2005). Appellant stole ordnance from several military training events. Appellant was convicted

of one specification of larceny of military property under Article 121 and one specification of storing stolen explosives in violation of 18 U.S.C. § 842 (h) under clause 3 of Article 134.

(3) Transporting a minor in interstate commerce. *United States v. Kearns*, 73 M.J. 177 (C.A.A.F. 2014). Appellant was convicted of transporting a minor in interstate commerce when he paid a friend to drive a minor with whom he had had sexual relations from Pennsylvania to Texas, where he was stationed. Appellant contended the evidence was insufficient to establish he possessed the required level of intent because the minor had told him that she had been sexually abused by a family member and he was trying to help her escape a dangerous situation. Appellant relied on several decisions from the circuit courts of appeals that required a showing that the "dominant," "predominant," "significant," or "efficient and compelling" intent was to have sexual relations with the minor. The CAAF rejected the reasoning of these decisions and held, consistent with decisions from other courts of appeals, that sexual activity needed to be only a purpose for transporting the minor across state lines.

2. State Law: Federal Assimilative Crimes Act (FACA). 18 U.S.C. §13.

a) Adopts un-preempted state offenses as the local federal law of application.

b) The purpose of FACA is to fill the gaps left by the patchwork of federal statutes. *United States v. Robbins*, 52 M.J. 159 (C.A.A.F. 1999); *United States v. Picotte*, 30 C.M.R. 196 (C.M.A. 1961).

c) In Army and Air Force Courts, "offenses" may not include any traffic offenses which have been designated as non-criminal even if they still carry a fine. *United States v. Brooks*, 64 M.J. 587 (A. Ct. Crim. App. 2006) and *United States v. Clinkenbeard*, 44 M.J. 577 (A.F. Ct. Crim. App. 1996). *But cf. United States v. White*, 39 M.J. 796 (N.M.C.M.R. 1994) (assimilating provisions of state motor vehicle code denominated as "violations" rather than "crimes", but which provide for penal sanctions). This split between the Service courts has not been addressed by C.A.A.F.

d) Applies state law whether enacted before or after passage of FACA. *United States v. Rowe*, 32 C.M.R. 302 (C.M.A. 1962).

e) State law may not be assimilated if the act or omission is punishable by any enactment of Congress. *Lewis v. United States*, 523 U.S. 155, 118 S.Ct. 1135 (1998). *Lewis* establishes a two-part test (This test should be applied in conjunction with the related, but similar Article 134 preemption analysis discussed below):

(1) Is the accused's "act or omission…made punishable by any enactment of Congress?" If not, then assimilate. If so, ask:

(2) Do the relevant federal statutes preclude application of the state law? Specifically, would the application of the state law interfere with the achievement of a federal policy, effectively rewrite an offense definition that Congress carefully considered, or run counter to Congressional intent to occupy the entire field under consideration?

f) The FACA may not be used to extend or narrow the scope of existing federal criminal law. *Lewis v. United States*, 523 U.S. 155, 118 S.Ct. 1135 (1998); *United States v. Perkins*, 6 M.J. 602 (A.C.M.R. 1978); see also *United States v. Robbins*, 52 M.J. 159 (1999) and MCM, pt. IV, ¶ 91c(4)(a)(iii).

g) Jurisdiction.

(1) The government must establish exclusive or concurrent federal jurisdiction before FACA is applicable. *See United States v. Dallman*, 34 M.J. 274 (C.M.A. 1992), *aff'd*, 37 M.J. 213 (C.M.A. 1993).

(2) A guilty plea may be sufficient to establish jurisdiction required by the Act. *United States v. Kline*, 21 M.J. 366 (C.M.A. 1986); *United States v. Jones*, 34 M.J. 270 (C.M.A. 1992), *but see United States v. Dallman*, above, where guilty plea was dismissed after court held that lack of discussion of jurisdiction by parties or military judge made plea improvident.

h) Refer to state case law for interpretation of the offense

(1) Defendant provided alcohol to someone under age 21and was charged under FACA with the violation of the South Carolina code. He stated during the providence inquiry he did not know at the time he provided the alcohol, but found out "later" the person was under age 21. ACCA looked to South Carolina Code to determine the offense was not a strict liability offense and then dismissed the specification. *United States v. Narewski*, No. ARMY 20140080, 2016 WL 4446559, at *1 (A. Ct. Crim. App. Aug. 22, 2016)

G. Limitations on the Use of Article 134, UCMJ.

1. The Preemption Doctrine. MCM, pt. IV, ¶ 91c(5)(a). (See also the discussion of FACA preemption above).

a) Article 134 cannot be used to prohibit conduct already prohibited by Congress in UCMJ arts. 78 & 80-132.

b) Under the test provided in *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978), conduct is already prohibited if:

(1) Congress intended to limit prosecutions for certain conduct to offenses defined in specific articles of the UCMJ, **<u>and</u>**

(2) The offense sought to be charged is composed of a residuum of elements of an enumerated offense under the UCMJ.

c) Applications.

(1) Prosecution under Article 134, Clause 1 for inhalation ("huffing") nitrous oxide is not preempted by Article 112a because the legislative record indicates that Congress did not intend for Article 112a to be a comprehensive law covering all drug-related offenses. *United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005).

(2) Federal Statutes: Prosecution for attempting to engage a minor in illegal sexual activity (sodomy and carnal knowledge) in violation of 18 U.S.C. § 2422(b) is not preempted by Articles 80, 120, or 125. *United States v. Kowalski*, 69 M.J. 705 (C.G. Ct. Crim. App. 2010). Prosecution of bank fraud under 18 U.S.C. § 1344 is not be preempted by Article 132. *United States v. Tenney*, 60 M.J. 838 (N-M. Ct. Crim. App. 2005); Prosecution under 18 U.S.C. § 842 (h) for possession of stolen explosives is not preempted. *United States v. Canatelli*, 5 M.J. 838 (A.C.M.R. 1978).

(3) State Statutes: State statute prohibiting wrongfully eluding a police officer is not preempted. *United States v. Kline*, 21 M.J. 366 (C.M.A. 1986); State auto burglary statute is not preempted where Congress had not included automobiles within protection of unauthorized entry laws. *United States v. Sellars*, 5 M.J. 814 (A.C.M.R. 1978); State statute prohibiting hunting at night is not preempted. *United States v. Fishel*, 12 M.J. 602 (A.C.M.R. 1981); State statute prohibiting the unlawful termination of another's

pregnancy is not preempted by Articles 118 and 119. *United States v. Robbins*, 52 M.J. 159 (C.A.A.F. 1999); State child abuse statute is not preempted *per se*; however, evidence establishes no more than assault under article 128. *United States v. Irvin*, 21 M.J. 184 (C.M.A. 1985), *cert. denied*, 479 U.S. 852 (1986); *see also United States v. Wallace*, 49 M.J. 292 (C.A.A.F. 1998).

(4) Preempted Statutes: State statute prohibiting false reports of crimes is preempted. *United States v. Jones*, 5 M.J. 579 (A.C.M.R. 1978); Prosecution of cable television fraud using Hawaii statute is preempted by an applicable federal statute on cable television fraud, 47 U.S.C. § 553 (a) & (b). *United States v. Mitchell*, 36 M.J. 882 (N.M.C.M.R. 1993), *aff'd*, 40 M.J. 270 (C.M.A. 1994), *cert. denied* 513 U.S. 1041 (1994).

2. The Capital Crime Exception. MCM, pt. IV, ¶ 91c(4)(a)(1)(i).

a) Capital crimes are those crimes made punishable by death under the common law or by statute of the United States.

b) Capital crimes may not be tried under Article 134. Only non-capital offenses may be prosecuted under article 134. *United States v. French*, 27 C.M.R. 245 (C.M.A. 1959).

3. Crimes Punishable under Article 92. MCM, pt. IV, ¶ 91c(2)(b).

a) Violations of "customs of the service" that are now contained in regulations should be charged as violations of Article 92, if the regulation is punitive.

b) *United States v. Caballero*, 49 C.M.R. 594 (C.M.A. 1975) (setting aside a conviction under Art. 134 for possession of drug paraphernalia, holding that possession of drug paraphernalia is properly prosecuted under Art. 92, where an order or regulation proscribing such possession exists).

c) *United States v. Borunda*, 67 M.J. 607 (A.F. Ct. Crim. App. 2009). The AFCCA interpreted *Caballero* "to mean that when a lawful general order or regulation proscribing the possession of drug paraphernalia exists, an order which by definition is punitive," the offense must be charged under Art. 92(1), UCMJ, and not Art. 134. In the absence of a lawful general order or regulation, the Government is at liberty to charge the conduct under another theory of Article 92 or Article 134.

H. Pleading Considerations.

1. Pleading the Terminal Element in Clause 1 and 2 Offenses.

a) Historically, enumerated Article 134 offenses did not require the explicit pleading of the terminal element within the specification. However, *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) marks a dramatic shift in charging Article 134 offenses. Article 134 offenses charged under Clause 1 or 2 should explicitly allege the terminal element, notwithstanding the language of the MCM and prior case law holding otherwise. Specifications that fail to explicitly allege the terminal element will receive increased scrutiny to determine if the terminal element is necessarily implied.

b) Explicit Pleading. The *Fosler* court reaffirms that a specification provides sufficient notice when it alleges every element of the charged offense either expressly or by necessary implication as reflected in R.C.M. 307(c)(3). In the context of Article 134, the court states "[a]n accused must be given notice as to which clause or clauses [of Article 134] he must defend against." When the terminal element is not expressly alleged, the court analyzes whether the element is necessarily implied.

c) Necessary Implication. With respect to whether the terminal element is necessarily implied, the court looks at historical precedent and stare decisis, including the MCM and *Parker v. Levy*, 417 U.S. 733 (1974). CAAF notes that increased emphasis on constitutional notice requirements in recent cases has changed both U.S. Supreme Court and CAAF LIO jurisprudence and "circumsrib[ed] the extent to which Article 134 – and particularly its terminal element – can be implied." The court states that the historical practice of implying the terminal element and stare decisis supporting this practice "has been substantially eroded." Merely alleging that a crime is an Article 134 offense does not imply the terminal element and, therefore, the specification does not provide adequate notice – even when coupled with words of criminality (i.e., "wrongfully") in the specification.

d) Notice is the legal issue; plain error is the test.

(1) Contested trials: Failing to allege the terminal element is error because the accused does not know against which theory of criminality he must defend. If the specification is challenged for a failure to state an offense at a contested trial, the remedy is dismissal. See *Fosler*, 70 M.J. at 226.

(2) Guilty pleas: Despite error failing to allege the terminal element, "in the context of a guilty plea, where the error is alleged for the first time on appeal, whether there is a remedy for the error will depend on whether the error has prejudiced the substantial rights of the accused. A court will not "find prejudice and disturb the providence of a plea where the providence inquiry clearly delineates each element of the offense and shows that the [accused] understood 'to what offense and under what legal theory [he was] pleading guilty.'" *United States v. Ballan*, 71 M.J. 28, 35 (C.A.A.F 2012). See also *United States v. Watson*, 71 M.J. 54 (C.A.A.F. 2012); *United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012).

2. Clause Three.

a) Each element of the federal or assimilated statute must be alleged expressly or by necessary implication. MCM, pt. IV, ¶ 91c(6)(b).

b) The federal or assimilated state statute *should* be identified. MCM, pt. IV, ¶ 91c(6)(b).

c) Clause 1 and 2 offenses are not *per se* LIOs of Clause 3. Consequently, in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) and *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008), it is prudent to add language to the Clause 3 specification alleging that the conduct was prejudicial to good order and discipline and/or service discrediting.

d) Sample specifications. *See* Chapter 7, Appendix B.

3. Article 134 offenses are not *per se* LIOs of offenses arising under other articles of the UCMJ. Consequently, applying *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994), *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008), and *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009), practitioners should use extreme care when the MCM suggests that offenses under Article 134 are lesser included offenses of offenses arising under the enumerated articles of the UCMJ.

I. Punishment.

1. For the offenses listed in MCM, pt. IV, paras. 92-108 the specified punishments control. R.C.M. 1003(c)(1)(A).

2. For other offenses, the following rules apply:

a) If the offense is either included in, or closely related to, an offense listed in paras. 92-108, then the penalty provided in the MCM for the listed offense applies. *United States v. Sellars*,

5 M.J. 814 (A.C.M.R. 1978) (state auto burglary statute was closely related to Article 130 housebreaking and should therefore be punished consistent with article 130 punishments); R.C.M. 1003(c)(1)(B)(i).

b) If an unlisted offense is included in a listed crime and is closely related to another, or is equally related to two or more listed offenses, the lesser punishment of the related crimes shall apply. R.C.M. 1003(c)(1)(B)(i). This is the opposite rule from that of Article 133, where the greater punishment applies. *See supra* ¶ XCIII., this chapter.

c) If the punishment for an unlisted offense cannot be determined by applying the above tests (a & b), which is usually the case, then the punishment is that provided by the civilian statute or authorized by the custom of the service. R.C.M. 1003(c)(1)(B)(ii).

(1) The accused was charged with and knowingly receiving visual depictions of minors engaging in sexually explicit conduct under Clauses 1 and 2 of Article 134. The military judge did not err in referencing the analogous federal statute, 18 USC § 2252(a)(2) to determine the maximum punishment, "when every element of the federal crime, except the jurisdictional element, was included in the specification." *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007); *but see United States v. Beaty*, 70 M.J. 39, 45 (C.A.A.F. 2011) (where accused was charged with possessing "what appears to be" child pornography, it was error for military judge to apply federal maximum punishment for possession of child pornography. These materials were different from what may be criminalized under federal law. Charge should have been treated as a general disorder, with a maximum punishment of four months confinement and forfeitures).

(2) Prosecution under 18 U.S.C. § 842 (h), for possession of stolen explosives, is punished under penalties provided in the federal statute. *United States v. Canatelli*, 5 M.J. 838 (A.C.M.R. 1978).

(3) Prosecution under 4 U.S.C. § 3, for wrongfully and dishonorably defiling the American flag, is punished under the penalties provided in the statute. *United States v. Cramer*, 24 C.M.R. 31 (C.M.A. 1957). However, counsel should consider *Texas v. Johnson*, 491 U.S. 397 (1989), where Supreme Court held that civilians may not be punished for desecrating flag. As in *Beaty* maximum punishment may be limited to that of a general disorder, four months confinement and forfeitures.

XCV. OFFENSES UNDER ART. 134.

A. Fraternization

1. Military case law.

a) Military case law suggests that wrongful fraternization is more easily described than defined. Usually, some other criminal offense was involved when officers were tried for this offense. Whatever the nature of the relationship, each case was clearly decided on its own merits with a searching examination of the surrounding circumstances rather than focusing on the act itself.

b) The legal test for describing or defining fraternization is found in *United States v. Free*, 14 C.M.R. 466 (N.B.R. 1953): "Because of the many situations which might arise, it would be a practical impossibility to lay down a measuring rod of particularities to determine in advance what acts are prejudicial to good order and discipline and what are not. As we have said, the surrounding circumstances have more to do with making the act prejudicial than the act itself in many cases. Suffice it to say, then, that each case must be determined on its own merits. Where it is shown that the acts and circumstances are such as to lead a reasonably

prudent person, experienced in the problems of military leadership, to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134."

2. The Manual for Courts-Martial specifically includes fraternization between officer and enlisted personnel as an offense under UCMJ art. 134. The elements of the offense are:

a) That the accused was a commissioned or warrant officer;

b) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

c) That the accused then knew the person(s) to be (an) enlisted member(s);

d) That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MCM, pt. IV, ¶ 101b.

3. In addition to Article 134, UCMJ, which only proscribes fraternization between officers and enlisted personnel, the services have promulgated punitive regulations punishable under Article 92, UCMJ that proscribe relationships between officers and between enlisted personnel that do not respect differences in grade or rank.

a) Army. AR 600-20, paras. 4-14 and 4-15 (6 Nov 2014), define improper superior-subordinate relationships, to include several specified prohibited relationships. DA Pam 600-35 (21 Jul 2017) provides additional regulatory guidance for determining improper superior-subordinate relationships or wrongful fraternization. Additional scrutiny should be given to relationships involving (1) direct command/supervisory authority or (2) power to influence personnel or disciplinary actions. "[A]uthority or influence . . . is central to any discussion of the propriety of a particular relationship between Soldiers of a different rank."

b) Navy and Marine Corps. U.S. NAVY REGULATIONS, 1990, art. 1165 (14 Sept. 1990) proscribes personal relationships between officer and enlisted members that are unduly familiar and that do not respect differences in grade or rank. These types of relationships are declared to be *per se* prejudicial to good order and discipline and violate long-standing traditions of the naval service. Personal relationships between officer members or between enlisted members that are unduly familiar and that do not respect differences in grade or rank are also proscribed if they are discrediting or prejudicial to good order and discipline. The regulation provides a non-exhaustive listing of circumstances that would qualify as service discrediting or prejudicial to good order and discipline.

4. In addition to service regulations, many commands have published regulations and policy letters concerning fraternization. Violations of regulations or policy letters are punishable under Article 92, if:

a) The regulation or policy letter specifically regulates individual conduct without being vague or overbroad. *See United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986); *United States v. Adams*, 19 M.J. 996 (A.C.M.R. 1985); *United States v. Moorer*, 15 M.J. 520 (A.C.M.R. 1983), *aff'd in part, rev'd in part*, 16 M.J. 451 (C.M.A. 1983); *United States v. Hoard*, 12 M.J. 563 (A.C.M.R. 1981);

b) The regulation or policy letter indicates that violations of the provisions are punishable under the UCMJ (directory language may be sufficient); and

c) Knowledge: Service members are presumed to have knowledge of lawful general regulations if they are properly published. Actual knowledge of regulations or policy letters issued by brigade-size or smaller organizations must be proven. *See generally United States v. Mayfield*, 21 M.J. 418 (C.M.A. 1981); *United States v. Tolkack*, 14 M.J. 239 (C.M.A. 1982); *see also United States v. Tedder*, 24 M.J. 176, 1981 (C.M.A. 1987).

5. Charging Fraternization.

a) Fraternization between an officer and an enlisted service member is charged generally under Article 134, UCMJ.

b) Fraternization between enlisted personnel and officers is generally charged as a violation of Article 92, UCMJ if there is an applicable service regulation or general order that is punitive. In the past, fraternization has been successfully charged as a violation of Article 134, UCMJ as well. *See United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), *aff'd*, 27 M.J. 361 (C.M.A. 1989); *United States v. Carter*, 23 M.J. 683 (N.M.C.M.R. 1986); *United States v. March*, 32 M.J. 740 (A.C.M.R. 1991).

(1) *United States v. Williams*, No. 201500296, 2017 WL 1034020, (N-M. Ct. Crim. App. 2017), review denied, (C.A.A.F. July 7, 2017). Declined to extend the holding of *Carter* that charging fraternization between enlisted personnel under Article 134, UCMJ was viable to a relationship between a Corporal (E-4) accused and a Lance Corporal (E-3).

(2) Based on the holding in *Williams*, fraternization between enlisted personnel should be charged as a violation of Article 92, UCMJ in any case where a punitive regulation or general order is available.

c) Additionally, Article 134 has been successfully used to prosecute instances of officer-officer fraternization, *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986

6. Options Available to Commanders.

a) Counsel the individuals involved.

b) Pursue other non-punitive measures (*e.g.*, reassignment, oral or written admonitions or reprimands, adverse OER/EER, bar to reenlistment, relief, administrative elimination).

c) Consider nonjudicial or punitive action.

(1) If the offense amounts to a social relationship between an officer and an enlisted person and violates good order and discipline, it may be charged under UCMJ art. 134.

(2) If the relationship violates other offenses such as adultery, sodomy, indecent acts, maltreatment, etc., the conduct should be alleged as such.

(3) Other articles may be charged depending upon the specific facts of the case.

(4) The conduct may be in violation of a regulation or order and charged under Art 92.

7. Applications.

a) Sexual activity.

(1) *United States v. Froehlke*, 390 F. Supp. 503 (D.D.C. 1975). Upheld conviction of warrant officer for undressing and bathing an enlisted woman (not his wife) with whom he had been drinking. Offense of unlawful fraternization held not unconstitutionally vague.

(2) *United States v. Hoard*, 12 M.J. 563 (A.C.M.R. 1981). "[W]rongfully socializing, drinking, and engaging in sexual intercourse with female receptees in violation of cadre-trainee regulation."

(3) *United States v. Lowery*, 21 M.J. 998 (A.C.M.R. 1986), *aff'd*, 24 M.J. 347 (C.M.A. 1987). Conviction upheld when accused officer had sexual intercourse with enlisted female, formerly under his command, where the female would not have gone to the accused's office to make an appointment but for the superior-subordinate relationship.

(4) *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987). Charges of unbecoming conduct based on officer having sexual relationship with enlisted woman Marine and seeking to have subordinates arrange dates for him with another subordinate Marine were not impermissibly vague.

(5) *United States v. Parrillo*, 31 M.J. 886 (A.F.C.M.R. 1990), *aff'd* 34 M.J. 112 (C.M.A. 1992) Sexual relations with enlisted members under the accused officer's supervision violated an Air Force custom against fraternization.

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

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

(8) *United States v. Delgado*, No. ARMY 20140927, 2016 WL 109792, at *1 (A. Ct. Crim. App. Jan. 6, 2016), *review denied*, (C.A.A.F. Mar. 30, 2016) (nonconsensual sexual assault cannot form the basis to establish an inappropriate relationship under AR 600-20).

b) Drugs and other illegal activities.

(1) *United States v. Graham*, 9 M.J. 556 (N.C.M.R. 1980). Navy lieutenant convicted under Article 133 for conduct unbecoming an officer for smoking marijuana on shore with members of his ship's crew.

(2) *United States v. Chesterfield*, 31 M.J. 942 (A.C.M.R. 1990). Drinking and smoking hashish with subordinates constituted fraternization.

c) Excessive socializing.

(1) *United States v. Arthen*, 32 M.J. 541 (A.F.C.M.R. 1990). Accused officer's romantic relationship with an enlisted co-worker did not constitute fraternization.

(2) *United States v. McCreight*, 43 M.J. 483 (C.A.A.F. 1996). Conviction for fraternization sustained where 1LT showed partiality and preferential treatment to senior airman; associated with airman on a first name basis at work and during numerous social contacts, including drinking and gambling; repeatedly allowed the same airman to stay in his apartment; and on one occasion drank with same airman under circumstances where the accused was the "designated drunk" and the airman was the designated driver. No sexual aspect alleged or proven. Fraternization does not require sexual conduct. *Accord*

United States v. Nunes, 39 M.J. 889 (A.F.C.M.R. 1994) ("That no sexual relationship was alleged is irrelevant. This case is a useful corrective to the common notion that fraternization perforce must include sexual hanky-panky.").

d) Proof of custom and other facts.

(1) *United States v. Wales*, 31 M.J. 301 (C.M.A. 1990). Accused's conviction for fraternization was reversed because the judge did not instruct that the members must find that the accused (an Air Force officer) was the supervisor of the enlisted member at the time of the alleged fraternization, and because the government did not prove that the accused's conduct violated a custom of the service. To prove a custom of the military service, proof must be offered by a knowledgeable witness--subject to cross-examination--about that custom.

(2) *United States v. Appel*, 31 M.J. 314 (C.M.A. 1990). If the government relies on a violation of a custom as fraternization, it must prove the custom (Air Force accused). Proof of a military custom may not be based on judicial notice.

(3) *United States v. Thompson*, 31 M.J. 781 (A.C.M.R. 1990). Military judge is entitled to take judicial notice of a post regulation proscribing fraternization.

(4) *United States v. Johanns*, 20 M.J. 155 (C.M.A. 1985), *cert. denied* 474 U.S. 850 (1985). Decision of A.F.C.M.R. that "[C]ustom in the Air Force against fraternization has been so eroded as to make *criminal prosecution* against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command or supervision, unavailable."

(5) *United States v. Fox*, 34 M.J. 99 (C.M.A. 1992). Air Force fraternization specification must at least imply existence of a superior-subordinate or supervisory relationship and court members must be instructed that to find the accused guilty they must find the existence of such a relationship.

(6) *United States v. Blake*, 35 M.J. 539 (A.C.M.R. 1992). Specification alleging fraternization between Army 1SG and female NCO in his company was fatally defective where it failed to allege a violation of Army custom, which is an essential element.

(7) *United States v. Boyett*, 37 M.J. 872 (A.F.C.M.R. 1993), *aff'd* 42 M.J. 150 (1995). Determination in previous case (*Johanns*) that custom against fraternization in the Air Force had been so eroded as to make criminal prosecution against officer for engaging in mutually voluntary, private, nondeviate sexual intercourse with enlisted member, neither under his command nor supervision, unavailable was limited to state of customs reflected in record in that case, and would not preclude every prosecution for fraternization based on such conduct. (Per Heimberg, J., with three Judges concurring and one Judge concurring separately).

(8) *United States v. Brown*, 55 M.J. 375 (C.A.A.F. 2001). The military judge did not abuse his discretion when he admitted the nonpunitive Air Force Pamphlet (AFP) 36-2705, Discrimination and Sexual Harassment (28 February 1995) over defense objection. In so ruling, the CAAF agreed with the military judge that the AFP was relevant to establish notice of the prohibited conduct and the applicable standard of conduct in the Air Force community to the appellant. Additionally, the CAAF stated that in cases were evidence of the custom of the service is needed to prove an element of an offense, it is likely that the probative value will outweigh the prejudicial effect.

B. Worthless check by dishonorably failing to maintain sufficient funds.

1. Elements.

a) That the accused made and uttered a certain check.

b) That the check was made and uttered for the purchase of a certain thing, in payment of debt, or for a certain purpose.

c) That the accused did thereafter fail to place or maintain sufficient funds in or credit with the drawee bank for payment of such check in full upon its presentment for payment.

d) That such failure was dishonorable.

e) That such failure was prejudicial to good order and discipline or was service discrediting.

2. "Dishonorable" failure to maintain sufficient funds.

a) Bad faith, gross indifference, fraud or deceit is necessary. *United States v. Brand*, 28 C.M.R. 3 (C.M.A. 1959).

b) Negligent failure insufficient. *United States v. Kess*, 48 C.M.R. 108 (A.F.B.R. 1973).

c) Redemption negates evidence of dishonorableness. *United States v. Groom*, 30 C.M.R. 11 (C.M.A. 1960).

d) Evidence sufficient. *United States v. Silas*, 31 M.J. 829 (N.M.C.M.R. 1990).

e) May occur after initial presentment. *United States v. Call*, 32 M.J. 873 (N.M.C.M.R. 1991).

3. Defenses.

a) Lack of sophistication regarding checking insufficient for guilt under either an Article 123a or Article 134 theory. *United States v. Elizondo*, 29 M.J. 798 (A.C.M.R. 1989); *see generally*, TJAGSA Practice Note, *Mens Rea and Bad Check Offenses*, Army Law., Mar. 1990, at 36 (discusses *Elizondo*).

b) Honest mistake, not a result of bad faith or gross indifference, is a legitimate defense. *United States v. Connell*, 22 C.M.R. 18 (C.M.A. 1956).

c) Bad checks written to satisfy gambling debts not enforceable on public policy grounds. *United States v. Allberry*, 44 M.J. 226 (C.A.A.F. 1996); *But see United States v. Falcon*, 65 M.J. 386 (C.A.A.F. 2008) overruling *United States v. Wallace*, 36 C.M.R. 148 (C.M.A. 1966) finding public policy rationale applied to illegal gambling has changed and "legal" gambling has grown in terms of popularity and acceptance). *United States v. Green*, 44 M.J. 828 (Army Ct. Crim. App. 1996) (public policy defense applies only when there is a direct connection between the check cashing service and the gambling activity).

C. Debt; dishonorably failing to pay

1. Elements.

a) That the accused was indebted to a certain person or entity in a certain sum;

b) That this debt became due and payable on or about a certain date;

c) That while the debt was still due and payable the accused dishonorably failed to pay this debt; and

d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. More than negligence in nonpayment is necessary. MCM, pt. IV, ¶ 71c. A mere failure to pay a debt does not establish dishonorable conduct. Even a negligent failure to pay a debt is not dishonorable. The term "dishonorable" connotes a state of mind amounting to gross indifference or bad faith, and is characterized by deceit, evasion, false promises, denial of indebtedness, or other distinctly culpable circumstances. *United States v. Bullman*, 56 M.J. 377 (C.A.A.F. 2002), *aff'd*, 57 M.J. 478 (C.A.A.F. 2002); *United States v. Burris*, 59 M.J. 700 (C.G. Ct. Crim. App. 2004). (Guilty plea to offense was improvident where the military judge failed to define dishonorable conduct with respect to an AAFES debt, failed to elicit a factual predicate for dishonorable conduct regarding the debt, and failed to resolve inconsistencies which indicated an inability to pay the debt and a lack of deceit or evasion.)

a) Evidence was legally sufficient to support conviction for dishonorable failure to pay a just debt where accused failed to make an arrangement for payment, had made late payments before, failed to contact rental agent even after formal notice, and surreptitiously vacated the apartment without paying, cleaning, or repairing damage. *United States v. Polk*, 47 M.J. 116 (C.A.A.F. 1997).

OTHER OFFENSES

XCVI. WARTIME RELATED OFFENSES

A. Offenses.

1. Desertion. UCMJ art. 85.
2. Willfully Disobeying Superior Commissioned Officer. UCMJ art. 90.
3. Misbehavior Before the Enemy. UCMJ art. 99.
4. Subordinate Compelling Surrender. UCMJ art. 100.
5. Improper Use of a Countersign. UCMJ art. 101.
6. Forcing A Safeguard. UCMJ art. 102.
7. Captured or Abandoned Property. UCMJ art. 108a.
8. Aiding the Enemy. UCMJ art. 103b.
9. Misconduct as a Prisoner. UCMJ art. 98.
10. Spies. UCMJ art. 103.
11. Espionage. UCMJ art. 103a.
12. Offenses by Sentinel or Lookout. UCMJ art. 95.
13. Malingering. UCMJ art. 83.
14. Straggling. UCMJ art. 134.
15. Other Offenses.
    a. Failure to Obey Lawful General Regulation. UCMJ art. 92.
    b. Dereliction of Duty. UCMJ art. 92.
    c. Violation of Federal Statutes. UCMJ art. 134.

B. The "Triggers". Typically the offenses listed above can occur or become aggravated only when one of the two triggers below exist.

1. Time of War.

2. Before the Enemy.

C. Time Of War.

1. Definition. "Time of war" means a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that time of war exists. R.C.M. 103(21).

a) Definition applies only to R.C.M. 1004(c)(6) and to Parts IV and V of the Manual.

b) The UCMJ does not define "time of war." R.C.M. 103(21), analysis.

c) The Court of Military Appeals (now Court of Appeals for the Armed Forces) has held that "time of war," as used in the UCMJ, does not necessarily mean declared war. Whether a time of war exists depends on the purpose of the specific article in which the phrase appears.

d) For purposes of Art. 2a(10), "time of war" means a war formally declared by Congress or during contingency operations. *United States v. Ali*, 71 M.J. 256, 262 (C.A.A.F. 2012).

e) Vietnam conflict was time of war for purposes of suspension of the statute of limitations under Article 43. *United States v. Anderson*, 38 C.M.R. 386 (C.M.A. 1968).

f) Conflicts in Iraq and Afghanistan in 2007 was a time of war for the suspension of the statute of limitations under Article 43. *United States v. Rivaschivas*, 74 M.J. 758 (A. Ct. Crim. App. 2015) (desertion).

2. The court has examined the following circumstances to determine if time of war exists:

a) The nature of the conflict, *i.e.* there must exist armed hostilities against an organized enemy. *United States v. Shell*, 23 C.M.R. 110, 114 (C.M.A. 1957);

b) The movement and numbers of United States forces in the combat area;

c) The casualties involved;

d) Legislation, executive orders or proclamations concerning the hostilities. *United States v. Bancroft*, 11 C.M.R. 3 (C.M.A. 1953).

3. Geographical limitation of time of war.

a) Not limited with respect to Article 43, UCMJ. *United States v. Anderson*, 38 C.M.R. 386 (C.M.A. 1968).

b) May be limited for other purposes. *See United States v. Taylor*, 15 C.M.R. 232 (C.M.A. 1954); *United States v. Ayers*, 15 C.M.R. 220 (C.M.A. 1954).

4. For a more broad discussion of the impact of "time of war" on offenses for purposes of Article 43, *see* Chapter 22 (Defenses) in this deskbook.

D. Applications.

1. Offenses which can occur only in time of war.

a) Improper use of a countersign. UCMJ art. 101.

b) Misconduct as a prisoner. UCMJ art. 98.

c) Spies. UCMJ art. 103.

2. Offenses which are capital offenses in time of war.

a) Desertion. UCMJ art. 85.

b) Willful Disobedience of a Superior Commissioned Officer's Order. UCMJ art. 90.

c) Offenses As A Sentinel. UCMJ art. 95 (Drunk or sleeping on post, or leaving post before being relieved).

d) Homicide. *See* R.C.M. 1004(c)(6).

3. Offenses where time of war is an aggravating factor.

a) Drug offenses. UCMJ art. 112a.

b) Malingering. UCMJ art. 83.

c) Offenses by a Sentinel. UCMJ art. 95.

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CHAPTER 21
SEXUAL OFFENSES

I. Rape and Sexual Assault Generally
II. Rape and Sexual Assault of a Child
III. Article 120a
IV. Other Sexual Misconduct
V. Sodomy and Bestiality (2012-2018)
VI. Child Pornography
App. Sexual Offenses Before 28 June 2012

This Chapter discusses the law pertaining to sexual offenses in effect as of 1 January 2019. For offenses occurring between 29 June 2012 and 1 January 2019, refer to the 2018 Criminal Law Deskbook. For offenses occurring prior to 28 June 2012, refer to the Appendix of this Chapter.

I. RAPE AND SEXUAL ASSAULT GENERALLY

Adult Crimes (Art. 120)
- Rape
- Sexual Assault
- Aggravated Sexual Contact
- Abusive Sexual Contact

A. Generally. MCM, pt. IV, ¶ 60; UCMJ art. 120.

1. The first step in determining whether an offense meets the statutory definition of a crime under Article 120 is determining whether a sexual act or sexual contact occurred.

a) Sexual Act: (1) penetration of the vulva, anus or mouth by the penis; (2) contact between the mouth and the penis, vulva, scrotum, or anus; or (3) the penetration, however, slight, of the vulva or penis or anus of another by any part of the body or any object, with the intent to abuse/humiliate/harass/degrade or with the intent to gratify sexual desires. Note that penetration by the penis is therefore by definition a general intent offense. A sexual act is required for rape and sexual assault offenses.

b) Sexual Contact: (1) touching, or causing another to touch, either directly or through clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with intent to abuse, humiliate, harass, or degrade any person or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object. A sexual contact is required for aggravated sexual contact and abusive sexual contact offenses.

2. The next step is to determine what actions the accused took, or in some instances, what status the victim was in at the time of the offense. This will determine which offense is at issue.

a) Rape and aggravated sexual contact occur when the accused takes one of the following actions to accomplish the sexual act or sexual contact:

(1) Using unlawful force against the victim

(2) Using force causing or likely to cause death or grievous bodily harm to any person

(3) Threatening death, grievous bodily harm, or kidnapping to any person

(4) Rendering the victim unconscious

(5) Administering intoxicant/drug by force or threat of force, or without knowledge or consent of the victim

b) Sexual assault and abusive sexual contact occur when the accused takes one of the following actions to accomplish the sexual act or sexual contact, or when the victim is in one of the statuses described:

(1) Threatening the victim or placing him/her in fear

(2) Without consent

(3) Making a fraudulent representation that the sexual act/contact serves a professional purpose

(4) Inducing a belief that the accused is another person

(5) When the victim is asleep, unconscious, or otherwise unaware that the sexual act/contact is occurring, and the accused knew or should have known of such condition

(6) When the victim is incapable of consent due to impairment by a drug/intoxicant/other similar substance, or due to mental disease or defect or physical disability, and the accused knew or should have known of such condition

c) Unlawful Force. Unlawful Force is defined as an "act of force done without legal justification or excuse." "Force" is further defined separately in the statute. Therefore, the government must prove more than that the accused used merely some amount of unlawful force to accomplish the sexual act or sexual contact – that is, the unlawful force must also amount to use of a weapon, use of physical strength or violence as is sufficient to overcome, restrain, or injure a person, or inflicting physical harm sufficient to coerce or compel submission by the victim. *See United States v. Thomas*, 74 M.J. 563 (N-M. Ct. Crim App. 2014).

(1) Body weight alone does not meet the statutory definition of force. *See United States v. Thomas*, 74 M.J. 563 (N-M.C.C.A. 2014); *United States v. Soto*, 2014 CCA LEXIS 681 (A.F.C.C.A. Sept. 16, 2014).

(2) Rolling an incapacitated victim over onto his back in order to place penis into the victim's mouth does not meet the statutory definition of force, though it may have met the elements under an "incapable of consent" theory. *United States v. Parker*, 2016 CCA LEXIS 83 (N-M. Ct. Crim. App. 2016).

d) Incapable of consenting. The term "incapable of consenting" means the person is "incapable of appraising the nature of the conduct at issue; or physically incapable of declining participation in, or communicating [unwillingness] to engage in, the sexual act at issue." This statutory language is modeled after the judicially-crafted definition where the government has alleged the victim was incapable of consenting: victims are incapable of consenting when they "lack[] the cognitive ability to appreciate the sexual conduct in question or lack[] the physical or mental ability to make or to communicate a decision about whether they agreed to the conduct" *United States v. Pease*, 75 M.J. 180 (CAAF 2016).

(1) Article 120(b)(3) requires proof beyond a reasonable doubt that the accused had actual knowledge that victim could not consent or reasonably should have known that the victim could not consent. Thus, mistake of fact is not a "defense" to sexual assault; it is

an attack on an element. The government is required to disprove, as a matter of course, a mistake of fact in every case under Article 120(b)(3). Therefore, it is not appropriate to instruct members on a mistake of fact defense in these cases. *United States v. Teague*, 75 M.J. 636 (A. Ct. Crim. App. 2016), *review denied*, (C.A.A.F. June 16, 2016).

(2) Incapable of consent raises three questions: was the victim aware of the nature of the sexual conduct at issue; was the victim able to communicate her unwillingness to engage in the conduct; and was the victim otherwise able to make competent decisions. *United States v. Wilson*, No. ARMY 20130601, 2016 WL 2726275 (A. Ct. Crim. App. May 5, 2016), *review denied*, (C.A.A.F. Aug. 1, 2016) (where victim's testimony answered all three questions in the affirmative, the two specifications alleging substantial incapacity were legally insufficient).

(3) "Impairment" is a different concept than incapable of consent, and impairment matters only insofar as it renders a victim of incapable of consenting. *See United States v. Newlan*, 2016 CCA LEXIS 540 (N-M. Ct. Crim App. 2016) (suggesting a model instruction to define "impairment" which focuses on impairment's impact on a victim's capacity to consent).

e) Consent.

(1) Definition.

(a) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is not consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(b) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being unconscious. A person cannot consent while under threat or in fear or when force causing or likely to cause death or grievous bodily harm is used, or when threatened or placed in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(c) All surrounding circumstances are to be considered in determining whether a person gave consent.

(2) Per Executive Order 13640 of 16 Sep 2016, "lack of consent is not an element of any offense under [Article 120] unless expressly stated." Lack of consent is expressly stated as an element in only two offenses: where the government alleges the accused administered a drug or intoxicant without the victim's consent, and where the government alleges the sexual act or sexual contact was without the victim's consent.

(3) Evidence of consent is potentially admissible as to any offense under Article 120. This is because evidence of consent "may preclude the causal link between the sexual conduct and the charged method." U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES BENCHBOOK. For example, if members believe the alleged victim consented in an unlawful force case, then the government has not proven that the accused used unlawful force.

(4) Mistake of Fact as to Consent is potentially a defense as to almost all offenses under Article 120. This is because the accused's honest and reasonable mistake of fact as to

consent "may preclude the causal link between the sexual conduct and the charged method." U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES BENCHBOOK. For example, if members believe the accused honestly and reasonably was mistaken as to whether the victim consented in a bodily harm case, then the government has not proven that the accused caused the sexual act via an offensive touching.

(a) Because mistake of fact is "baked into the elements" in incapable of consent cases, it is not a required instruction even if the evidence otherwise would have raised mistake of fact as a defense. *United States v. Teague*, 75 M.J. 636 (A. Ct. Crim. App. 2016).

(b) While the accused need not testify in order to warrant the instruction, there must be some evidence introduced during the trial "to which the members could attach credit" to the proposition that the accused both honestly and reasonably believed the victim consented. *See United States v. Davis*, 75 MJ 537 (A.C.C.A. 2015).

B. Lesser included offenses (LIO). The below cases are representative of LIO case law in the arena of Article 120 for offenses occurring prior to 1 January 2019. Note that whether an offense is an LIO of another, particularly in the context of Article 120, can be very fact specific; as such, the below cases are intended as guideposts only. Practitioners are advised to follow the guidance contained in Article 79 and Appendix 12A when determining whether an offense constitutes an LIO of another offense.

1. Sexual Assault by Causing Bodily Harm is an LIO of Rape by Force. *United States v. Alston*, 69 M.J. 214 (C.A.A.F. 2010). Note that this case is based on the 2007 statute, but the definitions are similar enough to use this as precedent in a post-2012 case. Also note that the analysis in this case would not apply in cases where the sexual act is alleged to be the bodily harm. In those cases, sexual assault by bodily harm would not be an LIO.

2. Assault consummated by a battery is an LIO of Wrongful Sexual Contact. *United States v. Bonner*, 70 M.J. 1 (C.A.A.F. 2011). The same analysis would apply to the current Abusive Sexual Contact offense.

3. Assault consummated by a battery is *not* an LIO of Sexual Assault where the bodily harm alleged is the penetrative act. *United States v. Hackler*, 75 M.J. 648 (N-M.Ct.Crim.App. 2016). However, Assault consummated by a battery is an LIO of Abusive Sexual Contact. *Id.*

4. Assault consummated by a battery is not an LIO of Abusive Sexual Contact by Fear, where the fear alleged does not include fear of bodily harm. *United States v. Riggins*, 75 M.J. 78 (C.A.A.F. 2016).

C. Exigencies of proof/charging in the alternative. The appellate courts recognize that Article 120 cases often lend themselves to charging in the alternative. *See United States v. Elespru*, 73 M.J. 326 (C.A.A.F. 2014). Military judges should ordinarily dismiss one of the charges based on the principle of unreasonable multiplication of charges only after findings have been reached. *Id.* Practitioners are advised to request the military judge to conditionally dismiss until such time as appellate review has been completed. *See, e.g., United States v. Hines*, 2016 CCA LEXIS 439 (A. Ct. Crim. App. July 27, 2016) fn 4 (MJ "should clearly state that the dismissal of the one specification is conditioned on a second specification surviving appellate review."). *See also United States v. Thomas*, 74 M.J. 563 (N-M. Ct. Crim App. 2014), *United States v. Parker*, 2016 CCA LEXIS 83 (N-M.Ct.Crim.App. Feb. 18, 2016). Consolidation of specifications may also be appropriate as an alternative to dismissal. *See United States v. Nelms*, 2016 CCA LEXIS 227 83 (N-M.Ct.Crim.App. Apr. 14, 2016).

D. Statute is gender neutral.

E. Defenses. Marriage is not a defense.

F. Maximum punishments were prescribed via Executive Order 13643 of 15 May 2013 and Executive Order 13825 of 1 March 2018. Mandatory minimum sentences of dishonorable discharge or dismissal were prescribed by statute on 24 June 2014 for the following offenses: Rape, Sexual Assault, Rape of a Child, Sexual Assault of a Child, Forcible Sodomy, and attempts of these offenses. For offenses occurring between 28 June 2012 and 14 May 2013, *see United States v. Busch*, 75 MJ 87 (CAAF 2016).

II. RAPE AND SEXUAL ASSAULT OF A CHILD

Child Crimes (Art. 120b)
- Rape of a Child
- Sexual Assault of a Child
- Sexual Abuse of a Child

A. Generally.

1. The definitions for sexual act and sexual contact found within Article 120b are identical to those found within Article 120, except the term sexual act also includes the intentional touching, not through clothing, of the genitalia of child with intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

2. The definition of force is slightly different in that Article 120b does not require the physical harm to be "sufficient to coerce or compel submission;" rather, physical harm by itself may be enough. Note that physical harm is but one theory of force available.

3. Rape of a Child

a) Any sexual act with a child under 12 is Rape of a Child, and no defense of mistake of fact as to age exists. In addition, the government need not prove the accused knew the age of the child.

b) Any sexual act with a child between 12 and 16 caused by force against any person, threatening or placing a child in fear, rendering a child unconscious, or administering a drug or intoxicant constitutes Rape of a Child.

4. Sexual Assault of a Child

a) Any sexual act committed on a child between 12 and 16 is sexual assault of a child. Mistake of fact as to age is a defense, though the defense bears the burden of proof by a preponderance of the evidence. In addition, the government need not prove the accused knew the age of the child.

b) Offenses against children may still be prosecuted under Article 120 (for example, if the government believes the accused had a reasonable mistaken belief that the child was 16 or older, it could still charge under an Article 120 theory of liability should one exist).

5. Sexual Abuse of a Child

a) Sexual Abuse of a Child is defined as committing a lewd act upon a child.

b) The term 'lewd act' means—

(1) any sexual contact with a child;

(2) intentionally exposing one's genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to

abuse, humiliate, or degrade any person, or to arose or gratify the sexual desire of any person;

(3) intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(4) any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

B. Maximum punishments were prescribed via Executive Order 13643 of May 15, 2013. Mandatory minimum sentences of dishonorable discharge or dismissal were prescribed by statute on 24 June 2014 for the following offenses: Rape, Sexual Assault, Rape of a Child, Sexual Assault of a Child, Forcible Sodomy, and attempts of these offenses. For offenses occurring between 28 June 2012 and 14 May 2013, *see United States v. Busch*, 75 MJ 87 (CAAF 2016).

III. ARTICLE 120A

A. Mails; Deposit of Obscene Matter. Article 120A (2019-)

1. Elements.

a) That the accused deposited or caused to be deposited in the mails certain matter for mailing and delivery;

b) That the act was done wrongfully and knowingly; and

c) That the matter was obscene.

2. Explanation.

a) Whether something is obscene is a question of fact.

b) Obscene is synonymous with indecent, meaning that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

B. Stalking. Article 120A (2012-2018).

1. Elements.

a) That that accused wrongfully engaged in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm to himself or herself or a member of his or her immediate family;

b) That the accused had knowledge, or should have had knowledge, that the specific person would be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family; and

c) That the accused's acts induced reasonable fear in the specific person of death or bodily harm to himself or herself or to a member of his or her immediate family.

2. For a discussion of what actions may constitute this offense, *see generally United States v. Gutierrez*, 73 MJ 172 (C.A.A.F. 2014).

IV. OTHER SEXUAL MISCONDUCT

Other Sexual Crimes (Art. 120c)
- Indecent Viewing, Visual Recording, or Broadcasting
- Indecent Exposure
- Forcible Pandering

A. Maximum punishments were prescribed via Executive Order 13643 of May 15, 2013.

B. Indecent viewing is only criminal insofar as the viewing is done "live" and in-person; viewing a recording of another's private area, even if the recording was done without consent, is not criminal. *See United States v. Quick*, 74 M.J. 517 (N-M.Ct.Crim.App. 2015), *aff'd*, 2015 CAAF LEXIS 703 (C.A.A.F. Aug. 11, 2015).

C. It is not indecent exposure to take a picture of one's genitals and then show that picture to another person; the offense requires a showing of the actual body part, not just an image. *United States v. Williams*, 75 M.J. 663 (A. Ct. Crim. App. 2016). *See also United States v. Uriostegui*, 75 MJ 857 (N-M.Ct.Crim.App. 2016)(pointing out that unlike Article 120b, Article 120c does not specifically mention communications technology).

D. Whether an exposure is done in an "indecent manner" may be judged based on several factors, such as consent, relative ages of the parties, and whether the exposure was in public or private. *United States v. Johnston*, 75 MJ 563 (N-M.Ct.Crim.App. 2016).

E. Indecent Conduct under Article 134.

1. As of 16 September 2016, the President enumerated Indecent Conduct as an Article 134 offense. MCM, pt. IV, ¶ 104.

a) Indecent conduct includes offenses previously proscribed by "Indecent Acts with Another" (prior to October 2007), with one important change: physical presence is no longer required.

b) For the purposes of this offense, the words "conduct" and "acts" are synonymous.

2. In some circumstances Indecent Acts may be charged for conduct occurring after 28 June 2012, by charging the conduct under Clause 1 and/or 2 of Article 134. *See United States v. Quick*, 74 M.J. 517 (N-M.Ct.Crim.App. 2015), aff'd, 2015 CAAF LEXIS 703 (C.A.A.F. 2015).

V. SODOMY AND BESTIALITY (2012-2018)

A. Consensual Sodomy. The offense of Sodomy under Article 125 was repealed in December 2013; therefore, consensual sodomy is no longer an offense under the UCMJ.

B. The offenses of Forcible Sodomy and Bestiality under Article 125 were deleted by 2016 MJA.

1. Forcible Sodomy is now covered under the definition of Sexual Act in Article 120.

2. Bestiality is now covered under Article 134 (Animal Abuse), Sexual Act With an Animal, MCM, pt. IV, ¶ 92b(2).

VI. CHILD PORNOGRAPHY

A. Prior to 12 January 2012 there was no enumerated crime addressing child pornography in the UCMJ and the President had not listed a child pornography offense under Article 134. Crimes in the

military that involve child pornography prior to 12 January 2012 must be charged under a general article (Article 133 or Article 134); see ¶ G.

B. Article 134 specifically criminalizes four child pornography offenses:

1. Possessing, receiving, or viewing

2. Possession with the intent to distribute

3. Distribution

4. Producing

C. There are few reported cases on this offense. Much of the case law developed prior to 12 January 2012 is still applicable; as such, practitioners should review ¶ G in its entirety as well.

D. Note that child pornography as enumerated under Article 134 is defined as either (a) "an *obscene* visual depiction of a minor engaging in sexually explicit conduct" or (b) "a visual depiction of an *actual* minor engaging in sexually explicit conduct" (emphasis added).

1. Obscenity is not defined within the text of the MCM. Practitioners should look to the myriad of case law defining obscenity if necessary. Note also that the C.A.A.F., in interpreting 18 U.S.C. § 2256(8)(B), has determined that a "graphic" exhibition of what appears to be a minor must necessarily include nudity. *United States v. Blouin*, 24 M.J. 247 (C.A.A.F. 2015). Whether the C.A.A.F. would require nudity for an "obscene" depiction of what appears to be a minor remains to be seen.

2. The word "obscene" is omitted from the model specification listed in the MCM; trial counsel should nevertheless allege obscenity when unable to definitively prove that the depictions are of actual minors.

E. Sexually explicit conduct is defined in part as a "lascivious exhibition of the genitals or pubic area of any person." This definition is not further defined within the MCM. Because it mirrors the definition found within 18 U.S.C. § 2256, military judges ordinarily read the definition found within subsection (8) of that statute. In turn, "[o]nce the military judge elects to use the statutory definition of child pornography under 18 U.S.C. § 2256(8), the Child Pornography Prevention Act (CPPA), the evidence must meet that definition." *United States v. Morris*, 2014 CCA LEXIS 645, *4 (N-M.Ct.Crim.App. Aug. 28, 2014), *aff'd*, 2015 CAAF LEXIS 685 (C.A.A.F. July 15, 2015).

1. When the images depict an actual minor, the lascivious exhibition need not include nudity, and "the contours of the genitals or pubic area [need not] be discernible or otherwise visible through the child subject's clothing." *United States v. Knox*, 32 F.3d 733, 746 (3d Cir. 1994). *See also United States v. Morris*, 2014 CCA LEXIS 645 (N-M.Ct.Crim.App. Aug. 28, 2014) , *aff'd*, 2015 CAAF LEXIS 685 (C.A.A.F. July 15, 2015).

2. In determining whether a display is lascivious, military courts look to the non-exclusive factors outlined in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986). These factors are:

a) whether the focal point of the visual depiction is on the child's genitalia or pubic area;

b) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

c) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

d) whether the child is fully or partially clothed, or nude;

e) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

f) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986).

g) Note: The *Dost* factors are considerations for the Court, however, "there may be other factors that are equally if not more important in determining whether a photograph contains a lascivious exhibition" and the court reaches that conclusion "by combining a review of the Dost factors with an overall consideration of the totality of the circumstances." *United States v. Roderick*, 62 M.J. 425, 429–30 (C.A.A.F. 2006). See also *United States v. Watkins*, No. ARMY 20140275, 2016 WL 3208750, at *2 (A. Ct. Crim. App. May 26, 2016) (child's testimony that she was not trying to be sexy was not dispositive; the accused's intent also mattered, and he clearly solicited the picture for his sexual pleasure. The backdrop of the picture – a bathroom mirror – favored neither side of the equation, but overall the picture qualified as child pornography); *United States v. Gould*, No. ARMY 20120727, 2016 WL 4177576, at *1 (A. Ct. Crim. App. Aug. 5, 2016) (images of eight year old's crotch where she was wearing underwear were not child pornography, but Judge Wolffe in dissent notes he would have found them to be child pornography under the totality of the circumstances as appellant admitted attraction to the child, had the child sleep in his bed, and admitted the photos were part of his pornography). However, see ¶D.1 – the C.A.A.F. seemingly does require nudity, despite the fact that it is but one factor per *Dost*.

h) Note: as discussed in ¶ D.1 above, depictions of a virtual child or a child not identifiable as an actual child *might* require nudity in order to qualify as "obscene." In that case, the *Dost* factors would still otherwise apply, though nudity would be a required factor. Again, there is no "obscenity" requirement for depictions of actual minors.

3. It is an open question whether possession of child erotica – that is, nude and sexualized images of children which nevertheless do not depict "sexually explicit conduct" as defined within the MCM – is a viable offense under clause 1 or 2 of Article 134. *See United States v. Moon*, 73 M.J. 382 (C.A.A.F. 2014). Possession of non-nude images of children, even if sexualized, is not an offense. *United States v. Warner*, 73 M.J. 1 (C.A.A.F. 2013).

F. Other issues.

1. Constitutional error. Even where some images are found not to meet the statutory definition of child pornography upon appellate review, there is no longer a requirement to set aside a guilty verdict as long as at least one of the images constituted non-Constitutionally protected material. *United States v. Piolunek*, 74 M.J. 107 (C.A.A.F. 2015). This case overturned *United States v. Barberi*, 71 M.J. 127 (C.A.A.F. 2012).

2. Multiplicity/UMC. Because the MCM defines child pornography not as images but materials that contain them, it matters not that the images on each material were visually similar or identical for each count of possession. Under the plain language of the MCM, accused completed the offense of possession each time he knowingly possessed, directly or constructively, a distinct material that contained visual depictions of child pornography. As such, accused's possession of each distinct material reflected a discrete and separately punishable unit of possession. The President, with respect to the MCM and Article 134, UCMJ, intended to separately criminalize and punish possession of each material that contained child pornography. Accordingly, the four possession specifications in this case represent four separate criminal acts under the relevant statute, rather than one criminal act charged four times, and the specifications were not multiplicitous. *United States v. Forrester*, 76 M.J. 479 (C.A.A.F. 2016).

G. Child Pornography – Before 12 January 2012.

1. There are two ways to charge child pornography crimes committed prior to 12 June 2012 using Article 134:

a) Charge the criminal conduct using Article 134, clauses 1 and 2.

b) Charge a violation of an applicable federal statute using Article 134, clause 3.

2. Clauses 1 and 2, Article 134.

a) "It is a mystery to me why, after this [c]ourt's ten-year history of invalidating convictions for child pornography offenses under clause 3, and of upholding convictions for such offenses under clause 2, we continue to see cases charged under clause 3." *United States v. Medina*, 66 M.J. 21, 29 n.1 (C.A.A.F. 2008) (Stucky, J., dissenting).

b) Possession of child pornography may be charged as a Clause 1 or Clause 2 offense. *United States v. Irvin*, 60 M.J. 23 (C.A.A.F. 2004).

c) Virtual Child Pornography under Clauses 1 and 2.

(1) *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004) ("The receipt or possession of "virtual" child pornography can, like "actual" child pornography, be service-discrediting or prejudicial to good order and discipline.").

(2) *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006) ("The knowing possession of images depicting sexually explicit conduct by minors, whether actual or virtual, when determined to be service-discrediting conduct or conduct prejudicial to good order and discipline, is an offense under Article 134").

(3) The maximum punishment for possession of virtual child pornography is 4 months. *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011). *Cf. United States v. Finch*, 73 M.J. 144 (C.A.A.F. 2014).

d) Referencing an unconstitutional statutory definition of child pornography in the pleadings and instructing the members using the unconstitutional statutory definition created instructional error in an Article 133 child pornography case. *United States v. Forney*, 67 M.J. 271 (C.A.A.F. 2009) (Effron, C.J., concurring in the result) (Erdmann, J., dissenting). This analysis should also apply if the offense was charged under clauses 1 and 2 of Article 134.

e) The nature of the images is not dispositive as to whether receiving such images is PGO&D or SD. *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003) (providence inquiry failed to establish whether accused pled guilty to possession of virtual or actual child pornography; no LIO of clause 1 or clause 2 because no discussion of PGO&D or SD).

f) Although *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008) provides the current state of the law regarding the relationship between the three clauses of Article 134, the following cases were affirmed under clause 2 of Article 134:

(1) *United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000) (after finding that the military judge failed to adequately advise the accused of the elements of federal offense of possession of child pornography, under 18 U.S.C. § 2252(a)(4)(A), which he was charged with violating under clause 3 of Article 134, the Air Force court did not err by affirming the lesser included offense of service-discrediting conduct, under clause 2 of Article 134.

(2) *United States v. Augustine*, 53 M.J. 95 (C.A.A.F. 2000) (affirming under clause 2 rather than clause 3 of Article 134).

(3) *United States v. Hays*, 62 M.J. 158 (C.A.A.F. 2005) (holding the plea inquiry did not implicate the appellant's First Amendment rights, thus placing the analysis under *Sapp* and *Augustine*; although the MJ did not discuss with appellant whether his conduct was

service discrediting or prejudicial to good order and discipline, there is no doubt that appellant was aware of the impact of his conduct on the image of the armed forces; affirmed under Clause 2).

3. Clause 3, Article 134.

a) *See generally* MCM, pt. IV, ¶ 60c(4).

b) Key federal statutes. The following federal statutes are available for charging various conduct involving the production, possession, transportation, and distribution of child pornography:

(1) 18 U.S.C. § 2251, Sexual Exploitation of Children. Among other prohibitions, this provision covers the use of minors in the production of child pornography.

(2) 18 U.S.C. § 2252, Certain Activities Relating to Material Involving the Sexual Exploitation of Minors. This child pornography provision was the predecessor to the computer-specific 18 U.S.C. § 2252A.

(3) 18 U.S.C. § 2252A, Certain Activities Relating to Material Constituting or Containing Child Pornography. This is the federal provision that most comprehensively covers the use of computers and the Internet to possess, transport, and distribute child pornography.

(4) Statutory Definitions. 18 U.S.C. § 2256 contains the applicable definitions for child pornography offenses.

c) Amendments.

(1) The Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358 (Oct. 8, 2008) (adds "using any means or facility of interstate or foreign commerce" to several sections in 18 USC 2251, 2251A, 2252, and 2252A).

(2) The Enhancing the Effective Prosecution of Child Pornography Act of 2007, Pub. L. No. 110-358 (Oct. 8, 2008) (adds to 18 USC 2252(a)(4) and 2252A(a)(5) the following language after "possesses": "or knowingly accesses with intent to view").

(3) The Providing Resources, Officer, and Technology to Eradicate Cyber Threats to Our Children Act of 2008 (or The PROTECT Our Children Act of 2008), Pub. L. No. 110-401 (Oct. 13, 2008) (Sec 301 prohibits broadcast of live images of child abuse, Sec. 302 amends the definition of "visual image" under 18 USC 2256(5) by inserting "and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format", Sec. 304 prohibits the adaptation or modification of an image of an identifiable minor to produce child pornography).

d) Pleading Child Pornography Offenses Using Clause 3.

(1) *See* MCM, pt. IV, ¶ 60c(6).

e) Actual versus Virtual Children.

(1) Using the CPPA and Clause 3, Article 134.

(a) In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the U.S. Supreme Court held that specific language within the definition of child pornography in the 1996 Child Pornography Prevention Act (CPPA) was unconstitutional. Specifically, the definition impermissibly prohibited “virtual” child pornography in contravention of the First Amendment. The “virtual image” language was contained in § 2256(8)(B) and § 2256(8)(D).

(b) Following *Ashcroft*, the CAAF made the "actual" character of visual depictions of child pornography a factual predicate for guilty pleas under the CPPA. *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003).

(c) Either the "appears to be" language or "conveys the impression" language found in the CPPA's unconstitutional definition of child pornography can trigger the requirement to prove an "actual" child was used to make an image of child pornography. *United States v. Wolford*, 62 M.J. 418 (C.A.A.F. 2006).

(2) Using Clauses 1 and 2, Article 134. Child pornography, whether virtual or actual, can be prejudicial to good order and discipline and service-discrediting. *See United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004); *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006).

f) Issues.

(1) Unallocated Space

(a) Per *United States v. Schempp*, No. ARMY 20140313, 2016 WL 873852 (A. Ct. Crim. App. Feb. 26, 2016), review denied, (C.A.A.F. May 12, 2016), where all child pornography images were found in unallocated space, the government failed to show Defendant "possessed" them. Possess "means to exercise control of something. Possession may be direct physical custody ... or it may be constructive.... Possession must be knowing and conscious." "Here, as the appellant was unable to access any of the images in unallocated space, he lacked the ability to exercise "dominion or control" over these files."

(2) Constitutionality of the Federal statute.

(a) In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the U.S. Supreme Court held that specific language within the definition of child pornography in the 1996 Child Pornography Prevention Act (CPPA) was unconstitutional. Specifically, the definition impermissibly prohibited "virtual" child pornography in contravention of the First Amendment. The "virtual image" language was contained in § 2256(8)(B) and § 2256(8)(D).

(b) The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (Apr. 30, 2003), which amended 18 U.S.C. § 2252A to include a provision that prohibits the solicitation and pandering of child pornography. *United States v. Williams*, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) (holding the Act to be neither impermissibly vague nor overbroad and holding that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment).

(c) The Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2252. Constitutional because its prohibition against knowing transport, shipment, receipt, distribution, or reproduction of a visual depiction of a minor engaged in sexually explicit conduct requires that the accused know that the performer in the depiction was a minor, thereby satisfying First Amendment concerns. *United States v. X-Citement Video*, 115 S.Ct. 464 (1994); *United States v. Maxwell*, 42 M.J. 568 (A.F. Ct. Crim. App. 1995), *reversed in part United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996) (transmission of visual images electronically through the use of an on-line computer service is "transport in interstate or foreign commerce' in light of legislative intent to prevent the transport of obscene material in interstate commerce regardless of the means used to effect that end and statute is constitutional in light of

United States v. X-Citement Video, 115 S.Ct. 464 (1994) (statute contains a scienter requirement because the word "knowingly" must be read as applying to the words "use of a minor").

(3) Extraterritoriality. Practitioners in overseas and deployed locations should ensure that the federal statute is applicable to the conduct at issue based on the time and location it occurred. For offenses occurring after 1 January 2019, Article 134 provides that "crimes and offenses not capital" (i.e. "Clause 3" offenses) includes any conduct engaged in outside the United States, as defined in 18 U.S.C. § 5, that would constitute a crime or offense not capital if the conduct had occurred within the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. § 7.

(a) *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005). Appellant pled guilty, in relevant part, to sending, receiving, reproducing, and possessing child pornography under Article 134, Clause 3, in violation of the CPPA. The conduct was charged using 18 U.S.C. §2252A(a)(1–3). Appellant's misconduct took place in Germany, both at an off-post internet café, and in his on-post barracks room. HELD: 1) The CPPA is not extraterritorial as there is no evidence of specific congressional intent to extend its coverage; 2) domestic application is possible under a "continuing offense" theory for *sending* material that flowed through servers in the United States; 3) appellant's plea to specification 1 under clause 3 of Article 134 is improvident under *O'Connor* because of the focus on the unconstitutional definition of child pornography and the lack of focus on "actual" vs. "virtual" images; and 4) there was no reference to appellant's conduct as service discrediting or prejudicial to good order and discipline. Strong dissents from both C.J. Gierke and J. Crawford.

(b) *United States v. Reeves*, 62 M.J. 88 (C.A.A.F. 2005). The accused was stationed in Hanau, Germany and used the on-post library computer to receive and print out images of child pornography that had been sent over the Internet. While still in Germany, he also used a video camera to record sexually explicit imagery of two German girls from about 200 feet away. His conduct was charged using 18 U.S.C. §§ 2251 and 2252A(a)(1–3). Citing *Martinelli*, the court held none of the following acts were continuing offenses with conduct that occurred in the United States, and as such, there could be no domestic application of the CPPA: (1) possession of child pornography at an on-post public library, land used by and under the control of the federal government; (2) receiving child pornography that had been transmitted through the internet; and (3) using minors to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.

(4) Definitions. *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009). The CPPA does not define "distribute." The court looked to three sources for a definition of the term: (1) the plain meaning, (2) the manner Article III courts have interpreted the term, and (3) the guidance that the UCMJ provides through parallel provisions. *See also United States v. Craig*, 67 M.J. 742 (N-M. Ct. Crim. App. 2009) (military judge read part of the definition of "distribute" from Article 112a, stating, "Distribute means to deliver to the possession of another.") .

(5) Method of Distribution.

(a) Yahoo! Briefcase. *United States v. Navrestad*, 66 M.J. 262 (C.A.A.F. 2008). Sending a hyperlink to a Yahoo! Briefcase during an internet chat session, where the Briefcase contained images of child pornography, does not constitute either distribution of child pornography as defined in the CPPA or possession of child pornography as affirmed by the ACCA under Clauses 1 and 2, where the link itself

only provides a roadmap to the child pornography and where the accused did not download or print any of the images to his own computer. The accused was initially charged under Clause 3 of Article 134, but Clause 1 and 2 language was added to both specifications prior to arraignment. Convictions for both possession under Clauses 1 and 2, and distribution under the CPPA were set aside. Note: Yahoo! discontinued its Briefcase service on 30 March 2009.

(b) KaZaA. *United States v. Ober*, 66 M.J. 393 (C.A.A.F. 2008). Using KaZaA to search for and download child pornography from host users over the Internet constituted transportation of child pornography in interstate commerce for purposes of 18 U.S.C. § 2252A(a)(1) because "a user's download caused an upload on the host user's computer."

(c) Peer-to-Peer Software in General. *United States v. Christy*, 65 M.J. 657 (A. Ct. Crim. App. 2007). The accused downloaded peer-to-peer software and set up a "shared files" folder. As part of his licensing agreement with the software company, he agreed to share all files in that folder, i.e., his child pornography, with other users. While the term "distribution" is not defined in the statute, definitions found in federal case law are broad enough to cover the act of posting images in a shared file folder and agreeing to allow others to download from the folder. Additionally, the accused's conduct was "knowing" under the CPPA, as he admitted during his providence inquiry that he knew 1) that he was posting his child pornography images in a shared file folder, and 2) that anyone with the same peer-to-peer software both had his permission and the general ability to download the files he posted.

(6) Lesser included offenses: Clause 1 and Clause 2. The use of Clause 1 and Clause 2 as a LIO to a Clause 3 offense has recently been limited by the CAAF holding in *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008). The court holds that in order for either Clause 1 or Clause 2 to be considered as a LIO to a Clause 3 offense, the Clause 3 specification should contain Clause 1 or Clause 2 language. If Clause 1 or Clause 2 language is absent from a Clause 3 offense, the opinion may yet allow for Clause 1 or Clause 2 to operate as a LIO provided the military judge clearly explains Clause 1 and Clause 2 and how they can operate as a LIO to the accused. Prudence, however, dictates that counsel plead the Clause 1 and/or Clause 2 language to avoid the issue at trial.

(7) Evidence to determine age of models. *United States v. Russell*, 47 M.J. 412 (C.A.A.F. 1998) (accused admitted that he guessed the models were "13 or older"; a pediatrician testified that the females shown in the exhibits were not more than 15.5 years old; and members were able to look at the pictures and use their common sense and experience to conclude that the girls were under age 18); *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996) (government was only required to prove that accused believed the images depicted minors to support conviction for knowingly transporting or receiving child pornography in interstate commerce (18 U.S.C. § 2252); government was not required to prove that accused had basis for actual knowledge of the subjects' ages). *United States v. Cendejas*, 62 M.J. 334 (C.A.A.F. 2006) (factfinder can make the determination that pornographic images are actual children based upon a review of the images alone).

g) Other Applications.

(1) *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009). As the CPPA does not expressly define "distribute," the court looked to three sources for a definition of the term: (1) the plain meaning, (2) the manner Article III courts have interpreted the term, and (3) the guidance that the UCMJ provides through parallel provisions. Considering

these sources, under the CPPA, distribution of child pornography through the Internet consists of two acts: (1) the posting of the image, where the image left the possession of the original user, and (2) the delivery of the image, where another user accessed and viewed the image. Here, the accused posted the image to his Yahoo! profile prior to his entry on active duty. The court reasoned that the profile serves as a "'public bulletin board' such that all Internet users can access information posted by the profile's owner." Although this was done prior to entering active duty, he accessed the account while on active duty and could have removed the image. The offense of distribution occurred while he was on active duty when the ICE agent accessed and viewed the image that he had posted for others to view.

(2) *United States v. Craig*, 67 M.J. 742 (N-M. Ct. Crim. App. 2009). As 18 U.S.C. § 2252A does not define "distribute," the military judge read part of the definition of "distribute" from Article 112a, stating, "Distribute means to deliver to the possession of another." The plain meaning of the term "distribute" includes "the transfer of an item from the possession of one person into the possession of another." The military judge provided a correct statement of the law in defining "distribute."

(3) *United States v. Smith*, 61 M.J. 696 (N-M. Ct. Crim. App. 2005) (Appellant engaged in marketing adult entertainment for profit on the internet, posting hundreds of photos of females engaged in sexually explicit conduct, many of them minors. Among other offenses, appellant ultimately pled guilty to violating 18 U.S.C. § 2257, under Clause 3, Article 134 for managing a website containing these depictions without maintaining proper records of each performer as that section requires. HELD: Appellant's failure to determine the age and record the identity of the child performer bore a direct relationship to the Government's interest in preventing child pornography).

(4) "Lascivious exhibition" category of sexually explicit conduct prohibited by § 2251(a). *United States v. Roderick*, 62 M.J. 425 (C.A.A.F. 2006) (applying the "Dost" factors to determine "lascivious exhibition").

(5) In prosecuting a violation of 18 U.S.C. § 2252 (a)(2) by knowingly receiving sexually explicit depictions of minors that have been transported in interstate commerce, "knowingly" applies to the sexually explicit nature of the materials and the ages of the subjects. The Government does not have to prove that the accused knew that the sexually explicit depictions passed through interstate commerce. The interstate commerce element is merely jurisdictional. *United States v. Murray*, 52 M.J. 423 (C.A.A.F. 2000).

(6) "Viewing" child pornography was not an offense under 18 U.S.C. § 2252 until its 2008 amendment. As such, viewing child pornography prior to the date of this amendment is likewise not chargeable under Article 134. *United States v. Merritt*, 72 MJ 483 (C.A.A.F. 2014).

h) Multiplicity/UMC.

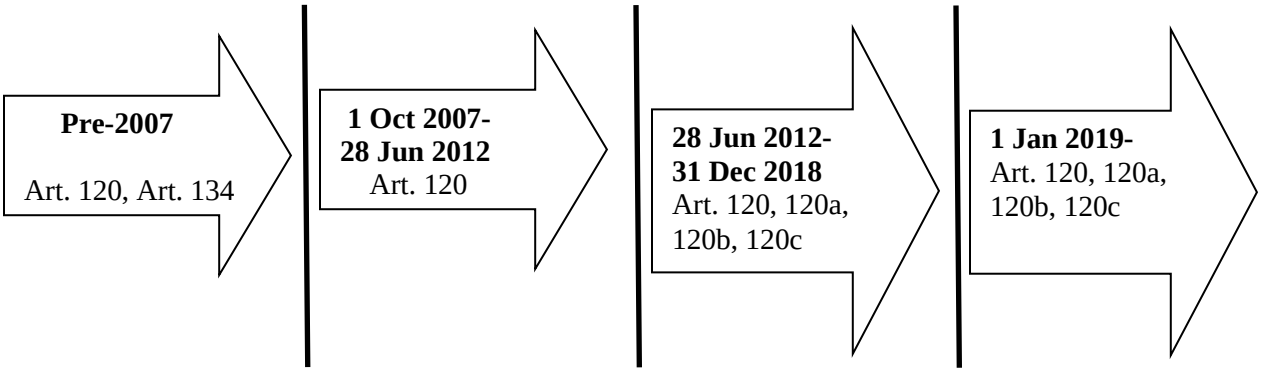
(1) *United States v. Purdy*, 67 M.J. 780 (N-M. Ct. Crim. App. 2009). The accused downloaded child pornography from the Internet onto his personal computer while stationed in Belgium. He then downloaded the images from the hard drive onto a compact disk and reformatted the hard drive, but retained the compact disk. He was charged with both receiving and possessing child pornography under Clause 3 of Art. 134. He pled guilty to both offenses under Clauses 1 and 2. In this case, his act of saving the images to the CD-ROM "was a clear exercise of dominion . . . separate and apart" from his receipt of the images at an earlier point in time. The conviction for both offenses was proper and the military judge did not commit plain error.

(2) *United States v. Craig*, 67 M.J. 742 (N-M. Ct. Crim. App. 2009). The accused used "LimeWire," a peer-to-peer file-sharing software program to search for and download child pornography. He downloaded the child pornography into a "share" folder on his hard drive. He kept some of the images in the "share" folder, copied some to compact disks, and deleted others. He pled guilty to both receipt and possession of child pornography under 18 U.S.C. § 2252A using Clause 3 of Art. 134. The court held that these two specifications were not facially duplicative and therefore military judge did not commit plain error in failing to dismiss these specifications as multiplicious. The charges of receipt and possession "address at least two criminal actions by the [accused] each of which occurred at a different time within the charged time period and involved separate media.

APPENDIX: SEXUAL OFFENSES BEFORE 28 JUNE 2012

Because different versions of Article 120 exist, different laws may apply to the same case; therefore, practitioners must remain cognizant of (1) the date the offense occurred and (2) the statute of limitations when deciding which offenses to research.

A. Changes in the Law



B. Pre-2007 Sexual Offenses

Article 120

Adult Crime	Child Crime
- Rape (B.1)	- Carnal Knowledge (B.2)

Article 125

- Sodomy (B.3)

Article 134

Child Crimes
- Indecent Acts or Liberties with a Child (B.4)

Other Sexual Crimes
- Indecent Assault (B.5)
- Indecent Exposure (B.6)
- Indecent Acts (B.7)

1. Rape (pre-1 October 2007). MCM (2016 ed.), App. 27, ¶ 45.

   a) Elements.

      (1) That the accused committed an act of sexual intercourse; and

      (2) That the act of sexual intercourse was done by force and without consent.

   b) Article 120 has no spousal exemption and is gender-neutral.

c) Any penetration, however slight, is sufficient. *United States v. Aleman*, 2 C.M.R. 269 (A.B.R. 1951).

d) In determining whether force and lack of consent occurred, a totality of the circumstances must be considered. *See United States v. Webster*, 40 M.J. 384, 386 (C.M.A. 1994).

e) Lack of Consent.

(1) Competence to consent.

(a) No consent exists where victim is incompetent, unconscious, or sleeping. *United States v. Booker*, 25 M.J. 114 (C.M.A. 1987); *United States v. Robertson*, 33 C.M.R. 828 (A.F.B.R. 1963); *United States v. Maithai*, 34 M.J. 33 (C.M.A. 1992); *United States v. Grier*, 53 M.J. 30 (C.A.A.F. 2000).

(b) A child of tender years is incapable of consent. *United States v. Aleman*, 2 C.M.R. 269 (A.B.R. 1951); *United States v. Thompson*, 3 M.J. 168 (C.M.A. 1977); *see United States v. Huff*, 4 M.J. 816 (A.C.M.R. 1978) (because victim is under 16, proof of age is proof of nonconsent allowing fresh complaint evidence).

(2) Resistance by Victim.

(a) The lack of consent required is more than mere lack of acquiescence. If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent. *See* MCM (2016 ed.), App. 27, ¶ 45.c.(1)(b).

(b) If victim is capable of resistance, evidence must show more than victim's lack of acquiescence. *United States v. Bonano-Torres*, 31 M.J. 175 (C.M.A. 1990) (acquiescence to intercourse with accused so the "victim" could go to sleep is insufficient for rape).

(c) Consent may be inferred unless victim makes her lack of consent "reasonably manifest by taking such measures of resistance as are called for by the circumstances." *United States v. Tollinchi*, 54 M.J. 80 (C.A.A.F. 2000) (holding successful resistance by intoxicated seventeen-year-old victim to oral sodomy, followed by lack of resistance to intercourse, rendered rape conviction legally insufficient).

(d) Verbal protest may be sufficient to manifest a lack of consent sufficient to support rape. *United States v. Webster*, 40 M.J. 384 (C.M.A. 1994) (evidence of unwavering and repeated verbal protest in context of a surprise nonviolent sexual aggression by boyfriend was considered reasonable resistance).

(3) Resistance by Victim Not Required.

(a) Consent may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties. All the surrounding circumstances are to be considered in determining whether a victim gave consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. *See* MCM (2016 ed.), App. 27, ¶ 45.c.(1)(b).

(b) Proof of rape of a daughter by her father may not require physical resistance if intercourse is accomplished under long, continued parental duress. *United States v. Dejonge*, 16 M.J. 974 (A.F.C.M.R. 1983); *see United States v. Palmer*, 33 M.J. 7 (C.M.A. 1991); *see United States v. Davis*, 52 M.J. 201 (1999); *United States v.*

Young, 50 M.J. 717 (Army Ct. Crim. App. 1999) (compulsion may apply even when child is not a minor); *see generally* TJAGSA Practice Note, *Proving Lack of Consent for Intra-Family Sex Crimes*, Army Law., Jun. 1990, at 51.

(c) Cooperation with assailant after resistance is overcome by numbers, threats, or fear of great bodily harm is not consent. *United States v. Burt*, 45 C.M.R. 557 (A.F.C.M.R. 1972); *United States v. Evans*, 6 M.J. 577 (A.C.M.R. 1978); *United States v. Lewis*, 6 M.J. 581 (A.C.M.R. 1978).

(d) Whether the rape victim was justified in resisting by words alone involves a factual issue whether she viewed physical resistance as impractical or futile. *United States v. Burns*, 9 M.J. 706 (N.C.M.R. 1980).

(4) Mistake as to Consent. An honest and reasonable mistake of fact to the victim's consent is a defense. *United States v. Hibbard*, 58 M.J. 71 (2003); *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984); *United States v. Davis*, 27 M.J. 543 (A.C.M.R. 1988); *United States v. True*, 41 M.J. 424 (1995) (mistake of fact as to victim's consent to intercourse cannot be predicated upon accused's negligence; mistake must be honest and reasonable); *United States v. Traylor*, 40 M.J. 248 (C.M.A. 1994) (mistake of fact as to consent is not reasonable when based upon belief by accused that victim would consent to intercourse with anyone); *United States v. Parker*, 54 M.J. 700 (Army Ct. Crim. App. 2000) (evidence factually insufficient to sustain conviction where accused claimed he mistakenly believed that the victim consented to intercourse and sodomy where she and the accused engaged in a consensual relationship for several months before the first alleged rape, she sent mixed signals to the accused about their relationship and the relationship included consensual sexual acts).

(5) Consent Obtained by Fraud. Consent obtained by fraud in the inducement (*e.g.*, lying about marital status or desire to marry, a promise to pay money or to respect sexual partner in the morning) will not support a charge of rape. Consent obtained by fraud in factum (*i.e.*, a misrepresentation of act performed or some aspects of identity) can support a rape charge. *United States v. Booker*, 25 M.J. 114 (C.M.A. 1987).

(6) Identity of partner. The victim's consent is not transferable to other partners. *United States v. Traylor*, 40 M.J. 248 (C.M.A. 1994) (victim consented to sexual intercourse with one soldier but during intercourse, another soldier, the accused, penetrated the victim without first obtaining her consent and victim was not aware of the accused's presence until he had already penetrated her without consent).

f) Relationship Between Elements of Lack of Consent and Force. Although force and lack of consent are separate elements, there may be circumstances in which the two are so closely intertwined that both elements may be proved by the same evidence. Consent induced by fear, fright, or coercion is equivalent to physical force. Such constructive force may consist of expressed or implied threats of bodily harm. *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003).

g) Force.

(1) When constructive force is not at issue and the victim is capable of resisting, some force more than that required for penetration is necessary; persistent sexual overtures are not enough. *United States v. Bonano-Torres*, 31 M.J. 175 (C.M.A. 1990).

(2) If a victim is incapable of consenting, no greater force is required than that necessary to achieve penetration. *United States v. Grier*, 53 M.J. 30 (C.A.A.F. 2000).

(3) *United States v. Cauley*, 45 M.J. 353 (C.A.A.F. 1996) (sufficient force where victim testified that she accompanied the accused without protest to his private quarters knowing that the accused intended to engage in sexual intercourse and offered no physical resistance as the accused removed her clothing and positioned her on the bed, but further testified that before sexual intercourse she told accused "no" several times and that she did "not want to do this" and "wanted to go home", that she turned her face when he attempted to kiss her and that he used his legs to pry her legs open). *But see United States v. King*, 32 M.J. 558 (A.C.M.R. 1991) (evidence insufficient to show requisite force).

(4) Constructive Force.

(a) If resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties, there is no consent and the force involved in penetration will suffice. *See* MCM (2016 ed.), App. 27, ¶ 45.c.(1)(b).

(b) Constructive force, as a substitute for actual force, may consist of express or implied threats of bodily harm. *United States v. Bradley*, 28 M.J. 197 (C.M.A. 1989) (threat of imprisoning husband); *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987); *United States v. Palmer*, 33 M.J. 7 (C.M.A. 1991) (parental figure can exert a psychological force over child that is constructive force).

(c) Force can be subtle and psychological, and need not be overt or physically brutal. *United States v. Torres*, 27 M.J. 867 (A.F.C.M.R. 1989) *clarified*, 1989 CMR LEXIS 1042 (A.F.C.M.R. Nov. 15, 1989); *United States v. Sargent*, 33 M.J. 815 (A.C.M.R. 1991), *aff'd*, 36 M.J. 14 (C.M.A. 1992).

(d) Constructive force in the form of parental compulsion is not limited to cases in which the victim is under 16 years of age. Age is one factor to consider in determining whether victim's resistance was overcome by parental compulsion. *United States v. Young*, 50 M.J. 717 (Army Ct. Crim. App. 1999) (accused started to "groom" and "condition" his stepdaughter when she was five years old; sexual intercourse started when she was 11 years old; accused was convicted of raping his stepdaughter from when she was 16 to 20 years old).

(e) Rank disparity alone is not sufficient to show constructive force. Other factors are relevant. *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003) (accused was in a power relationship, not a dating one, with the trainees he was accused of raping and the court noted: (1) the accused's physically imposing size; (2) his reputation in the unit for being tough and mean; (3) his position as a noncommissioned officer; (4) his actual and apparent authority over each of the victims in matters other than sexual contact; (5) the location and timing of the assaults, including his use of his official office and other areas within the barracks in which the trainees were required to live; (6) his refusal to accept verbal and physical indications that his victims were not willing participants; and (7) the relatively diminutive size and youth of his victims, and their lack of military experience; and finally, the accused's abuse of authority in ordering the victims to isolated locations where the charged offenses occurred).

(f) *United States v. Bright*, 66 M.J. 359 (C.A.A.F. 2008). The accused was a drill sergeant and was convicted of raping a female trainee on three separate occasions. The court concluded there was insufficient evidence, based on totality of circumstances, regarding lack of consent. First, the court observed that the record is devoid of any evidence that PVT W manifested a lack of consent or took any

measures to resist sexual intercourse. She made arrangements to meet him at a hotel knowing that sex would occur and she made her own way to the hotel to meet him. On two occasions, she arrived at the hotel first and waited for him. Additionally, even though she resisted sodomy on one occasion, there is no evidence that she resisted "normal sexual intercourse" in any way, verbal or physical. The court next concluded that there is no evidence to support the inference that resistance would have been futile or that he resistance would have been overcome by threats of death or grievous bodily harm. The accused never threatened her physically—the only threat was to take away her pass status. Finally, the court distinguished PVT W's perceived futility of resistance from the facts in *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003) (where the accused ordered his victims into isolated areas, initiated sexual activity, and then refused to accept "verbal and physical indications that his victims were not willing participants") and *United States v. Clark*, 35 M.J. 432 (C.M.A. 1992) (where the accused cornered the victim in a "small shed with brick walls and a metal door and . . . positioned himself between the door and the victim").

h) Lesser Included Offenses. When considering the lesser included offenses under the "old Article 120," it is important to consider the lesser included offenses as they existed prior to October 2007. However, it is also important to consider the current case law with regard to lesser included offense. *See United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008); *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). While Appendix 27 of the 2012 MCM contains the "old Article 120" offenses as well as the "old Article 134" offenses, that, at the time were considered lesser included offenses, **you must** consider the strict elemental test in determining what are the **actual lesser included offenses**. In order for an accused to be on notice of a lesser included offense, the government must allege every element, expressly or by necessary implication, including the terminal element of an Article 134 offense.

(1) Carnal knowledge. Carnal knowledge is a lesser included offense of rape when the pleading alleges that the victim has not yet attained the age of 16 years.

(2) Attempted rape.

(a) Accused who was dissuaded by the victim from completing the rape and abandoned the act could be found guilty of attempted rape. *United States v. Valenzuela*, 15 M.J. 699 (A.C.M.R. 1983), *aff'd in part, rev'd in part on multiplicity grounds*, 16 M.J. 305 (C.M.A. 1983). *But see United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987) (voluntary abandonment is a defense to attempted rape, but evidence insufficient to establish defense in this case). *See* MCM, pt. IV, ¶ 4.c.(4).

(b) *United States v. Polk*, 48 C.M.R. 993 (A.F.C.M.R. 1974) (gross and atrocious attempt to persuade the victim to consent to intercourse is not attempted rape but may be indecent assault).

i) Multiplicity.

(1) Rape and aggravated assault are multiplicious for findings. *United States v. Sellers*, 14 M.J. 211 (C.M.A. 1982) (summary disposition); *see United States v. DiBello*, 17 M.J. 77 (C.M.A. 1983).

(2) Rape and communication of a threat are multiplicious for findings. *United States v. Hollimon*, 16 M.J. 164 (C.M.A. 1983).

(3) Two rapes of same victim are not multiplicious for any purpose where first rape completely terminated before second rape began. *United States v. Ziegler*, 14 M.J. 860 (A.C.M.R. 1982); *accord United States v. Turner*, 17 M.J. 997 (A.C.M.R. 1984).

(4) Rape and extortion are not multiplicious for findings or sentence. *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987).

(5) Rape and adultery charges are not multiplicious for findings. *United States v. Hill*, 1997 CAAF LEXIS 1093 (Sept. 30, 1997); *United States v. Mason*, 42 M.J. 584 (Army Ct. Crim. App. 1995).

(6) Rape, sodomy, and indecent acts or liberties with a child are separate offenses. *United States v. Cox*, 42 M.J. 647 (A.F. Ct. Crim. App. 1995), *aff'd*, 45 M.J. 153 (C.A.A.F. 1996).

j) Punishment.

(1) *United States v. Stebbins*, 61 M.J. 366 (C.A.A.F. 2005). Appellant pled guilty to rape and sodomy of a child under the age of twelve. LWOP is an authorized punishment for rape after November 18, 1997 (extending the reasoning of *United States v. Ronghi*, 60 M.J. 83 (C.A.A.F. 2004)).

(2) Capital Punishment.

(a) Although UCMJ art. 120(a) authorizes the death penalty for rape, a plurality of the Supreme Court in *Coker v. Georgia*, 433 U.S. 584 (1977) held that the death penalty for the rape of an adult woman was cruel and unusual punishment regardless of aggravating circumstances. R.C.M. 1004(c)(9), revised to account for *Coker*, limits the death penalty for rape to cases where the victim is under the age of 12 or where the accused maimed or attempted to kill the victim. *See generally United States v. Straight*, 42 M.J. 244, 247 (C.A.A.F. 1995).

(b) In 2008, the Supreme Court held that the death penalty for the rape of a child is unconstitutional where the child was not killed. In *Kennedy v. Louisiana*, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008), the Court held that a Louisiana statute authorizing the imposition of the death penalty for the rape of a child under the age of 12 is prohibited by the Eighth Amendment and Fourteenth Amendments and is unconstitutional. The holding states specifically that "a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional." Slip Opinion at 10. The case does not include the UCMJ in its survey of jurisdictions that provide death as the maximum punishment for the rape of a child under 12 years of age. In denying a petition for rehearing based on the exclusion of the military from the survey of jurisdictions retaining the death penalty for child rape, the Court stated that the fact that the Manual for Courts-Martial "retains the death penalty for rape of a child or an adult . . . does not draw into question our conclusions that there is a consensus against the death penalty for the crime in the civilian context. . . ." Suggesting, perhaps, that there may be facts, circumstances, or policy reasons justifying death as a punishment for child rape when committed by a member of the military, the court declined to "decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases . . . ." *See Kennedy v. Louisiana*, No. 07-343 (U.S. Oct. 1, 2008) (statement accompanying denial of petition for rehearing).

2. Carnal Knowledge. MCM (2016 ed.), App. 27, ¶ 45; UCMJ art. 120(b).

a) Elements.

(1) That the accused committed an act of sexual intercourse with a certain person;

(2) That the person was not the accused's spouse; and

(3) That at the time of the sexual intercourse the person was less than 16 years of age.

b) This offense is gender-neutral.

c) Article 120(d), UCMJ, provides special defense to carnal knowledge based upon mistake of fact as to the age of the victim.

(1) The accused bears both the burden of production and persuasion for this defense.

(2) The defense applies only if the victim has attained the age of 12.

(3) The accused must establish by a preponderance of the evidence that the mistake by the accused as to the age of the victim was both honest and reasonable.

d) Honest and reasonable mistake as to identity of accused's sexual partner constitutes a legal defense. *United States v. Adams*, 33 M.J. 300 (C.M.A. 1991).

e) The victim is not an "accomplice" for purposes of a witness credibility instruction. *United States v. Cameron*, 34 C.M.R. 913 (A.F.B.R. 1964).

f) Marriage.

(1) Government may prove that the accused and the prosecutrix were not married without direct evidence on the issue. *United States v. Wilhite*, 28 M.J. 884 (A.F.C.M.R. 1989).

(2) Carnal knowledge form specification is sufficient even though it does not expressly allege that the accused and his partner were not married. *United States v. Osborne*, 31 M.J. 842 (N.M.C.M.R. 1990).

g) Multiplicity. Carnal knowledge and adultery are not multiplicious for findings. *United States v. Booker*, No. 97-0913, 1999 CAAF LEXIS 637 (C.A.A.F. Feb. 19, 1999)(unpublished).

h) Statute of Limitations. *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000) (statute of limitations codified at 18 U.S.C. § 3283, which permits prosecution for offenses involving sexual or physical abuse of children under the age of 18 until the child reaches the age of 25, does not apply to courts-martial as UCMJ Article 43 provides the applicable statute of limitations for courts-martial). *Willenbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998) (statute of limitations under Article 43 does not bar trial for rape, as any offense "punishable by death" may be tried at any time without limitation, even if it is referred as a noncapital case), *aff'd*, 57 M.J. 321 (C.A.A.F. 2002).

3. Forcible sodomy; bestiality. MCM (2016 ed.), pt. IV, ¶ 51; UCMJ art. 125.

a) The text of Article 125, UCMJ was amended effective <u>26 December 2013</u> to cover only acts of bestiality and forcible sodomy. The elements are:

(1) Forcible Sodomy:

(a) That the accused engaged in unnatural carnal copulation with another person of the same or opposite sex

(b) That the act was done by unlawful force or without the consent of the other person

(2) Bestiality:

(a) That the accused engaged in unnatural carnal copulation with an animal.

(b) Penetration, however slight, is sufficient to complete an offense under either subsection.

b) Notably, in some cases the same act could be charged under either Article 125 or Article 120/120b. There has been some suggestion that Article 125 is therefore no longer a viable charge as it relates to sodomistic acts. *See United States v. Gross*, 73 M.J. 864 (A.C.C.A. 2014)(Krauss, E., dissenting).

c) Sodomy – Elements pre-26 December 2013.

(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

(2) (If applicable) That the act was done with a child under the age of 16.

(3) (If applicable) That the act was done by force and without the consent of the other person.

d) Constitutionality.

(1) Before *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), it was clear that Article 125 was constitutional, even as applied to private, consensual sodomy between spouses.

(2) *United States v. Allen*, 53 M.J. 402 (C.A.A.F. 2000) (Constitutional right to privacy (engaging in sexual relations within a marital relationship) must bear a reasonable relationship to activity that is in furtherance of the marriage. As part of a pattern of abuse, the accused beat his wife, solicited her to prostitute herself, and anally sodomized her. Prior to the assaults, she had refused anal sodomy, because she was forcibly sodomized as a teenager).

(3) United *States v. Thompson*, 47 M.J. 378 (C.A.A.F. 1997) (accused could not claim that an act of consensual sodomy with his wife was protected by the constitutional right to privacy, where his wife performed fellatio on him in an attempt to divert his attention away from reloading a pistol which had misfired moments before when he put it against her head and pulled the trigger).

(4) Article 125's prohibition of "unnatural carnal copulation" is not unconstitutionally vague. *United States v. Scoby*, 5 M.J. 160 (C.M.A. 1978).

(5) <u>*Lawrence*</u>: However, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court overruled as unconstitutional a Texas law criminalizing consensual homosexual sodomy. In that case the Court stated that "[t]he State cannot demean a homosexual person's existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."

(6) <u>Post-*Lawrence* cases</u>:

(a) *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). Appellant was an NCO supervisor of junior airmen newly assigned to his flight. He regularly socialized with his subordinates, who often spent the night at his off-post home after parties. Appellant was charged, *inter alia*, with forcible sodomy under Art. 125 but was convicted of the lesser included offense of non-forcible sodomy. The CAAF affirmed Marcum's conviction, holding that as applied to appellant and in the context of his conduct, Art. 125 is constitutional. The court assumed without deciding that

appellant's conduct involved private sodomy between consenting adults, appellant's conduct was nevertheless outside the liberty interest recognized in *Lawrence*. Specifically, appellant was the airman's supervising NCO and knew his behavior was prohibited by service regulations concerning improper senior-subordinate relationships. Here, the situation involved a person "who might be coerced" and a "relationship where consent might not easily be refused," facts the Supreme Court specifically identified as not present in *Lawrence*. The CAAF explicitly did not decide whether Art. 125 would be constitutional in other settings.

(b) *Marcum* 3-Part Test for determining when the Constitution allows the prohibition of sodomy:

(i) Is the accused's conduct within the liberty interest identified by the Supreme Court in *Lawrence*?

(ii) Does the conduct encompass any behavior or factors identified as outside the analysis in *Lawrence* (i.e., public acts, prostitution, minors, persons who might be injured or coerced or who might not easily refuse consent)?

(iii) Are there additional factors relevant solely in the military environment that affect the reach of the *Lawrence* liberty interest?

(c) *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004) (non-forcible sodomy that violated service regulations prohibiting improper relationships between members of different ranks; citing *Marcum*, his conduct fell outside any liberty interest recognized in *Lawrence*).

(d) *United States v. Christian*, 61 M.J. 560 (N-M. Ct. Crim. App. 2005) (consensual sodomy between accused, a recruiter, and "RW," originally a volunteer ASVAB tutor at the accused's recruiting office; although private and not specifically excepted under *Lawrence*, appellant's conduct implicated military-specific interests described in the third prong of the *Marcum* framework. Specifically, his role as a Marine recruiter & his violation of a recruit depot general order). *United States v. Bart*, 61 M.J. 578 (N-M. Ct. Crim. App. 2005) (consensual sodomy between co-workers in violation of SecNavy Instruction, involved adultery, and one partner murdered a spouse to continue the relationship combined to violate *Marcum* third prong).

(e) *United States v. Smith*, 66 M.J. 556 (C.G. Ct. Crim. App. 2008). Assuming *arguendo* that the conduct was not the result of extortion, the sodomy in this case was between two consenting first-class cadets in different chains of command. As such, the court observed that the conduct appeared to fall within the *Lawrence* liberty interest. However, addressing the *Marcum* factors, the court found that Coast Guard Academy regulations prohibit sexual activities between cadets on board military installations, even if consensual. As there is a regulation prohibiting the behavior, the court held that the conduct constituting sodomy fell outside the protected liberty interest recognized in *Lawrence v. Texas*.

(f) *United States v. Harvey*, 67 M.J. 758 (A.F. Ct. Crim. App. 2009). In a prosecution of sodomy under Art. 133 as conduct unbecoming, military judge did not err in failing to instruct the members on the *Marcum* factors. "Whether an act comports with law, that is, whether it is legal or illegal [in relation to a constitutional or statutory right of an accused] is a question of law, not an issue of fact for determination by the triers of fact."

e) Acts Covered.

(1) "Unnatural carnal copulation" includes both fellatio and cunnilingus. *United States v. Harris*, 8 M.J. 52 (C.M.A. 1979).

(2) Some penetration, however, is required. UCMJ art. 125; *United States v. Barrow*, 42 M.J. 655 (A.F. Ct. Crim. App. 1995) (holding "intercourse" is a synonym for "copulation" and connotes act of penetration that the term "oral sex" does not), *aff'd*, 45 M.J. 478 (C.A.A.F. 1997); *United States v. Deland*, 16 M.J. 889 (A.C.M.R. 1983) *aff'd in part, rev'd in part on multiplicity grounds*, 22 M.J. 70 (C.M.A. 1986). Penetration, however slight, by male genital into orifice of human body except the vagina is sufficient. *United States v. Cox*, 23 M.J. 808 (N.M.C.M.R. 1986). Specification alleging "licking the genitalia" was not inconsistent with the penetration required for sodomy. *United States v. Cox*, 18 M.J. 72 (C.M.A. 1984); *United States v. Green*, 52 M.J. 803 (N-M. Ct. Crim. App. 2000) (victim's testimony that the accused's head was between her legs, his hands were on her thighs, her legs were spread apart, his mouth was on her vagina, he performed "oral sex," and he "was in between" her was sufficient to prove penetration). However, proof of licking, without proof of penetration, is insufficient for guilt. *United States v. Milliren*, 31 M.J. 664 (A.F.C.M.R. 1990); *see generally* TJAGSA Practice Note, *Sodomy and the Requirement for Penetration*, Army Law., Mar. 1991, at 30 (discussing *Milliren*).

f) Evidence is sufficient to prove forcible sodomy where the child victim submitted under compulsion of parental command. *United States v. Edens*, 29 M.J. 755 (A.C.M.R. 1989), *aff'd*, 31 M.J. 267 (C.M.A. 1990). Evidence of a threat by the accused to impose nonjudicial punishment upon the victim, under the circumstances, was not sufficient to prove forcible sodomy. *United States v. Carroway*, 30 M.J. 700 (A.C.M.R. 1990).

g) The defense is entitled to an accomplice instruction when the victim participates voluntarily in the offense. *United States v. Goodman*, 33 C.M.R. 195 (C.M.A. 1963).

h) Multiplicity.

(1) Attempted rape and forcible sodomy or rape and forcible sodomy arising out of the same transaction are separately punishable. *United States v. Dearman*, 7 M.J. 713 (A.C.M.R. 1979); *accord United States v. Rogan*, 19 M.J. 646 (A.F.C.M.R. 1984) (Burglary, rape, and sodomy were all separately punishable offenses since different societal norms were violated in each instance. Burglary is a crime against the habitation, rape an offense against the person, and sodomy an offense against morals); *United States v. Rose*, 6 M.J. 754 (N.C.M.R. 1978).

(2) Despite unity of time, offenses of sodomy and indecent liberties with a child were separate for findings and sentencing. *United States v. Cox*, 18 M.J. 72 (C.M.A. 1984). *Accord United States v. Cox*, 42 M.J. 647 (A.F. Ct. Crim. App. 1995), *aff'd* 45 M.J. 153 (C.A.A.F. 1996).

4. Indecent Acts or Liberties with a Child. MCM (2016 ed.), App. 27, ¶ 87.

a) The discussion that follows pertains to Indecent Acts or Liberties with a Child as it existed under Article 134 prior to October 2007.

b) Elements.

(1) Physical contact.

(a) That the accused committed a certain act upon or with the body of a certain person;

(b) That the person was under 16 years of age and not the spouse of the accused.

(c) That the act of the accused was indecent;

(d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) No physical contact.

(a) That the accused committed a certain act;

(b) That the act amounted to the taking of indecent liberties with a certain person;

(c) That the accused committed the act in the presence of this person.

(d) That the person was under 16 years of age and not the spouse of the accused.

(e) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

(f) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c) Not limited to female victim.

d) Consent is not a defense, as a child of tender years is incapable of consent. However, factual consent of an alleged victim is relevant on the issue of indecency. Consensual petting between an eighteen-year-old and a fifteen-year-old is not necessarily outside the scope of the offense of indecent acts with a child, but it is a question for the members under proper instructions. Here, the military judge committed plain error when she failed to provide adequately tailored instructions on the issue of indecency after a court-martial member asked for such instructions. *United States v. Baker*, 57 M.J. 330 (C.A.A.F. 2002).

e) Requires evidence of a specific intent to gratify the lust or sexual desires of the accused *or* the victim. *United States v. Johnson*, 35 C.M.R. 587 (A.B.R. 1965); *see United States v. Robertson*, 33 M.J. 832 (A.C.M.R. 1991) (absent a specific intent to gratify lust, accused's act of buying 14 year-old daughter a penis shaped vibrator and "motion lotion" did not amount to an indecent act), *rev'd on other grounds*, 37 M.J. 432 (C.M.A. 1993).

f) Physical presence required; constructive presence insufficient. *See United States v. Miller*, 67 M.J. 87 (C.A.A.F. 2008) (constructive presence through web-cam and Yahoo! chatroom insufficient for an attempted indecent liberties charge).

g) Application.

(1) Indecent acts.

(a) Physical contact is required. *United States v. Payne*, 41 C.M.R. 188 (C.M.A. 1970) (accused placed hand between child's legs); *United States v. Sanchez*, 29 C.M.R. 32 (C.M.A. 1960) (accused exposed his penis to child while cradling child in his arms.); *see United States v. Rodriguez*, 28 M.J. 1016 (A.F.C.M.R. 1989), *aff'd*, 31 M.J. 150 (C.M.A. 1990) (rubbing body against female patients); *United States v. Cottril*, 45 M.J. 485 (C.A.A.F. 1997) (accused touching child's vaginal area to the point of pain while bathing her was indecent, regardless of child's purported enjoyment of touchings, given accused's admissions that his acts excited his lust to point of masturbation).

(b) Offense of indecent acts or liberties with a child is not so continuous as to include all indecent acts or liberties with a single victim, without regard to their character, their interrupted nature, or different times of their occurrences, and accused may be charged with more than one offense as a result of one act with a single victim. *United States v. Neblock*, 45 M.J. 191 (C.A.A.F. 1996).

(2) Indecent liberties.

(a) No physical contact is required, but act must be done within the physical presence of the child. *United States v. Miller*, 67 M.J. 87 (C.A.A.F. 2008) (constructive presence through web-cam and Yahoo! chatroom insufficient for an attempted indecent liberties charge); *United States v. Brown*, 13 C.M.R. 10 (C.M.A. 1953) (accused's exposure of his penis to two young girls constituted an indecent liberty); see *United States v.* Thomas, *supra* at ¶ G.3. (participation of the child required); *see United States v. Robba*, 32 M.J. 771 (A.C.M.R. 1991) (victims presence implied); *see also United States v. Brown*, 39 M.J. 688 (N.M.C.M.R. 1993) (holding that a person sleeping in the room did not participate in accused's masturbation, and thus charge of indecent acts with another could not lie).

(b) Indecent liberties with a child can include displaying nonpornographic photographs if accompanied by the requisite intent. *United States v. Orben*, 28 M.J. 172 (C.M.A. 1989); *see* TJAGSA Practice Note, *Displaying Nonpornographic Photographs to a Child Can Constitute Taking Indecent Liberties*, Army Law., Aug. 1989, at 40 (discusses *Orben*); *United States v. Marrie*, 39 M.J. 993 (A.F.C.M.R. 1994) (showing victim material that, while not legally pornographic, is accompanied by behavior or language that demonstrates his intent to arouse his own sexual passions, those of the child, or both), *aff'd*, 43 M.J. 35 (C.A.A.F. 1995).

(c) Multiple acts of indecent liberties may occur simultaneously. *United States v. Lacy*, 53 M.J. 509 (N-M. Ct. Crim. App. 2000) (accused exposed his genitals, masturbated, and showed a pornographic video to two children simultaneously; the court adopted a "different victims" standard for indecent liberties, because the purpose of the offense is the protection of the individual person).

(d) Indecent liberties and indecent exposure are not necessarily multiplicious. *United States v. Rinkes*, 53 M.J. 741 (N-M. Ct. Crim. App. 2000) (accused's convictions of indecent liberties with a child and indecent exposure before an adult did not constitute an unreasonable multiplication of charges as considering the differing societal goals and victims, the specifications were aimed at distinctly separate criminal acts).

5. Indecent Assault. MCM (2016 ed.), App. 27, ¶ 63.

a) The discussion that follows pertains to Indecent Assault as it existed under Article 134 prior to October 2007.

b) Elements.

(1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;

(2) That the acts were done with the intent to gratify the lust or sexual desire of the accused; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of the good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c) Nonconsensual offense requiring assault or battery. The assault or battery need not be inherently indecent, lewd, or lascivious but may be rendered so by accompanying words and circumstances. *United States v. Wilson*, 13 M.J. 247 (C.M.A. 1982). *See United States v. Hester*, 44 M.J. 546 (Army Ct. Crim. App. 1996) (victim was a virtual stranger to accused and the two of them were engaged in official business of processing victim into the unit, touching of victim's thigh was an offensive touching which, when done with specific intent to gratify the accused's lust, was an indecent assault).

d) Intent.

(1) Requires accused's specific intent to gratify his lust or sexual desires. *United States v. Jackson*, 31 C.M.R. 738 (A.B.R. 1962); *see also United States v. Birch*, 13 M.J. 847 (C.G.C.M.R. 1982) (kissing victim against her will without evidence of specific intent to gratify lust or sexual desires was only a battery); *United States v. Campbell*, 55 M.J. 591 (C.G. Ct. Crim. App. 2001) (although male accused's tickling and similar touchings of female shipmates was unwelcome, boorish, and improper, the court could not reasonably describe the actions as indecent); *United States v. Proper*, 56 M.J. 717 (C.G. Ct. Crim. App. 2002) (pulling coveralls of a female subordinate away from her chest factually insufficient to prove that accused acted with intent to gratify his sexual lusts or desires even though he made comments about her breasts).

(2) The assault or battery must be committed with a prurient state of mind. *United States v. Arviso*, 32 M.J. 616 (A.C.M.R. 1991) (evidence established specific intent of accused to gratify his lust or sexual desires when he inserted his finger into anus of female patients after examination by physicians); *United States v. Hoggard*, 43 M.J. 1 (1995) (holding evidence of attempted kiss legally insufficient to establish indecent intent); *United States v. Hester*, 44 M.J. 546 (Army Ct. Crim. App 1996).

e) Can be committed by a male on a woman not his spouse or by a female on a male not her spouse. *United States v. Johnson*, 17 M.J. 251 (C.M.A. 1984).

f) An accused can be found guilty of indecent assault and not guilty of rape even though both the victim and the accused acknowledge that intercourse occurred. *United States v. Watson*, 31 M.J. 49 (C.M.A. 1990); *United States v. Wilson*, 13 M.J. 247 (C.M.A. 1982).

g) Lack of consent.

(1) Unlike rape, mere lack of acquiescence is sufficient lack of consent for indecent assault; actual resistance is not required.

(2) If accused stops advances after he knows of lack of consent, evidence is legally insufficient for indecent assault. *United States v. Ayers*, 54 M.J. 85 (C.A.A.F. 2000) (government failed to prove lack of consent as there was no unwanted sexual touching as she was a "willing participant" when the accused touched her and kissed her, but when the accused tried to progress to sexual intercourse the 'victim' drew the line, and the accused did not cross that line, the 'victim' continued the relationship by calling the accused after the initial incident and agreed to meet him; during subsequent incident, accused stopped advances after 'victim' demonstrated lack of consent), *aff'd by* 55 M.J. 243 (C.A.A.F. 2001).

h) Mistake of fact defense. Accused's plea of guilty to indecent assault was provident even when accused stated during providency that "I personally just thought [at the time] that she was [consenting] and that it wasn't unreasonable;" statement failed to raise mistake of fact defense and was not in substantial conflict with plea. *United States v. Garcia* 44 M.J. 496 (1996), *aff'd*, 48 M.J. 5 (C.A.A.F. 1997).

i) Indecent assault is lesser included offense of indecent acts with child. *United States v. Kibler*, 43 M.J. 725 (Army Ct. Crim. App. 1995), *aff'd*, 46 M.J. 160 (C.A.A.F. 1996), *cert. denied* 523 U.S. 1011 (1998).

6. Indecent Exposure. MCM (2016 ed.), App. 27, ¶ 88.

a) The discussion that follows pertains to Indecent Exposure with a Child as it existed under Article 134 prior to October 2007.

b) Elements.

(1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;

(2) That the exposure was willful and wrongful; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c) Negligent exposure is insufficient; "willfulness" is required. *United States v. Manos*, 25 C.M.R. 238 (C.M.A. 1958) (law enforcement officer viewed exposure through accused's window); *United States v. Stackhouse*, 37 C.M.R. 99 (C.M.A. 1967) (evidence was insufficient to sustain the accused's conviction of three specifications of indecent exposure where, in each instance, the accused was observed nude in his own apartment by passersby in the hallway looking in the partly open door of the apartment; such evidence is as consistent with negligence as with purposeful action and negligence is an insufficient basis for a conviction of indecent exposure); *accord United States v. Ardell*, 40 C.M.R. 160 (C.M.A. 1969); *United States v. Burbank*, 37 C.M.R. 955 (A.F.B.R. 1967) (plea of guilty to indecent exposure was not rendered improvident by stipulated evidence that the accused did nothing to attract attention to himself and may not even have been aware of the presence of the young females who saw him, where the accused admitted he had exposed himself in the children's section of the base library, a place so public an intent to be seen must be presumed); *United States v. Shaffer*, 46 M.J. 94 (1997) (evidence supported the conclusion that accused's exposures were "willful" so as to sustain conviction for indecent exposure where, on each occasion of exposure, accused was naked, facing out of his open garage, towards the street, in unobstructed view, during daylight hours and never made an attempt to cover himself or remove himself from view when seen).

d) "Public" exposure is required. To be criminal the exposure need not occur in a public place, but only be in public view. *United States v. Moore*, 33 C.M.R. 667 (C.G.B.R. 1963) (accused, who exposed his penis and made provocative gestures while joking with fellow seamen on board ship, was guilty of indecent exposure). "Public view" occurs when the exposure is done in a place and in a manner that is reasonably expected to be viewed by another. *United States v. Graham*, 56 M.J. 256 (2002) (accused exposed himself to his 15-year-old baby-sitter in the bedroom of his home by inviting her into the bedroom and then allowing his towel to drop in front of her. The accused's actions caused a normally private place, *i.e.*, the bedroom, to become public, as he reasonably expected the babysitter to view his naked body), *aff'd*, 56 M.J. 266 (C.A.A.F. 2002).

e) Exposure must be "indecent." Nudity per se is not indecent; thus, an unclothed male among others of the same sex is generally neither lewd nor morally offensive. *United States v. Caune*, 46 C.M.R. 200 (C.M.A. 1973).

f) *United States v. Jackson*, 30 M.J. 1203 (A.F.C.M.R. 1990) (rejecting indecent acts with another and affirming indecent exposure instead).

g) Indecent exposure via webcam. *United States v. Ferguson*, No. 10-0020 (C.A.A.F. Mar. 22, 2010) (accused admitted sufficient facts to affirm conviction for indecent exposure via Internet webcam to a law enforcement agent posing as a teenager).

7. Indecent Acts With Another. MCM (2016 ed.), App. 27 ¶ 90.

a) The discussion that follows pertains to Indecent Acts With Another as it existed under Article 134 prior to October 2007.

b) Elements.

(1) That the accused committed a certain wrongful act with a certain person;

(2) That the act was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c) An indecent act is defined as "that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene and repugnant to common propriety, but which tends to excite lust and deprave the morals with respect to sexual relations." MCM (2016 ed.), App. 27 ¶ 90c.

d) Physical touching not required, but participation of another is required.

(1) *United States v. McDaniel*, 39 M.J. 173 (C.M.A. 1994) (accused's instructions to female recruits to disrobe, change positions, and bounce up and down while videotaping them without their knowledge was sufficient participation).

(2) *United States v. Brown*, 39 M.J. 688 (N.M.C.M.R. 1993) (some minimal observation or actual participation by another person is required for the offense to lie; a victim who is asleep while the accused masturbates in her presence will not suffice). *See also United States v. Thomas*, 25 M.J. 75 (C.M.A. 1987); *United States v. Murray-Cotto*, 25 M.J. 784 (A.C.M.R. 1988). *Contra United States v. Jackson*, 30 M.J. 1203 (A.F.C.M.R. 1990); *United States v. Kenerson*, 34 M.J. 704, (A.C.M.R. 1992); *United States v. Proctor*, 58 M.J. 792 (A.F. Ct. Crim. App. 2003); *but see United States v. Jackson*, 30 M.J. 1203 (A.F.C.M.R. 1990) (holding victim provided "inspiration," not participation).

(3) *United States v. Rollins*, 61 M.J. 338 (2005). Appellant was convicted of several 134 offenses, including an indecent act with JG, "by giving him a pornographic magazine and suggesting that they masturbate together." HELD: The indecent act specification is affirmed. A reasonable factfinder could conclude that appellant committed a service discrediting indecent act "with" another by giving a person under the age of eighteen a pornographic magazine to stimulate mutual masturbation while in a parking lot open to the public.

(4) *United States v. Johnson*, 60 M.J. 988 (N-M. Ct. Crim. App. 2005). Appellant pled guilty, in relevant part, to indecent acts with another HELD: The indecent act specification is affirmed. Here, appellant's conduct in watching and encouraging his friend's sexual encounter constituted active participation, citing *United States v. McDaniel*, 39 M.J. 173 (C.M.A. 1994).

e) No specific intent is required. *United States v. Brundidge*, 17 M.J. 536 (A.C.M.R. 1983); *United States v. Jackson*, 31 C.M.R. 738 (A.B.R. 1972).

f) Acts covered.

(1) Acts not inherently indecent may be rendered so by the surrounding circumstances. *United States v. Proctor*, 34 M.J. 549 (A.F.C.M.R. 1992) (spanking young boys on the bare buttocks found to be indecent under the circumstances), *aff'd*, 37 M.J. 330 (C.M.A. 1993).

(2) Private, heterosexual, oral foreplay between two consenting adults that does not amount to sodomy is not an indecent act. *United States v. Stocks*, 35 M.J. 366 (C.M.A. 1992).

(3) Not limited to female victim.

(a) *United States v. Annal*, 32 C.M.R. 427 (C.M.R. 1963) (crime was committed when Army captain forcefully grabbed another male and tried to embrace him).

(b) *United States v. Holland*, 31 C.M.R. 30 (C.M.A.1961) (officer was convicted of indecent act by grabbing certain parts of the anatomy of another male officer).

(c) *United States v. Moore*, 33 C.M.R. 667 (C.G.B.R.1963) (consensual homosexual acts may constitute the offense of indecent acts with another).

(4) Consensual intercourse in the presence of others can constitute an indecent act. *United States v. Tollinchi*, 54 M.J. 80 (C.A.A.F. 2000); *United States v. Brundidge*, 17 M.J. 586 (A.C.M.R. 1983).

(5) Indecent acts, charged as a violation of UCMJ art. 134, need not involve another person. *United States v. Sanchez*, 29 C.M.R. 32 (C.M.A. 1960) (chicken); *United States v. Mabie*, 24 M.J. 711 (A.C.M.R. 1987) (corpse).

(6) Physically restraining victims in public restroom while accused masturbated is an indecent act. *United States v. Eberle*, 44 M.J. 374 (C.A.A.F. 1996).

(7) Fornication. Purely private sexual intercourse between unmarried persons is normally not punishable. *United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986), *overruled on other grounds by United States v. Hill*, 48 M.J. 352 (C.A.A.F. 1997). Context in which the sex act is committed may constitute an offense (*e.g.*, public fornication, fraternization, etc.). *See United States v. Berry*, 20 C.M.R. 325 (C.M.A. 1956) (two soldiers took two girls to a room where each soldier had intercourse with each of the girls in open view; such "open and notorious" conduct was service discrediting). *See also*, *United States v. Woodard*, 23 M.J. 514 (A.F.C.M.R. 1986) *vacated and remanded on other grounds*, 23 M.J. 400 (C.M.A. 1987), *findings set aside on other grounds*, 24 M.J. 514 (A.F.C.M.R. 1987) (private, consensual, intimate contact between a married officer and a 16-year-old babysitter was, under the circumstances, an indecent act).

(8) "Open and notorious" fornication between consenting adults was an offense under Article 134 prior to October 2007. The act is open and notorious when the participants know that a third party is present or when performed in such a place and under such circumstances that it is reasonably likely to be seen by others, even though others actually do not view the acts. Sexual intercourse in a barracks room behind a pinned up sheet, while two roommates were awake and suspicious, was open and notorious. *United States v. Izquierdo*, 51 M.J. 421 (C.A.A.F. 1999); *see United States v. King*, 29 M.J. 901 (A.C.M.R. 1989).

(a) Consensual fondling of a female soldier's breasts was not "open and notorious" conduct when it occurred in the accused's private bedroom with the door closed but unlocked. The accused was holding a promotion party with about forty attendees in a room next to his bedroom. Although there was a possibility that someone from the

party would enter the bedroom and observe the sexual activity, the accused's plea to indecent acts was improvident because it was not reasonably likely that a third person would observe the conduct. *United States v. Sims*, 57 M.J. 419 (C.A.A.F. 2002).

(b) The accused's plea of guilty to committing an indecent act by videotaping intercourse and sodomy with his future wife was provident. The potential that the videotape would be viewed by others, together with the salacious effect on the person doing the taping and viewer alike, contributed to the conclusion that the act of videotaping was indecent. *United States v. Allison*, 56 M.J. 606 (C.G. Ct. Crim. App. 2001).

(9) Webcam cases. Broadcasting live sexual images to a child over the Internet via webcam may constitute indecent acts with another under Article 134. *See United States v. Parker*, No. 20080579 (A. Ct. Crim. App. Aug. 31, 2009) (unpub.). Where the child victim is actually a law enforcement officer, the courts have affirmed attempted indecent acts with another. *See United States v. Lorenz*, No. 20061071 (A. Ct. Crim. App. Apr. 20, 2009) (unpub.); *United States v. Miller*, No. 36829, 2009 WL 1508494 (A.F. Ct. Crim. App. Apr. 30, 2009) (unpublished).

g) Consent is not a defense. *United States v. Carreiro*, 14 M.J. 954 (A.C.M.R. 1982); *United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978); *United States v. Woodard*, 23 M.J. 514 (A.C.M.R. 1986), *set aside on other grounds*, 24 M.J. 514 (A.F.C.M.R. 1987); *United States v. Thacker*, 37 C.M.R. 28 (C.M.A. 1966) (dicta).

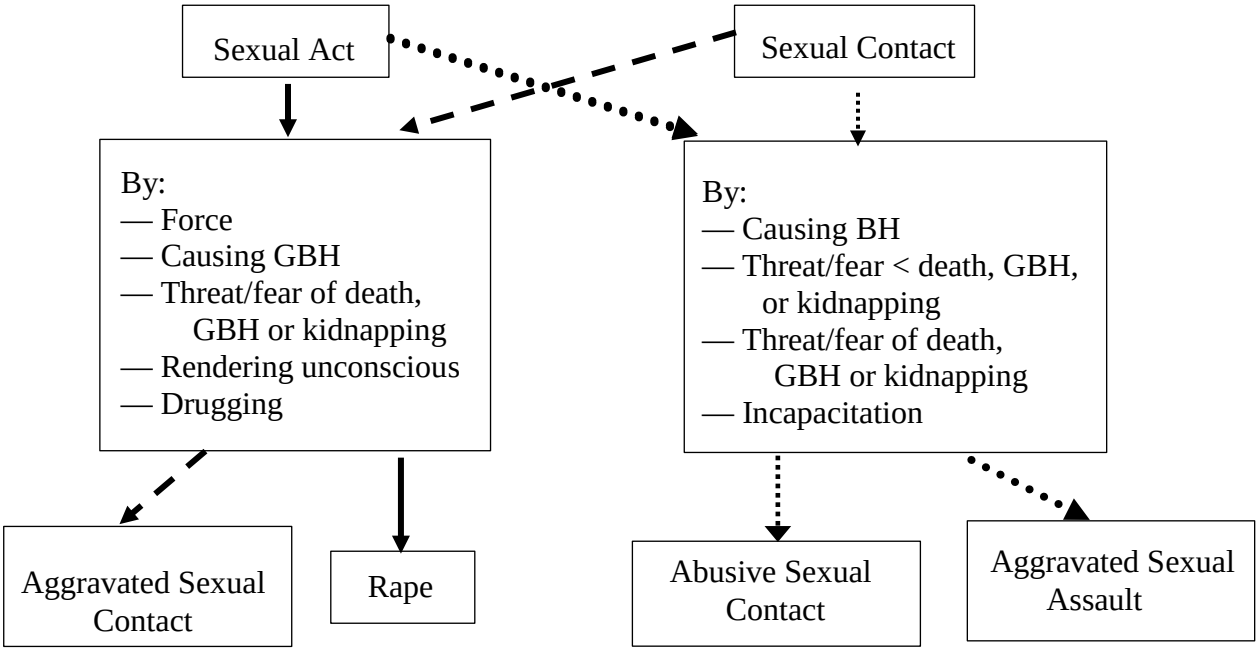
h) Fornication. Not a per se UCMJ violation. *United States v. Snyder*, 4 C.M.R. 15 (C.M.A. 1952). *See also United States v. Blake*, 33 M.J. 923 (A.C.M.R. 1991) (fornication, in and of itself, is not a crime in military law).

C. Article 120 (2007)

Adult Crimes
- Rape
- Aggravated Sexual Assault
- Aggravated Sexual Contact
- Abusive Sexual Contact
- Wrongful Sexual Contact

Child Crimes
- Rape of a Child
- Aggravated Sexual Contact with a Child
- Aggravated Sexual Assault of a Child
- Abusive Sexual Contact with a Child
- Aggravated Sexual Abuse of a Child
- Indecent Liberty With a Child

Other Sexual Crimes
- Indecent Acts
- Indecent Exposure
- Forcible Pandering



1. Rape, Sexual Assault, and Other Sexual Offenses (1 October 2007 version). MCM (2016 ed.), pt. App. 28, ¶ 45; UCMJ art. 120 (2008).

a) Effective date: 1 October 2007. Implementing Executive Order signed 28 September 2007 (E.O. 13447).

b) Statute best considered in three parts: the "Big Four" offenses, the child sexual abuse offenses, and the remaining sexual offenses:

(1) The "Big Four" offenses: rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact.

(a) By adding "w/ a child" to each of these four, the titles for eight of the statute's fourteen offenses emerge.

(b) Consent and mistake of fact as to consent are affirmative defenses only available to these "Big Four" offenses.

(c) Statutory definitions for "sexual act" and "sexual contact," along with the set of attendant circumstances identified in the statute, combine to define each of the four offenses.

(2) The Child Sexual Abuse Offenses: rape of a child, aggravated sexual assault of a child, aggravated sexual abuse of a child, aggravated sexual contact with a child, abusive sexual contact with a child, and indecent liberty with a child.

(3) The four remaining sexual offenses include: indecent act, forcible pandering, wrongful sexual contact, and indecent exposure.

c) Start with defining whether or not a "sexual act" or a "sexual contact" has been committed, then determine which set of attendant circumstances apply to arrive at the proper offense.

(1) "Sexual Act" (MCM 2016 ed., App. 28, ¶ 45a(t)(1)).

(a) The penetration described by "sexual act" excludes male-on-male sexual activity.

(b) Broader conduct than merely sexual intercourse.

(c) If penetration accomplished by hand, finger, or any object, specific intent requirement that must be alleged and proved: "with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person."

(2) "Sexual Contact" (MCM 2016 ed., App. 28, ¶ 45a(t)(2)).

(a) May encompass same conduct proscribed by Article 125, Sodomy, including male-on-male sexual activity.

(b) Specific intent requirement for all sexual contacts that must be alleged and proved: "with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person."

(3) "Lewd Act" (MCM 2016 ed., App. 28, ¶ 45a(t)(10)).

(a) Requires intentional "skin-to-skin contact" with the genitalia of another person.

(b) Requires the specific intent "to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person."

(c) Applies only to Aggravated Sexual Abuse of a Child (Art. 120(f)).

(4) "Force" (MCM 2016 ed., App. 28, ¶ 45a(t)(5)).

(a) While "without consent" is no longer an element of any of the "Big Four" offenses, "force" is defined using terms that nonetheless invoke the concept of "consent." Specifically, the statute says force means action *to compel submission* of another or *to overcome or prevent another's resistance*. (emphasis added). These emphasized phrases may cause the government to prove lack of consent as part of its "force" proof.

(b) The concept of "constructive force," developed by case law prior to the revision of Article 120, is defined out of the new Article 120's definition of "force" and appears elsewhere in other statutory definitions.

(5) At this time, the difference between "rendering" another person unconscious or "administering" an intoxicant to another person (for purposes of establishing rape or aggravated sexual contact) and taking advantage of incapacitation (for purposes of establishing an aggravated sexual assault or abusive sexual contact) appears to be the extent to which the principal caused the victim's incapacitation.

(6) "Threatening or placing that other person in fear" of anything less than death or grievous bodily harm is defined at MCM (2016 ed.), App. 28, ¶ 45a(t)(7) and National Defense Authorization Act, FY2006, PL 109-163, 119 Stat. 3260-1. This definition includes classic examples of the "old" Article 120's doctrine of constructive force. By statutory definition, "threatening" for purposes of establishing an aggravated sexual assault or an abusive sexual contact includes: A threat:

(a) To accuse a person of a crime;

(b) To expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt, or ridicule; or

(c) Through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.

(7) The Military Judge's Benchbook now contains a definition for "substantially incapacitated." *See* DA Pam 27-9, Military Judges' Benchbook, ¶ 3-45-5, subpara. d and ¶ 3-45-6, subpara. d.

d) Child Sexual Abuse Offenses.

(1) The six child sexual abuse offenses are: rape of a child (Art. 120(b)), aggravated sexual assault of a child (Art. 120(d)), aggravated sexual abuse of a child (Art. 120(f)), aggravated sexual contact with a child (Art. 120(g)), abusive sexual contact with a child (Art. 120(i)), and indecent liberty with a child (Art. 120(j)).

(2) Practitioners can best navigate the child sexual abuse framework by using the facts of the case to answer the following three questions:

(a) How old is the child (under 12, between 12 and 16, or over 16)?

(b) What type of sexual touching occurred (sexual act, sexual contact, lewd act, or some other type)?

(c) What type of inducement was employed (none, "rape-level," "aggravated sexual assault-level")?

Once answers to these three questions are obtained, the practitioner can then navigate the elements of the six child abuse offenses in order of severity.

(3) Aggravated Sexual Abuse of a Child. MCM 2016 ed., App. 28, ¶ 45a(f).

(a) Requires a "Lewd Act" as defined at MCM 2016 ed., App. 28, ¶ 45a(t)(10).

(b) Specific intent requirement for all lewd acts that must be alleged and proved: "with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person."

(4) Indecent Liberty with a Child. (MCM 2016 ed., App. 28, ¶ 45a(j)).

(a) Requires specific intent "to arouse, appeal to, or gratify the sexual desire of any person" or "to abuse, humiliate, or degrade any person."

(b) Physical touching is not required. *See* MCM (2016 ed.), App. 28, ¶ 45a(t)(11).

(c) May include communication of indecent language and exposure of one's genitalia, anus, buttocks, or female areola or nipple to a child. *See* MCM 2016 ed., App. 28, ¶ 45a(t)(11).

(d) Requires "Physical Presence" with the child. *See* MCM (2016 ed.), App. 28, ¶ 45a(j), (t)(11); *United States v. Miller*, 67 M.J. 87 (2008) (applying old Indecent Liberties with a Child provision in Art. 134, constructive presence through webcam is insufficient).

e) The remaining four offenses. The following notes are intended to alert the practitioner to issues involved with litigating these last four offenses.

(1) Wrongful Sexual Contact. MCM (2016 ed.), App. 28, ¶ 45a(m).

(a) Relies on the same definition of "Sexual Contact" employed by the "Big Four" offenses.

(b) Sexual contact occurs "without that other person's permission." This language may impose an affirmative consent requirement on the principal. In other words, the statutory language seems to suggest that a principal must ask for affirmative consent from the other party to engage in the conduct that might amount to sexual contact.

(c) The statutory language for this offense is taken directly from 18 U.S.C. § 2244(b).

(2) The following three offenses were all Article 134 offenses before the statutory change. As such, the implementing executive order, signed 28 October 2007, deleted these offenses from Article 134. In removing these offenses from Article 134, the requirement that the conduct be either prejudicial to good order and discipline or service discrediting has been eliminated.

(a) Indecent Act. MCM (2016 ed.), App. 28, ¶ 45a(k). Proscribes "indecent conduct," which is defined by statute. Contains no specific intent requirement. The statutory language specifies "voyeurism"-types of offenses, but the *Benchbook* instruction also imports traditional concepts of "open and notorious" sexual behavior. *See* DA Pam 27-9, Military Judges' Benchbook, ¶ 3-45-9, note 2.

(b) Forcible Pandering. MCM (2016 ed.), App. 28, ¶ 45a(l). Replaces only the "compel" portion of Article 134, Pandering.

(c) Indecent Exposure. MCM (2016 ed.), App. 28, ¶ 45a(n). Proscribes exposure which occurs in an "indecent manner." "Indecent" is defined at MCM (2016 ed.), App. 28, ¶ 45c(3).

f) Although a listing of lesser included offenses for the Article 120 offenses may be found both in paragraph (d) and (e) of the implementing executive order, *see* MCM (2016 ed.), App. 28, ¶ 45d & e, practitioners should reference *supra* ¶ B.1.h, this chapter, for a general discussion on determining LIOs.

(1) *United States v. Alston*, 69 M.J. 214 (C.A.A.F. 2010)(finding that aggravated sexual assault by causing bodily harm is a lesser included offense of rape by force and that the military judge did not err in providing the instruction, even though neither party requested it).

(2) *United States v. Bailey*, No. 200800897 (N-M. Ct. Crim. App. Sep. 29, 2009) (unpub.). In a single incident, the accused engaged in various acts of sexual physical contact. He was charged with three specifications under Art. 120. Specification 1 alleged "sexual contact causing bodily harm," Specification 2 alleged abusive sexual contact, and Specification 3 alleged wrongful sexual contact. The accused pled guilty to Specification 3 (wrongful sexual contact), and not guilty to the other two specifications. The military judge accepted his plea to Specification 3, but also convicted him of abusive sexual contact, finding that "the previously pleaded-to wrongful sexual contact was committed by placing the victim in fear of physical injury or other harm, constituting abusive sexual contact." The military judge considered the two offenses "multiplicious for sentencing." The N-MCCA held that the two specifications were multiplicious for findings and the military judge erred in not dismissing the wrongful sexual contact specification upon finding the accused guilty of the "more aggravated abusive sexual contact" specification. The MCM (2008 ed.) lists wrongful sexual contact as an LIO of abusive sexual contact "depending on the factual circumstances." *See* 2008 MCM, App. 28, ¶ 45.e.(8). The court reasoned that "the only significant difference between the specifications [is] the additional element of placing the victim in fear," which was proven in the contested portion of the trial. As such, the military judge erred and there was prejudice in the form of an additional conviction, as well as increased punitive exposure. The court also found that the conviction for the specification constituted an unreasonable multiplication of charges. Although the specifications were merged for sentencing, corrective action with respect to the findings was necessary.

g) Affirmative Defenses.

(1) The 2007 version of Article 120 assigns burdens for all affirmative defenses raised in the context of an Article 120 prosecution: "The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist."

(a) Unconstitutional Burden Shift. *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011) (where an accused raises the affirmative defense of consent to a charge of aggravated sexual assault by engaging in a sexual act with a person who was substantially incapacitated, the statutory interplay among the relevant provisions of Art 120, results in an unconstitutional burden shift to the accused.)

(b) Double-shift impossible. *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011) (where the members are instructed consistent with the statutory scheme, the error cannot be cured with standard "ultimate burden" instructions.) This provision improperly assigns two separate burdens of persuasion to two separate parties on a single issue, creating a "legal impossibility." *See also* Major Howard H. Hoege, III, *Overshift: The Unconstitutional Double Burden-Shift on Affirmative Defenses in the New Article 120*, Army Law., May 2007, at 2; *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (citing 9 J. Wigmore, Evidence § 2489 (3d ed. 1940)(stating, "the burden of persuasion 'never shifts.'").

(c) In the MJ Benchbook (DA Pam 27-9), the Army Trial Judiciary has taken the approach of treating affirmative defenses which will arise under Article 120 prosecutions just like the majority of other affirmative defenses recognized by the MCM and case law. In other words, "some evidence" will raise a defense and once the defense is raised, the government will have the burden of proving beyond a reasonable doubt that the affirmative defense does not exist. *See, e.g.*, DA Pam 27-9, para. 3-45-3, note 10.

(d) See James G. Clark, "A Camel is a Horse Designed by Committee": Resolving Constitutional Defects in Uniform Code of Military Justice Article 120's Consent and Mistake of Fact as to Consent Defenses, ARMY LAW., July 2011, at 3.

(2) Facial Challenges.

(a) *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010). In a prosecution of an aggravated sexual contact involving force under Art. 120(e), the trial judge dismissed the charge, finding that consent was an "implied element" and concluding that Article 120 unconstitutionally shifted the burden of proof on an element from the Government to the defense. This occurred after the defense case in chief, before instructions and findings. The government appealed under Article 62 and the N-MCCA reversed, holding that, under the facts of the case, proof of the element of force does not require proof of lack of consent and the affirmative defense of consent does not unconstitutionally shift the burden of proof to the defense. The CAAF, in a 3-2 decision, affirmed the N-MCCA's decision, and remanded the record of trial to the military judge. The court made two key interpretations of the language of the new Article 120: (1) absence of consent is not a fact necessary to prove the crime of aggravated sexual assault, and (2) the words "consent is not an issue" in Article 120(r) do not prohibit the factfinder from considering evidence of consent when determining whether the prosecution has proved the element of force beyond a reasonable doubt (*see also*

Martin v. Ohio, 480 U.S. 228 (1987)). Next, the court confirmed the interlocutory posture of the case, noting that there were no instructions, no closing arguments, and no findings. The court then found that the military judge erred in treating lack of consent as an element of the offense and in concluding that the affirmative defense scheme is unconstitutional. Although the court did not rule on the constitutionality of the statute as applied to the accused in this case due to its interlocutory nature, the court cautioned that the constitutionality may be affected by the content of instructions, the sequence of the instructions, and any waiver of instructions. In a dissenting opinion, which Judge Erdmann joined, Judge Ryan concludes that "' [force' and 'consent' . . . are two sides of the same coin," and "making consent an affirmative defense . . . relieves the government of [the burden of proof as to an element] and unconstitutionally requires the defendant to disprove force."

(b) *United States v. Crotchett*, 67 M.J. 713 (N-M. Ct. Crim. App. 2009) (holding that a facial challenge to Art. 120(c), Aggravated Sexual Assault, fails because the court's "construction of the statute leads to the conclusion that Article 120(c)(2)(C) does not mandate a shift to the defense of the burden of proof as to any element).

(c) *United States v. Rozmus*, No. 200900052, 2009 WL 2893176 (N-M. Ct. Crim. App. Sep. 10, 2009) (unpub.) (facial challenge fails because court extends the holding of *Crotchett* to Article 120(c)(2)(b)).

(3) Instructions.

(a) *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010). The constitutionality of the statute may be affected by the content of instructions, the sequence of the instructions, and any waiver of instructions. "A properly instructed jury may consider evidence of consent at two different levels: (1) as raising a reasonable doubt as to whether the prosecution has met its burden on the element of force; and (2) as to whether the defense has established an affirmative defense."

(b) *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011). In a prosecution of an aggravated sexual assault involving an incapacitated victim under Art. 120(c), the trial judge gave instructions for consent that mirrored the model instructions provided in the Military Judges' Benchbook and departed from the plain language from the statute regarding the assignment of burdens regarding the affirmative defense of consent. Specifically, the military judge instructed the members that "The prosecution has the burden to prove beyond a reasonable doubt that consent did not exist." The panel convicted the accused. *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011) ("Although, in the absence of a legally sufficient explanation, the military judge's decision not to employ the terms of the statute constituted error, we are satisfied that the error was harmless beyond a reasonable doubt.")

(c) *United States v. Rozmus*, No. 200900052, 2009 WL 2893176 (N-M. Ct. Crim. App. Sep. 10, 2009) (unpub.) (facial challenge fails because court extends the holding of *Crotchett* to Article 120(c)(2)(b), as applied challenge fails because no evidence of consent or mistake of fact as to consent raised at trial).

(4) Multiplicity and UMC.

(a) *United States v. Oliva*, No. 20080774 (A. Ct. Crim. App. Feb. 24, 2009) (unpublished). The accused, a drill sergeant, was charged with two specifications of aggravated sexual assault under Art. 120. Specification 1 alleged that he "caused the

victim . . . to engage in a sexual act, i.e., penetration of her genital opening with [his] finger, by causing bodily harm in the form of bruises on her arm." Specification 2 alleged that he "engaged in a sexual act, i.e., penetration of [the victim's] genital opening with his finger, by placing her in fear of [his] abuse of his military position to affect negatively her career." He pled not guilty to these offenses, however, he pled guilty to two specifications of the lesser included offense of wrongful sexual contact by "placing his finders in [her] vagina without legal justification or authorization and without her consent." He "pled guilty to the *identical* criminal conduct and acts for both specifications." The two specifications were multiplicious for findings and dismissed Specification 2. The accused pled guilty to two specifications of wrongful sexual contact for the exact same underlying conduct.

(b) *United States v. Bailey*, No. 200800897 (N-M. Ct. Crim. App. Sep. 29, 2009) (unpub.). In a single incident, the accused engaged in various acts of sexual physical contact. He was charged with three specifications under Art. 120. Specification 1 alleged "sexual contact causing bodily harm," Specification 2 alleged abusive sexual contact, and Specification 3 alleged wrongful sexual contact. The accused pled guilty to Specification 3 (wrongful sexual contact), and not guilty to the other two specifications. The military judge accepted his plea to Specification 3, but also convicted him of abusive sexual contact, finding that "the previously pleaded-to wrongful sexual contact was committed by placing the victim in fear of physical injury or other harm, constituting abusive sexual contact." The military judge considered the two offenses "multiplicious for sentencing." The N-MCCA held that the two specifications were multiplicious for findings and the military judge erred in not dismissing the wrongful sexual contact specification upon finding the accused guilty of the "more aggravated abusive sexual contact" specification. The MCM lists wrongful sexual contact as an LIO of abusive sexual contact "depending on the factual circumstances." *See* MCM (2008 ed.), App. 28, ¶ 45.e.(8). The court reasoned that "the only significant difference between the specifications [is] the additional element of placing the victim in fear," which was proven in the contested portion of the trial. As such, the military judge erred and there was prejudice in the form of an additional conviction, as well as increased punitive exposure. The court also found that the conviction for the specification constituted an unreasonable multiplication of charges.

(c) *United States v. Marshall*, No. 200900533 (N-M. Ct. Crim. App. Feb. 10, 2010) (unpub.). Accused engaged in sexual intercourse with an incapacitated victim. When victim awoke and tried to get him to stop, he withdrew, began masturbating over top of her, and ejaculated onto her hair, stomach, and shirt. The accused was convicted of both aggravated sexual assault and an indecent act, both under Art. 120. Charges were neither multiplicious nor an unreasonable multiplication of charges.

(d) *United States v. Swemley*, No. 200900359 (N-M. Ct. Crim. App. Apr. 29, 2010) (unpub.). Accused was charged with aggravated sexual assault of an incapacitated victim, but the panel convicted of the LIO of assault consummated by a battery by touching the victim and removing her clothing while she was asleep. The N-MCCA found that the military judge did not err in instructing on assault consummated by battery as an LIO of aggravated sexual assault and the accused received the requisite notice that he could be convicted of this lesser offense.

(e) *United States v. Elespru*, 73 MJ 326 (C.A.A.F. 2014). While it was proper for the government to charge wrongful sexual contact and abusive sexual contact for

exigencies of proof, one of the charges should have been dismissed on UMC grounds where accused was convicted of both.

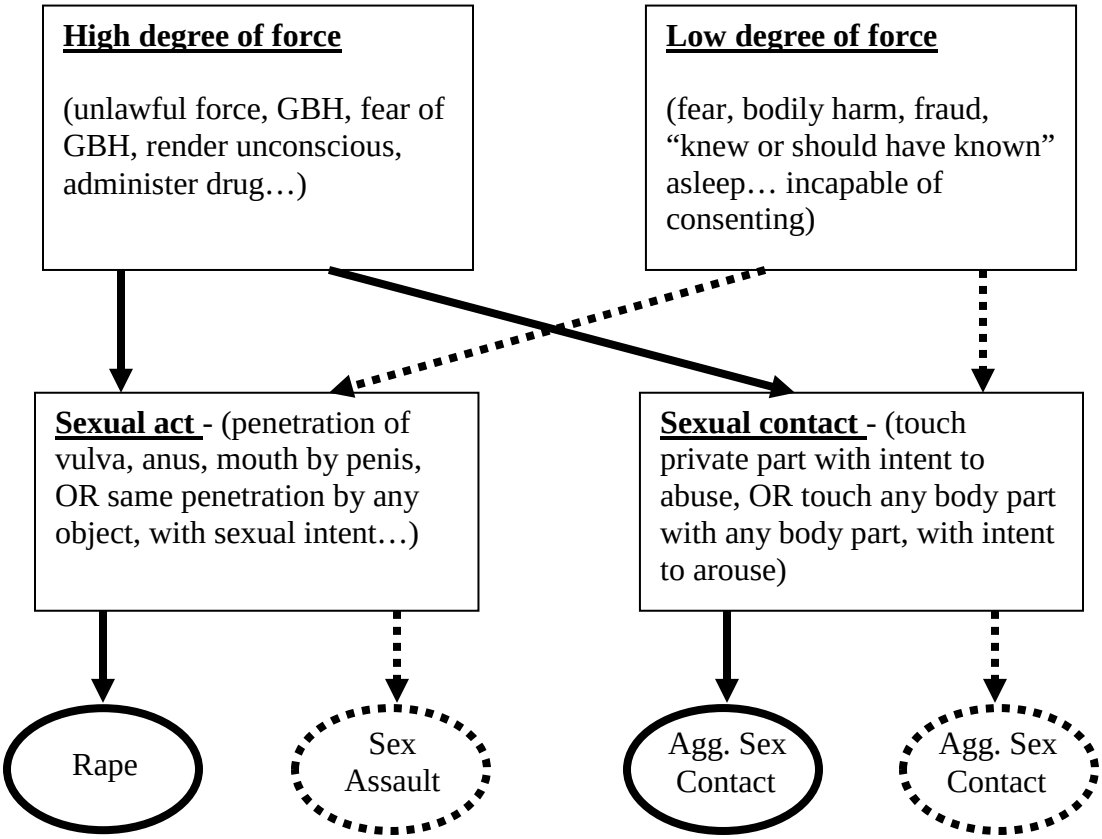
D. Article 120 (2012)

Adult Crimes (Art. 120) (D.1)
- Rape (D.1.b)
- Sexual Assault (D.1.c)
- Aggravated Sexual Contact
- Abusive Sexual Contact

Stalking (Art. 120a) (D.2)

Child Crimes (Art. 120b (D.3)
- Rape of a Child
- Sexual Assault of a Child
- Sexual Abuse of a Child

Other Sexual Crimes (Art. 120c) (D.4)
- Indecent Viewing, Visual Recording, or Broadcasting
- Indecent Exposure
- Forcible Pandering



1. Rape and Sexual Assault Generally. MCM, pt. IV, ¶ 45; UCMJ art. 120 (2012).

a) Effective date: 28 June 2012. An implementing executive order has yet to be signed prescribing elements, explanations, lesser included offenses, and sample specifications under his authority pursuant to Article 36. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide. Maximum punishments were prescribed via Executive Order 13643 of May 15, 2013.

b) One service court has defined "incapable of consent" as "incapable of entering a freely given agreement." *United States v. Pease*, 74 M.J. 763, 770 (N-M. Ct. Crim. App. 2015). Further, "[t]o be able to freely give an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question, then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person." *Id*. NOTE: this case is pending review at the C.A.A.F. as of the time of this writing.

c) Aggravated Sexual Contact. Statutory language: Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

d) Abusive Sexual Contact. Statutory language: Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

e) Statute is gender neutral.

f) Defenses. Marriage is not a defense.

g) Definitions. The definitions of sexual act and sexual contact have both been expanded from the 2007 definitions under Art. 120. Though not specifically delineated in the statute, the touching may also be accomplished by an object. *United States v. Schloff*, 74 M.J. 312 (C.A.A.F. 2015).

2. Stalking. MCM, pt. IV, ¶ 45a; UCMJ art. 120a (2012).

a) Elements.

(1) That that accused wrongfully engaged in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm to himself or herself or a member of his or her immediate family;

(2) That the accused had knowledge, or should have had knowledge, that the specific person would be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family; and

(3) That the accused's acts induced reasonable fear in the specific person of death or bodily harm to himself or herself or to a member of his or her immediate family.

b) *See infra* ¶ XXXIV.E, this Chapter, for the discussion on Stalking.

3. Rape and Sexual Assault of a Child. MCM, pt. IV, ¶ 45; UCMJ art. 120b (2012).

a) Effective date: 28 June 2012. An implementing executive order has yet to be signed prescribing elements, explanations, lesser included offenses, and sample specifications under his authority pursuant to Article 36. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide. Maximum punishments were prescribed via Executive Order 13643 of May 15, 2013.

b) The definition of lewd act has been expanded from the 2007 statutory language:

(1) The term 'lewd act' means—

(a) any sexual contact with a child;

(b) intentionally exposing one's genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent

to abuse, humiliate, or degrade any person, or to arose or gratify the sexual desire of any person;

(c) intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(d) any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

4. Other Sexual Misconduct. MCM, pt. IV, ¶ 45; UCMJ art. 120c (2012).

a) Effective date: 28 June 2012. An implementing executive order has yet to be signed prescribing elements, explanations, lesser included offenses, and sample specifications under his authority pursuant to Article 36. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide. Maximum punishments were prescribed via Executive Order 13643 of May 15, 2013.

(1) Indecent viewing is only criminal insofar as the viewing is done "live" and in-person; viewing a recording of another's private area, even if the recording was done without consent, is not criminal. *See United States v. Quick*, 74 M.J. 517 (N-M.Ct.Crim.App. 2015), *aff'd*, 2015 CAAF LEXIS 703 (C.A.A.F. Aug. 11, 2015).

(2) In some circumstances Indecent Acts may be charged for conduct occurring after 28 June, 2012, by charging the conduct under Clause 1 and/or 2 of Article 134. *See United States v. Quick*, 74 M.J. 517 (N-M.Ct.Crim.App. 2015), *aff'd*, 2015 CAAF LEXIS 703 (C.A.A.F. Aug. 11, 2015).

E. Child Pornography – On or after 12 January 2012

1. Prior to 12 January 2012 there was no enumerated crime addressing child pornography in the UCMJ and the President had not listed a child pornography offense under Article 134. Crimes in the military that involve child pornography prior to 12 January 2012 must be charged under a general article (Article 133 or Article 134); see ¶ H.

2. Article 134 specifically criminalizes four child pornography offenses:

a) Possessing, receiving, or viewing

b) Possession with the intent to distribute

c) Distribution

d) Producing

3. There are few reported cases on this offense. Much of the case law developed prior to 12 January 2012 is still applicable; as such, practitioners should review ¶ H as well.

4. Note that child pornography as enumerated under Article 134 is defined as either (a) "an *obscene* visual depiction of a minor engaging in sexually explicit conduct" or (b) "a visual depiction of an *actual* minor engaging in sexually explicit conduct" (emphasis added).

a) Obscenity is not defined within the text of the MCM. Practitioners should look to the myriad of case law defining obscenity if necessary. Note also that the C.A.A.F., in interpreting 18 U.S.C. § 2256(8)(B), has determined that a "graphic" exhibition of what appear to be a minor must necessarily include nudity. *United States v. Blouin*, 24 M.J. 247

(C.A.A.F. 2015). Whether the C.A.A.F. would require nudity for an "obscene" depiction of what appears to be a minor remains to be seen.

b) The word "obscene" is omitted from the model specification listed in the MCM; trial counsel should nevertheless allege obscenity when unable to definitively prove that the depictions are of actual minors.

5. Sexually explicit conduct is defined in part as a "lascivious exhibition of the genitals or pubic area of any person." This definition is not further defined within the MCM. Because it mirrors the definition found within 18 U.S.C. § 2256, military judges ordinarily read the definition found within subsection (8) of that statute. In turn, "[o]nce the military judge elects to use the statutory definition of child pornography under 18 U.S.C. § 2256(8), the Child Pornography Prevention Act (CPPA), the evidence must meet that definition." *United States v. Morris*, 2014 CCA LEXIS 645, *4 (N-M.Ct.Crim.App. Aug. 28, 2014), *aff'd*, 2015 CAAF LEXIS 685 (C.A.A.F. July 15, 2015).

a) When the images depict an actual minor, the lascivious exhibition need not include nudity, and "the contours of the genitals or pubic area [need not] be discernible or otherwise visible through the child subject's clothing." *United States v. Knox*, 32 F.3d 733, 746 (3d Cir. 1994). *See also United States v. Morris*, 2014 CCA LEXIS 645 (N-M.Ct.Crim.App. Aug. 28, 2014) , *aff'd*, 2015 CAAF LEXIS 685 (C.A.A.F. July 15, 2015).

b) In determining whether a display is lascivious, military courts look to the non-exclusive factors outlined in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986). These factors are:

> "1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer."
>
> *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986).

c) Note: as discussed in ¶ G.4 above, depictions of a virtual child or a child not identifiable as an actual child *might* require nudity in order to qualify as "obscene." In that case, the *Dost* factors would still otherwise apply, though nudity would be a required factor. Again, there is no "obscenity" requirement for depictions of actual minors.

6. It is an open question whether possession of child erotica – that is, nude and sexualized images of children which nevertheless do not depict "sexually explicit conduct" as defined within the MCM – is a viable offense under clause 1 or 2 of Article 134. *See United States v. Moon*, 73 M.J. 382 (C.A.A.F. 2014). Possession of non-nude images of children, even if sexualized, is not an offense. *United States v. Warner*, 73 M.J. 1 (C.A.A.F. 2013).

7. Other cases.

a) Even where some images are found not to meet the statutory definition of child pornography upon appellate review, there is no longer a requirement to set aside a guilty verdict as long as at least one of the images constituted non-Constitutionally protected material. *United States v. Piolunek*, 74 M.J. 107 (C.A.A.F. 2015). This case overturned *United States v. Barberi*, 71 M.J. 127 (C.A.A.F. 2012).

F. Child Pornography – Before 12 January 2012.

1. There are two ways to charge child pornography crimes committed prior to 12 June 2012 using Article 134:

a) Charge the criminal conduct using Article 134, clauses 1 and 2.

b) Charge a violation of an applicable federal statute using Article 134, clause 3.

2. Clauses 1 and 2, Article 134.

a) "It is a mystery to me why, after this [c]ourt's ten-year history of invalidating convictions for child pornography offenses under clause 3, and of upholding convictions for such offenses under clause 2, we continue to see cases charged under clause 3." *United States v. Medina*, 66 M.J. 21, 29 n.1 (C.A.A.F. 2008) (Stucky, J., dissenting).

b) Possession of child pornography may be charged as a Clause 1 or Clause 2 offense. *United States v. Irvin*, 60 M.J. 23 (C.A.A.F. 2004).

c) Virtual Child Pornography under Clauses 1 and 2.

(1) *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004) ("The receipt or possession of "virtual" child pornography can, like "actual" child pornography, be service-discrediting or prejudicial to good order and discipline.").

(2) *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006) ("The knowing possession of images depicting sexually explicit conduct by minors, whether actual or virtual, when determined to be service-discrediting conduct or conduct prejudicial to good order and discipline, is an offense under Article 134").

(3) The maximum punishment for possession of virtual child pornography is 4 months. *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011). *Cf. United States v. Finch*, 73 M.J. 144 (C.A.A.F. 2014).

d) Referencing an unconstitutional statutory definition of child pornography in the pleadings and instructing the members using the unconstitutional statutory definition created instructional error in an Article 133 child pornography case. *United States v. Forney*, 67 M.J. 271 (C.A.A.F. 2009) (Effron, C.J., concurring in the result) (Erdmann, J., dissenting). This analysis should also apply if the offense was charged under clauses 1 and 2 of Article 134.

e) The nature of the images is not dispositive as to whether receiving such images is PGO&D or SD. *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003) (providence inquiry failed to establish whether accused pled guilty to possession of virtual or actual child pornography; no LIO of clause 1 or clause 2 because no discussion of PGO&D or SD).

f) Although *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008) provides the current state of the law regarding the relationship between the three clauses of Article 134, the following cases were affirmed under clause 2 of Article 134:

(1) *United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000) (after finding that the military judge failed to adequately advise the accused of the elements of federal offense of possession of child pornography, under 18 U.S.C. § 2252(a)(4)(A), which he was charged

with violating under clause 3 of Article 134, the Air Force court did not err by affirming the lesser included offense of service-discrediting conduct, under clause 2 of Article 134.

(2) *United States v. Augustine*, 53 M.J. 95 (C.A.A.F. 2000) (affirming under clause 2 rather than clause 3 of Article 134).

(3) *United States v. Hays*, 62 M.J. 158 (C.A.A.F. 2005) (holding the plea inquiry did not implicate the appellant's First Amendment rights, thus placing the analysis under *Sapp* and *Augustine*; although the MJ did not discuss with appellant whether his conduct was service discrediting or prejudicial to good order and discipline, there is no doubt that appellant was aware of the impact of his conduct on the image of the armed forces; affirmed under Clause 2).

3. Clause 3, Article 134.

a) *See generally* MCM, pt. IV, ¶ 91c(4).

b) Key federal statutes. The following federal statutes are available for charging various conduct involving the production, possession, transportation, and distribution of child pornography:

(1) 18 U.S.C. § 2251, Sexual Exploitation of Children. Among other prohibitions, this provision covers the use of minors in the production of child pornography.

(2) 18 U.S.C. § 2252, Certain Activities Relating to Material Involving the Sexual Exploitation of Minors. This child pornography provision was the predecessor to the computer-specific 18 U.S.C. § 2252A.

(3) 18 U.S.C. § 2252A, Certain Activities Relating to Material Constituting or Containing Child Pornography. This is the federal provision that most comprehensively covers the use of computers and the Internet to possess, transport, and distribute child pornography.

(4) Statutory Definitions. 18 U.S.C. § 2256 contains the applicable definitions for child pornography offenses.

c) Amendments.

(1) The Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358 (Oct. 8, 2008) (adds "using any means or facility of interstate or foreign commerce" to several sections in 18 USC 2251, 2251A, 2252, and 2252A).

(2) The Enhancing the Effective Prosecution of Child Pornography Act of 2007, Pub. L. No. 110-358 (Oct. 8, 2008) (adds to 18 USC 2252(a)(4) and 2252A(a)(5) the following language after "possesses": "or knowingly accesses with intent to view").

(3) The Providing Resources, Officer, and Technology to Eradicate Cyber Threats to Our Children Act of 2008 (or The PROTECT Our Children Act of 2008), Pub. L. No. 110-401 (Oct. 13, 2008) (Sec 301 prohibits broadcast of live images of child abuse, Sec. 302 amends the definition of "visual image" under 18 USC 2256(5) by inserting "and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format", Sec. 304 prohibits the adaptation or modification of an image of an identifiable minor to produce child pornography).

d) Pleading Child Pornography Offenses Using Clause 3.

(1) *See* MCM, pt. IV, ¶ 60c(6).

e) Actual versus Virtual Children.

(1) Using the CPPA and Clause 3, Article 134.

(a) In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the U.S. Supreme Court held that specific language within the definition of child pornography in the 1996 Child Pornography Prevention Act (CPPA) was unconstitutional. Specifically, the definition impermissibly prohibited "virtual" child pornography in contravention of the First Amendment. The "virtual image" language was contained in § 2256(8)(B) and § 2256(8)(D).

(b) Following *Ashcroft*, the CAAF made the "actual" character of visual depictions of child pornography a factual predicate for guilty pleas under the CPPA. *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003).

(c) Either the "appears to be" language or "conveys the impression" language found in the CPPA's unconstitutional definition of child pornography can trigger the requirement to prove an "actual" child was used to make an image of child pornography. *United States v. Wolford*, 62 M.J. 418 (C.A.A.F. 2006).

(2) Using Clauses 1 and 2, Article 134. Child pornography, whether virtual or actual, can be prejudicial to good order and discipline and service-discrediting. *See United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004); *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006).

f) Issues.

(1) Constitutionality of the Federal statute.

(a) In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the U.S. Supreme Court held that specific language within the definition of child pornography in the 1996 Child Pornography Prevention Act (CPPA) was unconstitutional. Specifically, the definition impermissibly prohibited "virtual" child pornography in contravention of the First Amendment. The "virtual image" language was contained in § 2256(8)(B) and § 2256(8)(D).

(b) The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (Apr. 30, 2003), which amended 18 U.S.C. § 2252A to include a provision that prohibits the solicitation and pandering of child pornography. *United States v. Williams*, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) (holding the Act to be neither impermissibly vague nor overbroad and holding that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment).

(c) The Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2252. Constitutional because its prohibition against knowing transport, shipment, receipt, distribution, or reproduction of a visual depiction of a minor engaged in sexually explicit conduct requires that the accused know that the performer in the depiction was a minor, thereby satisfying First Amendment concerns. *United States v. X-Citement Video*, 115 S.Ct. 464 (1994); *United States v. Maxwell*, 42 M.J. 568 (A.F. Ct. Crim. App. 1995), *reversed in part United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996) (transmission of visual images electronically through the use of an on-line computer service is "transport in interstate or foreign commerce' in light of legislative intent to prevent the transport of obscene material in interstate commerce regardless of the means used to effect that end and statute is constitutional in light of *United States v. X-Citement Video*, 115 S.Ct. 464 (1994) (statute contains a scienter

requirement because the word "knowingly" must be read as applying to the words "use of a minor").

(2) Extraterritoriality. Practitioners in overseas and deployed locations should ensure that the federal statute is applicable to the conduct at issue.

(a) *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005). Appellant pled guilty, in relevant part, to sending, receiving, reproducing, and possessing child pornography under Article 134, Clause 3, in violation of the CPPA. The conduct was charged using 18 U.S.C. §2252A(a)(1–3). Appellant's misconduct took place in Germany, both at an off-post internet café, and in his on-post barracks room. HELD: 1) The CPPA is not extraterritorial as there is no evidence of specific congressional intent to extend its coverage; 2) domestic application is possible under a "continuing offense" theory for *sending* material that flowed through servers in the United States; 3) appellant's plea to specification 1 under clause 3 of Article 134 is improvident under *O'Connor* because of the focus on the unconstitutional definition of child pornography and the lack of focus on "actual" vs. "virtual" images; and 4) there was no reference to appellant's conduct as service discrediting or prejudicial to good order and discipline. Strong dissents from both C.J. Gierke and J. Crawford.

(b) *United States v. Reeves*, 62 M.J. 88 (C.A.A.F. 2005). The accused was stationed in Hanau, Germany and used the on-post library computer to receive and print out images of child pornography that had been sent over the Internet. While still in Germany, he also used a video camera to record sexually explicit imagery of two German girls from about 200 feet away. His conduct was charged using 18 U.S.C. §§ 2251 and 2252A(a)(1–3). Citing *Martinelli*, the court held none of the following acts were continuing offenses with conduct that occurred in the United States, and as such, there could be no domestic application of the CPPA: (1) possession of child pornography at an on-post public library, land used by and under the control of the federal government; (2) receiving child pornography that had been transmitted through the internet; and (3) using minors to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.

(3) Definitions. *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009). The CPPA does not define "distribute." The court looked to three sources for a definition of the term: (1) the plain meaning, (2) the manner Article III courts have interpreted the term, and (3) the guidance that the UCMJ provides through parallel provisions. *See also United States v. Craig*, 67 M.J. 742 (N-M. Ct. Crim. App. 2009) (military judge read part of the definition of "distribute" from Article 112a, stating, "Distribute means to deliver to the possession of another.") .

(4) Method of Distribution.

(a) Yahoo! Briefcase. *United States v. Navrestad*, 66 M.J. 262 (C.A.A.F. 2008). Sending a hyperlink to a Yahoo! Briefcase during an internet chat session, where the Briefcase contained images of child pornography, does not constitute either distribution of child pornography as defined in the CPPA or possession of child pornography as affirmed by the ACCA under Clauses 1 and 2, where the link itself only provides a roadmap to the child pornography and where the accused did not download or print any of the images to his own computer. The accused was initially charged under Clause 3 of Article 134, but Clause 1 and 2 language was added to both specifications prior to arraignment. Convictions for both possession under Clauses 1 and 2, and distribution under the CPPA were set aside. Note: Yahoo! discontinued its Briefcase service on 30 March 2009.

(b) KaZaA. *United States v. Ober*, 66 M.J. 393 (C.A.A.F. 2008). Using KaZaA to search for and download child pornography from host users over the Internet constituted transportation of child pornography in interstate commerce for purposes of 18 U.S.C. § 2252A(a)(1) because "a user's download caused an upload on the host user's computer."

(c) Peer-to-Peer Software in General. *United States v. Christy*, 65 M.J. 657 (A. Ct. Crim. App. 2007). The accused downloaded peer-to-peer software and set up a "shared files" folder. As part of his licensing agreement with the software company, he agreed to share all files in that folder, i.e., his child pornography, with other users. While the term "distribution" is not defined in the statute, definitions found in federal case law are broad enough to cover the act of posting images in a shared file folder and agreeing to allow others to download from the folder. Additionally, the accused's conduct was "knowing" under the CPPA, as he admitted during his providence inquiry that he knew 1) that he was posting his child pornography images in a shared file folder, and 2) that anyone with the same peer-to-peer software both had his permission and the general ability to download the files he posted.

(5) Lesser included offenses: Clause 1 and Clause 2. The use of Clause 1 and Clause 2 as a LIO to a Clause 3 offense has recently been limited by the CAAF holding in *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008). The court holds that in order for either Clause 1 or Clause 2 to be considered as a LIO to a Clause 3 offense, the Clause 3 specification should contain Clause 1 or Clause 2 language. If Clause 1 or Clause 2 language is absent from a Clause 3 offense, the opinion may yet allow for Clause 1 or Clause 2 to operate as a LIO provided the military judge clearly explains Clause 1 and Clause 2 and how they can operate as a LIO to the accused. Prudence, however, dictates that counsel plead the Clause 1 and/or Clause 2 language to avoid the issue at trial.

(6) Evidence to determine age of models. *United States v. Russell*, 47 M.J. 412 (C.A.A.F. 1998) (accused admitted that he guessed the models were "13 or older"; a pediatrician testified that the females shown in the exhibits were not more than 15.5 years old; and members were able to look at the pictures and use their common sense and experience to conclude that the girls were under age 18); *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996) (government was only required to prove that accused believed the images depicted minors to support conviction for knowingly transporting or receiving child pornography in interstate commerce (18 U.S.C. § 2252); government was not required to prove that accused had basis for actual knowledge of the subjects' ages). *United States v. Cendejas*, 62 M.J. 334 (C.A.A.F. 2006) (factfinder can make the determination that pornographic images are actual children based upon a review of the images alone).

g) Other Applications.

(1) *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009). As the CPPA does not expressly define "distribute," the court looked to three sources for a definition of the term: (1) the plain meaning, (2) the manner Article III courts have interpreted the term, and (3) the guidance that the UCMJ provides through parallel provisions. Considering these sources, under the CPPA, distribution of child pornography through the Internet consists of two acts: (1) the posting of the image, where the image left the possession of the original user, and (2) the delivery of the image, where another user accessed and viewed the image. Here, the accused posted the image to his Yahoo! profile prior to his entry on active duty. The court reasoned that the profile serves as a "'public bulletin board' such that all Internet users can access information posted by the profile's owner."

Although this was done prior to entering active duty, he accessed the account while on active duty and could have removed the image. The offense of distribution occurred while he was on active duty when the ICE agent accessed and viewed the image that he had posted for others to view.

(2) *United States v. Craig*, 67 M.J. 742 (N-M. Ct. Crim. App. 2009). As 18 U.S.C. § 2252A does not define "distribute," the military judge read part of the definition of "distribute" from Article 112a, stating, "Distribute means to deliver to the possession of another." The plain meaning of the term "distribute" includes "the transfer of an item from the possession of one person into the possession of another." The military judge provided a correct statement of the law in defining "distribute."

(3) *United States v. Smith*, 61 M.J. 696 (N-M. Ct. Crim. App. 2005) (Appellant engaged in marketing adult entertainment for profit on the internet, posting hundreds of photos of females engaged in sexually explicit conduct, many of them minors. Among other offenses, appellant ultimately pled guilty to violating 18 U.S.C. § 2257, under Clause 3, Article 134 for managing a website containing these depictions without maintaining proper records of each performer as that section requires. HELD: Appellant's failure to determine the age and record the identity of the child performer bore a direct relationship to the Government's interest in preventing child pornography).

(4) "Lascivious exhibition" category of sexually explicit conduct prohibited by § 2251(a). *United States v. Roderick*, 62 M.J. 425 (C.A.A.F. 2006) (applying the "Dost" factors to determine "lascivious exhibition").

(5) In prosecuting a violation of 18 U.S.C. § 2252 (a)(2) by knowingly receiving sexually explicit depictions of minors that have been transported in interstate commerce, "knowingly" applies to the sexually explicit nature of the materials and the ages of the subjects. The Government does not have to prove that the accused knew that the sexually explicit depictions passed through interstate commerce. The interstate commerce element is merely jurisdictional. *United States v. Murray*, 52 M.J. 423 (C.A.A.F. 2000).

(6) "Viewing" child pornography was not an offense under 18 U.S.C. § 2252 until its 2008 amendment. As such, viewing child pornography prior to the date of this amendment is likewise not chargeable under Article 134. *United States v. Merritt*, 72 MJ 483 (C.A.A.F. 2014).

h) Multiplicity/UMC.

(1) *United States v. Purdy*, 67 M.J. 780 (N-M. Ct. Crim. App. 2009). The accused downloaded child pornography from the Internet onto his personal computer while stationed in Belgium. He then downloaded the images from the hard drive onto a compact disk and reformatted the hard drive, but retained the compact disk. He was charged with both receiving and possessing child pornography under Clause 3 of Art. 134. He pled guilty to both offenses under Clauses 1 and 2. In this case, his act of saving the images to the CD-ROM "was a clear exercise of dominion . . . separate and apart" from his receipt of the images at an earlier point in time. The conviction for both offenses was proper and the military judge did not commit plain error.

(2) *United States v. Craig*, 67 M.J. 742 (N-M. Ct. Crim. App. 2009). The accused used "LimeWire," a peer-to-peer file-sharing software program to search for and download child pornography. He downloaded the child pornography into a "share" folder on his hard drive. He kept some of the images in the "share" folder, copied some to compact disks, and deleted others. He pled guilty to both receipt and possession of child pornography under 18 U.S.C. § 2252A using Clause 3 of Art. 134. The court held that

these two specifications were not facially duplicative and therefore military judge did not commit plain error in failing to dismiss these specifications as multiplicious. The charges of receipt and possession "address at least two criminal actions by the [accused] each of which occurred at a different time within the charged time period and involved separate media.

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CHAPTER 22
DEFENSES

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"Special Defense" vs. "Other Defenses." Special defenses, the military's equivalent to affirmative defenses, are those which deny, wholly or partially, criminal responsibility for the objective acts committed, but do not deny that those acts were committed by the accused. Other defenses, such as alibi and mistaken identity, deny commission of the culpable act or other elements of the crime. R.C.M. 916(a). For Mental Responsibility, see Chapter 23.

I. PROCEDURE

A. Raising a Defense.

1. The military judge must instruct upon all special defenses raised by the evidence. The test of whether a defense is raised is whether the record contains some evidence as to each element of the defense to which the trier of fact may attach credit if it so desires. *United States v. Ferguson*, 15 M.J. 12 (C.M.A. 1983); *United States v. Tan*, 43 C.M.R. 636 (A.C.M.R. 1971); *see also United States v. Jackson*, 12 M.J. 163 (C.M.A. 1982); *United States v. Jett*, 14 M.J. 941 (A.C.M.R. 1982). Generally, the reasonableness of the evidence is irrelevant to the military judge's determination to instruct. *United States v. Thomas*, 43 C.M.R. 89 (C.M.A. 1971); *United States v. Symister*, 19 M.J. 503 (A.F.C.M.R. 1984).

2. A defense may be raised by evidence presented by the defense, the Government, or the court-martial. R.C.M. 916(b) discussion; *United States v. Rose*, 28 M.J. 132 (C.M.A. 1989).

3. In deciding whether the defense is raised, the military judge is not to judge credibility or prejudge the evidence and preclude its introduction before the court members. *United States v. Tulin*, 14 M.J. 695 (N.M.C.M.R. 1982).

4. A defense is not raised, however, if it is wholly incredible or unworthy of belief. *United States v. Brown*, 19 C.M.R. 363 (C.M.A. 1955); *United States v. Franklin*, 4 M.J. 635 (A.F.C.M.R. 1977).

5. Appellate military courts are very generous in finding that a defense has been raised. *See, e.g.*, *United States v. Goins*, 37 C.M.R. 396 (C.M.A. 1967) (self-defense raised against charge of assault with intent to commit rape). Any doubt whether the evidence is sufficient to require an instruction should be resolved in favor of the accused. *United States v. Steinruck*, 11 M.J. 322 (C.M.A. 1981); *United States v. Jenkins*, 59 M.J. 893 (A. Ct. Crim. App. 2004).

6. In a bench trial, the impact of the raised defense is resolved by the military judge, *sub silentio*, in reaching a determination on the merits.

7. Burden of Proof. Except for the defense of lack of mental responsibility and the defense of mistake of fact as to age as described in pt. IV, ¶ 45c(2) in a prosecution of carnal knowledge, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist. The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence, and has the burden of proving mistake of fact as to age in a carnal knowledge prosecution by a preponderance of the evidence. R.C.M. 916(b).

B. Advising the Accused. If in the course of a guilty plea trial, the accused's comments or any other evidence raises a defense, the military judge must explain the elements of the defense to the accused. *See generally* UCMJ art. 45(a). The accused's comments raising the defense need not be credible. *United States v. Lee*, 16 M.J. 278 (C.M.A. 1983). Subsequently, if the accused does not negate the defense or other evidence belies the accused's negation of the defense, the military judge must withdraw the guilty plea, enter a plea of not guilty for the accused, and proceed to trial on the merits. *United States v. Jemmings*, 1 M.J. 414 (C.M.A. 1976).

C. Instructions.

1. In a members trial, the military judge must instruct the members, *sua sponte*, regarding all special defenses raised by the evidence. *United States v. Williams*, 21 M.J. 360 (C.M.A. 1986); *United States v. Sawyer*, 4 M.J. 64 (C.M.A. 1977); *United States v. Graves*, 1 M.J. 50 (C.M.A. 1975); R.C.M. 920(e)(3).

2. In instructing a military jury on a defense, the judge is under no obligation to summarize the evidence, but if he undertakes to do so, the summary must be fair and adequate. *United States v. Nickoson*, 35 C.M.R. 312 (C.M.A. 1965).

3. While the military judge must instruct upon every special defense in issue, there is no sua sponte duty to instruct upon every fact that may support a given defense. *United States v. Sanders*, 41 M.J. 485 (C.A.A.F. 1995) (holding no plain error to fail to mention victim's alleged invitation to assault).

D. Consistency of Defenses.

1. Generally, conflicting defenses may be raised and pursued at trial. R.C.M. 916(b) discussion; *see also United States v. Viola*, 26 M.J. 822, 827-28 (A.C.M.R. 1988), *aff'd* 27 M.J. 456 (C.M.A. 1988); Nagle, *Inconsistent Defenses in Criminal Cases*, 92 Mil. L. Rev. 77 (1981). *See generally United States v. Garcia*, 1 M.J. 26 (C.M.A. 1975) (alibi and entrapment); *United States v. Walker*, 45 C.M.R. 150 (C.M.A. 1972) (lack of mental responsibility and self-defense); *United States v. Lincoln*, 38 C.M.R. 128 (C.M.A. 1967) (accident and self-defense); *United States v. Snyder*, 21 C.M.R. 14 (C.M.A. 1956) (heat of passion/voluntary manslaughter and self-defense); *United States v. Ravine*, 11 M.J. 325 (C.M.A. 1981) (entrapment and agency).

2. The defense of self-defense is eviscerated by the defendant's testimony that he did not inflict the injury, regardless of what other evidence might show. *United States v. Ducksworth*, 33 C.M.R. 47 (C.M.A. 1963); *United States v. Bellamy*, 47 C.M.R. 319 (A.C.M.R. 1973); *see also United States v. Crabtree*, 32 C.M.R. 652 (A.B.R. 1962) (both duress and denial may not be raised).

E. Burden of Proof.

1. Lack of mental responsibility. The accused has the burden of proving this defense by clear and convincing evidence. UCMJ Art. 50a(b); R.C.M. 916(b).

2. Mistake of fact as to age of victim of carnal knowledge. The accused has the burden of proving this defense by a preponderance of the evidence. The mistake must be both honest and reasonable. UCMJ Art. 120(d). *Cf. United States v. Strode*, 43 M.J. 29 (1995) (holding honest and reasonable mistake of fact as to age of victim of indecent acts with child may be a defense if acts would otherwise be lawful if victim was over age 16).

3. All other defenses. If a defense is raised, the prosecution then has the burden of proving beyond a reasonable doubt that the defense does not exist. R.C.M. 916(b); *United States v. Verdi*, 5 M.J. 330 (C.M.A. 1978).

II. ACCIDENT

A. Defined. R.C.M. 916(f). To be excusable as an accident, the act resulting in death or injury must have been the result of doing a lawful act in a lawful manner, free of negligence and unaccompanied by any criminally careless or reckless conduct. *United States v. Rodriguez*, 31 M.J. 150 (C.M.A. 1990); *United States v. Moyler*, 47 C.M.R. 82, 85 (A.C.M.R. 1973). Accident is an unexpected act not due to negligence. It is not the unexpected consequence of a deliberate act. *United States v. Pemberton*, 36 C.M.R. 239 (C.M.A. 1966); R.C.M. 916(f). *See generally* TJAGSA Practice Note. *The Defense of Accident: More Limited Than You Might Think*, Army Law., Jan. 1989, at 45.

1. The lawful act. The unlawful nature of an accused's actions are apparent when performed in the course of committing a malum in se offense, *e.g.*, robbery. Such is not the case, however, when a malum prohibitum offense is involved. In *United States v. Sandoval*, 15 C.M.R. 61 (C.M.A. 1954), the accused was charged with killing a fellow soldier. He claimed that the death resulted from an accidentally inflicted gunshot wound. The government argued that accident was not available as a defense because the accused's possession of the murder weapon was a violation of local regulations. The Court of Military Appeals' decision implied that violation of the regulation made the accused's act per se illegal and thus precluded access to the accident defense. Eighteen years later in *United States v. Small*, 45 C.M.R. 700 (A.C.M.R. 1972), the Army Court of Military Review stated that an accident instruction could be denied only if the act, illegal as violative of a general regulation, was the proximate cause of the injury inflicted. *See also United States v. Tucker*, 38 C.M.R. 349 (C.M.A. 1968); *United States v. Taliau*, 7 M.J. 845 (A.C.M.R. 1979).

2. The unexpected act. If an act is specifically intended and directed at another, the fact that the ultimate consequence of the act is unintended or unforeseen does not raise the accident defense.

a) *United States v. McMonagle*, 38 M.J. 53 (C.M.A. 1993) (the defense of accident is not raised where accused engages a target in a combat zone that turns out to be a noncombatant; the death of a human being is neither unexpected nor unforeseen under these circumstances).

b) *United States v. Femmer*, 34 C.M.R. 138 (C.M.A. 1964) (no instruction on accident was required where the accused charged with aggravated assault admitted that the victim was injured by a razor blade in accused's hand which he used in a calculated effort to push the victim away from him. Because the injury resulted from an act intentionally directed at the victim, and the accused knew he held the razor blade when he carried out the act, accident of the kind that would absolve one of criminal liability was not involved).

c) Accident is not synonymous with unintended injury. A particular act may be directed at another without any intention to inflict injury, but if the natural and direct consequence of the

act results in injury, the wrong is not excusable because of accident. *United States v. Pemberton*, 36 C.M.R. 239 (C.M.A. 1968) (accused's act of struggling with victim over a broken beer bottle was not directed at the victim but rather at wresting the bottle from the victim. Accident defense was therefore available although the judge in this case instructed improperly).

d) In military law, the defense of accident excuses a lawful act, in a lawful manner, which causes an unintentional and unexpected result. *United States v. Marbury*, 50 M.J. 526 (A. Ct. Crim. App. 1999), *aff'd* 56 M.J. 12 (C.A.A.F. 2001) (defense of accident did not apply where the accused intentionally engaged in an offer type assault with a knife against a drunk and combative victim who was skilled in martial arts training).

3. Lawful manner. R.C.M. 916(f) discussion. The defense of accident is not available when the act which caused the death, injury, or event was a negligent act.

a) *United States v. Sandoval*, 15 C.M.R. 61 (C.M.A. 1954) (pushing door open with a loaded weapon does not constitute due care to allow accused to interpose accident defense to homicide).

b) *United States v. Redding*, 34 C.M.R. 22 (C.M.A. 1963) (in the course of playing "quick draw," accused shot a friend with a pistol. Even though the evidence established that the injury was unintentionally inflicted, no accident instruction was required because of the accused's culpable negligence).

c) *United States v. Moyler*, 47 C.M.R. 82 (A.C.M.R. 1973) (carrying a weapon within the base camp with a magazine inserted, a round chambered, the safety off, and the selector on automatic, constitutes negligence as a matter of law). *See also United States v. Rodriguez*, 8 M.J. 648 (A.F.C.M.R. 1979).

d) *United States v. Leach*, 22 M.J. 738 (N.M.C.M.R. 1986) (swinging a knife upwards in close quarters of victim was negligent, so the accident defense was not available).

e) *United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000) (where the accused admitted that he was negligent by failing to properly secure his infant daughter in her car seat, the military judge did not err by failing to instruct *sua sponte* on the affirmative defense of accident).

f) *United States v. Jenkins*, 59 M.J. 893 (A. Ct. Crim. App. 2004) (holding the military judge erred in refusing to give a requested accident instruction when there was evidence that the accused showed sufficient due care in firing a pistol).

g) *United States v. Ferguson*, 15 M.J. 12 (C.M.A. 1983) (waving a loaded shotgun without placing the safety in operation was a negligent act).

4. Negligent self-defense. Acting in self-defense can be the lawful act in a lawful manner for purposes of the accident defense. Negligent self-defense would deprive an accused of the accident defense. *See United States v. Lett*, 9 M.J. 602 (A.F.C.M.R. 1980) (using switchblade knife as passive deterrent was negligent self-defense); *United States v. Taliau*, 7 M.J. 845 (A.C.M.R. 1979) (unintentional injury to innocent third party excused where accused was engaging in lawful self-defense); *see also United States v. Jenkins*, 59 M.J. 893 (Army Ct. Crim. App. 2004) (accident and defense of another). Instructions: MJ should instruct on both doctrines where death of a victim is unintended and deadly force is not authorized. *See* DA PAM 27-9, Military Judges' Benchbook ¶¶ 5-2, 5-4; *United States v. Jones*, 3 M.J. 279 (C.M.A. 1977); *United States v. Perry*, 36 C.M.R. 377 (C.M.A. 1966).

B. Assault by Culpable Negligence and the Defense of Accident.

1. Unavailability of the defense of accident because of the accused's failure to act with due care does not establish assault under the theory of a culpably negligent act. *See United States v. Tucker*, 38 C.M.R. 349 (C.M.A. 1968).

2. When raised by evidence, "defense" of accident applies to all allegations of assault; if accused is successful in raising reasonable doubt as to any requisite *mens rea* element, result is acquittal. *United States v. Curry*, 38 M.J. 77 (C.M.A. 1993).

III. DEFECTIVE CAUSATION / INTERVENING CAUSE

A. Defined. The accused is not criminally responsible for the loss/damage/injury if his or her act or omission was not a proximate cause.

1. Accused's act may be "proximate" even if it is not the sole or latest cause. *United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977); *United States v. Taylor*, 44 M.J. 254 (C.A.A.F. 1996) (accused entitled to present evidence of negligent medical care given by paramedics to drowning victim even if eventual death did not result solely from such negligent medical care). *But see United States v. Reveles*, 41 M.J. 388 (C.A.A.F. 1995) (possibility that victim's death was caused by negligence of medical personnel subsequent to injury inflicted by accused was no defense because medical negligence did not loom so large that accused's act was not a substantial factor in victim's death).

2. The accused is not responsible unless his or her act plays a "major role" or "material role" in causing the loss/damage/injury. *United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977) (manslaughter conviction affirmed where the accused's act of selling heroin played "major role" in overdose death of buyer); *United States v. Romero*, 1 M.J. 227 (C.M.A. 1975) (manslaughter conviction affirmed where the accused's act of assisting overdose victim in inserting syringe into vein played "material role" in victim's death).

3. In a crime of negligent omission, the accused is not criminally responsible unless his or her omission was a "substantial factor," among multiple causes, in producing the damage. *United States v. Day*, 23 C.M.R. 651 (N.B.R. 1957) (ship commander's failure to keep engines in readiness held proximate cause of ship grounding in gale).

4. *See generally* Benchbook ¶ 5-19.

5. The Supreme Court's decision in *Burrage v. United* States, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014), is potentially at odds with the current military standard of causation. In that case, the Court held that where a federal statute enhanced punishment when death "resulted from" drug distribution, the government was required to prove "but-for" causation – that is, it was error for the trial judge to instruct the jury that the government needed only to prove the defendant's actions contributed to the death. *See also United States v. Bailey*, 75 M.J. 527 (A. Ct. Crim. App. 2015) (finding no instructional error, but nonetheless recommending that the Benchbook be updated in accordance with *Burrage*).

B. Intervening Cause.

1. The accused is not criminally responsible for the crime if:

a) The injury or death resulted from an independent, intervening cause;

b) The accused did not participate in the intervening cause, and

c) The intervening cause was not foreseeable.

2. Intervening cause test from 26 Am. Jur. *Homicide*, § 50, cited with approval in *United States v. Houghten*, 32 C.M.R. 3 (C.M.A. 1962), states that: "If it appears that the act of the accused

was not the proximate cause of the death for which he is being prosecuted, but that another cause intervened, with which he was in no way connected and but for which death would not have occurred, such supervening cause is a good defense to the crime of homicide."

3. Intervening cause must be "new and wholly independent" of the original act of the defendant. *United States v. Eddy*, 26 C.M.R. 718 (A.B.R. 1958) (to constitute an intervening cause to the offense of murder, medical maltreatment must be so grossly erroneous as to constitute a new and independent cause of death); *see also United States v. Gomez*, 15 M.J. 954 (A.C.M.R. 1983).

4. The intervening cause must not be foreseeable. *United States v. Varraso*, 21 M.J. 129 (C.M.A. 1985) (defense not raised where accused helped victim hang herself by tying her hands behind her back and putting her head in the noose; any later acts by the victim to complete the hanging were foreseeable).

5. Intervening cause must intrude between the original wrongful act or omission and the injury and produce a result which would not otherwise have followed. *United States v. King*, 4 M.J. 785 (N.C.M.R. 1977), *aff'd*, 7 M.J. 207 (C.M.A. 1979). Defense offered evidence that the accused drove onto the shoulder of the road to avoid the oncoming victim and that, in attempting to negotiate the sunken shoulder to regain the road, the accused crossed over the center line and struck the victim's vehicle. The court noted that intervening cause would have been present had a third vehicle been involved or had the accused offered evidence that one of the wheels of his vehicle dropped off or that an earthslide forced him into the oncoming lane.

6. *Henderson v. Kibbe*, 431 U.S. 145 (1977) (abandoning intoxicated robbery victim on an abandoned rural road in a snowstorm established culpability for death of victim resulting from his being struck by a speeding truck).

7. *United States v. Riley*, 58 M.J. 305 (C.A.A.F. 2003). Airman gave birth to a baby girl in the latrine of hospital. The baby died from blunt force trauma and left in the trashcan of the latrine. Appellant argued that the doctors' failure to discover her pregnancy on three prior medical visits was an intervening cause in the baby's death. CAAF disagreed, concluding that, at best, the negligence was a contributing cause. The doctors did not intervene between the birth of the baby and the ultimate death. *See also United States v. Cooke*, 18 M.J. 152 (C.M.A. 1984).

IV. DURESS

A. Defined. The defense of duress exists when the accused commits the offense because of a well-grounded apprehension of immediate death or serious bodily harm. R.C.M. 916(h); *see generally United States v. Rankins*, 34 M.J. 326 (C.M.A. 1992); *United States v. Montford*, 13 M.J. 829 (A.C.M.R. 1982).

1. Financial hardship, no matter how extreme, does not amount to duress under military law. *United States v. Alomarestrada*, 39 M.J. 1068 (A.C.M.R. 1994).

2. Duress is never a defense to homicide or to disobedience of valid military orders requiring performance of dangerous military duty. R.C.M. 916(h); *United States v. Talty*, 17 M.J. 1127 (N.M.C.M.R. 1984)(where sailor refused the order of his commander to enter the reactor chamber of a nuclear submarine to perform maintenance, based on his belief that radiation from the reactor could harm him); *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002) (refusal to receive anthrax vaccination).

3. Reasonable opportunity to seek assistance negates a reasonable apprehension that another innocent person would immediately suffer death or serious bodily injury. *United States v. Vasquez*, 48 M.J. 426 (C.A.A.F. 1998).

4. What constitutes reasonable apprehension? Fear sufficient to cause a person of ordinary fortitude and courage to yield. *United States v. Logan*, 47 C.M.R. 1 (C.M.A. 1973) (reasonable fear did not exist where accused was in Korea and threats to harm his family in CONUS were made by local Korean nationals); *United States v. Olson*, 22 C.M.R. 250 (C.M.A. 1957) (prisoner-of-war who wrote anti-American articles while incarcerated was denied the duress instruction at his court-martial for aiding the enemy when the only evidence of coercion brought to bear on him consisted of veiled threats of future possible mistreatment); *United States v. Palus*, 13 M.J. 179 (C.M.A. 1982) (inadequate providency inquiry required reversal where accused in Germany stated he feared for his family's safety when his wife was harassed in Las Vegas about his gambling debts). *See generally United States v. Ellerbee*, 30 M.J. 517 (A.F.C.M.R. 1990) (sufficient to raise duress); *United States v. Riofredo*, 30 M.J. 1251 (N.M.C.M.R. 1990) (evidence does not raise duress); TJAGSA Practice Note, *Duress and Absence Without Authority*, Army Law., Dec. 1990, at 34 (discusses *Riofredo*).

5. The military apparently does not recognize the rule that one who recklessly or intentionally placed himself in a situation in which it was reasonably foreseeable that he or she would be subjected to coercion is not entitled to the defense of duress. *United States v. Jemmings*, 50 C.M.R. 247 (A.C.M.R. 1975), *rev'd*, 1 M.J. 414 (C.M.A. 1976); *see also United States v. Vandemark*, 14 M.J. 690 (N.M.C.M.R. 1982).

6. The defense requires fear of immediate death or great bodily harm and no reasonable opportunity to avoid committing the harm. *See generally United States v. Barnes*, 12 M.J. 779 (A.C.M.R. 1981).

a) The accused must not only fear immediate death or great bodily harm but also have no reasonable opportunity to avoid committing the crime. R.C.M. 916(h). *See United States v. Banks*, 37 M.J. 700 (A.C.M.R. 1993) (defense of duress to charge of AWOL was not raised by accused's testimony that he failed to return from leave on time because of the serious illness of his mother); *United States v. Vasquez*, 48 M.J. 426 (C.A.A.F. 1998) (duress defense not raised in bigamy case where accused married Turkish woman three days after being caught with her and authorities threatened to put them in jail).

b) The old rule. *United States v. Fleming*, 23 C.M.R. 7 (C.M.A. 1957) (even though accused was subjected to great deprivation as POW, actions of captors did not constitute defense against charge of collaboration with the enemy because accused's resistance had not brought him to the "last ditch.").

c) The new rule. The immediacy element of the defense is designed to encourage individuals promptly to report threats rather than breaking the law themselves. *United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A. 1976) (threat to inflict harm the next day held sufficient to activate defense where accused's company commander had previously refused to assist); *United States v. Campfield*, 17 M.J. 715 (N.M.C.M.R. 1983) *rev'd in part on other grounds (multiplicity)*, 20 M.J. 246 (C.M.A. 1985); *United States v. Biscoe*, 47 M.J. 398 (C.A.A.F. 1998) (sexual harassment did not constitute duress when victim conceded during providency that she did not fear for her life or the lives of her children when she went AWOL); *United States v. Vasquez*, 48 M.J. 426 (C.A.A.F. 1998) (in three days before threat to jail him and Turkish woman and his bigamous marriage, the accused could have sought legal assistance, sought assistance from the consulate, or sought help from his chain of command).

7. *United States v. Le*, 59 M.J. 859 (A. Ct. Crim. App. 2004). Appellant pled guilty to desertion. During his providence inquiry, appellant stated his primary reason for leaving was fear that his girlfriend's ex-boyfriend, a purported gang member, would kill or harm him. In response to the military judge's questions, appellant repeatedly said he did not fear "immediate" death or serious

bodily injury, but he did not know when "they are going to come for me." The appeals court held that appellant's guilty plea was improvident because he raised the defense of duress, and the military judge failed to resolve the apparent inconsistency. Appellant's response that he did not fear immediate harm was merely a recitation of a conclusion of law. Duress has long been recognized as a defense to absence offenses; however, it only applies so long as the accused surrenders at the earliest possible opportunity. Appellant's claim of duress could only apply while his reasonably grounded fear still existed. Once away from the source of the fear, the threat lost its coercive force.

8. *United States v. Barnes*, 60 M.J. 950 (N-M. Ct. Crim. App. 2005). Appellant pled guilty to a 52 month absence terminated by apprehension. Appellant claimed that he was beaten and threatened regularly and this contributed to his absence. HELD: The military judge erred when he granted a motion *in limine* to preclude the affirmative defense of duress, after ruling that the offense of desertion and the lesser included offense of unauthorized absence were not complete when appellant left the ship with the intent to remain away.

9. *See generally* Benchbook ¶ 5-5

B. Who Must Be Endangered. Any innocent person. R.C.M. 916(h); *see United States v. Barnes*, 12 M.J. 779 (A.C.M.R. 1981); *United States v. Pinkston*, 39 C.M.R. 261 (C.M.A. 1969) (threat against fiancée and illegitimate child can raise the defense of duress); *United States v. Jemmings*, 1 M.J. 414 (C.M.A. 1976) (threat against accused's children can raise the defense of duress).

C. Evidence. Accused's use of the duress defense creates an opportunity for the prosecution to introduce evidence of his other voluntary crimes in order to rebut the defense. *United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977); *see also* M.R.E. 404(b).

D. The Nexus Requirement.

1. A nexus between the threat and the crime committed must exist. *United States v. Barnes*, 12 M.J. 779 (A.C.M.R. 1981) (duress was not available to an accused who robbed a taxi driver where the threat was only to force payment of a debt; the coercion must be to commit a criminal act); *see also United States v. Banks*, 37 M.J. 700 (A.C.M.R. 1993) (defense of duress to charge of AWOL was not raised by accused's testimony that he failed to return from leave on time because of the serious illness of his mother); *United States v. Biscoe*, 47 M.J. 398 (C.A.A.F. 1998) (allegation of sexual harassment alone, absent threat of death or serious bodily injury, did not raise duress as a defense to AWOL).

2. For requirements on instructions, see *United States v. Rankins*, 32 M.J. 971 (A.C.M.R. 1991), *aff'd*, 34 M.J. 326 (C.M.A. 1992).

E. The Military "Defense" of Necessity.

1. Duress Distinguished. Necessity is a defense of justification; it exculpates a nominally unlawful act to avoid a greater evil. Duress is a defense of excuse; it excuses a threatened or coerced actor. *See generally* Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 Mil. L. Rev. 95 (1988).

2. Duress and necessity are separate affirmative defenses, and the defense of necessity is not recognized in military law. *United States v. Banks*, 37 M.J. 700 (A.C.M.R. 1993). *But see United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999); *United States v. Olinger*, 50 M.J. 365 (1999) (common law defense of necessity, which may be broader than the defense of duress, may apply to the military).

3. Necessity has arguably been recognized and applied de facto to the offenses of AWOL and escape from confinement, but always under the name of duress.

a) *United States v. Blair*, 36 C.M.R. 413 (C.M.A. 1966) (error not to instruct on defense raised by accused's flight from cell to avoid beating by a brig guard).

b) *United States v. Pierce*, 42 C.M.R. 390 (A.C.M.R. 1970) ("duress" to escape from confinement not raised by defense offer of proof regarding stockade conditions, but lacking a showing of imminent danger).

c) *United States v. Guzman*, 3 M.J. 740 (N.C.M.R. 1977) (accused with injury that would have been aggravated by duty assignment had no defense of "duress" to crime of AWOL because performing duty would not have caused *immediate* death or serious bodily injury), *rev'd on other grounds (court-martial improperly convened)*, 4 M.J. 115 (C.M.A. 1977).

d) In an early case in which a sailor went AWOL because of death threats by a shipmate, the Navy Board of Review held that the defense of duress was not raised. Noting that the accused was never in danger of imminent harm and that the threatener had never demanded that the accused leave his ship, the board concluded that the accused had no right to leave a duty station in order to find a place of greater safety. *United States v. Wilson*, 30 C.M.R. 630 (N.B.R. 1960).

e) Escapees are not entitled to duress or necessity instructions unless they offer evidence of bona fide efforts to surrender or return to custody once the coercive force of the alleged duress/necessity had dissipated. *United States v. Bailey*, 444 U.S. 394 (1979); *accord United States v. Clark*, NCM 79-1948 (N.C.M.R. 30 May 1980) (unpub.).

f) *United States v. Roberts*, 14 M.J. 671 (N.M.C.M.R. 1982), *rev'd*, 15 M.J. 106 (C.M.A. 1983) (summary disposition) (duress available to female sailor who went AWOL to avoid shipboard initiation when complaints about harassment went unheeded); *see also United States v. Tulin*, 14 M.J. 695 (N.M.C.M.R. 1982) (informant felt Navy could no longer protect him); *United States v. Hullum*, 15 M.J. 261 (C.M.A. 1983) (racial harassment).

g) Note, Medical Necessity as a Defense to Criminal Liability, 46 Geo. Wash. L. Rev. 273 (1978).

4. Controlled Substances. No implied medical necessity exception to prohibitions established by the Controlled Substances Act. The necessity defense is especially controversial under a constitutional system in which federal crimes are defined by statute rather than common law. The defense of necessity cannot succeed when the legislature itself has made a determination of values. *United States v. Oakland Cannabis Buyer's Cooperative*, 121 S.Ct. 1711 (2001).

5. Duress and Necessity. *United States v. Washington*, 54 M.J. 936 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 129 (C.A.A.F. 2003). The accused conceded that he was not under an unlawful threat; therefore, the defense of duress was not available to him. The court further held that the defense of necessity was not available because the accused's refusal to be inoculated was a direct flouting of military authority and detracted from the ability of his unit to perform its mission. A military accused cannot justify his disobedience of a lawful order by asserting that his health would be jeopardized.

V. INABILITY / IMPOSSIBILITY—OBSTRUCTED COMPLIANCE

A. Defined. Generally this defense pertains only to situations in which the accused has an affirmative duty to act and does not. The defense excuses a failure to act.

B. Physical (Health-Related) Obstructions to Compliance.

1. Physical impossibility. *See generally* Benchbook ¶ 5-9-1.

a) The accused's conduct is excused if physical conditions made it impossible to obey or involuntarily caused the accused to disobey. *See United States v. Williams*, 21 M.J. 360 (C.M.A. 1986).

b) When one's physical condition is such as actually to prevent compliance with orders or to cause the commission of an offense, the question is not one of reasonableness but whether the accused's illness was the proximate cause of the crime. The case is not one of balancing refusal and reason, but one of physical impossibility to maintain the strict standards required under military law. In such a situation, the accused is excused from the offense if its commission was directly caused by the physical condition and the question whether the accused acted reasonably does not enter into the matter. *United States v. Cooley*, 36 C.M.R. 180 (C.M.A. 1966). To apply a reasonableness standard in instructing the court is error. *United States v. Liggon*, 42 C.M.R. 614 (A.C.M.R. 1970).

c) Physical impossibility may exist as a result of illness/injury of the accused. *United States v. Cooley*, 36 C.M.R. 180 (C.M.A. 1966) (the defense applied to a charge of sleeping on guard where the accused suffered from narcolepsy resulting in uncontrollable sleeping spells.) The defense also exists when requirements placed on the accused are physically impossible of performance. *United States v. Borell*, 46 C.M.R. 1108 (A.F.C.M.R. 1973) (discusses the impossibility of obeying an order to report to the orderly room within a very short period of time).

d) *United States v. Roeseler*, 55 M.J. 286 (C.A.A.F. 2001) (because the impossibility of the fictitious victims being murdered was not a defense to either attempt or conspiracy, it was not a defense to the offense of attempted conspiracy).

e) *United States v. Lee*, 16 M.J. 278 (C.M.A. 1983) (collects cases on impossibility and AWOL).

2. Physical Inability. *See generally* Benchbook ¶ 5-9-2.

a) If the accused's noncompliance was reasonable under the circumstances, it is excused.

b) Unlike physical impossibility, inability to act is a matter of degree. To determine whether a soldier's failure to act because of a physical shortcoming constitutes a defense, one must ask whether the non-performance was reasonable in light of the injury, the task imposed, and the pressing nature of circumstances. *United States v. Cooley*, 36 C.M.R. 180 (C.M.A. 1966).

c) *United States v. Amie*, 22 C.M.R. 304 (C.M.A. 1957) (inability raised when accused testified that upon expiration of leave he was ill and, pursuant to medical advice, undertook to recuperate at home, thus resulting in late return to unit).

d) *United States v. Heims*, 12 C.M.R. 174 (C.M.A. 1953) (law officer erred by failing to instruct on the physical inability defense where evidence established that accused was unable to comply with order to tie sandbags because he was suffering from a hand injury).

e) *United States v. King*, 17 C.M.R. 3 (C.M.A. 1954) (inability defense raised where accused refused order to return to his battle position allegedly because he was suffering from frostbitten feet).

f) *United States v. Barnes*, 39 M.J. 230 (C.M.A. 1994) (defense of physical inability to return to unit is available only when accused's failure to return was not the result of his own willful and deliberate conduct; defense was raised by testimony that accused's failure to return was due to his abduction by third parties, the subsequent theft of his car, and his forty mile walk back to his home).

g) If a physical inability occurred through the accused's own fault or design, it is not a defense. *United States v. New*, 50 M.J. 729 (Army Ct. Crim. App. 1999) (military judge did not err by failing to instruct on inability where the accused claimed that after he willfully reported to the company formation in the wrong uniform, he was removed from the formation and unable to comply with the order to be in the follow-on battalion formation in the Macedonia deployment uniform), *aff'd*, 55 M.J. 95 (C.A.A.F. 2001).

h) Relationship to mental responsibility defense. Military judge need not instruct on both lack of mental responsibility and physical inability when physical symptoms are insignificant compared to mental distress and are part and parcel of mental condition. *United States v. Meeks*, 41 M.J. 150 (C.M.A. 1994)

3. Financial and Other Inability.

a) This defense is applicable if the accused can show the following:

(1) An extrinsic factor caused noncompliance;

(2) The accused had no control over the extrinsic factor;

(3) Noncompliance was not due to the fault or design of the accused after he had an obligation to obey; and

(4) The extrinsic factor could not be remedied by the accused's timely, legal efforts.

b) *See generally* Benchbook ¶ 5-10.

c) *United States v. Pinkston*, 21 C.M.R. 22 (C.M.A. 1966) (accused not guilty of disobeying order to procure new uniforms when, through no fault of his own, he was financially incapable of purchasing required uniforms).

d) *United States v. Smith*, 16 M.J. 694 (A.F.C.M.R. 1983). Financial inability is a defense to dishonorable failure to pay a debt. *But cf. United States v. Hilton*, 39 M.J. 97 (C.M.A. 1994) (financial inability not a defense to dishonorable failure to pay just debt where accused's financial straits resulted from her own financial scheming, had debts of only $50 each month and was receiving monthly pay of $724.20).

e) *United States v. Kuhn*, 28 C.M.R. 715 (C.G.C.M.R. 1959) (seaman who was granted leave to answer charges by civil authorities and who was detained in confinement after the expiration of his leave was not AWOL).

4. Physical Impossibility and Inability and Attempts. Generally physical impossibility and inability does not excuse an attempt. *United States v. Powell*, 24 M.J. 603 (A.F.C.M.R. 1987); *see supra*, chapter 1, section I.

VI. ENTRAPMENT – SUBJECTIVE AND DUE PROCESS

A. Subjective Entrapment: The General Rule.

1. In *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982) the court set out the two elements of subjective entrapment.

a) The suggestion to commit the crime originated in the government, *and*

b) The accused had no predisposition to commit the offense.

2. A question of fact for the finder of fact. *United States v. Jursnick*, 24 M.J. 504 (A.F.C.M.R. 1987).

3. *See generally* TJAGSA Practice Note, *The Evolving Entrapment Defense*, Army Law., Jan. 1989, at 40.

B. Predisposition to Commit the Crime.

1. The prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents. *Jacobson v. United States*, 503 U.S. 540 (1992); *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982).

2. An accused who readily accepts the government's first invitation to commit the offense has no defense of entrapment. *United States v. Suter*, 45 C.M.R. 284 (C.M.A. 1972); *United States v. Garcia*, 1 M.J. 26 (C.M.A. 1975); *United States v. Collins*, 17 M.J. 901 (A.C.M.R. 1984); *see United States v. Rollins*, 28 M.J. 803 (A.C.M.R. 1989); *see also United States v. Clark*, 28 M.J. 401 (C.M.A. 1989) (accused's hesitancy did not raise entrapment, as it was a result of fearing apprehension rather than a lack of predisposition); *United States v. St. Mary*, 33 M.J. 836 (A.C.M.R. 1991) (evidence supported finding predisposition where accused procured hashish and sold it to undercover agent within 24 hours of first request.).

3. The government's reasonable suspicion of the accused's criminal activity is immaterial. *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982); *United States v. Gonzalez-Dominicci*, 14 M.J. 426 (C.M.A. 1983); *United States v. Eason*, 21 M.J. 79 (C.M.A. 1985) (holding error to instruct trier of fact that entrapment negated if gov't agents reasonably believed that accused involved in criminal activity).

4. To show predisposition the government may introduce evidence of relevant, uncharged misconduct to establish predisposition. *United States v. Hunter*, 21 M.J. 240 (C.M.A. 1986); *See* M.R.E. 405(b).

5. Some authority suggests that reputation and hearsay evidence may be admissible to show predisposition. *See, e.g.*, *United States v. Rocha*, 401 F.2d 529 (5th Cir. 1968); *United States v. Simon*, 488 F.2d 133 (5th Cir. 1973); *United States v. Woolfs*, 594 F.2d 77 (5th Cir. 1979). *But see United States v. Cunningham*, 529 F.2d 884 (6th Cir. 1976); *United States v. Whiting*, 295 F.2d 512 (1st Cir. 1961); *United States v. McClain*, 531 F.2d 431 (9th Cir. 1976). *See generally* Annot., 61 A.L.R. 3d 293, 314-18 (1975).

6. In a prosecution for possession of a large quantity of hashish for the purpose of trafficking, accused's prior possession and use of small quantities of hashish was held not to constitute "similar criminal conduct," and did not extinguish the defense of entrapment as to the large quantity. The accused would be found guilty, however, of possessing the lesser amount. *United States v. Fredrichs*, 49 C.M.R. 765 (A.C.M.R. 1974); *see also United States v. Jacobs*, 14 M.J. 999 (A.C.M.R. 1982). Prior possession or use of drugs does not necessarily establish a predisposition to sell or distribute drugs. *United States v. Venus*, 15 M.J. 1095 (A.C.M.R. 1983); *United States v. Bailey*, 18 M.J. 749 (A.C.M.R. 1984), *aff'd*, 21 M.J. 244 (C.M.A. 1986).

7. Continuing Defense. A valid defense of entrapment to commit the first of a series of crimes is presumed to carry over into the later crimes. *United States v. Skrzek*, 47 C.M.R. 314 (A.C.M.R. 1973). Whether the presumption carries over to different kinds of drugs is a question of fact. *United States v. Jacobs*, 14 M.J. 999 (A.C.M.R. 1982). The taint can extend to a different type of crime as long as the acts come from the same inducement. *United States v. Bailey*, 18 M.J. 749 (A.C.M.R. 1984) (accused entrapped to distribute drugs could raise defense to larceny by trick arising from later distribution of counterfeit drugs), *aff'd*, 21 M.J. 244 (C.M.A. 1986).

8. Profit motive does not necessarily negate an entrapment defense. *United States v. Eckhoff*, 27 M.J. 142 (C.M.A. 1988); *United States v. Meyers*, 21 M.J. 1007 (A.C.M.R. 1986); *United States*

v. Cortes, 29 M.J. 946 (A.C.M.R. 1990); *see* TJAGSA Practice Note, *Multiple Requests, Profit Motive, and Entrapment*, Army Law., Jun. 1990, at 48 (discusses *Cortes*).

9. Predisposition is a question of fact. A military judge may not find predisposition as a matter of law and refuse to instruct on entrapment. *United States v. Johnson*, 17 M.J. 1056 (A.F.C.M.R. 1983).

C. Government Conduct.

1. *United States v. Williams*, 61 M.J. 584 (N-M. Ct. Crim. App. 2005) (wanting to get to know two attractive females (undercover government agents) is insufficient to raise entrapment and reject an otherwise provident plea).

2. Profit motive does not necessarily negate entrapment. *Eckhoff*, *Cortes* and *Meyers*, all *supra*.

3. Multiple requests by a government agent alone may not raise entrapment. *United States v. Sermons*, 14 M.J. 350 (C.M.A. 1982).

4. The latitude given the government in "inducing" the criminal act is considerably greater in drug cases than it would be in other kinds of crimes. *United States v. Vanzandt*, 14 M.J. 332, 344 (C.M.A. 1982); *United States v. Cortes*, 29 M.J. 946 (A.C.M.R. 1990). *But cf. United States v. Lemaster*, 40 M.J. 178 (C.M.A. 1994)

D. Not Confession and Avoidance. In order for the defense of entrapment to be raised and established, the accused need not admit the crime; indeed, he may deny it. *United States v. Garcia*, 1 M.J. 26 (C.M.A. 1975); *United States v. Williams*, 4 M.J. 507, 509 n. 1 (A.C.M.R. 1977).

E. Due Process Entrapment. *See generally* Benchbook ¶ 5-6, note 4.

1. The due process defense is recognized under military law. *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982) (but outrageous government conduct in drug cases will be especially difficult to prove given the greater latitude given government agents in drug cases); *United States v. Simmons*, 14 M.J. 624 (A.F.C.M.R. 1982); *United States v. Harms*, 14 M.J. 677 (A.F.C.M.R. 1982); *United States v. Lemaster*, 40 M.J. 178 (C.M.A. 1994) (targeting an emotionally unstable female suspect, sexually and emotionally exploiting her, and planting drugs upon her in a reverse sting operation violates the fundamental norms of military due process and is the functional equivalent of entrapment), *amended by*, 42 M.J. 91 (C.M.A. 1995).

2. The due process defense is a question of law for the military judge. *United States v. Vanzandt*, 14 M.J. 332, 343 n. 11 (C.M.A. 1982).

3. Reverse sting operation does not deprive accused of due process. *United States v. Frazier*, 30 M.J. 1231 (A.C.M.R. 1990).

4. Police did not violate due process in soliciting the accused's involvement in drug transactions where they had no knowledge of his enrollment in a drug rehabilitation program. *United States v. Harris*, 41 M.J. 433 (C.A.A.F. 1995); *United States v. Bell*, 38 M.J. 358 (C.M.A. 1993); *United States. v. Cooper*, 33 M.J. 356 (C.M.A. 1991), *cert. denied*, 507 U.S. 985 (1993).

5. *United States v. St. Mary*, 33 M.J. 836 (A.C.M.R. 1991) (government conduct did not violate due process where accused provided drugs to undercover female agent in hopes of having a future sexual relationship as the agent did not offer dating or sexual favors as an inducement); *accord United States v. Fegurgur*, 43 M.J. 871 (Army Ct. Crim. App. 1996) (undercover CID agent who repeatedly asked accused to obtain marijuana for her, knowing that he wished to date her, was not so outrageous as to bar prosecution of accused under either due process clause or fundamental norms of military due process).

6. *United States v. Bell*, 38 M.J. 358 (C.M.A. 1993) (sufficient evidence existed to show accused's predisposition to commit two separate offenses of distribution of cocaine; however, due process entrapment defense was available for drug use offenses where government improperly induced accused, a recovering cocaine addict enrolled in Army rehabilitation program, into using cocaine).

7. Court members should be instructed only on subjective entrapment, and not the due process defense. *United States v. Dayton*, 29 M.J. 6 (C.M.A. 1989).

F. Entrapment does not apply if carried out by foreign law enforcement activities. *See United States v. Perl*, 584 F.2d 1316, 1321 n. 3 (4th Cir. 1978).

VII. SELF-DEFENSE

A. "Preventive Self-Defense" in which no injury is inflicted. If no battery is committed, but the accused's acts constitute assault by offer, the accused may threaten the victim with any degree of force, provided only that the accused honestly and reasonably believes that the victim is about to commit a battery upon him. R.C.M. 916(e)(2). *United States v. Acosta-Vargas*, 32 C.M.R. 388 (C.M.A. 1962); *United States v. Johnson*, 25 C.M.R. 554 A.C.M.R. 1958); *United States v. Lett*, 9 M.J. 602 (A.F.C.M.R. 1980). *See generally* Benchbook ¶ 5-2-5.

B. Crimes in which an injury is inflicted upon the victim. Two separate standards of self-defense exist depending on the nature of the injury inflicted on the victim. *United States v. Thomas*, 11 M.J. 315 (C.M.A. 1981); *United States v. Sawyer*, 4 M.J. 64 (C.M.A. 1977); *United States v. Jackson*, 36 C.M.R. 101 (C.M.A. 1966).

1. R.C.M. 916(e)(1). Standard applied when homicide or aggravated assault is charged. The accused may justifiably inflict death or grievous bodily harm upon another if:

a) He apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted on him; and

b) He believed that the force he used was necessary to prevent death or grievous bodily harm.

c) *See United States v. Clayborne*, 7 M.J. 528 (A.C.M.R. 1979) (court set aside a conviction for unpremeditated murder because it "was not convinced beyond a reasonable doubt that the accused did not act in self-defense" in using a knife against a victim who attacked the accused with only his hands when the accused knew 1) the victim was an experienced boxer, 2) with a reputation for fighting anyone, 3) who had defeated three men in a street fight, and 4) had choked and beaten a sleeping soldier once before). *But see United States v. Ratliff*, 49 C.M.R. 775 (A.C.M.R. 1975) (reaching opposite result in a knife scenario).

2. R.C.M. 916(e)(3). Standard applied when simple assault or battery is charged. The accused may justifiably inflict injury short of death or grievous bodily harm if:

a) He apprehended, upon reasonable grounds, that bodily harm was about to be inflicted on him, and

b) He believed that the force he used was necessary to avoid that harm, but that the force actually used was not reasonably likely to result in death or grievous bodily harm.

c) *See United States v. Jones*, 3 M.J. 279 (C.M.A. 1977) (one may respond to a simple fistic assault with similar force); *United States v. Perry*, 36 C.M.R. 377 (C.M.A. 1966).

3. Loss of Self-Defense by Aggressor / Mutual Combatant. A provoker, aggressor, or one who voluntarily engages in a mutual affray is not entitled to act in self defense unless he first

withdraws in good faith and indicates his desire for peace. R.C.M. 916(e)(4). *United States v. Marbury*, 50 M.J. 526 (Army Ct. Crim. App. 1999) *aff'd* 56 M.J. 12 (C.A.A.F. 2001) (after the victim struck the accused in the face, the accused retreated from her room, unsuccessfully sought assistance from fellow NCOs, grabbed a knife, reentered her room, and then started a confrontation by threatening the victim with the knife). *United States v. Brown*, 33 C.M.R. 17 (C.M.A. 1963); *United States v. O'Neal*, 36 C.M.R. 189 (C.M.A. 1966); *United States v. Green*, 33 C.M.R. 77 (C.M.A. 1963).

4. Retreat / Withdrawal. The accused is not required to retreat when he is at a place where he has a right to be. The presence or absence of an opportunity to withdraw safely, however, may be a factor in deciding whether the accused had a reasonable belief that bodily harm was about to be inflicted upon him. R.C.M. 916(e)(4) discussion; *United States v. Lincoln*, 38 C.M.R. 128 (C.M.A. 1967); *United States v. Smith*, 33 C.M.R. 3 (C.M.A. 1963); *United States v. Adams*, 18 C.M.R. 187 (C.M.A. 1955); *United States v. Jenkins*, 59 M.J. 893 (A. Ct. Crim. App. 2004) (holding when an aggressor, provoker, or mutual combatant who becomes unconscious and ceases resistance effectively withdraws, entitling another to exercise self-defense on his behalf).

5. Escalation. An accused who wrongfully engages in a simple assault and battery may have a right to use deadly force if the victim first uses deadly force upon the accused. *United States v. Cardwell*, 15 M.J. 124 (C.M.A. 1983); *United States v. Dearing*, 63 M.J. 478 (2006) (citing *Cardwell*); *United States v. Lewis*, 65 M.J. 85 (2007); *see United States v. Winston*, 27 M.J. 618 (A.C.M.R. 1988) (self-defense not raised where the accused aggressively participated in an escalating mutual affray);

6. Termination of Self-Defense. The right to self-defense ceases when the threat is removed. *United States v. Richey*, 20 M.J. 251 (C.M.A. 1985) (ejecting a trespasser).

7. Voluntary Intoxication. The accused's voluntary intoxication cannot be considered in determining accused's perception of the potential threat which led him to believe that a battery was about to be inflicted, as this is measured objectively. *United States v. Judkins*, 34 C.M.R. 232 (C.M.A. 1964).

8. Requirement to Raise. Self-defense need not be raised by the accused's testimony, even if he testifies. *United States v. Rose*, 28 M.J. 132 (C.M.A. 1989); *see* TJAGSA Practice Note, *Self-Defense Need Not Be Raised by the Accused's Testimony*, Army Law., Aug. 1989, at 40 (discusses *Rose*). *See United States v. Reid*, 32 M.J. 146 (C.M.A. 1991).

9. The "Egg-Shell" Victim. R.C.M. 916(e)(3) discussion (MCM 2016 ed.). If an accused is lawfully acting in self-defense and using less force than is likely to cause death or grievous bodily harm, the death of the victim does not deprive the accused of the defense, if:

a) The accused's use of force was not disproportionate, and

b) The death was unintended, and

c) The death was not a reasonably foreseeable consequence. *United States v. Jones*, 3 M.J. 279 (C.M.A. 1977); *United States v. Perry*, 36 C.M.R. 377 (C.M.A. 1966).

d) *See generally* Benchbook ¶ 5-2-4.

VIII. DEFENSE OF ANOTHER

A. Traditional View Adopted by Military. R.C.M. 916(e)(5). One who acts in defense of another has no greater right than the party defended. *United States v. Regalado*, 33 C.M.R. 12 (C.M.A. 1963); *United States v. Hernandez*, 19 C.M.R. 822 (A.F.B.R. 1955); *United States v. Cole*, 54 M.J. 572 (A. Ct. Crim. App. 2000) (where the victim did not attack or make an offer of violence to the

accused's wife, he was not entitled to use deadly force in defense of his family), *aff'd*, 55 M.J. 466 (C.A.A.F. 2001). *See generally* Benchbook ¶ 5-3.

B. "Enlightened View" Rejected. Accused who honestly and reasonably believes he is justified in defending another does not escape criminal liability if the "defended party" is not entitled to the defense of self-defense. *United States v. Lanier*, 50 M.J. 772 (A. Ct. Crim. App. 1999), *aff'd* 53 M.J. 220 (C.A.A.F. 2000) (accused may not use more force than the person defended was lawfully entitled to use under the circumstances. This "alter ego" status imposes significant limitations on the availability and application of the defense of defense of another); *United States v. Tanksley*, 7 M.J. 573 (A.C.M.R. 1979), *aff'd*, 10 M.J. 180 (C.M.A. 1980); *United States v. Styron*, 21 C.M.R. 579 (C.G.B.R. 1956). *But see* LaFave & Scott, Criminal Law § 54 at 397-399 (1972). *See generally* Byler, *Defense of Another, Guilt Without Fault?*, Army Law., June 1980.

C. Accident & Defense of Another. *United States v. Jenkins*, 59 M.J. 893 (A. Ct. Crim. App. 2004). Appellant and friends traveled to another unit's barracks area to solve a dispute with another group. Appellant carried with him a loaded handgun, which he gave to a friend to hold. A fight erupted between two members of the factions. A member of the opposing faction had beaten appellant's colleague unconscious and continued to beat him. Appellant retrieved his pistol and fired three shots; the third shot struck another soldier and caused the loss of his kidney. At trial, defense counsel requested instructions on accident, defense of another, and withdrawal as reviving the right to self-defense. The Military Judge (MJ) instructed the panel only on defense of another, and the panel convicted appellant of conspiracy to assault and intentional infliction of grievous bodily harm. The appellate court held that the MJ erred in refusing to give the requested instructions. When appellant's friend became unconscious during the fight, he effectively withdrew from the mutual affray, giving appellant the right to defend him. Further, there was evidence in the record that appellant showed due care in firing his pistol to prevent further injury to his friend. Finally, the panel's finding of guilt for intentional assault did not render the errors harmless.

IX. INTOXICATION

A. Voluntary Intoxication. R.C.M. 916(l)(2). *See generally* Milhizer, *Voluntary Intoxication as a Criminal Defense Under Military Law*, 127 Mil. L. Rev. 131 (1990).

1. Voluntary intoxication is a legitimate defense against an element of premeditation, specific intent, knowledge, or willfulness in any crime---except the element of specific intent in the crime of unpremeditated murder. R.C.M. 916(l)(2); MCM, pt. IV, ¶ 43c(2)(c); *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993) (voluntary intoxication no defense to unpremeditated murder; re-affirming the rule in face of lower courts calling the rule into question); *United States v. Ferguson*, 38 C.M.R. 239 (C.M.A. 1968). To constitute a valid defense, voluntary intoxication need not deprive the accused of his mental capacities nor substantially deprive him of his mental capacities. Rather, it need only be of such a degree as to create a reasonable doubt that he premeditated or entertained the required intent, knowledge, or willfulness. *See generally United States v. Gerston*, 15 M.J. 990 (N.M.C.M.R. 1983); *United States v. Ledbetter*, 32 M.J. 272 (C.M.A. 1991); *United States v. Cameron*, 37 M.J. 1042 (A.C.M.R. 1993) (defense to willful disobedience to a lawful order).

2. Voluntary intoxication is not a defense to crimes involving only a general intent. *United States v. Brosius*, 37 M.J. 652 (A.C.M.R. 1993) (voluntary intoxication no defense to general intent crime of communicating a threat), *aff'd*, 39 M.J. 378 (C.M.A. 1994); *United States v. Reitz*, 47 C.M.R. 608 (N.C.M.R. 1973) (voluntary intoxication no defense to drug sale, transfer, possession).

3. Where there is some evidence of excessive drinking and impairment of accused's faculties, military judge must *sua sponte* instruct on the defense of voluntary intoxication. *United States v. Yandle*, 34 M.J. 890 (N.M.C.M.R. 1992). If no evidence of excessive drinking or impairment, military judge is not required to instruct. *United States v. Watford*, 32 M.J. 176 (C.M.A. 1991).

4. Limitations on voluntary intoxication defense are constitutional. *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996) (Montana's statutory ban on voluntary intoxication evidence in general intent crimes is consistent with state interests in deterring crime, holding one responsible for consequences of his actions, and excluding misleading evidence, and does not violate the due process clause).

5. *See generally* Benchbook ¶ 5-12 and 5-2-6, Note 4.

B. Involuntary Intoxication.

1. In issue when:

a) Intoxicant is introduced into accused's body either without her knowledge or by force; or

b) Accused is "pathologically intoxicated," i.e., grossly intoxicated in light of amount of intoxicant consumed and accused not aware of susceptibility; or

c) Long-term use of alcohol causes severe mental disease.

2. An accused is involuntarily intoxicated when he exercises no independent judgment in taking the intoxicant--as, for example, when he has been made drunk by fraudulent contrivances of others, by accident, or by error of his physician. If the accused's intoxication was involuntary and his capacity for control over his conduct was affected thereby and resulted in the criminal act charged, he should be acquitted. *United States v. Travels*, 44 M.J. 654 (A.F. Ct. Crim. App. 1996) (involuntary intoxication exists when accused is intoxicated through force, fraud, or trickery or actual ignorance of intoxicating nature of the substance consumed); *but see United States v. Ward*, 14 M.J. 950 (A.C.M.R. 1982) (holding intoxication not "involuntary" where accused knew substance was marijuana but was unaware it was laced with PCP).

3. An accused who voluntarily takes the first drink, knowing from past experience that the natural and reasonably foreseeable consequences of that act will be a violent intoxicating reaction cannot claim that his condition was "involuntary" so as to interpose an affirmative defense. *United States v. Schumacher*, 11 M.J. 612 (A.C.M.R. 1981). *See generally* Kaczynski, "*I Did What?" The Defense of Involuntary Intoxication*, Army Law., Apr. 1983, at 1.

4. Compulsion to drink that merely results from alcoholism that has not risen to the level of a severe mental disease or defect is considered "voluntary intoxication" and will not generally excuse crimes committed while intoxicated.

5. Involuntary intoxication is not available if accused is aware of his reduced tolerance for alcohol (such as when also ingesting other drugs) but chooses to consume it anyway. *United States v. Hensler*, 44 M.J. 184 (C.A.A.F. 1996).

6. To the extent that military case law once equated involuntary intoxication to legal insanity, that case law is overturned. *United States v. McDonald*, 73 M.J. 426 (C.A.A.F. 2014). While it is true that the involuntary intoxication must have been such that it rendered the accused unable to appreciate the nature and quality or wrongfulness of his actions, the underlying cause of that inability is different. That is, an accused who raises the defense of involuntary intoxication has no burden to prove that he had an underlying mental disease or defect. Rather, the burden is on the prosecution to prove that the accused's intoxication was not involuntarily. *Id.*

X. MISTAKEN BELIEF OR IGNORANCE

A. Degrees of Mistake or Ignorance of Fact.

1. An honest (subjective) mistake of fact or ignorance is generally a defense to crimes requiring premeditation, specific intent, knowledge, or willfulness. For example, an accused's honest belief that he had permission to take certain property would excuse the crime of larceny or wrongful appropriation. R.C.M. 916(j). *United States v. McDonald* 57 M.J. 18 (2002) (accused entitled to mistake of fact instruction as to buying stolen retail merchandise); *United States v. Binegar*, 55 M.J. 1 (C.A.A.F. 2001) (honest mistake of fact a defense to larceny); *United States v. Turner*, 27 M.J. 217 (C.M.A. 1988) (honest mistake a defense to larceny); *see* TJAGSA Practice Note, *Recent Applications of the Mistake of Fact Defense*, Army Law., Feb. 1989, at 66 (discusses *Turner*); *United States v. Hill*, 32 C.M.R. 158 (C.M.A. 1962) (honest belief owner gave permission to use car a good defense to wrongful appropriation); *see also United States v. Jett*, 14 M.J. 941 (A.C.M.R. 1982). Similarly, an honest mistake can be a defense to presenting a false claim, *United States v. Graves*, 23 M.J. 374 (C.M.A. 1987); *United States v. Ward*, 16 M.J. 341 (C.M.A. 1983), and false official statement. *United States v. Oglivie*, 29 M.J. 1069 (A.C.M.R. 1990). *See generally* Benchbook ¶ 5-11-1.

a) *United States v. Gillenwater*, 43 M.J. 10 (C.A.A.F. 1995) (mistake of fact defense raised in prosecution for wrongful appropriation of government tools where accused's former supervisor testified that he gave accused permission to take things home for government use & accused worked on several government projects at home); *United States v. Gunter*, 42 M.J. 292 (C.A.A.F. 1995) (discussing possible defenses of self-help and honest claim of right).

b) *United States v. McDivitt*, 41 M.J. 442 (C.A.A.F. 1995) (mistake of fact defense is not raised by evidence where accused signed official documents falsely asserting that he had supported dependents for prior two years in order to obtain higher allowances after being advised by finance clerk that he was entitled to allowances at higher rate until divorced).

2. An honest and reasonable (objective) mistake. A defense to general intent crimes—crimes lacking an element of premeditation, specific intent, knowledge or willfulness. R.C.M. 916(j). *United States v. Brown*, 22 M.J. 448 (C.M.A. 1986); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984) (rape); *United States v. Davis*, 27 M.J. 543 (A.C.M.R. 1988) (rape); *United States v. Graham*, 3 M.J. 962 (N.C.M.R. 1977) (accused's honest and reasonable mistaken belief he had permission to be gone held a legitimate defense to AWOL); *United States v. Jenkins*, 47 C.M.R. 120 (C.M.A. 1973) (accused's honest and reasonable belief he had a "permanent profile" held a legitimate defense to disobedience of a general regulation requiring shaving); *United States v. Oglivie*, 29 M.J. 1069 (A.C.M.R. 1990) (an honest and reasonable mistake is required for a defense to the general intent crime of bigamy); *United States v. Barnard*, 32 M.J. 530 (A.F.C.M.R. 1990) (an honest and reasonable mistake is required for a defense to general intent crime of dishonorable failure to maintain sufficient funds); *United States v. McMonagle*, 38 M.J. 53 (C.M.A. 1993) (mistake of fact can rebut state of mind required for depraved-heart murder and can negate element of unlawfulness and thus, killing was justified if accused honestly and reasonably thought that he was shooting at a combatant); *United States v. New*, 50 M.J. 729 (A. Ct. Crim. App. 1999), *aff'd* 55 M.J. 97 (C.A.A.F. 2001) (a mistake about the lawfulness of an order to wear UN accouterments must be both honest and reasonable); *See generally* Benchbook ¶ 5-11-2.

3. Honest mistake. Negates an element of premeditation, specific intent, willfulness, or actual knowledge. *United States v. Binegar*, 55 M.J. 1 (C.A.A.F. 2001) (larceny).

4. Certain offenses such as bad checks and dishonorable failure to pay debts require a special degree of prudence and the mistake and ignorance standards must be adjusted accordingly. For

example, in UCMJ art. 134 check offenses the accused's ignorance or mistake to be exonerating must not have been the result of bad faith or gross indifference. *United States v. Barnard*, 32 M.J. 530 (A.F.C.M.R. 1990). *See generally* Benchbook ¶ 5-11-3.

5. Some offenses, like carnal knowledge, have strict liability elements. *See* Milhizer, *Mistake of Fact and Carnal Knowledge*, Army Law., Oct. 1990, at 4. Deliberate ignorance can create criminal liability. *United States v. Dougal*, 32 M.J. 863 (N.M.C.M.R. 1991).

B. Result of Mistaken Belief. To be a successful defense, the mistaken belief must be one which would, if true, exonerate the accused. *United States v. Vega*, 29 M.J. 892 (A.F.C.M.R. 1989) (no defense where the accused believed he possessed marijuana rather than cocaine); *United States v. Fell*, 33 M.J. 628 (A.C.M.R. 1991) (against a charge of robbery, the accused's honest belief that the money was his is a legitimate defense to robbery of the money, though not a shield against conviction for assault on the victim); *United States v. Anderson*, 46 C.M.R. 1073 (A.F.C.M.R. 1973) (accused charged with LSD offense has no defense because he believed the substance to be mescaline); *United States v. Calley*, 46 C.M.R. 1131, 1179 (A.C.M.R. 1973) (no defense to homicide that accused believed victims were detained PWs rather than noncombatants); *United States v. Jefferson*, 13 M.J. 779 (A.C.M.R. 1982) (mistake not exonerating where accused accepted heroin thinking it was hashish); *United States v. Myles*, 31 M.J. 7 (C.M.A. 1990) (mistake as to type of controlled substance is not exculpatory); *see* TJAGSA Practice Note, *Mistake of Drug is Not Exculpatory*, Army Law., Dec. 1990, at 36 (discusses *Myles*). *See generally United States v. Mance*, 26 M.J. 244 (C.M.A. 1988); *United States v. Heitkamp*, 65 M.J. 861 (A. Ct. Crim. App. 2007).

C. Mistake or Ignorance and Drug Offenses. *See supra* ¶ IX.K.2, ch. 4.

D. Mistake of Fact and Sex Offenses.

1. Consent and Mistake of Fact as to Consent (for offenses involving the middle Article 120, effective 1 October 2007, and new Article 120, effective 28 June 2012). Article 120 provides that consent and mistake of fact as to consent are affirmative defenses for Rape, Aggravated Sexual Assault, Aggravated Sexual Contact, and Abusive Sexual Contact. *See* UCMJ art. 120(r) & (t)(14). This is an unconstitutional burden shift. *See supra* Ch.5, ¶ XXXVIII.C.

2. Mistake of Fact as to Consent. An honest and reasonable mistake of fact as to consent is a defense in rape cases. *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988) (mistake of fact not available in conspiracy to commit rape absent evidence that all co-conspirators had a mistaken belief that the victim consented); *United States v. Baran*, 22 M.J. 265 (C.M.A. 1986); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984); *United States v. Davis*, 27 M.J. 543 (A.C.M.R. 1988); *see* TJAGSA Practice Note, *Recent Applications of the Mistake of Fact Defense*, Army Law., Feb. 1989, at 66 (discusses *Davis*); *see also United States v. Daniels*, 28 M.J. 743 (A.F.C.M.R. 1989) (discusses sufficiency of evidence to raise the defense).

a) Mistake of fact as to victim's consent to sexual intercourse cannot be predicated upon negligence of accused; mistake must be honest and reasonable to negate a general intent or knowledge. *United States v. True*, 41 M.J. 424 (1995).

b) Mistake of fact as to whether the victim consented to intercourse is a different defense than actual consent by the victim. When the evidence raises only an issue as to actual consent, the military judge has no sua sponte duty to instruct on mistake. *United States v. Willis*, 41 M.J. 435 (1995). *Cf. United States v. Brown*, 43 M.J. 187 (1995) (observing "[i]n every case where consent is a defense to a charge of rape, the military judge would be well advised to either give the mistake instruction or discuss on the record with counsel the applicability of the defense").

c) Applications.

(1) *United States v. Hibbard*, 58 M.J. 71 (C.A.A.F. 2003). Evidence cited by the defense in light of the totality of the circumstances, including the manner that the issue was litigated at trial, was insufficient to reasonably raise the issue of whether the accused had a reasonable belief that the victim consented to sexual intercourse. *See also United States v. Hines*, 75 M.J. 734 (A. Ct. Crim. App. 2016) (where victim testified she awoke to the accused, with whom she had no romantic relationship, touching her buttocks and Hines did not testify, mistake of fact was not raised by the evidence; to put the defense of mistake of fact at issue, there must be some evidence of honest belief the victim consented to the touching).

(2) *United States v. Teague*, 75 M.J. 636 (A. Ct. Crim. App. 2016), *review denied*, (C.A.A.F. June 16, 2016). Article 120(b)(3) requires proof beyond a reasonable doubt that accused had actual knowledge that victim could not consent or reasonably should have known that victim could not consent. Thus, mistake of fact is not a "defense" to sexual assault charged under this theory of liability; it is an attack on an element. The government is required to disprove, as a matter of course, a mistake of fact in every such case.

(3) *United States v. Yarborough*, 39 M.J. 563 (A.C.M.R. 1994). Mistake of fact as to consent in a prosecution for rape is not reasonable where the 13-year-old victim is a virgin who was too intoxicated to consent or resist even if she was aware of the intercourse, notwithstanding her response of "yeah" when the accused asked her if she "wanted to do it."

(4) *United States v. Valentin-Nieves*, 57 M.J. 691 (N-M. Ct. Crim. App. 2002). Victim's alleged statement that she had told another witness she would not mind having sex with accused did not establish mistake of fact where, a few days later, accused had taken the very intoxicated victim into a bathroom and had sexual intercourse with victim, who at the time was "too weak to hold [her]self up let alone hold someone else away."

(5) *United States v. Barboza*, 39 M.J. 596 (A.C.M.R. 1994). There could be no honest or reasonable mistake of fact as to consent to intercourse and sodomy where the accused and victim had only slight acquaintance as classmates, no dating relationship, victim stated she did not want sex and asked accused to leave her room, accused forced her head to his penis to accomplish fellatio and threatened to kill her if she told anyone about the incident.

(6) *United States v. Campbell*, 55 M.J. 591 (C.G. Ct. Crim. App. 2001). The evidence established the affirmative defense of mistake of fact as to consent. The victim's failure to take action to stop the accused from touching her ribs and across her front after consenting to his giving her a back rub was sufficient to confirm in the mind of a reasonable person that she was consenting to his actions. His departure from the back rub to front side caress ultimately led to the touching of her breasts.

(7) *United States v. Parker*, 54 M.J. 700 (A. Ct. Crim. App. 2000), *rev'd on other grounds*, 59 M.J. 195 (C.A.A.F. 2003). The government did not disprove accused's defense that he mistakenly believed that the victim consented to the intercourse and sodomy. The victim admitted that she and the accused engaged in a consensual relationship for several months before the first alleged rape, and she sent mixed signals to the accused about their relationship. The relationship included consensual sexual acts, which were similar to the acts she claimed were nonconsensual.

(8) *United States v. Black*, 42 M.J. 505 (A. Ct. Crim. App. 1995) (evidence that victim of sex offenses may have engaged in oral sex with another individual prior to assault by

accused was not relevant to show that accused was mistaken as to consent of victim to engage in such acts with accused). *Cf. United States v. Greaves*, 40 M.J. 432 (C.M.A. 1994)(excluding evidence of accused's projected beliefs of victim's sexual relations with others); *United States v. Traylor*, 40 M.J. 248 (C.M.A. 1994) (holding mistake of fact as to consent to intercourse not reasonable when based upon belief by accused that victim "would consent to intercourse with anyone").

(9) *United States v. Peterson*, 47 M.J. 231 (C.A.A.F. 1997) (holding consent element is a general intent element, even though indecent assault requires specific intent to gratify lust); *United States v. Johnson*, 25 M.J. 691 (A.C.M.R. 1987).

(10) Even though indecent assault is a specific intent crime, a mistake of fact as to the victim's consent must be both honest and reasonable as the defense goes to the *victim's* intent and not the accused's intent. *United States v. Johnson*, 25 M.J. 691 (A.C.M.R. 1987); *United States v. McFarlin*, 19 M.J. 790 (A.C.M.R. 1985). Compare this with assault with intent to commit rape, a specific intent crime, where a mistake of fact as to victim's consent need only be honest. *United States v. Langley*, 33 M.J. 278 (C.M.A. 1991); s*ee also United States v. Apilado*, 34 M.J. 773 (A.C.M.R. 1992).

(11) *United States v. Gaines*, 61 M.J. 689 (N-M. Ct. Crim. App. 2005). Appellant went into a dark room and touched the legs and pelvic area of the woman sleeping there, believing she was someone else. HELD: Mistake of fact was raised in this case, especially as to the issue of consent. Had the victim consented to the touching, there would be no assault. If appellant had an honest and reasonable belief that the victim consented to the touching, he would have a complete defense.

3. Mistake of Fact as to Age, Indecent Acts. *United States v. Zachary*, 63 M.J. 438 (C.A.A.F. 2006) (holding that it is a defense to indecent acts with a child that, at the time of the act, the accused held an honest and reasonable belief that the person with whom the accused committed the indecent act was at least sixteen years of age). *United States v. Strode*, 43 M.J. 29 (1995) (mistake of fact may be a defense if the accused had an honest and reasonable belief as to the age of the victim and the acts would otherwise be lawful were the victim 16 or older).

4. Mistake of Fact as to Age, Carnal Knowledge. The accused carries the burden to prove mistake of fact as to age by a preponderance of the evidence in a carnal knowledge case. R.C.M. 916(b).

5. Mistake of Fact as to Age, Sodomy. "There is no mistake of fact defense available with regard to the child's age in the Article 125, UCMJ, offense of sodomy with a child under the age of sixteen." *United States v. Wilson*, 66 M.J. 39 (C.A.A.F. 2008). *See also United States v. Gross*, 73 M.J. 864 (A.Ct.Crim.App. 2014).

6. Accused not required to take stand to raise defense of mistake of fact. *United States v. Sellers*, 33 M.J. 364 (C.M.A. 1991).

E. Mistake of Law.

1. Ordinarily, mistake of law is not a defense. R.C.M. 916(l). *United States v. Bishop*, 2 M.J. 741 (A.F.C.M.R. 1977) (accused's belief that under state law he could carry a concealed weapon not a defense to carrying a concealed weapon on base in violation of Article 134, UCMJ); *United States v. Ivey*, 53 M.J. 685 (A. Ct. Crim. App. 2000) (accused argued that he did not know what was meant by "actual buyer" on ATF Form 4473 when purchasing firearms for friends), *aff'd*, 55 M.J. 251 (C.A.A.F. 2001); *United States v. Heitkamp*, 65 M.J. 861 (A. Ct. Crim. App. 2007) (accused believed it was lawful to possess methandienone; "[I]f an accused knows the identity of

a substance that he is possessing or using but does not know that such possession or use is illegal, his ignorance is immaterial . . . because ignorance of the law is no defense.”).

2. Under some circumstances, however, a mistake of law may negate a criminal intent or a state of mind necessary for an offense. R.C.M. 916(l)(1) discussion.

a) A mistake as to a separate, nonpenal law may exonerate. *See United States v. Sicley*, 20 C.M.R. 118 (C.M.A. 1955) (honest mistake of fact as to claim of right under property law negates criminal intent in larceny); *United States v. Ward*, 16 M.J. 341 (C.M.A. 1983) (honest mistake defense to presenting a false claim).

b) Reliance on decisions and pronouncements of authorized public officials and agencies may be a defense. *See United States v. Maynulet*, 68 M.J. 374 (C.A.A.F. 2010) (claimed reliance on JAG Law of War deployment briefing not raise a defense to “mercy killing” where accused could not show any pronouncement in the briefing that condoned the practice).

c) Reliance on representing counsel’s advice would not be a defense. R.C.M. 916(l)(1) discussion; R. Perkins and M. Boyce, Criminal Law 1041, 1043 (3rd ed. 1982). *Cf. United States v. Lawton*, 19 M.J. 886 (A.C.M.R. 1985) (behavior after obtaining lawyer’s opinion that married at common law, *inter alia*, sufficient to raise mistake defense).

3. When an attorney advises an accused to act in manner that the accused knows is criminal, the accused should not escape responsibility on the basis of the attorney’s bad advice. Thus, advice of counsel would not afford accused any protection for misconduct which is self-evidently criminal, such as injuring someone, violating a lawful regulation, or taking someone else’s property without consent. *United States v. Sorbera*, 43 M.J. 818 (A.F. Ct. Crim. App. 1996).

F. Special Evidentiary Rule. M.R.E. 404(b) allows the prosecution to present evidence of uncharged crimes, wrongs, or acts committed by the accused in order to show the absence of a mistake. This is particularly important because such extrinsic evidence may be admitted even though the accused does not testify on his own behalf. *See United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979). Before such evidence will be admitted, however, it must be tested against the criteria of M.R.E. 403. *See United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989).

XI. JUSTIFICATION

A. Protection of Property.

1. Two types: “defense of property in the context of an imminent threat to the property, and defense of property in the context of preventing a trespass or ejecting a trespasser from the property.” *United States v. Davis*, 73 M.J. 268, 271 (C.A.A.F. 2014)

a) Imminent threat to property: requires a “reasonable belief that [the accused’s] real or personal property was in immediate danger of trespass or theft; and the accused must have actually believed that the force used was necessary to prevent a trespass or theft of his real or personal property.” *Id.*

b) Preventing trespass/ejecting trespasser: “the accused may only use as much force as is reasonably necessary to remove an individual from his property after requesting that the individual leave and then allowing a reasonable amount of time for the individual to leave.” *Id.*

2. Use of non-deadly force. Reasonable, non-deadly force may be used to protect personal property from trespass or theft. *United States v. Regalado*, 33 C.M.R. 12 (C.M.A. 1963) (one

lawfully in charge of premises may use reasonable force to eject another, if the other has refused an oral request to leave and a reasonable time to depart has been allowed); *United States v. Hines*, 21 C.M.R. 201 (C.M.A. 1956) (with regard to on-post quarters, commander on military business is not a trespasser subject to accused's right to eject); *United States v. Gordon*, 33 C.M.R. 489 (A.B.R. 1963) (the necessity to use force in defense of personal property need not be real, but only reasonably apparent); *United States v. Wilson*, 7 M.J. 997 (A.C.M.R. 1979) (accused had no right to resist execution of a search warrant, even though warrant subsequently held to be invalid); *United States v. Adams*, 18 C.M.R. 187 (C.M.A. 1955) (generally a military person's place of abode is the place where he bunks and keeps his private possessions. His home is the particular place where the necessities of the service force him to live. This may be a barracks, a tent, or even a fox hole. Whatever the name of his place of abode, it is his sanctuary from unlawful intrusion and he is entitled to stand his ground against a trespasser, to the same extent that a civilian is entitled to stand fast in his civilian home); *see also United States v. Lincoln*, 38 C.M.R. 128 (C.M.A. 1967). *See generally* Peck, *The Use of Force to Protect Government Property*, 26 Mil. L. Rev. 81 (1964); Benchbook ¶ 5-7.

3. Use of deadly force. Deadly force may be employed to protect property only if (1) the crime is of a forceful, serious or aggravated nature, and (2) the accused honestly believes use of deadly force is necessary to prevent loss of the property. *United States v. Lee*, 13 C.M.R. 57 (C.M.A. 1953).

4. Reasonable force. While it is well established that a service member has a legal right to eject a trespasser from her military bedroom and a legal right to protect her personal property, the soldier has no legal right to do so unreasonably. *United States v. Marbury*, 56 M.J. 12 (C.A.A.F. 2001) (accused's immediate return to her bedroom brandishing a knife for the purpose of ejecting her assailant was excessive or unreasonable force and hence unlawful conduct).

B. Prevention of Crime.

1. Under military law a private person may use force essential to prevent commission of a felony in his presence, although the degree of force should not exceed that demanded by the circumstances. *United States v. Hamilton*, 27 C.M.R. 204 (C.M.A. 1959). *See generally* Peck, *The Use of Force to Protect Government Property*, 26 Mil. L. Rev. 81 (1964). While felony is not defined in the 2008 Manual for Courts-Martial, 18 U.S.C. § 1 (1) (1982) defines it as any offense punishable by death or imprisonment for a term exceeding one year.

2. Use of deadly force. *United States v. Person*, 7 C.M.R. 298 (A.B.R. 1953) (soldier on combat patrol justified in killing unknown attacker of another patrol member where (1) victim was committing a felony in the accused's presence, and (2) the accused attempted to inflict less than deadly force).

C. Performance of Duty.

1. A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful. R.C.M. 916(c).

2. Justification is raised only if the accused was performing a legal duty at the time of the offense. *United States v. Rockwood*, 52 M.J. 98, 112 (1999) (holding that neither international law nor television speech by the President imposed on accused a duty to inspect Haitian penitentiary for possible human rights violations); *United States v. McMonagle*, 38 M.J. 53 (C.M.A. 1993) (killing civilian may be justified by a mistake of fact as to victim's identity, although not the facts of this case).

3. *United States v. Little*, 43 M.J. 88 (C.A.A.F. 1995) (accused's statements in providence inquiry about his authorization for possession of a work knife were substantially inconsistent with guilty plea for unauthorized possession of a dangerous weapon on naval vessel).

4. *United States v. Reap*, 43 M.J. 61 (C.A.A.F. 1995) (naval custom whereby goods are bartered or traded from department to department in order to avoid delays, red tape, and technicalities incident to acquisition through regular supply channels, is not a defense to wrongful disposition of government property unless it rises to the level of a claim of authority or honest and reasonable mistaken belief of authority).

5. *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999) (accused's interpretation of the President's command intent did not create a legal duty to inspect penitentiary in Haiti and accused could not base a special defense of justification on that ground. The commander, not the subordinate assesses competing concerns and develops command mission priorities).

D. Obedience to Orders.

1. Orders of military superiors are inferred to be legal. MCM, pt. IV, ¶ 14c(2)(a); *United States v. Cherry*, 22 M.J. 284 (C.M.A. 1986).

2. The accused is entitled to the defense where he committed the act pursuant to an order which (a) appeared legal and which (b) the accused did not know to be illegal. R.C.M. 916(d); *United States v. Calley*, 46 C.M.R. 1131, 1183 (A.C.M.R. 1973).

a) Accused's actual knowledge of illegality required. *United States v. Whatley*, 20 C.M.R. 614 (A.F.B.R. 1955) (where superior ordered accused to violate a general regulation, the defense of obedience to orders will prevail unless the evidence shows not only that the accused had actual knowledge that the order was contrary to the regulation but, also, that he could not have reasonably believed that the superior's order may have been valid).

b) Defense unavailable if man of ordinary sense and understanding would know the order to be unlawful. *United States v. Griffen*, 39 C.M.R. 586 (A.B.R. 1968) (no error to refuse request for instruction on defense where accused shot PW pursuant to a superior's order); *see United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973) (instruction on obedience to orders given).

3. The processing of a conscientious objector application does not afford an accused a defense against his obligation to deploy, even if the orders to do so violate service regulations concerning conscientious objections. *United States v. Johnson*, 45 M.J. 88 (C.A.A.F. 1996).

4. Obedience to orders given by an individual who is acting outside the scope of his authority does not trigger the Obedience to Lawful Orders defense—only the Obedience to Orders defense. *United States v. Smith*, 68 M.J. 316 (C.A.A.F. 2010) (military working dog (MWD) handler, who complied with cell-block NCOIC's instructions to incorporate MWD into the interrogation of an Iraqi detainee, was not entitled to Obedience to Lawful Orders defense where task force (CJTF-7) commanding general had withheld authority to order MWD use during detainee interrogations).

5. *See generally* Benchbook ¶ 5-8.

E. The Right to Resist Restraint.

1. Illegal confinement. "Escape" is from lawful confinement only; if the confinement itself was illegal, then no escape. MCM, pt. IV, ¶ 19c(1)(e); *United States v. Gray*, 20 C.M.R. 331 (C.M.A. 1956) (no crime to escape from confinement where accused's incarceration was contrary to orders of a superior commander).

2. Illegal apprehension/arrest. An individual is not guilty of having resisted apprehension (UCMJ art. 95) if that apprehension was illegal. *United States v. Clark*, 37 C.M.R. 621 (A.B.R. 1967) (accused physically detained by private citizen for satisfaction of a debt may, under the standards of self-defense, forcefully resist and seek to escape); *United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976) (by forcibly detaining accused immediately following his illegal apprehension, NCOs involved acted beyond scope of their offices); *United States v. Lewis*, 7 M.J. 348 (C.M.A. 1979) (accused cannot assert illegality of apprehension as defense to assault charge when apprehending official acted within the scope of his office); *United States v. Noble*, 2 M.J. 672 (A.F.C.M.R. 1976) (accused may resist apprehension if he has no "reason to believe" the person apprehending him is empowered to do so); *United States v. Braloski*, 50 C.M.R. 310 (A.C.M.R. 1975) (resisting apprehension by a German policeman is not an offense cognizable under UCMJ art. 95, but must be charged under UCMJ art. 134).

F. Parental Discipline.

1. The law has clearly recognized the right of a parent to discipline a minor child by means of moderate punishment. *United States v. Scofield*, 33 M.J. 857 (A.C.M.R. 1991). *See generally* Benchbook ¶ 5-16.

2. The use of force by parents or guardians is justifiable if:

a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and

b) the force is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation. *United States v. Brown*, 26 M.J. 148 (C.M.A. 1988).

3. A parent who spanks a child with a leather belt using reasonable force and thereby unintentionally leaves welts or bruises nevertheless acts lawfully so long as the parent acted with a bona fide parental purpose. *United States v. Scofield*, 33 M.J. 857 (A.C.M.R. 1991). *But see United States v. Staton*, 68 M.J. 569, (A.F.Ct.Crim.App. 2009) (service court looked at size and strength of accused versus that of the child and the objects used in the punishments to determine that the government had carried its burden in proving the force to be unreasonable.)

4. One acting in the capacity of parent is justified in spanking a child, but the disciplining must be done in good faith for correction of the child motivated by educational purpose and not for some malevolent motive. *United States v. Proctor*, 34 M.J. 549 (A.F.C.M.R. 1991), *aff'd*, 37 M.J. 330 (C.M.A. 1993); *United States v. Ward*, 39 M.J. 1085 (A.C.M.R. 1994) (not a license to abuse the child).

5. Applications.

a) Tying stepson's hands and legs and placing a plastic bag over his head went beyond use of reasonable or moderate force allowed in parental discipline. *United States v. Gowadia*, 34 M.J. 714 (A.C.M.R. 1992).

b) Accused who admitted striking his child out of frustration and as means of punishment and who made no claim that he honestly believed that force used was not such as would cause extreme pain, disfigurement, or serious bodily injury was not entitled to instruction on parental discipline defense. *United States v. Gooden*, 37 M.J. 1055 (N.M.C.M.R. 1993).

c) Evidence of one closed-fist punch, without evidence of actual physical harm, was legally sufficient to overcome the affirmative defense of parental discipline where the punch was hard enough to knock down the accused's 13-year old son. *United States v. Rivera*, 54 M.J. 489 (C.A.A.F 2001).

d) *See also United States v. Robertson*, 36 M.J. 190 (C.M.A. 1992); *United States v. Ziots*, 36 M.J. 1007 (A.C.M.R. 1993).

XII. ALIBI

A. Not an Affirmative Defense. R.C.M. 916(a) discussion.

B. Notice Required. R.C.M. 701(b)(2). Exclusion of alibi evidence because of lack of notice is a drastic remedy to be employed only after considering the disadvantage to opposing counsel and the reason for failing to provide notice. *United States v. Townsend*, 23 M.J. 848 (A.F.C.M.R. 1987). Military judge abused his discretion when he excluded defense testimony because R.C.M. 701(b)(1) notice requirements were not met. *United States v. Preuss*, 34 M.J. 688 (N.M.C.M.R. 1991).

C. Raised by Evidence. Alibi raised when some evidence shows that the accused was elsewhere at the time of the commission of a crime.

D. Instructions.

1. Military judge is under no *sua sponte* obligation to instruct on this theory of defense. R.C.M. 920(e)(3); *United States v. Boyd*, 17 M.J. 562 (A.F.C.M.R. 1983); *United States v. Bigger*, 8 C.M.R. 97 (C.M.A. 1953); *United States v. Wright*, 48 C.M.R. 295, 297 (A.F.C.M.R. 1974).

2. When defense is raised by the evidence and accused requests an instruction, failure to instruct is error. *United States v. Moore*, 35 C.M.R. 317 (C.M.A. 1965); *United States v. Jones*, 7 M.J. 441 (C.M.A. 1979).

E. Sufficiency.

1. If alibi raises a reasonable doubt as to guilt, the accused is entitled to an acquittal. *United States v. Stafford*, 22 M.J. 825 (N.M.C.M.R. 1986) (finding error to require defense to prove alibi beyond a reasonable doubt).

2. Rebuttal not required. *United States v. Rath*, 27 M.J. 600 (A.C.M.R. 1988) (holding alibi defense can be rejected by the trier of fact even absent rebuttal by government).

XIII. VOLUNTARY ABANDONMENT

A. Special defense to a charge of attempted commission of a crime. M.C.M., pt. IV, ¶4c(4); *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987).

1. Not available as a defense to an attempt crime where the acts committed have caused substantial harm to the victim. *United States v. Smauley*, 42 M.J. 449 (C.A.A.F. 1995); *United States v. Thornsbury*, 59 M.J. 767 (A. Ct. Crim. App. 2004).

2. Available for a consummated attempt only when the accused has a genuine change of heart that causes her to renounce the criminal enterprise. *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993); *United States v. Walther*, 30 M.J. 829 (N.M.C.M.R. 1990).

B. Not raised when:

1. Not raised as a defense to attempted breaking restriction where the accused abandoned his efforts because of a fear of being detected or apprehended. *United States v. Miller*, 30 M.J. 999 (N.M.C.M.R. 1990).

2. Not raised as a defense where the accused merely postpones his criminal enterprise until a more advantageous time or transfers his criminal effort to another objective or victim, or where his criminal purpose is frustrated by external forces beyond his control. *United States v. Rios*, 33 M.J. 436 (C.M.A. 1991).

XIV. MISCELLANEOUS DEFENSES

A. Amnesia.

1. General. Inability to recall past events or the facts of one's identity is loosely described as amnesia. An accused who suffers from amnesia at the time of the trial is at a disadvantage. Failure to recall a past event may prevent the accused from disclaiming the possession of a particular intent, the existence of which is essential for conviction of the offenses charged. Similarly, inability to recall identity can prevent the accused from obtaining evidence of good character from friends and family. Amnesia, however, is, by itself, generally "a relatively neutral circumstance in its bearing on criminal responsibility." *United States v. Olvera*, 15 C.M.R. 134 (C.M.A. 1954). *See generally United States v. Boultinghouse*, 29 C.M.R. 537 (C.M.A. 1960); *United States v. Buran*, 23 M.J. 736 (A.F.C.M.R. 1986); *United States v. Barreto*, 57 M.J. 127 (C.A.A.F. 2002).

2. When Amnesia May be a Defense.

a) Military offenses requiring knowledge of accused's status as a service person.

(1) Inability to recall identity might include loss of awareness of being a member of the armed forces; in that situation, amnesia might be a defense to a charge of failing to obey an order given before the onset of the condition, as it would show the existence of a mental state which would serve to negate criminal responsibility. *United States v. Olvera, supra* ¶ XIV.A.

(2) An accused cannot be convicted of AWOL if he was temporarily without knowledge that he was in the military during the period of his alleged absence. *United States v. Wiseman*, 30 C.M.R. 724 (N.B.R. 1961).

b) Drug/alcohol induced amnesia.

(1) Lack of memory or amnesia resulting from drugs or alcohol has never constituted a complete defense. *United States v. Luebs*, 43 C.M.R. 315 (C.M.A. 1971); *United States v. Butler*, 43 C.M.R. 87 (C.M.A. 1971); *United States v. Day*, 33 C.M.R. 398 (C.M.A. 1963).

(2) Drug/alcohol induced amnesia in and of itself does not constitute a mental disease or defect which will excuse criminal conduct under the defense of lack of mental responsibility. *United States v. Olvera, supra* at ¶ XIV.A.; *United States v. Lopez-Malave*, 15 C.M.R. 341 (C.M.A. 1954).

(3) Under earlier law, in order to require an insanity instruction, the evidence must show that accused's alcoholism constitutes a mental disease or defect so as to impair substantially his capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. *United States v. Brown*, 50 C.M.R. 374 (N.C.M.R. 1975); *United States v. Marriott*, 15 C.M.R. 390 (C.M.A. 1954).

(4) With the passage of UCMJ art. 50a, the standard for lack of mental responsibility is now complete impairment. For a complete discussion of Article 50a, see Chapter 6, *infra*.

3. Amnesia as Affecting Accused's Competency to Stand Trial.

a) The virtually unanimous weight of authority is that an accused is not incompetent to stand trial simply because he is suffering from amnesia. *Thomas v. State*, 301 S.W.2d 358 (Tenn. 1957); *Commonwealth v. Hubbard*, 371 Mass. 160 (1976).

b) The appropriate test when amnesia is found is whether an accused can receive, or has received, a fair trial. The test, as stated in *Dusky v. United States*, 362 U.S. 402 (1960), is "whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him."

c) The problem when the accused suffers from amnesia is not his ability to consult with his attorney but rather his inability to recall events during a crucial period.

d) Where the amnesia appears to be temporary, an appropriate solution might be to defer trial for a reasonable period to see if the accused's memory improves.

e) *Commonwealth v. Lombardi*, 393 N.E.2d 346 (Mass. 1979). Where the amnesia is apparently permanent, the fairness of proceeding to trial must be assessed on the basis of the particular circumstances of the case. A variety of factors may be significant in determining whether the trial shall proceed, to include:

(1) the nature of the crime,

(2) the extent to which the prosecution makes a full disclosure of its case and circumstances known to it,

(3) the degree to which the evidence establishes the accused's guilt,

(4) the likelihood that an alibi or some defense could be established but for the amnesia,

(5) the extent and effect of the accused's amnesia.

f) A pretrial determination of whether the accused's amnesia will deny him a fair trial is not always possible. In such a case, the trial judge may make a determination of fairness after trial with appropriate findings of fact and rulings concerning the relevant criteria.

4. Guilty Pleas. An accused who fails to recall the factual basis of the offenses but is satisfied from the evidence that he is guilty may plead guilty. *United States v. Luebs*, 43 C.M.R. 315 (C.M.A. 1971); *United States v. Butler*, 43 C.M.R. 87 (C.M.A. 1971).

B. Automatism / Unconsciousness.

1. Until recently, automatism was treated as a mental responsibility defense under military law.

2. "In cases where the issue of automatism has been reasonably raised by the evidence, a military judge should instruct the panel that automatism may serve to negate the actus reus of a criminal offense." *United States v. Torres*, 74 M.J. 154, 158 (C.A.A.F. 2015)(in an assault case, error to instruct under R.C.M. 916(k)(1) where defense provided evidence that the assault occurred during an epileptic fit).

3. Once the defense has been raised, the prosecution has a burden of proving beyond a reasonable doubt that the accused's actions were voluntary.

4. In addition to epilepsy, sleepwalking or other parasomnias would likely qualify as automatistic disorders rather than mental diseases or defects.

C. Due Process Fair Warning. The touchstone of the fair warning requirement is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that defendant's conduct was criminal. *United States v. Lanier*, 117 S.Ct. 1219 (1997).

D. Selective Prosecution**.** Accused was not subjected to selective or vindictive prosecution in regard to handling or adultery allegations, though charges were not preferred against two others alleged to

have committed adultery, where charges were preferred against accused only after he violated a "no-contact" order. *United States v. Argo*, 46 M.J. 454 (C.A.A.F. 1997).

E. Jury Nullification. Because there is no right to jury nullification, military judge did not err either in declining to give a nullification instruction or in declining to otherwise instruct the members that they had the power to nullify his instructions on matters of law. *United States v. Hardy*, 46 M.J. 67 (C.A.A.F. 1997). *See generally* Lieutenant Colonel Donna M. Wright & Lieutenant Colonel (Ret.) Lawrence M. Cuculic, *Annual Review of Developments in Instructions – 1997*, Army Law., Jul. 1998, at 39, 48 (discussing *Hardy*).

F. Religious Convictions. *United States v. Webster*, 65 M.J. 936 (A. Ct. Crim. App. 2008). The accused pled guilty to missing movement to Iraq by design and disobeying orders from two superior commissioned officers to deliver his bags for deployment. The accused had converted to Islam in 1994 and had doubts about whether he should participate in a war against Muslims. After consulting Islamic scholars on the Internet, the accused determined that the consensus was that Muslims are not permitted to participate in the war in Iraq. By participating as a combatant, the accused believed that he would be placed "in an unfavorable position on the Day of Judgment." The accused filed a conscientious objector packet prior to the deployment, but withdrew it. He filed another conscientious objector packet on the same day that he missed movement. During the guilty plea inquiry, the military judge ruled that his religious beliefs would not provide a defense to disobeying orders. The ACCA first held that the accused's guilty plea was knowing, voluntary, and provident. First, the accused confirmed that the defense of duress did not apply to him. Second, there is no authority for the proposition that conscientious objector status provides a defense for missing movement or violating lawful orders. Third, under AR 600-43, conscientious objector requests made after an individual has entered active duty will not be favorably considered when the objection is to a certain war, which was the case here. Finally, it is irrelevant that the offenses involving missing movement and failure to obey orders were based on religious motives where such motives and beliefs did not rise to the level of a duress defense and did not constitute any other defense. The court then held that the First Amendment does not require anything more to accommodate the accused's free exercise of religion than was offered here, and the accused's rights were not violated. The ACCA first identified the applicable standard for analyzing alleged government infringement on the free exercise of religion. Under the Religious Freedom Restoration Act of 1993, the state must have a "compelling state interest" before it can burden the free exercise of religion. Additionally, courts are enjoined to apply judicial deference when strictly scrutinizing the military's burden on the free exercise of religion. *See Goldman v. Weinberger*, 475 U.S. 503 (1986). Applying these two standards, the ACCA concluded that the government had a compelling interest in requiring soldiers to deploy with their units. The government furthered this compelling interest using the least restrictive means. The Army offers soldiers an opportunity to apply for conscientious objector status, and in this case, his command offered the accused the opportunity to deploy in a non-combat role. In applying the duly required judicial deference, the ACCA concluded that the Army furthered its compelling interest in the least restrictive manner possible. The accused "had no legal right or privilege under the First Amendment to refuse obedience to the orders, and the orders were not given for an illegal purpose." (citing *United States v. Barry*, 36 C.M.R. 829, 831 (C.G.B.R. 1966) (internal brackets omitted).

XV. STATUTE OF LIMITATIONS

A. While not an affirmative or special defense, the statute of limitations operates like a defense in that it time-bars prosecutions. *See* UCMJ art. 43 (2008); R.C.M. 907(a)(2)(B) and discussion.

B. The standard statute of limitations is five years. *See* UCMJ art. 43(a). Statute of limitations is tolled when the summary court-martial convening authority receives the sworn charges. *See* UCMJ art. 43(b)(1).

C. Offenses without a statute of limitations. UCMJ art. 43(a).

1. The following offenses may be tried at any time without limitation:

a) Absence without leave.

b) Missing movement in a time of war.

c) Murder.

d) Rape and rape of a child.

e) Any offense punishable by death.

2. Applications.

a) *Willenbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998) (statute of limitations under Article 43 does not bar trial for rape, as any offense "punishable by death" may be tried at any time without limitation, even if it is referred as a noncapital case), *aff'd,* 57 M.J. 321 (C.A.A.F. 2002).

b) *United States v. Thompson*, 59 M.J. 432 (C.A.A.F. 2004). Appellant was charged with raping his stepdaughter on divers occasions within a specified four-year period. Evidence at trial showed a pattern of sexual abuse occurring over an eleven-year period at several duty stations. Over defense objection, the MJ instructed the members on carnal knowledge and indecent acts as LIOs. The members found appellant guilty of indecent acts or liberties. The MJ amended the charge sheet, deleting the time period during which the indecent acts would be barred by the statute of limitations, and asked the members whether the change did "violence" to their verdict. The president indicated that if the amended specification included a portion of the period at Fort Irwin, then that was satisfactory to the panel. The CAAF held that before instructing the members on any LIOs barred by the statute of limitations, the MJ failed to obtain a required waiver from the appellant. Because appellant did not waive the statute, the instructions erroneously included a time-barred period. The MJ was not authorized to modify the unambiguous findings of the panel, after announcement of the verdict, to reflect the non-time barred period.

D. Child Abuse Offenses. UCMJ art. 43(b)(2)(B) defines "child abuse offense."

1. Prior to 24 November 2003, the statute of limitations for child abuse offenses was 5 years.

2. Effective 24 November 2003, the statute of limitations for child abuse offenses was amended so that an accused could be tried as long as sworn charges were received by the SCMCA before the victim reached the age of 25.

3. Effective 6 January 2006, the statute of limitations for child abuse offenses was amended once again, and an accused may now be tried for a child abuse offense as long as sworn charges are received by the SCMCA during the life of the child, or within 5 years of the offense, whichever is longer.

4. The applicable statute of limitations is the one effective at the time of the commission of the offense. *See United States v. Lopez de Victoria,* 66 M.J. 67 (C.A.A.F. 2008).

5. *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000) (statute of limitations codified at 18 U.S.C. § 3283, which permits prosecution for offenses involving sexual or physical abuse of

children under the age of 18 until the child reaches the age of 25, does not apply to courts-martial as UCMJ Article 43 provides the applicable statute of limitations for courts-martial).

E. Effect of Amendments to Art. 43.

1. An amendment to the statute of limitations may not revive and extend a statute of limitations that had run prior to the amendment. *Stogner v. California*, 539 U.S. 607 (2003) (holding that reviving time-barred offenses violated the Ex Post Facto Clause).

2. An amendment to the statute of limitations may extend a statute of limitations that had not run prior to the amendment ONLY when Congress evinces an intent to do so. *United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008) (holding an amendment to Article 43 that increased the statute of limitations for certain "child abuse" offenses did not extend existing limitations periods that had not run at the time of the amendment; the Article 43 amendment and its legislative history were silent as to retrospective application).

F. Extended Statute of Limitations for Certain Crimes in a Time of War. UCMJ art. 43.

1. Article 43(a). Covers AWOL and missing movement in a time of war. May be tried and punished at any time without limitation.

a) Time of War for purposes of Art. 43(a) is a de facto determination. *See Broussard v. Patton* 466 F.2d 816 (9th Cir. 1972) ("time of war refers to *de facto* war and does not require a formal Congressional declaration").

b) Korean Conflict. *United States v. Ayers* 15 C.M.R. 220 (C.M.R. 1954) (Korean Conflict is time of war for purposes of Article 43(a)); *United States v. Shell*, 23 C.M.R. 110 (C.M.R. 1957) (Armistice on July 27, 1953 terminated hostilities).

c) Vietnam Conflict. *United States v. Anderson*, 38 C.M.R. 386 (C.M.R. 1968) (As of the Gulf of Tonkin Resolution on Aug. 10, 1964, the Vietnam Conflict is time of war for purposes of Article 43(a)); *United States v. Michaud*, 48 C.M.R. 379 (N.C.M.R. 1973) (Vietnam Conflict is time of war for purposes of Article 43(a)); *United States v. Reyes*, 48 C.M.R. 832 (A.C.M.R. 1974) (the Vietnam "time of war" terminated on 27 January 1973).

2. Article 43(f). Covers crimes against the United States or any agency thereof involving frauds, real or personal property, and contracting. Art. 43(f)(1–3).

a) Statute of limitations is suspended during the time of war and for three years after the termination of hostilities. Art. 43(f).

b) "Time of War."

(1) *United States v. Swain*, 27 C.M.R. 111 (C.M.A. 1958) (Korean Conflict constituted a time of war for purposes of Article 43(f)).

(2) There is no military caselaw addressing whether OIF or OEF constitute a "time of war" for purposes of Art. 43(f). For arguments that OIF and OEF should be considered a time of war for Art. 43, see Lieutenant Commander Joseph Romero, *Of War and Punishment: "Time of War" in Military Jurisprudence and a Call for Congress to Define its Meaning*, 51 Naval L. Rev. 1 (2005).

(3) One federal district court has concluded that both OIF and OEF were, at one point, a time of war, invoking the federal analogue to Article 43(f), 18 U.S.C. § 3287. *See United States v. Prosperi*, 2008 U.S. Dist. LEXIS 66470 (Dist. Mass. Aug. 29, 2008).

XVI. FORMER JEOPARDY (ART. 44, UCMJ)

A. No person may, without his consent, be tried a second time for the same offense. Article 44(a); U.S. Const. amend V.

B. When Jeopardy Attaches.

1. A proceeding which, after introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused, is a trial. Article 44(c).

2. In the military, jeopardy does not attach until an accused is put to trial before the trier of the facts. *See United States v. Ragard*, 56 M.J. 852, 855 (A. Ct. Crim. App. 2003).

a) In a military judge alone case, jeopardy attaches after an accused has been indicted and arraigned, has pleaded and the court has begun to hear evidence. *See United States v. McClain*, 65 M.J. 894 (A. Ct. Crim. App. 2008) (citing *McCarthy v. Zerbst*, 85 F.2d 640, 642 (10th Cir. 1936)).

b) In a panel case, this occurs when the members are empaneled and sworn. *United States v. McClain*, 65 M.J. 894 (A. Ct. Crim. App. 2008) (citing *Serfass v. United States*, 420 U.S. 377, 390-91, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975)).

3. Withdrawal of charges after arraignment but before presentation of evidence does not constitute former jeopardy, and denial of a motion to dismiss charges at a subsequent trial is proper. *United States v. Wells*, 26 C.M.R. 289 (C.M.A. 1958).

4. Double jeopardy does not attach when charges are dismissed for violating the statute of limitations. Thus, the government is not barred from prosecuting the accused on a charge sheet that had properly been received by the summary court-martial convening authority within the period of the statute, following dismissal of charges for the same offense (but on a different charge sheet) that was not received within the period of the statute. However, if evidence was introduced in the first proceeding, the first is considered a trial and jeopardy attaches. *United States v. Jackson*, 20 M.J. 83 (C.M.A. 1985).

C. When Former Jeopardy Bars a Second Trial.

1. A determination that jeopardy attaches does not end the analysis. Double jeopardy bars retrial only when the military judge or the panel has made a determination by regarding guilt or innocence. *See United States v. McClain*, 65 M.J. 894 (A. Ct. Crim. App. 2008); *United States v. Germono*, 16 M.J. 987, 988 (A.C.M.R. 1988).

2. An accused is "acquitted" only when a ruling of the judge actually resolves some or all of the factual elements of the offense charged in the accused's favor, even if some or all of that resolution may be incorrect. *See United States v. McClain*, 65 M.J. 894 (A. Ct. Crim. App. 2008) (citing *United States v. Hunt*, 24 M.J. 725, 728 (A.C.M.R. 1987) and *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977)).

3. Retrial for offenses was not barred when the military judge granted a defense motion to dismiss on speedy trial grounds after hearing evidence in the first trial, but before entering findings. *United States v. McClain*, 65 M.J. 894 (A. Ct. Crim. App. 2008).

D. Same Offense.

1. Once tried for a lesser offense, accused cannot be tried for a major offense that differs from the lesser offense in degree only. Trial for AWOL bars subsequent trial for desertion. *United States v. Hayes*, 14 C.M.R. 445 (N.B.R. 1953).

2. "The protection against double jeopardy does not rest upon a surface comparison of the allegations of the charges; it also involves consideration of whether there is a substantial relationship between the wrongdoing asserted in the one charge and the misconduct alleged in the other." *United States v. Lynch*, 47 C.M.R. 498, 500 (C.M.A. 1973) (doctrine of former jeopardy precluded another trial for unauthorized absence from different unit and shorter time period). *But see United States v. Robinson*, 21 C.M.R. 380 (A.B.R. 1956) (permitting, after conviction for an AWOL and after disapproval of findings and sentence by the convening authority, trial for AWOL for the same period but from a different unit than was previously charged); *United States v. Hutzler*, 5 C.M.R. 661, 664 n.3 (A.B.R. 1951).

3. Nonjudicial punishment previously imposed under Article 15 for a *minor* offense and punishment imposed under Article 15 for a *minor* disciplinary infraction may be interposed as a bar to trial for the same minor offense or infraction. R.C.M. 907(b)(2)(D)(iv).

a) "Minor" normally does not include offenses for which the maximum punishment at a general court-martial could be dishonorable discharge or confinement for more than one year. MCM, pt. V, ¶ 1.e.

E. If an accused has previously received punishment under Article 15 for other than a minor offense, the service member may be tried subsequently by court-martial; however, the prior punishment under Article 15 must be considered in determining the amount of punishment to be adjudged at trial if the accused is found guilty at the court-martial. *United States v. Jackson*, 20 M.J. 83 (C.M.A. 1985); *see* UCMJ art. 15(f); R.C.M. 1001(c)(1)(B); *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989) (accused must be given complete credit for any and all nonjudicial punishment suffered—day-for-day, dollar-for-dollar, and stripe-for-stripe).

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CHAPTER 23
MENTAL RESPONSIBILITY AND COMPETENCE

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I. INTRODUCTION

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

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

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

II. MENTAL RESPONSIBILITY

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

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

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

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

C. Significant aspects of the current standard.

1. Threshold Requirements.

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

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

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

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

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

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

D. Procedure.

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

2. Burden and standard of proof.

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

b) The constitutionality of shifting the burden to the defense to prove lack of mental responsibility by clear and convincing evidence. *See United States v. Martin*, 48 M.J. 820, 825 (A. Ct. Crim. App. 1998); *United States v. Freeman*, 804 F.2d 1574 (11th Cir. 1986), citing *Leland v. Oregon*, 343 U.S. 790 (1952).

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

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

a) First vote on whether accused is guilty (3/4 vote required).

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

5. RCM 1105. Not guilty only by reason of lack of mental responsibility. Within 40 days of verdict, court-martial must conduct a hearing. UCMJ art. 76b. RCM 1105(c) sets out the procedural guidelines for the hearing.

a) Before the hearing, the judge or convening authority shall order a new psychiatric or psychological examination of the accused, with the resulting psychiatric or psychological report transmitted to the military judge for use in the post-trial hearing. RCM 1105(b). *See also* 18 U.S.C. § 4243 (post-trial psychiatric examination).

b) The convening authority *shall* commit the accused to a suitable facility until person is eligible for release IAW UCMJ, art. 76b(b). UCMJ, art. 76b(b)(1). The UCMJ provides no guidance as to a "suitable facility," but it is almost certainly not a confinement facility. Rather, the accused should be committed to a mental health facility, which will require a court order by the military judge.

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

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

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

d) **Right to Counsel**. RCM 1105(c)(1) provides that an accused shall be represented by counsel.

e) Practical Considerations

(1) The accused's status does not change even if jurisdiction under Article 2, UCMJ, terminates during the time the accused is in the custody of the Attorney General, hospitalized, or on conditional release. UCMJ, Art. 76b(d)(2)

(2) If the GCMCA determines to remit the accused to the custody of the Attorney General after a hearing, the Attorney General is statutorily required to "take action in accordance with subsection (e) of section 4243 of title 18." UCMJ, Art. 76b(b)(4)(B)

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

III. PARTIAL MENTAL RESPONSIBILITY

A. **The Old (pre-2004 Amendment) Manual Standard**. A mental condition not amounting to a general lack of mental responsibility under subsection RCM 916(k)(1) is not a defense, *nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind*

necessary to be proven as an element of the offense. RCM 916(k)(2). The old standard tried to prohibit a partial mental responsibility defense.

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

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

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

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

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

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

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

IV. DEFENSES WHICH ARE *NOT* MENTAL RESPONSIBILITY

A. **Voluntary Intoxication**. RCM 916(l)(2). Voluntary intoxication from alcohol or drugs may negate the elements of premeditation, specific intent, knowledge, or willfulness. Voluntary intoxication, by itself, will not reduce unpremeditated murder to a lesser offense. *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993). Voluntary intoxication not amounting to legal insanity is not a defense to general intent crimes. *See generally* Major Eugene Milhizer, *Weapons Systems Warranties: Voluntary Intoxication as a Defense Under Military Law*, 127 Mil. L. Rev. 131 (1990).

B. **Involuntary Intoxication**. Generally, involuntary intoxication is a defense to a general or specific intent crime. *See United States v. Hensler*, 44 M.J. 184 (C.A.A.F. 1996).

1. The defense of involuntary intoxication has been analogized to that of mental responsibility. *See United Stated v. Hensler*, 40 M.J. 892, 895-96 (N.M.C.M.R. 1994), *aff'd*, 44 M.J. 184 (C.A.A.F. 1996). The two defenses, however, are distinct. Both defenses' success depends on a finding that the accused was unable to appreciate the nature and quality or wrongfulness of his acts. However, a mental responsibility defense requires a finding that the inability was due to a severe mental disease or defect. Involuntary intoxication, however, requires a finding that the

inability was due to involuntary ingestion of an intoxicant. *See United States v. McDonald*, 73 M.J. 426 (C.A.A.F. 2014).

2. Whether the ingestion was involuntary is a question of fact. *See United States v. Ward*, 14 M.J. 950 (A.C.M.R. 1982) (involuntary intoxication not available when accused knowingly used marijuana, but did not know it also contained PCP). However, if the government does not present evidence that the ingestion was voluntary, it is error not to instruct when the defense has first presented some evidence of this affirmative defense. *See United States v. McDonald*, 73 M.J. 426 (C.A.A.F. 2014).

C. **Automatism**. Automatism (more fully discussed in Chapter 6 of this Deskbook) is an affirmative defense in the military. *See United States v. Torres*, 74 MJ 154 (C.A.A.F. 2015). Practitioners must take care to distinguish between an automatism defense and a mental responsibility defense.

V. COMPETENCY TO STAND TRIAL

A. **Current Standard**. "No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them [sic] or to conduct or cooperate intelligently in the defense of the case." RCM 909(a). *See also* 18 U.S.C. § 4241(d). The accused is presumed to have capacity to stand trial. RCM 909(b).

B. Cases.

1. The real issue is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has rational as well as factual understanding of the proceeding against him. It is not enough that he is oriented to time and place and has some recollection of events. *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993) (quoting *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)).

2. "The question is whether the accused is possessed of sufficient mental power, and has such understanding of his situation, such coherency of ideas, control of his mental facilities, and the requisite power of memory, as will enable him to testify in his own behalf, if he so desires, and otherwise to properly and intelligently aid his counsel in making a rational defense." *United States v. Lee*, 22 M.J. 767, 769 (A.F.C.M.R. 1986).

3. *United States v. Schlarb*, 46 M.J. 708 (N-M. Ct. Crim. App. 1997). The accused did not establish a lack of mental capacity to stand trial where she testified clearly and at length on four occasions, showing a clear understanding of the proceedings.

4. *Indiana v. Edwards*, 554 U.S. 164 (2008). The Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. Therefore, a defendant who is mentally competent to stand trial may still be denied the right to represent themselves, depending on the vagaries of the mental disease or illness.

5. *United States v. Schwisow*, No. ARMY MISC 20150720, 2016 WL 1179130 (A. Ct. Crim. App. Mar. 22, 2016): MJ dismissed case for a speedy trial violation, finding the time taken for the second RCM 706 board could not be excluded as the board was unnecessary; defendant was found competent by the previous board. ACCA held the MJ abused his discretion by conflating the concepts of competency and mental responsibility. The first 706 board only dealt with competency, and did not address whether Defendant suffered from a severe mental disease or defect, which was a separate question.

C. Compared to Amnesia.

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

2. *United States v. Axelson*, 65 M.J. 501 (A. Ct. Crim. App. 2007). A failure to recall facts pertaining to an offense does not preclude an accused from pleading guilty so long as, after assessing the Government's evidence against him, he is convinced of his own guilt.

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

1. **Interlocutory question of fact.** After referral, military judge *may* conduct an incompetence determination hearing either *sua sponte* or on request of either party. RCM 909(d).

2. Defense has the burden of proof by a preponderance of the evidence.

3. Military judge *shall* conduct the hearing if sanity board completed IAW RCM 706 before or after referral concluded the accused is not competent.

4. Military judge determines whether the accused is competent to stand trial. *United States v. Proctor*, 37 M.J. 330 (C.M.A. 1993); *Short v. Chambers*, 33 M.J. 49 (C.M.A. 1991).

5. Once a sanity board is requested, the military judge must consider the sanity board report before ruling on the accused's capacity to stand trial. *United States v. Collins*, 41 M.J. 610 (A. Ct. Crim. App. 1994).

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

1. Upon a finding of incompetence, if the convening authority agrees, there is no discretion regarding commitment. *United States. v. Salahuddin*, 54 M.J. 918 (A.F. Ct. Crim. App. 2001); *see also* RCM 909(e)(3) and 18 U.S.C. § 4241(d).

2. The four-month time period may be extended. To justify extended commitment, the Government must prove by clear and convincing evidence that "a substantial probability exists that the continued administration of antipsychotic medication will result in a defendant attaining the capacity to permit the trial to proceed in the foreseeable future." *United States v. Weston*, 260 F. Supp. 2d 147, 154 (D.D.C. 2003) (approving a year-long extension from the case below in (3)(a)).

3. Involuntary Medication.

a) *United States v. Weston*, 255 F.3d 873 (D.C. Cir. 2001). Defendant indicted for the murders and attempted murder of federal law enforcement officers. A court-appointed forensic psychiatrist diagnosed defendant with paranoid schizophrenia, the severity of which rendered him incompetent to stand trial. Because he refused treatment with antipsychotic

medication, he was simply placed in solitary confinement under constant supervision. The government sought a court order authorizing the involuntary administration of medication to render him competent to stand trial. The Circuit Court held that there was no basis to believe that defendant's worsening condition rendered him more dangerous, given his near-total incapacitation. However, the court affirmed the District Court's decision that the government's interest in administering antipsychotic drugs overrode his liberty interest and that restoring his competence in this way did not violate his right to a fair trial.

b) *Sell v. United States*, 539 U.S. 166 (2003). Defendant was charged with fraud. A federal magistrate found him incompetent to stand trial and ordered his hospitalization to determine whether he would attain capacity to allow his trial to proceed. Sell refused to take antipsychotic drugs. The magistrate found involuntary medication appropriate because Sell was a danger to himself and others, that medication was the only way to render him less dangerous, that any serious side effects could be ameliorated, that the benefits to him outweighed the risks, and that the drugs were substantially likely to return Sell to competence. The District Court, although determining that the Magistrate's conclusion regarding Sell's dangerousness was clearly erroneous, nonetheless affirmed the decision because it found that the medication was the only viable hope of rendering Sell competent and was necessary to serve the government's interest in adjudicating his guilt or innocence. The Circuit Court affirmed, finding that the government had an essential interest in bringing Sell to trial, that treatment was medically appropriate, and that the medical evidence indicated a reasonably probability that Sell would fairly be able to participate in his defense. The Supreme Court vacated and remanded the case. Determining that forced medication solely for trial competency purposes may be rare, the Court held that the Constitution permits involuntary medication to render a mentally ill defendant competent to stand trial on serious criminal charges if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the trial's fairness, and, taking account of less intrusive alternatives, is necessary to significantly further important governmental trial-related interests.

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

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

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

F. **Waiver**. *Moore v. Campbell*, 344 F.3d. 1313 (11th Cir. 2003). The Eleventh Circuit Court of Appeals looked at whether a defendant in a capital case can forfeit his right to competency – a case of

first impression. Moore attempted suicide during his capital murder trial. After treatment at a hospital and subsequent examination by a psychiatrist, Moore appeared at trial, which resumed on 31 August. From 27 August until the evening of 1 September, Moore had refused anything to eat or drink, resulting in dehydration. The state court found Moore was competent to stand trial and that he took a "calculated and concerted effort to disrupt his murder trial." The state court also found Moore's asserted incompetence similar to a defendant whose behavior results in exclusion from a trial. Reviewing the state court proceedings during a federal *habeas* petition, the Court of Appeals determined that the "state court's determination that a capital defendant in Alabama can forfeit his right to be competent – that is mentally present – at trial" was not contrary to or an unreasonable application of clearly established Supreme Court precedent, if only because the issue has not been yet decided by the Supreme Court.

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

VI. THE SANITY BOARD

A. Sanity Board Request.

1. Who can request? Any commander, preliminary hearing officer, trial counsel, defense counsel, military judge, or member. RCM 706(a).

a) Request goes to CA (before referral) and MJ (after referral).

b) A sanity board should be granted if request is not frivolous and is made in good faith. *United States v. Nix*, 36 C.M.R. 76, 80-81 (C.M.A. 1965); *United States v. Kish*, 20 M.J. 652 (A.C.M.R. 1985).

c) It may be prudent for trial counsel to join in the motion. *See United States v. James*, 47 M.J. 641 (A. Ct. Crim. App. 1997) (finding that a mental status evaluation was not an adequate substitute for a sanity board).

2. Failure to direct a sanity inquiry.

a) Though ultimate result may be "favorable" to the government, failure to timely direct a sanity board can result in lengthy appellate review. *United States v. Breese*, 47 M.J. 5 (C.A.A.F. 1997).

b) "**A low threshold is nonetheless a threshold which the proponent must cross**." *United States v. Pattin*, 50 M.J. 637, 639 (A. Ct. Crim. App. 1999) (finding that the military judge's refusal to order a sanity board was not error where it appeared the motion for a sanity board was merely a frivolous attempt to get a trial delay).

3. Sanity Board Order asks the following questions:

a) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?

b) What is the clinical psychiatric diagnosis?

c) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his conduct?

d) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense?

4. Composition of the sanity board.

a) One or more persons.

b) Physician or clinical psychologist.

c) At least one psychiatrist or clinical psychologist.

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

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

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

7. Results of board - limited distribution.

a) Defense counsel gets full report.

b) Trial counsel initially only gets answers to the above questions.

B. The Sanity Inquiry.

1. Compelled Examination. RCM 706.

a) Article 31, UCMJ, not applicable.

b) Failure to cooperate in an examination can result in the exclusion of defense expert evidence.

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

a) The general rule: Anything the accused says (and any derivative evidence) to the sanity board is privileged and cannot be used against him.

b) This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by MRE 305.

c) Waiver. There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence. Privilege applies only to examinations ordered under RCM 706. *See United States v. Toledo*, 25 M.J. 270 (C.M.A. 1987), *aff'd on reconsid.*, 26 M.J. 104 (C.M.A. 1988).

3. Derivative Evidence. In *United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005), the accused was charged, *inter alia*, with breaking restriction. Dr. Petersen treated the accused for almost a month after his command referred him to mental health. She concluded that the accused suffered a manic episode during the charged time period. Prior to trial, the defense requested a sanity board. Dr. Marrero was the lone member of the board, and he agreed with Dr. Petersen's diagnosis, but concluded that the accused was mentally responsible. At trial, Dr. Petersen, testifying for the defense, opined that there was a "high likelihood" that the accused suffered from a severe mental disease or defect during the relevant time period and that, as a result of that severe mental disease or defect, would have had a difficult time appreciating the nature and quality or wrongfulness of his conduct. During her testimony, Dr. Petersen acknowledged that she reviewed the sanity board report. The trial counsel renewed his motion to obtain a copy of the report (the MJ earlier denied the same request), which was granted. The CAAF held that it was error to release the statements of accused to Dr. Marrero as the derivative evidence provisions of MRE 302 had not been triggered. As a nonconstitutional error, the government would have to demonstrate that the error did not have a substantial influence on the findings. Given that the government relied heavily upon the testimony of Dr. Marrero, the court was left to conclude that the insanity defense may have succeeded had the military judge not erred in releasing the appellant's privileged statements to the government.

C. Are there substitutes for a sanity board?

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

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

VII. TRIAL CONSIDERATIONS

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

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

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

3. Expert must be made part of the "defense team" under MRE 502 to be covered by the attorney-client privilege. *United States v. Toledo*, 25 M.J. 270 (C.M.A. 1987), *aff'd on reconsid*., 26 M.J. 104 (C.M.A. 1988). *United States v. Mansfield*, 38 M.J. 415 (C.M.A. 1993). A physician, psychotherapist who assists the defense in preparation of a defense may fall within the scope of the attorney-client privilege.

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

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

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

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

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

portion of the report by not calling experts who authored the report. *See United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005).

F. Although the rule seems to condition the use of expert testimony by the prosecution on prior use of **experts** by the defense, the Court of Military Appeals rejected such an interpretation, finding that lay testimony can permit the government to use its experts. *United States v. Bledsoe*, 26 M.J. 97 (C.M.A. 1988); *see also United States v. Matthews*, 14 M.J. 656 (A.C.M.R. 1982).

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

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

I. Guilty Pleas and Sanity Issues.

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

2. *United States v. Shaw*, 64 M.J. 460 (C.A.A.F. 2007). The accused pled guilty to offenses during a guilty plea and findings were entered. During the accused's unsworn statement, he said that prior to the charged offenses he was assaulted by a man wielding a lead pipe and suffered severe injuries to his head and brain. The accused also said that he spent almost a month in the hospital and that he was diagnosed with bipolar syndrome. The CAAF determined that the military judge did not err when he failed to inquire into the accused mental condition because his statements were unsupported by other evidence entered into the record or his behavior during his providence inquiry or unsworn statement. <u>A military judge is only required to inquire into circumstances or statements that raise a possible defense, not circumstances or statements that raise the "mere possibility" of defense.</u> NOTE: The majority opinion recommended that a prudent military judge conduct an inquiry when a significant mental health condition is raised during the plea inquiry; s*ee also United States v. Falcon*, 65 M.J. 386 (C.A.A.F. 2008) (noting that "[the accused] has provided no authority that a diagnosis of pathological gambling can constitute a defense of lack of mental responsibility."); *United States v. Glenn*, 66 M.J. 64 (C.A.A.F. 2008) (stating that the accused's expert mitigation evidence that he suffered from a mood disorder and his unsworn and unsubstantiated statements that he suffered from bipolar disorder did not raise a substantial basis in law for questioning his guilty plea); *United States v. Torgensen*, No. ARMY 20150356, 2016 WL 3545494, (A. Ct. Crim. App. June 22, 2016) (MJ erred in failing to inquire into lack of mental responsibility during providence inquiry where sentencing included evidence of mental health diagnoses and treatment).

3. *United States v. Handy*, 48 M.J. 590, 593 (A.F. Ct. Crim. App. 1998). During a guilty plea, "[w]hen evidence of an accused's mental health rears its head, the judge should question defense

counsel on whether he or she has explored the mental responsibility angle of the case, including whether evidence exists to negate an intent or knowledge element of the offense. The judge should ask the accused if defense counsel has discussed that issue and how it may apply to the particular case. The judge should accept the guilty plea only if the mental issues are resolved for the record and the accused disclaims any potential mental 'defense,' full or partial."

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

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

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

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

VIII. REFERENCES

A. Manual for Courts-Martial, United States.

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

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

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

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

F. Major Rita Caroll, *Insanity Defense Reform*, 114 Mil. L. Rev. 183 (1986).

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

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

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CHAPTER 24
EVIDENCE

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I. REFERENCES

A. Military Rules of Evidence, Manual for Courts-Martial (2019 ed.).

II. INTRODUCTION

A. Implementation of the Rules

1. Prior to the codification of specific rules, the handling of evidence at courts-martial was governed by prior versions of the Manual for Courts-Martial (M.C.M.). However, those prior versions of the MCM were unclear as to which portions of those Manuals were binding, and which portions were merely explanatory.

2. The Military Rules of Evidence (Mil. R. Evid.) were promulgated in 1980 by Executive Order 12,198. Drafted by an early version of the Joint Service Committee on Military Justice, the Rules were created with a view toward incorporating the then-recent Federal Rules of Evidence into military law. For a summary of this process and its effects, see Fredric I. Lederer, "The Military Rules of Evidence: Origins and Judicial Implementation" (1990). *Faculty Publications*. Paper 638. http://scholarship.law.wm.edu/facpubs/638; *see also* Fred Borch, *The Military Rules of Evidence: A Short History of Their Origin and Adoption at Courts-Martial*, Army Law., June 2012, at 1–4.

B. Recent Modifications

1. The Military Rules of Evidence have always been similar, and in some cases identical, to their civilian federal counterparts. This is both by design and required by law, as Article 36 of the UCMJ provides that "for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts…". 10 U.S.C. 936(a).

2. To recognize other developments in the law, and on recommendation of the JSC, the President in 2013 made numerous stylistic and substantive modifications to the Rules by Executive Order 13,643. Those changes are summarized at the beginning of the 2013 supplement to the Manual for Courts-Martial.

3. Additionally, recent years have seen Congress become increasingly active in directing changes to the Rules. In particular, the National Defense Authorization Act for fiscal year 2015 contained several changes affecting the rules of privilege and relevance. *See, generally,* Carl Levin and Howard P. ''Buck'' McKeon National Defense Authorization Act for Fiscal Year 2015' Pub. L. No. 113–291, 128 Stat. 3292 (2014). As a result, nearly every military rule of evidence has changed in recent years.

III. MJA EFFECTIVE DATE INFORMATION

A. The 2016 Military Justice Act had little impact on the Military Rules of Evidence. Changes impacting the Military Rules of Evidence were made through Executive Order 13825 and are incorporated into the Military Rules of Evidence in the 2019 edition of the Manual for Courts-Martial. Those changes are included below and are effective 1 January 2019.

IV. MILITARY RULES OF EVIDENCE, GENERALLY

A. Rule 101. Scope.

1. Scope. The Military Rules of Evidence are applicable to courts-martial, including summary courts-martial, to the extent and with the exceptions noted in Rule 1101. Rule 101 also provides a rule of construction, again linking military practice with its civilian counterpart.

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Rule 101. Scope

(a) *Scope*. These rules apply to courts-martial proceedings to the extent and with the exceptions stated in Mil. R. Evid. 1101.

(b) *Sources of Law*. In the absence of guidance in this Manual or these rules, courts-martial will apply:

(1) First, the Federal Rules of Evidence and the case law interpreting them; and

(2) Second, when not inconsistent with subdivision (b)(1), the rules of evidence at common law.

(c) *Rule of Construction*. Except as otherwise provided in these rules, the term "military judge" includes the president of a special court-martial without a military judge and a summary court-martial officer.

Rule 1101. Applicability of these rules

(a) *In General*. Except as otherwise provided in this Manual, these rules apply generally to all courts-martial, including summary courts-martial, Article 39(a) sessions, limited fact-finding proceedings ordered on review, proceedings in revision, and contempt proceedings other than contempt proceedings in which the judge may act summarily.

(b) *Rules Relaxed*. The application of these rules may be relaxed in presentencing proceedings as provided under R.C.M. 1001 and otherwise as provided in this Manual.

(c) *Rules on Privilege*. The rules on privilege apply at all stages of a case or proceeding.

(d) *Exceptions*. These rules - except for Mil. R. Evid. 412 and those on privilege - do not apply to the following:

(1) the military judge's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

(2) pretrial investigations under Article 32;

(3) proceedings for vacation of suspension of sentence under Article 72; and
(4) miscellaneous actions and proceedings related to search authorizations, pretrial restraint, pretrial confinement, or other proceedings authorized under the Uniform Code of Military Justice or this Manual that are not listed in subdivision (a).

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2. Secondary Sources. Rule 101 (b). If not otherwise prescribed in the Manual or rules, courts-martial will first apply the rules of evidence recognized in the trial of criminal cases in the United States district courts; and secondly, the rules of evidence at common law. *United States v. Toy*, 65 M.J. 405, 410 (2008).

B. Rule 102. Purpose.

1. Rule 102 outlines the policy contours of the Rules of Evidence generally, and mirrors its counterpart in the Rules for Courts-Martial 102. It is taken verbatim from the Federal Rules of Evidence.

2. Though not a rule of construction *per se*, it has been cited for the proposition that it is "intended to aid in the construction and legitimate application of other specific Rules." *See* 1 SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 102.02[1][B] at 1–20 (8th ed. 2015). Rule 102 is mentioned in Appendix 22 (MRE Analysis, MCM 2016 ed.) only to note that it is "not a license to disregard the Rules in order to reach a desired result." This is presumably to avoid the possibility that another affirmative rule in the MRE collides with a military judge's notions of fairness, justice, or truth.

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Rule 102. Purpose

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

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C. Rule 103. Rulings on Evidence.

1. This rule imposes significant responsibility on counsel to raise and preserve evidentiary questions for review.

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Rule 103. Rulings on evidence

(a) *Preserving a Claim of Error*. A party may claim error in a ruling to admit or exclude evidence only if the error materially prejudices a substantial right of the party and:
(1) if the ruling admits evidence, a party, on the record:
(A) timely objects or moves to strike; and
(B) states the specific ground, unless it was apparent from the context; or
(2) if the ruling excludes evidence, a party informs the military judge of its substance by an offer of proof, unless the substance was apparent from the context.
(b) *Not Needing to Renew an Objection or Offer of Proof*. Once the military judge rules definitively on the record admitting or excluding evidence, either before or at trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(c) *Review of Constitutional Error*. The standard provided in subdivision (a)(2) does not apply to errors implicating the United States Constitution as it applies to members of the Armed

Forces, unless the error arises under these rules and subdivision (a)(2) provides a standard that is more advantageous to the accused than the constitutional standard.
(d) *Military Judge's Statement about the Ruling; Directing an Offer of Proof*. The military judge may make any statement about the character or form of the evidence, the objection made, and the ruling. The military judge may direct that an offer of proof be made in question-and-answer form.
(e) *Preventing the Members from Hearing Inadmissible Evidence*. In a court-martial composed of a military judge and members, to the extent practicable, the military judge must conduct a trial so that inadmissible evidence is not suggested to the members by any means.
(f) *Taking Notice of Plain Error*. A military judge may take notice of a plain error that materially prejudices a substantial right, even if the claim of error was not properly preserved.
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2. Objections to evidence admitted. Rule 103(a)(1): Objections to evidence must be specific and timely, or the objection is waived, absent a plain error. While citation to evidentiary rules by number is not required, objections must be sufficiently specific to make the issue known to the military judge. If so, the issue will be preserved. *United States v. Datz*, 61 M.J. 37 (2005). While the rule does not require a moving party to present *every* argument in support of an objection, argument must be sufficient to make the military judge aware of the specific ground for objection in a practical rather than a formulaic manner. *United States v. Reynoso*, 66 M.J. 208 (2008).

3. Where the witness' answer is objectionable, but it has been heard by the panel, the opponent must seek a curative instruction (to disregard the testimony) or a mistrial. Declaration of a mistrial lies within the sound discretion of the judge, *United States v. McGeeney*, 41 M.J. 544 (N-M. Ct. Crim. App. 1994), and should only be granted where circumstances demonstrate the necessity to prevent a manifest injustice to the accused. *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993).

4. Offer of Proof. Rule 103(a)(2): If the military judge sustains an objection to the tender of evidence, the proponent generally must make an offer to preserve the issue for appeal. The offer should include the substance of the proffered evidence, the affected issue, and how the issue is affected by the judge's ruling. *United States v. Means*, 24 M.J. 160 (C.M.A. 1987) and *United States v. Viola*, 26 M.J. 822 (A.C.M.R. 1988).

5. Repeating Objections. Counsel do not have to repeat objections during trial if they first obtain unconditional, unfavorable ruling from the military judge in out-of-court session. *United States v. Sheridan*, 43 M.J. 682 (A.F. Ct. Crim. App. 1995). However, a preliminary, tentative ruling may require a subsequent objection to preserve the issue for appeal. *United States v. Jones*, 43 M.J. 708 (A.F. Ct. Crim. App. 1995). Rule 103 also applies at sentencing to the admission of documents from the accused's personnel records. *See United States v. Kahmann*, 59 M.J. 309 (2004) (holding that where defense counsel failed to object, the military judge did not commit plain error in admitting a summary court-martial conviction record that did not indicate on its face whether the accused had received *Booker* counseling or whether mandatory review of the conviction had taken place under Art. 64).

D. Rule 105. Limiting evidence not admissible against other parties or for other purposes.

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Rule 105.
If the military judge admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the military judge, on timely request, must restrict the evidence to its proper scope and instruct the members accordingly.
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1. A limiting instruction may be an appropriate alternative to exclusion of evidence. *See, e.g., United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983) (exclusion of Rule 412 evidence); *United States v. Ureta*, 44 M.J. 290 (1996), *cert. denied*, 117 S. Ct. 692 (1997) (prior inconsistent statements offered for impeachment); *United States v. Barrow*, 42 M.J. 655 (A.F. Ct. Crim. App. 1995) (uncharged misconduct).

2. The rule embodies the view that, as a general matter, evidence should be received if it is admissible for any purpose. The rule places the major responsibility for the limiting instruction upon counsel. Counsel should state the grounds for limiting the evidence outside the hearing of the members. Counsel should offer—and the court may request—specific language for the instruction, which may be given at the time the evidence is received, as part of the general instructions, or both.

E. Rule 106. Remainder of or Related Writings or Recorded Statements.

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Rule 106.
If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part - or any other writing or recorded statement - that in fairness ought to be considered at the same time.
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1. In *United States v. Rodriquez*, 56 M.J. 336 (2002), the CAAF held that in the military there are two distinct rules of completeness, Rule 106 and Rule 304(h)(2). CAAF held that Rule 106 applies when fairness demands that the rest of the evidence be considered contemporaneously with the portions of the evidence offered by the opposing side. They adopted a standard regarding Rule 304(h)(2) that allows for admissibility of statements made by the accused when the defense introduces the remainder of a statement or statements that are explanatory or relevant to the confession or admission of the accused previously offered by the government. This is allowed even if the statements the defense seeks to admit are otherwise inadmissible hearsay. CAAF requires a case-by-case determination when the defense attempts to admit a series of statements as part of the original confession or admission in order to determine if they are part of an ongoing statement or a separate transaction or course of action.

2. In the context of a confession or an admission, read this rule in connection with Rule 304(h)(2) (where only part of the alleged admission or confession is introduced, the defense may introduce other portions). Other portions admitted by the defense do not need to overcome a hearsay objection. *United States v. Benton*, 54 M.J. 717 (A. Ct. Crim. App. 2001). However, note that this has the potential to open the door to an accused's character – the *Goldwire* trap. In *United States v. Goldwire*, 55 M.J. 139 (2001), the CAAF held that when defense counsel uses the rule of completeness to admit portions of their client's statements into evidence through cross examination of a government witness they open the door to reputation and opinion testimony regarding the truthfulness of the accused. CAAF analyzed the potential application of the rule of completeness under both the federal and military rules, as well as the common law doctrine of completeness.

3. Supplementary Statements. In *United States v. Foisy*, 69 M.J. 562 (N.M. Ct. Crim. App. 2010), the accused gave a sworn statement to an NCIS agents admitting that he had sex with the victim, but insisting that it was consensual. He also described his interactions with the victim which led him to believe that it was consensual. Another NCIS agent took a second statement from the accused which was labeled as a "supplementary statement." The facts in the supplementary statement began immediately before appellant penetrated the victim. At trial, the government admitted only the supplementary statement. The defense attempted to admit the first statement under the rule of completeness. The government objected and the military judge sustained the objection. Finding the military judge erred in not allowing the defense to introduce the first statement, the Navy-Marine Court of Criminal Appeals held that, under MRE 304(h)(2), "where the Government links two statements by constructing them as a statement and a 'supplement' to that statement, the Government may not deconstruct those statements for the purposes of trial where the admission of the second statement standing alone would create a misimpression on the part of the fact finder as to an accused's actual admissions."

V. RELEVANCY AND ITS LIMITS

A. Rule 401: Test for relevant evidence

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Rule 401. Test for relevant evidence
Evidence is relevant if:
(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.
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1. The Main Relevancy Provisions

a) The Military Rules of Evidence have three main relevance provisions: Rules 401, 402, and 403. Rule 401 defines what is relevant. Rule 402 requires that evidence be relevant in order to be admitted and that irrelevant evidence be excluded. Finally, Rule 403 allows the military judge to exclude relevant evidence which is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the panel, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

b) Justification: Relevancy requirements help save time, narrow the topics the parties have to develop in preparation for trial, and increase the perceived legitimacy of courts-martial by ensuring that outcomes based on information most people would believe have something to do with the issues at trial.

2. Establishing Relevancy. The logical starting place when evaluating any issue at trial is the concept of relevance. Military Rule of Evidence 401 is taken without change from the Federal Rule and adopts a logical approach to relevance. Rule 401 permits both circumstantial and direct evidence to satisfy the relevancy criteria. A relevancy objection, although often overlooked, is frequently the most valid objection available to counsel. Military courts have used Rule 401 to expand the amount of information available to the members. *See, e.g., United States v. Tomlinson*, 20 M.J. 897 (A.C.M.R. 1985) (Rule 401 was "intended to broaden the admissibility" of most evidence.)

3. Requirements of Counsel. Counsel should be prepared to articulate what issue the offered evidence relates to and show how it rationally advances the inquiry about that issue by doing the following:

a) Describe the evidence;

b) Explain its nexus to the consequential issue in the case; and

c) Indicate how the offered evidence will establish the fact in question.

4. The test under Mil. R. Evid. 401 for logical relevance (as opposed to legal relevance discussed under Rule 403 later in this outline) is whether the item of evidence has *any tendency whatsoever* to affect the balance of probabilities of the existence of a fact of consequence, and is a very low threshold. *United States v. White*, 69 M.J. 236 (2010).

a) *United States v. Schlamer*, 52 M.J. 80 (1999). Accused was charged with the premeditated murder. Victim was found with her throat cut. At trial, the government introduced pictures and writings seized from the accused. In these documents, the accused set out in graphic detail his desires to kill women and have sex with them and commit other violent acts. These writings did not mirror the actual crime, and defense claimed that they were not relevant. The military judge admitted the evidence over the defense objection. The CAAF held Rule 401 is a low standard and since the defense was trying to portray the accused as a docile person, this evidence had some tendency to show the darker side that was consistent with his confession.

b) *United States v. Berry*, 61 M.J. 91 (2005). Relevant evidence under Rule 401 is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evidence of a prior uncharged sexual assault by an accused involving a younger victim satisfied the relevance prong of the threshold test for the admission of uncharged sexual assault in a case where the accused was charged with forcible sodomy of a victim who was drunk, as it has some tendency to make it more probable that the accused committed a nonconsensual act against a vulnerable person.

5. Relationship between Rule 401 and the Due Process Clause. In *United States v. Brewer*, 61 M.J. 425 (2005), the CAAF held that in a urinalysis case, the defense was entitled to introduce a "mosaic alibi" defense to counter the permissive inference of wrongful use, even though such evidence would violate Rules 404 and 405.

B. Relationship Between Rules 401 and 104.

1. Preliminary Questions. Rule 104 provides that the military judge must decide preliminary questions of admissibility of evidence. In addressing these preliminary questions, the military judge is not bound by the rules of evidence, except those with respect to privilege.

2. When ruling on a relevancy objection, the military judge has four basic options:

a) Exclude the evidence;

b) Admit all the evidence;

c) Admit all the evidence subject to a limiting instruction; or

d) Admit part of the evidence and exclude part.

3. Threshold. Although the primary responsibility for showing the relevancy of a particular piece of evidence rests with the proponent, it is a very low hurdle to overcome. All that the military judge is required to determine in order to rule a piece of evidence is relevant, is that a rational member could be influenced by the evidence in deciding the existence of a fact of consequence. The evidence only has to be capable of making determination of the fact more or less probable than it would be without the evidence.

4. Relevancy that Depends on a Fact. Rule 104(b) deals with the situation where the relevancy of a piece of evidence is conditioned upon proof of a predicate fact. *United States v. Bins*, 43 M.J. 79 (1995). The military judge's responsibility in these cases is not to decide the credibility of evidence or announce a subjective belief whether a proponent has proven the predicate fact. Instead, the judge only decides whether counsel has introduced enough evidence so that the panel could reasonably conclude the existence of the conditional fact. In other words, the judge decides only if there is a sufficient factual predicate for admissibility of the evidence; weight and credibility of the evidence are matters for the members. *United States v. Kelly*, 45 M.J. 275 (1996). *Huddleston v. United States*, 485 U.S. 681 (1988) (holding that neither FRE 104 nor 404(b) requires the trial judge to determine by a preponderance of the evidence that a 'similar act' was committed; the trial judge is only required to consider all of the evidence offered and decide whether the jury could reasonably find the similar act was committed).

5. The military judge should ask the following questions:

a) Will the members find it helpful in deciding the case accurately? If no, then the judge excludes the evidence. If yes, then the judge asks another question;

b) Is there sufficient evidence to warrant a reasonable member in believing the evidence? If no, then the judge excludes the evidence. If yes, then the judge admits the evidence.

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Rule 402. General admissibility of relevant evidence

(a) Relevant evidence is admissible unless any of the following provides otherwise:
(1) the United States Constitution as it applies to members of the Armed Forces;
(2) a federal statute applicable to trial by courts-martial;
(3) these rules; or
(4) this Manual.

(b) Irrelevant evidence is not admissible.

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6. Exclusion of relevant evidence. The plain language of Rule 402 strongly favors admission of relevant evidence. However, irrelevant evidence is never admissible because it does not assist the trier of fact in reaching an accurate and fair result. The Rule requires the court to address three separate questions before admitting evidence.

a) Does the evidence qualify under Rule 401's definition?

b) Does the evidence violate any of the five prohibitions listed in Rule 402?

c) Does the evidence satisfy any provision requiring a Rule 403 related judicial assessment of the probative value of the evidence? See, e.g., Rules 403, 412, 413, 414, 803(6), 804(b)(5), 807, and 1003.

C. Relationship Between Rules 401 and 403.

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Rule 403. Excluding relevant evidence for prejudice, confusion, waste of time, other reasons

The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.

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1. Unfair Prejudice. Evidence is subject to exclusion if the opposing counsel can successfully convince the military judge that the risk of unfair prejudice substantially outweighs it probative value. Rule 403 is one of the most often cited rules by counsel. The rule is particularly important in the law of evidence since it is a rule that empowers the military judge to exclude probative evidence if it can be said to be unfairly prejudicial.

a) Standard. In a sense, all evidence that either the government or defense seeks to introduce is intended to prejudice the opponent. If it didn't prejudice the opponent, one could reasonably question the value of seeking to admit the evidence. The question under Rule 403 is really one that addresses how the factfinder will view the evidence. It is only when a factfinder might react to the proffered evidence in a way (usually emotional) that is not supposed to be part of the evaluative process that the reaction is considered unfairly prejudicial. *United States v. Owens*, 16 M.J. 999 (A.C.M.R. 1983) (describing unfair prejudice as existing "if the evidence is used for something other than its logical, probative force").

(1) PROPER PREJUDICE EXAMPLE: SPC Smiffy is charged with assault upon PVT Jones. The government seeks to introduce evidence from CPT Honest who will testify he heard SPC Smiffy say "the next time I see PVT Jones he is a dead man." The defense might try to keep the testimony out under a number of justifications, but under Rule 403, although the evidence is prejudicial and a member may use it to determine that SPC Smiffy likely assaulted PVT Jones, this type of prejudice is proper because it comes from the member's belief that the accused committed the charged offense.

(2) IMPROPER PREJUDICE EXAMPLE: Same facts as above except CPT Honest is going to testify he heard SPC Smiffy say "the next time I see PVT Jones he is a dead man, because I belong to the "bare knuckles gang" that encourages members to beat people up." Under Rule 403, the defense would have a much better argument to keep out the portion of the statement regarding SPC Smiffy's gang membership. The risk of admitting the entire statement is that the members may develop a negative feeling about SPC Smiffy based upon their feelings about individuals that belong to a gang. Those impressions would be an example of unfair prejudice since they are unrelated to the probative value the gang information has with respect to the charged offense. Instead, they flow from the members' reactions to information about the accused that would cause loathing whether or not it was linked to the events of the alleged offense. The risk of the members believing the accused is a wretch that deserves punishment no matter what the evidence is regarding the assault is an example of unfair prejudice under Rule 403.

b) Legal Relevance. The probative value of any evidence cannot be substantially outweighed by any attendant or incidental probative dangers. Among the factors specifically mentioned in the rule are "the danger of unfair prejudice, confusion of the issues, or misleading the members." To determine whether the risk of unfair prejudice substantially outweighs the probative value of evidence, the military judge is required to do some kind of weighing. Although there is not a clear test for the military judge to follow, some factors the military judge might consider include:

(1) the strength of the probative value of the evidence (i.e., a high degree of similarity);

(2) the importance of the fact to be proven;

(3) whether there are alternative means of accomplishing the same evidentiary goal (consider in connection with defense concessions to 404(b) uncharged misconduct); and

(4) the ability of the panel to adhere to a limiting instruction.

(5) *Berry* Factors - *United States v. Berry*, 61 M.J. 91 (2005). When conducting a Rule 403 balancing test, a military judge should consider the following factors: the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the factfinder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties.

c) Rule 403 favors admissibility. A military judge will exclude evidence on a legal relevance theory only when the probative values is "substantially outweighed" by the accompanying probative dangers. *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981) (stating that striking a balance between probative value and prejudicial effect is left to the trial judge and that the balance "should be struck in favor of admission"). The passive voice suggests that it is the opponent who must persuade that the prejudicial dangers overcome the probative value. *United States v. Leiker*, 37 M.J. 418 (C.M.A. 1993) (cautioning defense counsel that failure to make a satisfactory offer of proof prohibits an appellate court from weighing the evidence's probative value against its possibility for causing undue delay or waste of time).

d) Rule 403 is the rule by which legal relevance is determined. While Rule 403 has broad application throughout the Military Rules of Evidence, some commentators have noted that "its greatest value may be in resolving Rule 404(b) issues "because of the low threshold of proof required to establish extrinsic events. *See* 1 SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 102.02[1][B], at 4–40 (8th ed. 2015). Editorial Comment, Rule 403, Military Rules of Evidence at Section 403.03[7], at 4-30 (5th ed. 2003).

e) Rule 403 and special findings. The military judge should always make special findings when resolving a Rule 403 objection, even without a request to do so by counsel. *United States v. Bins*, 43 M.J. 79 (1995) (criticizing the military judge for stating that he had performed the balancing test required by Rule 403, when all he really did was recite the Rule's language). Special findings are beneficial for at least two reasons:

(1) Appellate courts will be able to evaluate the criteria and thought process used by the military judge. This will reduce the likelihood of reversal for abuse of discretion. *United States v. Hursey*, 55 M.J. 34 (2001) (describing that when a military judge conducts a proper Rule 403 balancing test, the ruling will not be overturned unless there is a clear abuse of discretion).

(2) Special findings provide counsel with an opportunity to correct erroneous determinations by the military judge at the trial level, instead of waiting months or years later to do the same on appeal.

VI. CHARACTER EVIDENCE

A. Character Evidence Generally Prohibited.

1. As a general rule, the law disfavors character evidence. This principle is embodied in Mil. R. Evid. 404(a)(1), which prohibits the use of evidence of a person's character to prove that the person acted on a specific occasion in conformity with that character. This general rule of prohibition is derived from the common law, where "[c]ourts… almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt…. The State may not show the defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might

logically be persuasive that he is by propensity a probable perpetrator of the crime." *Michelson v. United States*, 335 U.S. 469, 475 (1948) (footnotes omitted) (citation omitted).

2. There are two main justifications for the prohibition on propensity:

a) Propensity evidence may lead to the wrong outcome in a court-martial.

b) Propensity evidence almost always carries a significant risk of unfair prejudice.

3. The Rules generally break character evidence into two basic types: character traits under Mil. R. Evid. 404(a), and specific instances of character conduct under Mil. R. Evid. 404(b). Both subsections of the rule prohibited the "propensity inference"– that a person's character (either as a trait, or in the form of specific instances of past conduct) suggests that the person did something because of a propensity to do such things.

4. While the law embraces a general rule prohibiting introduction of propensity evidence, there are exceptions to that general rule. The exceptions generally fall into three categories:

a) Narrow exceptions for character evidence of an accused or victim (Mil. R. Evid. 404(a)(2)), including good character as a defense, and a victim's character for peacefulness in homicide or assault cases;

b) Broad exceptions for the character of an accused in sexual assault and child molestation cases (Mil. R. Evid. 413 and 414);

c) Tailored exceptions for witnesses (Mil. R. Evid. 404(a)(3)); this rule provides exceptions for witnesses' character by incorporating the requirements of Rules 607–609).

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Rule 404(a). Character evidence

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for an Accused or Victim

(A) The accused may offer evidence of the accused's pertinent trait and, if the evidence is admitted, the prosecution may offer evidence to rebut it. General military character is not a pertinent trait for the purposes of showing the probability of innocence of the accused for the following offenses under the UCMJ:

(i) Articles 120–123a;

(ii) Articles 125–127;

(iii) Articles 129–132;

(iv) Any other offense in which evidence of general military character of the accused is not relevant to any element of an offense for which the accused has been charged; or

(v) An attempt or conspiracy to commit one of the above offenses.

(B) Subject to the limitations in Mil. R. Evid. 412, the accused may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecution may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the accused's same trait; and

(C) In a homicide or assault case, the prosecution may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Mil R. Evid. 607, 608, and 609.

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B. Permissible Propensity Inference

1. While character evidence is generally prohibited, there are specific exceptions which allow the use of character evidence for its "propensity purpose": using evidence to show a person acted in conformity with their character. The Rule lists these exceptions based on the status of the person offering the evidence, and about whom the evidence is offered.

a) Pertinent Character Traits Offered by the Accused:

(1) The accused was permitted under Rule 404(a) to offer any pertinent character trait which makes it unlikely that she committed the charged offense. In other words, this is circumstantial evidence of conduct. "Pertinent" in 404(a) means the same thing as "relevant" as that term is defined in 401.

(2) When submitting the request for reputation or opinion witnesses, the proffer should include the following foundational elements: the name of the witness, whether the witness belongs to the same community or unit as the accused, how long the witness has known the accused, whether he knows him in a professional or social capacity, the character trait known, and a summary of the expected testimony. *United States v. Breeding*, 44 M.J. 345 (1996).

(3) The formula could be applied in the following scenarios:

Offense	**Pertinent Character Trait**
Larceny	Trustworthiness or Honesty
Drunkenness	Sobriety
Assault	Peacefulness

b) General Good Military Character of the Accused—Past and Present

(1) In the past, the Rules (and the courts) held a permissive view of a military accused's general good military character as a pertinent character trait if there was a nexus, however strained or slight, between the crime circumstances and the military. In most cases this meant a likelihood that the defense would include a "good soldier defense" by presenting the accused's good military character evidence. *United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989). Consider the impact of *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994) (service discrediting behavior or conduct prejudicial to good order inherent in all enumerated offenses).

(2) The National Defense Authorization Act for Fiscal year 2015 directed numerous changes to the Rules of Evidence, including a modification to the admissibility of general good military character. In particular, the new Rule notes that the general good military character of an accused is *not* a pertinent (meaning not relevant to, and therefore not admissible) trait for the following offenses:

(a) Articles 120–123a;

(b) Articles 125–127;

(c) Articles 129–132;

(d) Any other offense in which evidence of general military character of the accused is not relevant to any element of an offense for which the accused has been charged; or

(e) An attempt or conspiracy to commit one of the above offenses.

(3) NOTE: the full effect of this change in the law on lesser included offenses remains uncertain. Assault consummated by a battery under Article 128 can be a lesser included offense in a sexual assault case, meaning that a special instruction or series of instructions may be necessary to properly advise the members on when, and for what offenses, general good military character may be considered. To determine whether general good military character may be admissible, first determine whether an offense for which the introduction of general good military character is permitted is a lesser included offense of a charged offense. If that's the case, then general good military character may be admissible; prudent counsel will request a special instruction from the military judge on that evidence.

c) Rebuttal by Government of Good Character of Accused – if an accused introduces good military character evidence (or any other pertinent character trait evidence), the government is allowed to rebut it. NOTE: If a defense counsel loses a motion *in limine* to preclude the government from cross-examining character witnesses regarding accused's bad acts, a tactical election not to present good character case probably will bar review. *United States v. Gee*, 39 M.J. 311 (C.M.A. 1994).

(1) Rebuttal by the government is proper when the accused claims that he or she is not the sort of person who would do such a thing. "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson v. United States*, 335 U.S. 469, 479 (1948); *United States v. Johnson*, 46 M.J. 8 (1997).

(a) But see, *United States v. Trimper*, 28 M.J. 460 (C.M.A.) cert. denied, 493 U.S. 965 (1989). Even if the accused opens the door to uncharged misconduct (here by claiming to have never used cocaine), the judge must decide whether the unfair prejudicial effect of the rebuttal evidence substantially outweighs its probative value. Rule 403. See also, *United States v. Graham*, 50 M.J. 56 (1999). The CAAF held it was reversible error to allow trial counsel to question accused about prior positive urinalysis, even though the accused testified he was surprised when he tested positive for THC.

(b) *United States v. Goldwire*, 55 M.J. 139 (2001), the CAAF held that when defense counsel attempt to develop their theory of the case through the cross examination of government witnesses, they may open the door to reputation and opinion testimony regarding truthfulness of the accused. In *Goldwire*, the trial defense counsel cross-examined the CID agent on exculpatory statements made by the accused during the interview conducted by the CID agent. The appellant argued on appeal that this cross-examination was allowed under the rule of completeness and that it did not open the door to reputation and opinion testimony concerning the accused. The CAAF disagreed.

(2) Accused's Sexual Propensities – proof of an accused's sexual propensities in sex offense courts-martial is specifically allowed, provided certain requirements are met and

special instructions given. Rules 413 and 414 discuss these rules in greater detail later in this outline.

d) Character of Victim – subject to Rule 412, an accused is allowed to offer evidence of a pertinent character trait of an alleged victim in order to show that it makes it likely the victim acted in a certain way on a specific occasion. Rule 404(a)(1) and (2). For example, the accused is permitted, when relevant, to show that the victim was the aggressor by introducing evidence of the victim's character for violence. *United States v. Rodriguez*, 28 M.J. 1016 (A.F.C.M.R. 1989).

e) Rebuttal by the Government – if an accused offers evidence of a victim's character, the government is permitted to rebut that evidence:

(1) Where an accused offers a pertinent character trait of the victim, the government may rebut the accused's evidence with character evidence of the victim. Rule 404(a)(2)(A).

(2) Where an accused offers the character trait of the victim, that "opens the door" to government evidence of the same character trait, if relevant, of the accused (even without the accused first bringing his or her character into evidence). Rule 404(a)(1).

(3) In homicide and assault cases, the government may introduce character evidence to prove the peaceful character of the victim to rebut a claim made in any way that the victim was the first aggressor. Rule 404(a)(2), *United States v. Pearson*, 13 M.J. 922 (N.M.C.M.R. 1992) (victim's character for peacefulness relevant after accused introduces evidence that victim was the aggressor).

f) Impeachment of a Witness – when an issue is whether a witness testified truthfully, evidence about that witness's character for truth-telling is permitted to support an inference that the witness has acted at trial in conformity with the witness's usual respect for truth. Rules 405(a) and 608.

2. Character Evidence for Non-propensity Purpose – If the evidence has relevance independent of propensity, it may be admissible. For example, evidence that someone charged with an offense has committed similar offenses in the past could lead a trier of fact to conclude the person is a bad person and criminally inclined. If this were the only purpose for the evidence given by the government, it would not be a permissible use of character evidence (unless offered under Rules 413 or 414). If, however, the evidence were offered to prove the accused possessed the knowledge necessary to commit the charged offense in the current court-martial, then admissibility would be possible. *See* "**KIPPOMIA**" under Rule 404(b) (treated in greater detail later in this outline).

VII. UNCHARGED CONDUCT

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Rule 404(b): Crimes, Wrongs, or Other Acts

(b) *Crimes, Wrongs, or Other Acts*.

(1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by the accused, the prosecution must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecution intends to offer at trial; and
(B) do so before trial - or during trial if the military judge, for good cause, excuses lack of pretrial notice.

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A. Uncharged Conduct Generally

1. Understanding the Rule: Although character evidence is generally inadmissible to prove action in conformity with that character (propensity) on a specific occasion (except in those exceptions noted elsewhere in this outline), it ***is*** admissible if introduced for a *non-propensity* purpose. Non-propensity evidence (uncharged misconduct) is not offered to prove that an individual acted in conformity with that individual's character on a particular occasion. Rather, this evidence is offered to prove other relevant things like **K**nowledge, **I**ntent, **P**lan, **P**reparation, **O**pportunity, **M**otive, **I**dentity, and **A**bsence of Mistake (**KIPPOMIA**). Mil. R. Evid. 404(b)(2). The list in Rule 404(b)(2) is not an exhaustive one: **The "sole test" for admissibility of uncharged misconduct is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime** and therefore to suggest that the factfinder infer that he is guilty, as charged, because he is predisposed to commit similar offenses. It is unnecessary that relevant evidence fit snugly into a pigeon hole provided by Rule 404(b). *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989).

2. Rule 404(b) is an "inclusive rule" which permits admission of extrinsic evidence unless the sole purpose is to show criminal disposition. If the proponent can articulate a non-propensity theory of logical relevance for the uncharged misconduct evidence, the military judge will have discretion to admit or exclude the evidence after applying MRE 403.

3. Some Non-propensity Theories of Relevance.

a) Motive. Motive supplies the reason that nudges the will and prods the mind to indulge in criminal intent. Such evidence may be offered to prove that the act was committed, or to prove the identity of the actor, or to prove the requisite mental state.

(1) Two inferences are required:

(a) first, the act(s) must support an inference of some mental state;

(b) second, the mental state must be causally related to an issue in the case. This is an area which is difficult to distinguish, analytically, from propensity.

(2) Some examples:

(a) *United States v. Watkins*, 21 M.J. 224, 225 (C.M.A. 1986) (motive evidence relevant to show a person's action as an outlet for emotions. Prior acts of conduct must be of a type which reasonably could be viewed as the expression and effect of the existing internal emotion, and same motive must exist at time of subsequently charged acts).

(b) *United States v. Phillips*, 52 M.J. 268 (2000). Accused charged with BAQ fraud and entering into a sham marriage in order to collect BAQ payments. Court held that evidence of the accused's homosexual relationship was admissible under Rule 404(b) to show motive and intent.

b) Intent: Negates accident, inadvertence, or causality. Intent differs from other named Rule 404(b) exceptions because, typically, it is an ultimate issue in the case. When considering whether uncharged misconduct constitutes admissible evidence of intent under

Rule 404(b), a military judge should consider "whether … [the accused's] state of mind in the commission of both the charged and uncharged acts was sufficiently similar to make the evidence of the prior acts relevant on the intent element of the charged offenses." *United States v. McDonald*, 59 M.J. 426, 430 (2004). According to the CAAF, the relevancy of the other crime is derived from the accused's possession of the same state of mind in the commission of both offenses. The state of mind does not have to be identical, but must be sufficiently similar to make the evidence of the prior acts relevant on the intent element of the charged offenses. The link between the charged and uncharged misconduct must permit meaningful comparison.

(1) The "doctrine of chances." *United States v. Merriweather*, 22 M.J. 657, 661 (A.C.M.R. 1986) ("[T]he sheer number of injuries suffered by the victim over a relatively short period of time would have led common persons to conclude that the charged injury was less likely to have been accidental, thus rebutting the inference of possible accident which arose from the testimony elicited by the defense counsel").

(2) *United States v. Sweeney*, 48 M.J. 117 (1998). Accused charged with stalking his current wife. Court allowed evidence that accused stalked former wife in a similar manner. Court said uncharged misconduct was probative of intent to inflict emotional distress.

(3) *United States v. Henry*, 53 M.J. 108 (2000). At his trial for rape of his stepdaughters, evidence was introduced that the accused made her watch pornographic videos with him. No videos were found in the home, but magazines containing video order forms were found and introduced at trial under Rule 404(b). The CAAF affirmed holding that this evidence was relevant to show intent and that the accused may have groomed his victim. The court also said this evidence was relevant to impeach the victim's in-court testimony because she was now recanting her allegations of rape.

(4) *United States v. Hays*, 62 M.J. 158 (2005), the CAAF affirmed a military judge's decision to admit the appellant's uncharged acts as evidence of intent. The appellant was charged with solicitation to commit the rape of a minor, and the government introduced numerous items of child pornography and explicit e-mails from the appellant's computer to demonstrate intent to commit the offense.

(5) *United States v. Harrow*, 65 M.J. 190 (2007). Appellant was charged with the unpremeditated murder of her five-month-old daughter. The military judge permitted three witnesses to testify about previous incidents where the appellant was abusive to her daughter. The military judge correctly applied the three-part test found in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989) to determine admissibility of previous incidents of flicking, thumping, and biting reflected a state of mind indicating that the appellant responded to her daughter's irritating, yet normal, behavior with deliberate, inappropriate physical force under MRE 404(b). The CAAF determined that the evidence was relevant to show both absence of mistake and intent. Although the appellant did not argue accident, evidence produced at trial by the appellant supported an argument that the injuries might have been accidentally inflicted. The government was entitled to rebut this argument. Likewise, although the appellant did not defend on the ground of either lack of requisite intent or accident, the CAAF held that "evidence of intent and lack of accident may be admitted regardless of whether a defendant argues lack of intent because every element of a crime must be proven by the prosecution." *Id*. at 202.

c) Plan: Connotes a prior mental resolve to commit a criminal act, and implies preparation, and working out the particulars (time, place, manner, means, and so forth). Plan may prove identity, intent, or the actual criminal act. Evidence of plan must actually establish a plan. The CAAF will examine the relationship between the victims and the appellant, ages of victims, nature of the acts, situs of the acts, circumstances of the acts, and time span. If the CAAF finds the dissimilarities too great to support a common plan theory, it will not support admitting the uncharged misconduct.

(1) Some decisions have been quite liberal in admitting uncharged misconduct evidence under the rubric of plan. See, *United States v. Munoz*, 32 M.J. 359 (C.M.A.), cert. denied, 502 U.S. 967 (1991) (where the "age of the victim, the situs of the offense, the circumstances surrounding their commission, and the fondling nature of the misconduct" were similar to sexual misconduct of the accused 12 years earlier, the evidence was admissible to show a plan to sexually abuse his children (per Judge Sullivan).

(2) The CAAF may be applying the brakes to the practice of using old acts of uncharged misconduct to prove plan under Rule 404(b). See, *United States v. McDonald*, 59 M.J. 426, 430 (2004) (holding that a military judge abused his discretion in admitting 20-year-old acts of uncharged misconduct committed when the appellant was 13 years old to establish a common plan to commit charged acts of sexual misconduct against the appellant's daughter.

d) Identity: The government may use modus operandi evidence to establish the identity of the accused.

(1) A high degree of similarity between the extrinsic act and the charged offense is required, so similar as to constitute "a signature marking the offense as the handiwork of the accused." *United States v. Gamble*, 27 M.J. 298, 305 (C.M.A. 1988).

e) Consciousness of Guilt:

(1) In *United States v. Rhodes*, 61 M.J. 445 (2005), the military judge admitted evidence of a meeting between a key government witness and the appellant to show the appellant's consciousness of guilt. Shortly after the meeting, the witness manifested a sudden memory loss pertaining to his potential testimony. The CAAF reversed, holding that, while the evidence could have been admitted to evaluate the truthfulness of the witness's claim of memory loss, it was not admissible to show appellant's consciousness of guilt. However, consciousness of guilt may be admissible in some circumstances.

(2) In *United States v. Staton*, 69 M.J. 228 (C.A.A.F. 2010), the court held that prosecutor intimidation, where the accused drove his car aggressively towards the trial counsel in the commissary parking lot, is probative of consciousness of guilt, and that a carefully tailored instruction appropriately mitigated defense concerns that the evidence would be used for the wrong purpose. The Court used the *Reynolds* test to determine admissibility.

B. The *Reynolds* Test

1. In 1989, the Court of Military Appeals in *United States v Reynolds* (29 M.J. 105 (C.M.A. 1989) announced a 3-part test to determine admissibility of uncharged misconduct:

a) Does the evidence reasonably support a finding that the appellant committed the prior crimes, wrongs, or acts?

(1) Identify the "other act" and show who did it. This is a question of conditional relevancy, and governed by Rule 104(b). The judge is required only to consider the evidence offered and decide whether the panel reasonably could find that the "similar act" was committed by the accused.

(2) In determining whether the government has introduced enough evidence, the trial court neither weighs credibility nor makes a finding that the government has proven the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the panel members could reasonably find the conditional fact. *See Huddleston v. United States*, 485 U.S. 681 (1988) (preliminary finding by the court that the government has proven the act by a preponderance of the evidence is not required by FRE 104(a); *United States v. Castillo*, 29 M.J. 145, 151 (C.M.A. 1989).

b) Does the evidence make a fact of consequence in the case more or less probable? What inferences and conclusions can be drawn from the evidence? If the inference intended includes one's character as a <u>necessary</u> link, the past bad act evidence is excluded.

c) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice?

C. When Properly Admitted

1. *United States v. Hays*, 62 M.J. 158 (2005). After being convicted of possessing child pornography and soliciting the rape of a child, the accused appealed on grounds that the introduction of uncharged misconduct in the form of emails in which he solicited pictures of child pornography was improper. The evidence included emails and pictures from the appellant discussing and showing children and adults engaging in sexual activity. The defense objected under Rules 401 and 403. The CAAF focused on the third *Reynolds* prong. Although the pictures and language in the e-mails were offensive, the CAAF believed that this was the nature of much of the evidence in cases involving child pornography. See *United States v. Garot*, 801 F.2d 1241, 1247 (10th Cir. 1986) (noting that defendants in child pornography cases unavoidably risk the introduction of evidence that would offend an average juror). The CAAF determined that in light of the nature of the offense and the other evidence admitted, the prejudicial impact of the admitted exhibits did not substantially outweigh their probative value in demonstrating appellant's intent and motive to solicit sex with a child. See *United States v. Acton*, 38 M.J. 330, 334 (C.M.A. 1993) (explaining that any prejudicial impact due to the "shocking nature" of a pornographic video depicting incest was diminished because the same conduct was already before the court members).

2. *United States v. Harrow*, 62 M.J. 649 (A.F. Ct. Crim. App. 2006). After conducting a detailed *Reynolds* analysis, the AFCCA affirmed the introduction of prior instances of "flicking, biting, and thumping" the child in a shaken baby syndrome death case, finding the prior incidents demonstrated the state of mind of the accused and were sufficiently similar to pass the second *Reynolds* prong. The AFCCA went on to note "that, generally speaking, Rule 404(b) is interpreted more restrictively in military jurisprudence than its counterpart in other federal courts. In applying this jurisprudence, it is clear that military decisions are very fact specific, often based upon the totality of the circumstances, rather than granting the military judge broad discretion." *Harrow*, 62 M.J. at 660; See e.g., *Hays*, 62 M.J. 158 (2005); *Bresnahan*, 62 M.J. 137 (2005); *Rhodes*, 61 M.J. 445 (2005); and *Diaz* 59 M.J. at 79 (2003). The interesting dicta on the difference between MRE 404(b) and F.R.E. 404(b) notwithstanding, the *Harrow* court also mentions that 404(b) is a "rule of inclusion, not exclusion." *Harrow*, 62 M.J. at 659. In a subsequent appeal, CAAF ignored the AFCCA dicta and instead focused on *Reynolds'* second

prong, analyzing whether the evidence was relevant to show the appellant's intent or absence of mistake. *United States v. Harrow*, 65 M.J. 190 (2007).

3. *United States v. Booker*, 62 M.J. 703 (A.F. Ct. Crim. App. 2006). In *Booker*, the government sought admission of evidence to show an accused's consciousness of guilt. This case generally stands for the principle that, so long as the evidence is offered for a purpose *other than to show the accused's predisposition to commit the crime*, evidence may be admitted under MRE 404(b). The relevant evidence need not fit exactly into one of the pigeon holes described under MRE 404(b).

4. Admissibility of Post-Offense Misconduct. Evidence of an accused's crack-related activities occurring after the charged offense was admissible to show intent and knowledge as to earlier offense. *United States v. Latney*, 108 F.3d 1446 (D.C. Cir. 1997). *But see United States v. Matthews*, 53 M.J. 465 (2000) (holding that evidence of a hot urinalysis that occurred after the charged wrongful use could not be used to show knowing use on the date of the charged offense).

5. Effect of an Acquittal on Admissibility of Rule 404(b): In *United States v. Mundell*, 40 M.J. 704 (A.C.M.R. 1994), the Army appellate court applied earlier precedents in *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987) and *Dowling v. United States*, 493 U.S. 342 (1990) to uphold the introduction of other acts for which the accused had been previously acquitted. "[C]ollateral estoppel does not preclude using otherwise admissible evidence even though it was previously introduced on charges of which an accused has been acquitted." (*Hicks*, 24 M.J. at 8 (Cox, J., concurring)).

D. Limiting the Admissibility

1. In *United States v. Diaz*, 59 M.J. 79 (2003), the government introduced evidence of several other injuries the appellant had allegedly inflicted on his daughter to establish a "pattern of abuse" that would help establish that the death of his daughter was a homicide and appellant was the perpetrator. The CAAF applied the *Reynolds* test and concluded that the uncharged misconduct was improperly admitted: (1) The government failed to establish that the accused had inflicted the other injuries on his daughter; (2) the evidence did not make a fact of consequence more or less probable because the accused's defense was a general denial and a claim that the death was due to unknown causes; and (3) when viewed in the light of improper opinion testimony that was also admitted at trial, the evidence was substantially more prejudicial than probative.

2. *United States v. McDonald*, 59 M.J. 426 (2004). Applying the second prong of *Reynolds*, CAAF held that evidence of appellant's uncharged acts was not logically relevant to show either a common plan or appellant's intent. The CAAF concluded that the military judge abused his discretion in admitting the uncharged acts to establish a common plan due to how dissimilar the uncharged acts were to the charged offenses. The CAAF focused on the fact the appellant was 13 years of age at the time of the uncharged acts, rather than a 33-year-old adult; the uncharged acts were committed in the home of his stepsister, where he was visiting, while the charged acts occurred where he was the head of the household; the uncharged acts were with a stepsister who was about five years younger, rather than with a young stepchild under his parental control, who was about 20 years younger. The CAAF also held the uncharged acts were not relevant to show intent. The CAAF focused on the fact the appellant was a 13-year-old child at the time of the uncharged acts, and a 33-year-old married adult at the time of the charged acts. Absent evidence of that 13-year-old adolescent's mental and emotional state, sufficient to permit meaningful comparison with appellant's state of mind as an adult 20 years later, the CAAF held that the military judge's determination of relevance on the issue of intent was "fanciful and clearly unreasonable."

3. *United States v. Rhodes*, 61 M.J. 445 (2005). The CAAF reversed the affected findings and sentence after holding that the military judge abused his discretion in applying the third prong of the *Reynolds* test. The case involved a government witness who suddenly lost his memory after speaking with the appellant shortly before trial. The witness had given a confession implicating himself and the appellant in drug offenses. The trial counsel wanted to offer evidence of the previous meeting to argue the appellant had intimidated the witness. The CAAF determined that the military judge did not err by allowing the government to enter evidence about the meeting between the appellant and the government witness. The Court concluded this evidence placed the memory loss in its proper context. However, the military judge did err when he instructed the members that they could use the evidence to prove consciousness of guilt on the appellant's part. The CAAF believed the military judge's instruction erroneously allowed the Government to suggest that the Appellant was at fault for a key government witness's memory loss (other factors could have contributed to the memory loss, such as the significant time between the confession and trial). "When evidence is admitted under Rule 404(b), the [members] must be clearly, simply, and correctly instructed concerning the narrow and limited purpose for which the evidence may be considered."

4. *United States v. Bresnahan*, 62 M.J. 137 (2005). Military judge abused his discretion by admitting uncharged misconduct evidence. Although not expressly stated in the opinion, the military judge's decision failed the first prong of the *Reynolds* test. The CAAF determined that the admission was harmless. When a military judge erroneously admits uncharged misconduct, that decision will not be overturned "unless the error materially prejudices the substantial rights of the accused." UCMJ, art. 59(a). The harmlessness of the error will be evaluated by "'weighing: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" *McDonald*, 59 M.J. at 430, citing *United States v. Kerr*, 51 M.J. 401, 405 (1999).

5. *United States v. Thompson*, 63 M.J. 228 (2006). The Appellant was convicted of wrongful use, possession and distribution of marijuana. The uncharged misconduct at issue on appeal involved statements by the Appellant about his preservice drug use. The appellant maintained the uncharged misconduct served no legitimate purpose and merely painted him as a habitual drug user. Focusing again on the second *Reynolds* prong, CAAF found that Thompson did not raise the issues of lack of knowledge or mistake of fact regarding marijuana. Although the defense counsel referred to the Appellant as "naïve" and "young" in his opening statement, this description was never tied to marijuana or tied to anything that caused the Appellant to misapprehend any fact of consequence. Because the military judge admitted the uncharged acts evidence for the purpose of disproving lack of knowledge or mistake of fact, that evidence served no relevant purpose. Since it was not relevant, the evidence failed the second prong of the *Reynolds* analysis. The evidence did not make a fact of consequence more or less probable by the existence of the evidence.

6. Uncharged Acts During Sentencing: Admissibility of uncharged misconduct during presentencing is controlled by Rule 1001(b)(4), not Rule 404(b). Rule 404(b) evidence which may have been admissible on the merits is not admissible during presentencing unless it constitutes aggravating circumstances within the purview of Rule 1001(b)(4).

7. Defense Concessions. *United States v. Crowder*, 141 F.3d 1202 (D.C. Cir. 1998). Case remanded from the Supreme Court in light of *Old Chief v. United States*, 519 U.S. 172 (1997). In an *en banc* reversal, a majority of the court held that the defense could not stipulate to uncharged misconduct in an effort to preclude the government from introducing evidence under Rule 404(b). The D.C. Circuit said that the evidence was relevant under Rule 401 even though there may have been other forms of evidence available. The defense cannot force the government to stipulate,

and if the evidence fits an exception under Rule 404(b) and is not unduly prejudicial under Rule 403, then it is admissible in the form the government wants. Stipulations are not the same as other evidence and government is not required to sacrifice the context and richness of the evidence through stipulations unless, as in *Old Chief*, the stipulation deals with the legal status of the accused and the stipulation gives the government everything they otherwise would want through use of the evidence. *See also United States v. McCrimmon*, 60 MJ 145 (2004) (assuming no overreaching by the government, evidence of uncharged misconduct, otherwise inadmissible evidence, may be presented to the court by stipulation and may be considered by the court).

VIII. METHODS OF PROVING CHARACTER

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Rule 405. Methods of proving character
(a) *By Reputation or Opinion*. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the military judge may allow an inquiry into relevant specific instances of the person's conduct.
(b) *By Specific Instances of Conduct*. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.
(c) *By Affidavit*. The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this subdivision, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.
(d) *Definitions*. "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. "Community" in the Armed Forces includes a post, camp, ship, station, or other military organization regardless of size.
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A. Rule 405. Form of proof.

1. While Rule 404 governs *whether* character evidence is admissible, by contrast, Rule 405 governs “how” a proponent may prove character or a character trait. The rule applies in those situations where “character is in issue” (likely only entrapment cases) and in certain instances of allowable character evidence under Rule 404(a)(1) (character of the accused), Rule 404(a)(2) (character of the alleged victim) and Rule 608 (character of a witness).

2. Rule 405 does not apply to the following:

a) Propensity Inferences under Rule 404(a). Since this use of character evidence is prohibited, there is no acceptable form of proof to introduce the character evidence.

b) Non-propensity purpose under Rule 404(b). If one of the stated purposes of introduction under Rule 404(b) (**KIPPOMIA** – **K**nowledge, **I**ntent, **P**lan, **P**reparation, **O**pportunity, **M**otive, **I**dentity, or **A**bsence of mistake) or any other non-character basis is offered for introduction of the evidence, then Rule 405 does not apply. Under Rule 404(b), relevancy does not depend upon conclusions about a person’s character.

c) Habit under Rule 406. Habit evidence is not treated as character evidence and as such, is exempted from Rule 405.

d) Evidence of a victim's other sexual behavior under Rule 412. Rule 405 does not govern the method of proof. Under Rule 412, the evidence may only be proven by extrinsic specific acts subject to the other constraints under Rule 412.

e) Evidence of similar crimes under Rules 413 and 414. These rules are exempted from 405. Under Rules 413 and 414, the accused's sex-related traits in sex offense or child molestation cases may be proven by reputation, opinion, or extrinsic specific acts.

B. Rule 405. Methods of Proving Character.

1. Rule 405(a) limits a proponent of character evidence to proving it either through using reputation or opinion testimony. A proponent is generally not allowed to elicit testimony regarding specific instances of conduct (unless character is an essential element of an offense or defense – discussed in detail below).

a) Reputation evidence is information that a witness knows about an individual from having heard discussion about the individual in a specified community. Rule 405(d) lists several permissible examples of a "community." *See United States v. Reveles*, 41 M.J. 388 (1995) (for purposes of reputation testimony, "community" broadly defined to include patrons at officer's club bar).

b) Opinion evidence is a witness's personal opinion of an individual's character. From a practical standpoint, the impact of this evidence, depends greatly upon the individual giving it.

c) On cross-examination of a character witness, inquiry is allowable into relevant instances of conduct (discussed in greater detail below).

2. Mechanically, the proponent demonstrates reputation/opinion/specific instances character evidence by showing the following that an individual has a particular character trait; the witness has an opinion about the trait, or is familiar with the person's reputation concerning that particular trait, or can testify concerning specific acts relevant to the trait; AND the witness states an opinion, relates the reputation, or, under very limited circumstances, testifies about specific instances of conduct relevant to trait in issue.

3. Cross-Examining a Character Witness

a) The witness giving the reputation or opinion testimony is subject to impeachment by relevant specific instances of conduct. Rule 405(a). The rule in practice tends almost exclusively to be used by the government; however, it applies equally to both trial and defense counsel. This method is obviously a very effective way of testing a witness's opinion or reputation knowledge. If the witness admits hearing or knowing of the act, the trier of fact may discredit their testimony. If the witness denies having heard or knowing of the act, the trier of fact may question how well the witness knows the individual or the individual's reputation.

b) Counsel may inquire about specific instance of conduct by asking "Have you heard" or "Do you know" questions. Prior to asking any such question, however, counsel must have a good faith belief. *United States v. Pruitt*, 43 M.J. 864 (A.F. Ct. Crim. App. 1996). The opponent to such inquiry may require the proponent to state their good faith belief by way of a motion *in limine*.

c) The witness either knows of the specific instances of conduct or they do not. The counsel asking the question is stuck with the witness's response. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994), *cert. denied*, 115 S. Ct. 721 (1995). This is true since the purpose of the

specific instance of conduct is to test the basis of the witness providing the character evidence.

d) When cross-examining on specific instances of conduct, the focus should be on the underlying conduct and not the government action taken in response to the underlying conduct. For example, counsel's questions should focus on the conduct which led to an article 15 and not the fact of the article 15 itself. *Robertson*, 39 M.J. at 214-15.

e) Timeliness of Acts – Rule 405(a) is concerned with character at the time of the charged offense. Under the rule, any cross-examination should be limited to acts that would have occurred prior to the offense charged, because the court wants to test character at that time. Thus, it is improper to ask a character witness whether the charges brought in the case have affected reputation or their opinion. *United States v. Brewer*, 43 M.J. 43 (1995) (although not objected to, the court held that counsel are not permitted to test the basis of a witness' character opinion by using the charged offense).

4. Under Rule 405(b), specific instances of conduct are allowed in cases where character or a trait of character of an individual is an essential element of an offense or defense. Character is rarely an essential element of an offense or defense. An example of when character would be an essential element of an offense or defense is in a court-martial where the defense to purchasing illegal drugs is entrapment. Either the government or defense would be permitted to offer character evidence regarding the predisposition to purchase illegal drugs. Such evidence escapes the general proscription against character evidence because it is not offered to prove conformity, but because of the significance of the trait in relation to the crime. Where character is "an essential element of the offense or defense," proof may be made by means of opinion or reputation evidence or specific instances of a person's conduct. Rule 405(a) and (b).

a) *United States v. Schelkle*, 47 M.J. 110 (1997) (character is not an essential element of good soldier defense such that proof may be made by reference to specific acts of conduct).

b) *United States v. Dobson*, 63 M.J. 1 (2006). May evidence of specific acts of violence by an alleged victim, known to the accused, be admitted into evidence on the issue of the accused's intent? Yes. Although the military judge correctly prevented the defense from using specific acts under Rule 405 to prove character of the accused, the military judge erred by not admitting the evidence to show the appellant's state of mind at the time of the victim's death. Under Rule 405, a relevant character trait may only be admitted by reputation or opinion testimony, unless the character trait is an essential element of an offense or defense. The military judge determined that although the victim's character for violence could be proved by opinion or reputation evidence, specific acts by the victim were not admissible because the character trait for violence was not an essential element of the self-defense claim. The CAAF held the military judge erred when he did not address the question of whether evidence of specific acts of violence known to the appellant were admissible on the issue of the appellant's intent. Since the government lacked any direct evidence on premeditation, the prohibited testimony was material. With no direct evidence of intent, the panel could have accepted all of the government's evidence pointing to the appellant as the perpetrator of the murder, but still have a reasonable doubt as to whether she premeditated the murder in light of the impact of abuse on her intent. Under these circumstances, the CAAF could not be confident that the error of excluding the testimony of the defense's two witnesses was harmless on the issue of premeditation. Therefore CAAF reversed the findings as to premeditated murder as well as the sentence.

5. Rule 405(c) has no federal counterpart, and is made necessary by the worldwide disposition of the armed forces and the difficulty of securing witnesses, particularly in connection with brief

statements concerning character. Rule 405(c) is based on prior military practice and permits the defense to use affidavits or other documentary evidence to establish the accused's character. The rule permits the government to make use of similar evidence in rebuttal.

a) This use may have Sixth Amendment difficulties under *Crawford v. Washington*, 541 U.S. 36 (2004).

b) *United States v. Lowe*, 56 M.J. 914 (N-M Ct. Crim. App. 2002), the service court held that the military judge erred in allowing opinion testimony through the introduction of hearsay documents containing a "litany" of uncharged misconduct. The court went on to note that while Rule 405(c) relaxes the rules of evidence regarding hearsay concerning the form of such testimony, it does not relax the rules of evidence concerning the substance of such evidence. While the government counsel could have presented a written opinion under Rule 405(c) rebutting the opinion offered by the defense, it couldn't use Rule 405(c) to admit extrinsic evidence of otherwise inadmissible uncharged misconduct to rebut the offered opinion.

IX. RULE 410

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Rule 410. Pleas, plea discussions, and related statements

(a) *Prohibited Uses*. Evidence of the following is not admissible against the accused who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas; or

(4) any statement made during plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the government if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) *Exceptions*. The military judge may admit a statement described in subdivision (a)(3) or (a)(4):

(1) when another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a proceeding for perjury or false statement, if the accused made the statement under oath, on the record, and with counsel present.

(c) *Request for Administrative Disposition*. A "statement made during plea discussions" includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial; "on the record" includes the written statement submitted by the accused in furtherance of such request.

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A. Rule 410

1. The rule aims to encourage legitimate plea bargaining by protecting open, candid discussions between the accused and the prosecution. *See* Notes of Advisory Committee to Federal Rule of Evidence 410 (1975); Standard 14-2.2, ABA Standards Relating to Pleas of Guilty (1986). *Mezzanatto v. United States*, 513 U.S. 196 (1995).

2. The Military Rule extends to pretrial agreements, or discussions of the same with the trial counsel, staff judge advocate, or convening authority **or other counsel for the Government**. The federal rule extends only to "an attorney for the prosecuting authority."

3. The following are inadmissible against an accused:

a) A plea of guilty that is later withdrawn;

b) Any statement made by the accused and defense counsel in the course of the providence inquiry concerning a plea of guilty that is later withdrawn;

c) Any statement made by the accused and defense counsel in the course of plea discussions which do not ultimately result in a plea of guilty or which result in a plea of guilty that is later withdrawn.

4. *United States v. Vasquez*, 54 M.J. 303 (2001). Accused submitted a chapter 10 request admitting to a 212 day AWOL. That charge was not before the court. Government admitted that request in the sentencing case as part of the accused's service records. CAAF said that accused's statements were covered by Rule 410 in light of the court's long-standing precedent for avoiding an excessively formalistic application of the rule in favor of a broad application.

5. Rule 410 Examples.

a) *United States v. Barunas*, 23 M.J. 71 (C.M.A. 1986) (accused's letter to commander requesting non-judicial disposition of use and possession of cocaine charges was inadmissible under Rule 410).

b) *United States v. Brabant*, 29 M.J. 259, 264-65 (C.M.A. 1989) (accused's statement that he would do whatever it took to "make this right" was inadmissible).

c) *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992) (accused's questions to investigator as to amount of likely prison sentence is not plea negotiation as CID not within enumerated exceptions of Rule 410).

d) *United States v. Balagna*, 33 M.J. 54, (C.M.A. 1991). CSM testified concerning the accused's duty performance. CSM previously had spoken for the accused in an Article 15 hearing based on a positive urinalysis, but stated that because of a report he had read, he would not do so again. Court member asked about the report. The panel was told about a Chapter 10 request, and the judge instructed that the report had no relevance to the trial.

e) The Government may be able to introduce such evidence if it can establish that the same information was independently obtained or pursuant to other theories. *See United States v. Magee*, 821 F.2d 234 (5th Cir. 1987).

X. RULE 412

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Rule 412. Sex offense cases: The victim's sexual behavior or predisposition

(a) *Evidence generally inadmissible*. The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions*. In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(3) evidence the exclusion of which would violate the constitutional rights of the accused.

(c) *Procedure to determine admissibility*.

(1) A party intending to offer evidence under subsection (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and remain under seal unless the military judge or an appellate court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence that the accused seeks to offer is relevant for a purpose under subdivision (b)(1) or (2) of this rule and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy, or that the evidence is described by subdivision (b)(3) of this rule, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the victim may be examined or cross-examined. Any evidence introduced under this rule is subject to challenge under Mil. R. Evid. 403.

(d) *Definitions*. For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the fact finder. For the purpose of this rule, the term “victim” includes an alleged victim.

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A. Purpose and Background.

1. Basics: Rule 412 is a rule of *relevance* which prohibits the introduction of evidence of a victim’s other sexual behavior or predisposition. The logical foundation of the rule is similar to—though broader in scope than—the prohibition on propensity evidence from Rule 404, and rests on the premise that evidence of a person’s other sexual conduct rarely is relevant to the question of how a person acted on a specific occasion. The Rule “is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses.” (MCM, App. 22, at A22–36) (2012)).

2. Prior to adoption of Rule 412, an accused was permitted to introduce evidence of the “unchaste” character of the victim, regardless whether the victim testified at trial. The prior rule often produced evidence “of at best minimal probative value with great potential for distraction…[which] discourages both the reporting and prosecution of many sexual assaults.” This use of the alleged victim’s sexual history by an accused came under criticism in the late

1970s. As a result, Congress passed the Privacy for Rape Victim Act of 1978 as Federal Rule of Evidence 412. Congress revised the rule as part of the Violent Crime Control and Law Enforcement Act of 1994. The military adopted Federal Rule of Evidence 412 under the provisions of Rule 1102 as Rule 412.

3. Early decisions of military appellate courts expressed "grave doubts whether Rule 412(a) should be properly construed as an absolute bar to the admission of evidence of a prosecutrix' sexual reputation." *United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983). Since that time the contours of Rule 412 have become clearer through both case law and refinements to the rule itself.

B. Applicability and Exceptions.

1. Rule 412 applies to both consensual and non-consensual offenses under the UCMJ. The rule's protections depend on the status and presence of a victim, rather than consent. *United States v. Banker*, 60 M.J. 216 (2004). After CAAF's decision in *Banker*, the Rule was amended in 2007 to clarify that Rule 412 applies in all sexual offense cases where the evidence is offered against a person that can reasonably be characterized as a "victim of the alleged sexual offense." Hence, Rule 412 applies to nonconsensual as well as consensual offenses, sexual offenses specifically proscribed under the UCMJ, federal sexual offenses prosecutable under clause 3 of Article 134, and state sexual offenses prosecutable under the Federal Assimilative Crimes Act. Accordingly, the "nonconsensual" language was removed from the rule by Executive Order 13,447 in September 2008.

2. There are three enumerated exceptions to the general rule of prohibition under 412:

a) *Someone else is the source of physical evidence*: If the trial counsel has introduced evidence of semen, injury, or other physical evidence, the defense must be allowed to introduce other specific instances of the victim's sexual behavior (if relevant) to show another was the source of the evidence. Rule 412(b)(1).

b) *Evidence of other specific instances of sexual behavior between the victim and the accused if offered to prove consent, or if offered by the prosecution*: this may be offered by the accused to prove consent or mistake of fact as to consent, or by the prosecution to prove lack of consent. Rule 412(b)(2).

(1) *United States v. Jensen*, 25 M.J. 284 (C.M.A. 1987). Includes acts and statements of intent to engage in intercourse.

(2) *United States v. Kelly*, 33 M.J. 878 (A.C.M.R. 1991). The military judge erred in excluding evidence of an alleged rape victim's flirtatious and sexually provocative conduct. To admit evidence of past sexual behavior, the proponent must demonstrate that the evidence is relevant, material, and favorable to the defense. The prosecutrix's past sexual conduct met those requirements in this case. The rape shield provisions aim to protect the victim from harassment and humiliation, but those ends are not served by excluding evidence of pattern of behavior involving open, public displays of sexually suggestive conduct. Findings and sentence were set aside.

c) *Constitutionally-required evidence*: Under Rule 412(b)(3), the standard is that the evidence must be (1) relevant, (2) material, and (3) favorable (defined by case-law as "vital") to the defense. For all practical purposes, this is a test of necessity or vitality in military courts-martial. *United States v. Banker*, 60 M.J. 216 (2004).

(1) *United States v. Savala*, 70 M.J. 70 (C.A.A.F. 2011). The military judge denied the accused's initial MRE 412(b)(3) (formally MRE 412(b)(1)(C)) motion to cross examine

the victim on a prior, unfounded rape allegation. During direct examination the government opened the door by using it to bolster her reason for delayed reporting the current allegation. The court found it error to deny the accused the ability to cross examine on it after the government opened the door. Denying the accused the right to confront the victim with her previous allegation of rape under MRE 412(b)(1)(C) after the government opened the door on direct examination in an effort to bolster her credibility denied the accused his right to confrontation despite the military judge's earlier ruling to exclude the evidence in pretrial motions. A key component of the Confrontation Clause is the crucible of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 316-317 (1974). This right becomes even broader when the prosecution opens the door to impermissible evidence during their case in chief. A failure by the intermediate court was not recognizing that witness credibility is an issue for the fact finder.

(2) *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). The C.A.A.F. held that the prior decision in *United States v. Banker* was wrong in holding that an accused's constitutional rights should be balanced against a victim's privacy interests when determining admissibility under MRE 412(b)(3). If evidence is constitutionally required, and it survives MRE 403 balancing, the evidence is admissible regardless of the level of embarrassment. Despite this holding, the facts of this case did not allow the accused to confront the victim with evidence under MRE 412. The accused in this case did not make a showing that the evidence found in e-mails alluding to the victim being sexually active was constitutionally required under MRE 412(b)(3). The military judge did allow cross-examination on the e-mails without allowing questions into the content by using MRE 611. While an accused has a right to confront his accuser, that right is not without limitations. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). The Confrontation Clause protects a person's rights to a fair cross-examination of a witness to establish bias or motive to lie. That cross-examination can be curtailed when the probative value is outweighed by the danger of unfair prejudice. These dangers of unfair prejudice include harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. *Delaware v. Van Arsdall*, 475 U.S. 673, 678–79 (1986). Here, the judge had already determined that there was insufficient probative value in the e-mails to rise to the level of constitutionally required evidence. As such, he may be allowed an opportunity to expose her motive to lie, but not in every possible manner. The military judge placed limits on the inquiry, and CAAF held that the judge had admitted sufficient evidence to establish TE's motive to lie. Excluding the sexual nature of the worrisome e-mails did not violate the constitutional rights of the accused. The court did not conduct any MRE 403 analysis.

(3) *United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011). The C.A.A.F. held that in an Article 120 case it was error for the military judge to exclude evidence that the victim had an extra-marital affair two years prior. When she disclosed the earlier affair to her husband, he became enraged and kicked down the wife's lover's door. The court found that the military judge prevented the appellant from presenting a theory that a previous affair made it more likely that CL would have lied in this case; that it was a fair inference that a second affair would be more damaging to CL's marriage than a single event; and there was evidence in the record to support this inference, particularly the evidence that the husband had had a prior violent reaction when learning about CL's affair. The court found that the proffered evidence had a direct and substantial link to CL's credibility, and her credibility was a material fact in the case. The probative value of the evidence was high because the other evidence in the case was so conflicting, and was not outweighed by other concerns. The court did not conduct any MRE 403 analysis.

(4) *United States v. Williams*, 37 M.J. 352 (C.M.A. 1993). The military judge denied the defense motion for a rehearing based on newly discovered evidence concerning the victim's credibility. The evidence suggested a motive to fabricate, and showed that the government expert based his opinion testimony on her "deceitful and misleading" information. Since the evidence was relevant, material and favorable to the defense, it was "constitutionally required to be admitted."

(5) *United States v. Greaves*, 40 M.J. 432 (C.M.A. 1994). The military judge properly prevented accused from testifying that he knew that rape victim was a hostess at a Japanese bar and dressed provocatively. The testimony was not relevant where the victim was semi-conscious and where the accused was allowed to testify about circumstances which allegedly led him to believe the victim consented.

(6) *United States v. Harris*, 41 M.J. 890 (A. Ct. Crim. App. 1995). Evidence of a victim's prior sexual activity as a prostitute was constitutionally required to be admitted where defense theory was that victim agreed to sexual intercourse in expectation of receiving money for a bus ticket to Cleveland, and was motivated to retaliate by alleging rape only after accused called her a "skank bitch." *See also United States v. Saipaia*, 24 M.J. 172 (C.M.A. 1987), cert. denied, 484 U.S. 1004 (1988).

(7) *United States v. Buenaventura*, 45 M.J. 72 (1996). Evidence of sexual abuse of an eight-year-old victim by the grandfather, and expert testimony regarding "normalization" – replacing abusive person (grandfather) with friendly person (accused) in recalling the abuse – was constitutionally required to be admitted. *But see United States v. Gober*, 43 M.J. 52 (1995); *United States v. Pagel*, 45 M.J. 64 (1996).

d) The victim's past sexual history must be relevant to the defense's theory before it is admissible under a Constitutionally-required standard.

(1) *United States v. Velez*, 48 M.J. 220 (1998). Accused was convicted of rape. The CAAF noted that the defense theory of the case was that the contact never happened, so even if the victim was promiscuous, it didn't matter under the defense theory.

(2) *United States v. Datz*, 59 M.J. 510 (C.G. Ct. Crim. App. 2003). Affirming appellant's rape conviction, the court held that evidence of the victim's previous sexual encounters with another Service member was too speculative and not commonly viewed as being relevant.

(3) *United States v. Banker*, 60 M.J. 216 (2004); *abrogated by United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011) (holding that the prior decision in *United States v. Banker* was wrong when it held that the victim's privacy interests should be balanced against evidence determined to be constitutionally required before allowing it into evidence). In *Banker*, the C.A.A.F. held that evidence proffered under the constitutionally required exception to MRE 412(a) is admissible only if the evidence is 1) relevant; 2) material; and 3) favorable to the defense AND it is not outweighed by the victim's privacy. This balancing test, applied in this manner, is unconstitutional under *United States v. Gaddis.* While other sections of *Banker* may be useful in helping counsel determine relevant and material, if evidence is found constitutionally required, the victim's privacy cannot be used to exclude it regardless of the significance.

C. Rule 412. Requirements for admission.

1. Prior to admission, the proponent must show: The act is relevant for one of the specified exceptions to in Rule 412; where the act occurred; when the act occurred; AND who was present;

2. Proponent must show that its probative value outweighs Rule 403 dangers.

a) *United States v. Sanchez*, 44 M.J. 174 (1996). As offer of proof failed to identify the significance and theory of admissibility of the victim's prior sexual behavior, accused was not entitled to hearing on the admissibility of Rule 412 evidence. Judge Everett claims that, where alleged motive is commonly understood and obvious from the facts, it is unnecessary for the defense to produce expert testimony. However, where the proffered motive is highly speculative and not commonly understood, expert testimony is essential to understand the connection between the motive to lie and the prior consensual behavior.

b) *United States v. Banker*, 60 M.J. 216 (2004). In applying Rule 412, the military judge is not asked to determine if the proffered evidence is true. Rather, the military judge serves as a gatekeeper by deciding first whether the evidence is relevant and next whether it is admissible under the Rule. The factfinder weigh the evidence and determine its veracity. While evidence of a motive to fabricate an accusation is generally constitutionally required to be admitted, the alleged motive must itself be articulated to the military judge in order for her to properly assess the threshold requirement of relevance.

c) *United States v. Zak*, 65 M.J. 786 (A. Ct. Crim. App. 2007). The military judge abused her discretion in excluding evidence of the victim's prior sexual behavior towards appellant (i.e., a mostly nude massage) because she did not believe that the incident occurred. Based on *Banker*, the ACCA reiterated that the military judge only determines whether the evidence is relevant and meets one of the exceptions under MRE 412(b), not whether the evidence is true.

3. Evidence admissible under Rule 412 is still subject to challenge, and may therefore be excluded, under Rule 403. (Note that the 2007 Amendment to 412(c)(3) specifically states, "Such evidence is still subject to challenge under Mil. R. Evid. 403.").

4. Procedural requirements for admission. Rule 412(c) imposes procedural and notice requirements that must be implemented before a defense counsel may use one of the exceptions. The defense must file a written motion at least five days prior to entering a plea. The motion must specifically describe the desired evidence and the purpose for which it is being offered. The defense must serve the motion on the government, the military judge, and notify the alleged victim. The military judge, if necessary, conducts a closed Article 39(a) session. During this proceeding both parties may call witnesses, including the alleged victim and offer other evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. The defense is required to establish that its evidence satisfies one of the stated exceptions. The military judge must determine whether, on the basis of the hearing, the evidence the defense seeks to admit is relevant. Evidence admissible under Rule 412 is still subject to challenge under Rule 403.

XI. RULES 413 AND 414

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Rule 413. Similar crimes in sexual offense cases
(a) *Permitted Uses*. In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant.
(b) *Disclosure to the Accused*. If the prosecution intends to offer this evidence, the prosecution must disclose it to the accused, including any witnesses' statements or a summary of the expected

testimony. The prosecution must do so at least 5 days prior to entry of pleas or at a later time that the military judge allows for good cause.
(c) *Effect on Other Rules*. This rule does not limit the admission or consideration of evidence under any other rule.
(d) *Definition*. As used in this rule, "sexual offense" means an offense punishable under the Uniform Code of Military Justice, or a crime under federal or state law (as "state" is defined in 18 U.S.C. § 513), involving:

(1) any conduct prohibited by Article 120;
(2) any conduct prohibited by 18 U.S.C. chapter 109A;
(3) contact, without consent, between any part of the accused's body, or an object held or controlled by the accused, and another person's genitals or anus;
(4) contact, without consent, between the accused's genitals or anus and any part of another person's body;
(5) contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
(6) an attempt or conspiracy to engage in conduct described in subdivisions (d)(1)–(5).

Rule 414. Similar crimes in child-molestation cases
(a) *Permitted Uses*. In a court-martial proceeding in which an accused is charged with an act of child molestation, the military judge may admit evidence that the accused committed any other offense of child molestation. The evidence may be considered on any matter to which it is relevant.
(b) *Disclosure to the Accused*. If the prosecution intends to offer this evidence, the prosecution must disclose it to the accused, including witnesses' statements or a summary of the expected testimony. The prosecution must do so at least 5 days prior to entry of pleas or at a later time that the military judge allows for good cause.
(c) *Effect on Other Rules*. This rule does not limit the admission or consideration of evidence under any other rule.
(d) *Definitions*. As used in this rule:

(1) "Child" means a person below the age of 16; and
(2) "Child molestation" means an offense punishable under the Uniform Code of Military Justice, or a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513), that involves:
    (A) any conduct prohibited by Article 120 and committed with a child;
    (B) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;
    (C) any conduct prohibited by 18 U.S.C. chapter 110;
    (D) contact between any part of the accused's body, or an object held or controlled by the accused, and a child's genitals or anus;
    (E) contact between the accused's genitals or anus and any part of a child's body;
    (F) contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or
    (G) an attempt or conspiracy to engage in conduct described in subdivisions (d)(2)(A)–(F).

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A. Rule 413/414.

1. Rule 413 allows, in sexual assault cases, the introduction of evidence that the accused has committed another sexual assault offense. If admitted, the evidence may be considered on any matter to which it is relevant (including propensity). The rule operates as an exception to the rule prohibiting propensity evidence under Rule 404. Rule 414 functions the same way in cases of child molestation. The rules were written to overcome three main criticisms of Rule 404(b) in

sex offense cases: (1) Rule 404(b) requires trial counsel to articulate a non-propensity purpose; (2) the military judge always has discretion under Rule 403 to exclude the evidence; and (3) the limiting instruction from the military judge prohibited the government from using the evidence to argue an accused has a propensity to commit sexual offenses.

2. Congress enacted Rules 413 and 414 as part of the Violent Crime Control and Enforcement Act of 1994. During the Congressional debate on these provisions, Representative Susan Molinari, the Rules' primary sponsor, said it was the intent of Congress that the courts "liberally construe" both Rules so that finders of fact can accurately assess a defendant's criminal propensities and probabilities in light of his past conduct.

B. Rule 413/414. Scope of the Rule.

1. Prior to admitting evidence under Rule 413 or 414, the military judge must make three threshold determinations:

a) The accused is charged with an offense of sexual assault/child molestation;

b) The evidence proffered is evidence of the accused's commission of another offense of sexual assault/child molestation; and

c) The evidence is relevant under Rules 401 and 402. *United States v. Berry*, 61 M.J. 91 (2005).

2. Balancing under Rule 403. If the evidence offered meets these threshold requirements, a military judge must next apply the balancing test under Rule 403 to determine whether the evidence may be excluded because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members. Numerous military appellate courts have published opinions which clarify the contours of this important rule.

a) *United States v. Green*, 51 M.J. 835 (A. Ct. Crim. App. 1999). Military judge erroneously believed Rule 413 "trumped" Rule 403, and that the Rule 403 balancing test was not required. The Army appellate court held that a military judge is required to conduct a Rule 403 balancing test prior to admitting evidence under either Rules 413 or 414.

b) In *United States v. Wright*, 53 M.J. 476, 482 (2000), the accused pled guilty to indecent assault of P in October of 1996. He pled not guilty but was convicted of indecent assault of D in April of 1996, and housebreaking of P's room in October of 1996. The government admitted the assault on P under Rule 413 to prove propensity to commit indecent assault against D. The CAAF rejected the appellant's claim that 413 was unconstitutional, finding the internal procedural protections of the rule and 403 balancing were sufficient to safeguard the interests of an accused. In addition, CAAF outlined a list of several nonexclusive factors (now widely referenced as the "*Wright* factors") a military judge must consider in performing the required balancing of probative value and prejudicial effect. These include: strength of proof of the prior act (e.g. a conviction, versus mere gossip); probative weight of the evidence; potential for less prejudicial evidence; distraction of the factfinder; time needed for proof of prior conduct; temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and relationship between the parties.

c) *United States v. Henley*, 53 M.J. 488 (2000). The accused was convicted of committing oral sodomy on his natural son and daughter. At trial, the government introduced incidents falling outside the statute of limitations under both Rules 414 and 404(b). The trial court admitted the evidence under both rules. The Air Force Court found the evidence admissible under Rule 404(b), and therefore did not need to address the Rule 414 issue. While CAAF agreed with the Air Force Court's approach and affirmed, the opinion included dicta noting

that, in light of its opinion in *Wright*, the evidence would have been admissible under 414 as well.

d) *United States v. Bailey*, 55 M.J. 238 (2001). Appellant was convicted at a general court-martial of rape, forcible sodomy, aggravated assault, and other offenses. He argued on appeal that the military judge erred in admitting, over defense objection, evidence of prior acts of forcible sodomy through the testimony of the appellant's former wife and former girlfriend when the acts in question occurred up to a decade in time prior to the charged offenses. The military judge allowed the evidence under Rule 413, after performing a balancing test under Rule 403. The military judge also provided a limiting instruction to the panel concerning this evidence. The CAAF held that the balancing test conducted by the military judge, in conjunction with his limiting instruction, met the requirements for an appropriate balancing test outlined in *United States v. Wright*, even though the trial judge had not applied all of the non-exclusive factors outlined in the *Wright* decision. *See also United States v. Dewrell*, 55 M.J. 131 (2001).

e) *United States v. Berry*, 61 M.J. 91 (2005). Appellant was convicted of forcible sodomy involving another male soldier. At trial, the appellant's defense to the charge of forcible sodomy was that the alleged victim had consented to the oral sex incident. To counter this defense, the Government sought to introduce testimony from LS, who testified he had been the victim of a similar act by the appellant eight years earlier. The military judge found that the testimony was relevant and admissible under Rule 413. The ruling was affirmed by ACCA in an unpublished opinion. The CAAF found that although the testimony was relevant, the military judge erred in admitting it because he failed to do an adequate balancing test under Rule 403 and that under a proper Rule 403 balancing test the testimony was inadmissible and prejudicial.

3. No Temporal Limit. *United States v. James*, 63 M.J. 217 (2006). The CAAF concluded that the clear language of Rule 414 does not limit the admission of other incidents of child molestation to those occurring before the charged offenses. This reading has equal application to Rule 413. Therefore, the fact that propensity evidence under Rule 413/414 occurs after the date of the charged offenses is not a barrier to its admission in the accused's court-martial.

4. Same acts not required. No requirement that the acts admitted under MRE 413/414 be the exact same acts of molestation as the charged offenses. *United States v. Ediger*, 68 M.J. 243 (C.A.A.F. 2010).

5. Limiting instructions may be required.

a) In *United States v. Dacosta*, 63 M.J. 575 (Army Ct. Crim. App. 2006), the Army Court of Criminal Appeals held that trial judges have a *sua sponte* duty to issue a specific list of instructions to members on considering evidence offered under Rule 413. The Benchbook was later modified to meet this requirement.

b) *United States v. Schroder*, 65 M.J. 49 (2007) illustrates the need for the type of instruction mandated by *Dacosta*. In *Schroder*, the military judge properly admitted the uncharged misconduct under MRE 414, but failed adequately to instruct the members on its proper uses. While finding that the military judge's instruction fell short of what was required when MRE 414 evidence is admitted at trial, CAAF noted that the military judge correctly instructed the members on the government's burden, but improperly qualified the statement by informing the members that they may "[h]owever . . . consider the similarities in the testimony" of the three alleged victims concerning the alleged rape and indecent acts. The CAAF believed the instruction was "susceptible to unconstitutional interpretation"

because it could be construed to mean the similarities between the charged and uncharged misconduct could, standing alone, convict the appellant. The CAAF pointed to *Dacosta* and Benchbook instruction 7-13-1. While not adopting the entirety of the *Dacosta* instruction as its own, the CAAF stated the members "must be instructed that the introduction of such propensity evidence [under MRE 414] does not relieve the government of its burden of proving every element of every offense charged. Moreover, the factfinder may not convict on the basis of propensity evidence alone." In this case, the CAAF was convinced beyond reasonable doubt that the error did not contribute to the appellant's conviction. As such, the court determined the error was harmless.

c) In 2016 ACCA revisited the issue and overturned the portion of *Dacosta* which required those specific instructions. *United States v. Williams*, 75 M.J. 621, 629–30 (Army Ct. Crim. App. 2016). While the "formulaic" requirement of *Dacosta* has been eliminated, ACCA reaffirmed a more general requirement that a judge's "instruction on M.R.E. 413 or M.R.E. 414 evidence must still inform the panel that: 1) an accused may not be convicted based on propensity evidence alone; and 2) that M.R.E. 413 or M.R.E. 414 evidence does not relieve the government of its burden to prove every element of every offense charged." *Williams*, 75 M.J. at 630, *citing Schroder*, 65 M.J. at 56.

6. Admissibility of juvenile offenses. In *United States v. Bare*, 65 M.J. 35 (2007), the accused was charged with sexually molesting his natural daughter, RB. At the time of the trial, RB was fourteen years old. However, the sodomy specification covered a period when RB was under the age of twelve. At trial, the government sought to admit the testimony of the appellant's sister KB regarding his sexual molestation of her when she was between the ages of seven and eleven and the appellant was between the ages of fifteen and nineteen. The Government also sought to admit the testimony of TA, the appellant's stepdaughter. TA alleged the appellant had sexually molested her when she was about eleven years old. The government offered KB and TA's testimony under MRE 414. The appellant did not challenge the admissibility of TA's testimony (since this occurred when he was an adult). However, the appellant did argue that the military judge erred in conducting the required MRE 403 analysis. The appellant analogized his case to that of *United States v. Berry*, 61 M.J. 91 (2005) and *United States v. McDonald*, 59 M.J. 426 (2004). In both *Berry* and *McDonald*, the CAAF concluded the military judge erred in admitting evidence of uncharged adolescent sexual misconduct to prove the charged adult sexual misconduct. The appellant in *Bare* argued that, as in *Berry* and *McDonald*, the military judge failed to give adequate consideration to his young age at the time of the uncharged misconduct when conducting his MRE 403 analysis. The CAAF considered whether, in light of *Berry* and *McDonald*, the military judge erred in admitting uncharged sexual acts between the appellant, when he was an adolescent, and his sister. The CAAF stated that a military judge must take care to meaningfully analyze the different phases of an accused's development when projecting on a child the *mens rea* of an adult or extrapolating an adult *mens rea* from the acts of a child. The CAAF cautioned military judges to not treat the different phases of the accused's development as being unaffected by time, experience, and maturity. In this case, however, CAAF was persuaded that the appellant's facts were distinguishable from those in *Berry*. Unlike *Berry*, the military judge conducted a meaningful MRE 403 balancing analysis which considered factors weighing both against and in favor of admission of the evidence; the misconduct occurred while the accused was an adult as well as an adolescent; the appellant was charged with an offense of child molestation (Berry was not); and the misconduct occurred regularly for a period of about two or three years. All of these factors, according to the CAAF, made KB's testimony more probative and less unfairly prejudicial than the testimony admitted in *Berry*. As such, the military judge did not abuse his discretion in admitting the evidence under MRE 414.

7. Scope of evidence. The evidence offered under MRE 413 or 414 does not necessarily have to be the acts which constitute a sexual offense.

a) In *United States v. Yammine*, 69 M.J. 70 (C.A.A.F. 2010), the government admitted over defense objection file names suggestive of homosexual acts with preteen and teenage boys under MRE 414 (and alternatively under MRE 404(b) against the accused who was charged with sodomizing a fourteen-year-old male. The CAAF held that the file names were not proper propensity evidence under MRE 414, nor were they admissible for any purpose under MRE 404(b).

b) In order to be admissible under MRE 414, the proffered propensity evidence must be evidence of the accused's commission of another offense of child molestation as defined by the rule. The military judge admitted the evidence under MRE 414(d)(5) and alternatively under section (d)(2). MRE 414(d)(5) allows evidence of an offense of child molestation that constitutes a crime under any Federal law that prohibits "deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child." MRE 414(d)(2) allows evidence of "any sexually explicit conduct with children" proscribed by the UCMJ, Federal, or State law. The court held that MRE 414(d)(5) could not include possession of just the file names suggestive of child pornography because, in the absence of the actual files, it was not possible to determine if the conduct depicted in the media fell within the parameters of MRE 414(d)(5).

c) The court further held that MRE 414(d)(2) did not apply because it requires that the qualifying "sexually explicit conduct" proscribed by Federal law be "with children." According to the court, under military law, "with children" means in the physical presence of children. *United States v. Miller*, 67 M.J. 87 (C.A.A.F. 2008).[1] As such, possession or attempted possession of child pornography would not qualify under MRE 414(d)(2) because the appellant himself was not physically present with the children depicted in the child pornography. *But see United States v. Conrady*, 69 M.J. 714 (A. Ct. Crim. App. 2011) (holding that images clearly depicting a child in pain where the appellant saved them to his personal computer and admitted receiving sexual gratification from the images qualified under MRE 414(d)(5)). *Conrady* is discussed further below.

d) The court also held that the unassociated file names were not admissible under MRE 404(b) because the military judge failed to make a proper MRE 404(b) analysis. The court noted that the military judge specifically referenced "propensity" in making his MRE 404(b) determination. Propensity may be a relevant basis under MRE 413 and 414, but it is not a proper basis for admitting evidence under MRE 404(b). Accordingly, the military judged erred in alternatively admitting the unassociated file names under MRE 404(b). Additionally, the court independently determined that the probative value of the proffered evidence did not outweigh the danger of unfair prejudice.

e) Finally, the court held that admitting the unassociated file names was prejudicial and therefore set aside appellant's conviction for sodomy and indecent acts. The court also noted that the indecent acts charge was not subject to rehearing because the finding to that charge was reached as a lesser included offense of forcible sodomy under Article 125, UCMJ.

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[1] In *Miller*, CAAF held that an accused cannot be convicted of indecent liberties with a child under Article 134 when the alleged indecent conduct takes place over a webcam rather than in the actual presence of the child. *United States v. Miller*, 67 M.J. 87, 90-91 (C.A.A.F. 2008).

Pursuant to *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), indecent acts with a child is no longer a lesser included offense of sodomy.

f) *United States v. Conrady*, 69 M.J. 714 (A.C.C.A. 2011). The Appellant had a previous court-martial conviction for receiving child pornography through interstate commerce in violation Article 134, U.C.M.J. (charged as 18 U.S.C. §2252A(a)(2)(B)). The government sought to admit several items from the Appellant's prior court-martial, two of which were images of child pornography. The government argued that the images qualified under MRE 414 as a prior crime of child molestation under MRE 414(d)(1) and (2). PE 14 depicted a child, obviously in pain, engaged in sexual activity with two adults, while PE 18 contained an image of child pornography but no element of infliction of pain or injury. While the military judge did err in admitting the PE 14 under MRE 414(d)(1) and (2), the error was harmless because PE 14 was admissible under MRE 414(d)(5). Possession, receipt or transport of an image of child pornography alone does not meet the definition of a sexual act or sexual conduct with children because it is not done in the presence of a child, which is required under MRE 414(d)(1) and (2). *United States v. Yammine*, 69 M.J. 70, 76 (C.A.A.F. 2010). However, this court's prior decision in *Yammine* did not rule out the possibility that child pornography could be a qualifying prior crime under MRE 414 in other circumstances. MRE 414(d)(5) does not refer to engaging in sexual contact and, as such, does not require the presence of a child. Instead, it focuses on "deriving pleasure . . . from the infliction of physical pain on a child," which the accused here did through receiving and viewing the photograph. While the admission of PE 18 admission was in error and it was not admissible under another subsection, based on the other evidence admitted, the error was harmless. [NOTE: the subsections of MRE 414 have been renumbered since the court's decision in *Conrady*, but the law remains substantively the same.]

8. Admissibility between charged offenses. In the past, Rule 413 permitted the government to argue a propensity inference—subject to the *Wright* factors noted above—between charged offenses. *See, generally*, *United States v. Barnes*, 74 M.J. 692 (A.C.C.A. 2015)(trial counsel's comments on the propensity of the accused during closing argument in a case involving only charged misconduct were proper under MRE 413); *United States v. Bass*, 74 M.J. 806 (N–M. C.C.A. 2015)(military judge's instructions on the members' consideration of the propensity of the accused was proper where only charged misconduct was before the court); *United States v. Maliwat*, 2015 CCA LEXIS 443 (A.F.C.C.A., Oct. 19, 2015)(there is a general presumption of admission for MRE 413 evidence which, when admissible, may be considered for the propensity of the accused to commit a sexual assault). However, in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), CAAF held that the use of sexual offense evidence for propensity purposes as between charged offenses was unconstitutional because it undermined the presumption of innocence and diluted the government's burden of proving charged offenses beyond a reasonable doubt. The use of charged conduct as Rule 413 evidence is error regardless of the forum, the number of victims, or whether the events are connected. *See United States v. Hukill*, 76 M.J. 219, (C.A.A.F. 2017).

XII. PRIVILEGE RULES

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Rule 501. Privilege in general

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) the United States Constitution as applied to members of the Armed Forces;

(2) a federal statute applicable to trials by courts-martial;
(3) these rules;
(4) this Manual; or
(5) the principles of common law generally recognized in the trial of criminal cases in the United States district courts under rule 501 of the Federal Rules of Evidence, insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual.

(b) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:
(1) refuse to be a witness;
(2) refuse to disclose any matter;
(3) refuse to produce any object or writing; or
(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

(c) The term "person" includes an appropriate representative of the Federal Government, a State, or political subdivision thereof, or any other entity claiming to be the holder of a privilege.

(d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

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A. Privileges generally.

1. Privileges are distinctive in their operation, in that they govern not just the admissibility and use of evidence at trial (whether members of the court may see or hear it, and how counsel may argue on those things), but govern also whether the materials may be produced in the first place. The authors of Military Evidentiary Foundations (5th Edition) explain privilege analysis in the following manner: in certain proceedings, the holder has a privilege unless it is waived or there is an applicable exception. DAVID A. SCHLUETER ET AL., MILITARY EVIDENTIARY FOUNDATIONS, § 7–1[1] *et seq.* (5th ed. 2013). There are six considerations in this analytical framework:

a) <u>The proceedings to which the privileges apply</u>: pursuant to Rule 1101, the Rules respecting privileges apply at all stages in virtually all proceedings conducted pursuant to the UCMJ: investigations, Article 32 hearings, Article 72 vacation proceedings, search and seizure authorizations, and proceedings involving pretrial confinement.

b) <u>The holder of the privilege</u>: The original holder is the intended beneficiary (e.g., the client, the penitent, the patient), although in certain cases, another person (e.g. psychotherapist) will have authority to assert the privilege.

c) <u>The nature of the privilege</u>: Encompasses three rights - to testify and refuse to disclose the privileged information; to prevent third parties from making disclosure; and the right to prevent counsel or the judge from commenting on the invocation of the privilege.

d) <u>What is privileged</u>? The confidential communication between properly related parties made incident to their relation.

e) “Communication” is broadly defined.

f) “Confidential” implies physical privacy and intent on the part of the holder to maintain secrecy.

g) <u>Waiver of the privilege</u>: Voluntary disclosure of the privileged matter, in-court or out-of-court, will waive the privilege.

h) Exceptions to the privilege: In the military, exceptions to a privilege (as well as the privilege itself) are expressly delineated. *See United States v. Custis*, 65 M.J. 366, 370-71 (2007) (stating that "whereas privileges evolve in other federal courts based on case law determinations, in the military system the privileges and their exceptions are expressly delineated.").

2. To claim a privilege, the elements of the foundation, in general, are: The privilege applies to this proceeding; the claimant is asserting the right type of privilege; the claimant is a proper holder of the privilege; and the information to be suppressed is privileged because it was a communication, it was confidential, it occurred between properly related parties, and it was incident to the relation.

B. Rule 501.

1. Rule 501 is the basic rule of privilege, recognizing privileges required by or provided for by the Constitution, acts of Congress, the Military Rules of Evidence, the MCM, and the privileges "generally recognized in the trial of criminal cases in the United States district courts pursuant to FRE 501 to the extent that application of those principles to courts-martial is practicable." *United States v. Miller*, 32 M.J. 843 (N.M.C.M.R. 1991) (although it was unaware of any case applying 501(a)(4) to a privilege arising entirely from state law, here, accused did not even have standing to claim a statutory privilege for statements made by daughter to state social services officials).

2. Despite the express provisions of MRE 501 (a)(4), can military courts apply federal common law privileges? *See United States v. Custis*, 65 M.J. 366, 370-71 (2007) (stating that "whereas privileges evolve in other federal courts based on case law determinations, in the military system the privileges and their exceptions are expressly delineated.") *See also United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App. 2009) (refusing to recognize a "reporter's privilege," in part, because the privilege was not specifically delineated.)

C. Rule 502. Lawyer-Client Privilege.

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Rule 502. Lawyer-client privilege

(a) *General Rule*. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(1) between the client or the client's representative and the lawyer or the lawyer's representative;

(2) between the lawyer and the lawyer's representative;

(3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest;

(4) between representatives of the client or between the client and a representative of the client; or

(5) between lawyers representing the client.

(b) *Definitions*. As used in this rule:

(1) "Client" means a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law; or a member of the Armed Forces detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding. The term "lawyer" does not include a member of the Armed Forces serving in a

capacity other than as a judge advocate, legal officer, or law specialist as defined in Article 1, unless the member:

(A) is detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding;

(B) is authorized by the Armed Forces, or reasonably believed by the client to be authorized, to render professional legal services to members of the Armed Forces; or

(C) is authorized to practice law and renders professional legal services during off-duty employment.

(3) "Lawyer's representative" means a person employed by or assigned to assist a lawyer in providing professional legal services.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) *Who May Claim the Privilege*. The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The lawyer or the lawyer's representative who received the communication may claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule under any of the following circumstances:

(1) Crime or Fraud. If the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) Document Attested by the Lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint Clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

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1. An attorney-client relationship is created when an individual seeks and receives professional legal service from an attorney. In addition, there must be an acceptance of the attorney by the client and an acceptance of the client by the attorney before the relationship is established.

2. This privilege may be claimed by the client, or the lawyer on the client's behalf. However, Rule 502(d)(1) removes the privilege with respect to future crimes, as does 502(d)(3) with regard to breach of duty by lawyer or client, etc. *United States v. Smith*, 33 M.J. 527 (A.C.M.R. 1991).

3. Waiver is examined strictly. In *United States v. Marcum*, 60 M.J. 198 (2004), the appellant went AWOL after findings but before sentencing. His defense counsel used a 20-page document the appellant had prepared for use at trial as an unsworn statement on sentencing. The document contained unflattering observations about several of the victims involved in the case, and the trial counsel capitalized on those observations in his sentencing argument. The CAAF held that the right to introduce an unsworn statement is personal to the accused, and in the absence of

affirmative evidence of waiver, the evidence was admitted in violation of the attorney-client privilege.

4. Remedy for breach. In *United States v. Pinson*, 57 M.J. 489 (2002), the CAAF held that when the actions of the government breached the attorney-client relationship between the accused and the defense counsel it may warrant reversal if it impacted the attorney's performance or resulted in the disclosure of privileged information at the time of trial. The CAAF identified the following factors when making that determination: (1) whether an informant testified at the accused's trial as to the conversation between the accused and his attorney; (2) whether the prosecution's evidence originated in the conversations; (3) whether the overheard conversation was used in any other way to the substantial detriment of the accused; or (4) whether the prosecution learned from the informant the details of the conversations about trial preparations. Based upon these factors the court concluded no harm to the defense and affirmed the case.

D. Rule 503. Communications to Clergy.

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Rule 503. Communications to clergy

(a) *General Rule*. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) *Definitions*. As used in this rule:

(1) "Clergyman" means a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

(2) "Clergyman's assistant" means a person employed by or assigned to assist a clergyman in his capacity as a spiritual advisor.

(3) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(c) *Who May Claim the Privilege*. The privilege may be claimed by the person, guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

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1. This privilege protects communications made as a formal act of religion or conscience. The privilege may be claimed by the penitent or in the absence of contrary evidence, by the clergyman or his/her assistant. *United States v. Napoleon*, 46 M.J. 279 (1997). For privilege to apply, the communication must: be made either as a formal act of religion or as matter of conscience; be made to a clergyman in his or her capacity as a spiritual advisor or to a clergyman's assistant in his or her capacity as an assistant to a spiritual advisor; and be intended to be confidential. Note that the privilege was amended in 2007 to include communications made to a clergyman's assistant. A "clergyman's assistant" is "a person employed by or assigned to assist a clergyman in his capacity as a spiritual advisor." *See* MRE 503(b)(2).

2. *United States v. Benner*, 57 MJ 210 (2002). The CAAF reversed the case, holding that when a chaplain meets with a penitent, Rule 503 allows the disclosing person to prevent the chaplain from disclosing the contents of the statement when it was made as a formal act of religion or as a

matter of conscience. In this case the chaplain spoke with the accused and then informed him that army regulations would force the chaplain to disclose the confession of the accused. That was an erroneous statement of the Army's regulation governing chaplains. Based upon statements made by the chaplain the accused then made an involuntary confession to CID agents after the chaplain took him to the MP station. The CAAF held that the confession was involuntary, and under a totality of the circumstances test could not be deemed admissible.

3. In *United States v. Shelton*, 64 M.J. 32 (C.A.A.F. 2006), the CAAF held that communications made to a civilian minister acting as a marital counselor were covered by the attorney-client privilege.

E. Rule 504. Marital Privilege.

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Rule 504. Marital privilege

(a) *Spousal Incapacity*. A person has a privilege to refuse to testify against his or her spouse. There is no privilege under subdivision (a) when, at the time of the testimony, the parties are divorced, or the marriage has been annulled.

(b) *Confidential Communication Made During the Marriage*.

(1) *General Rule*. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were married and not separated as provided by law.

(2) *Who May Claim the Privilege*. The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

(c) *Exceptions.*

(1) *To Confidential Communications Only.* Where both parties have been substantial participants in illegal activity, those communications between the spouses during the marriage regarding the illegal activity in which they have jointly participated are not marital communications for purposes of the privilege in subdivision (b) and are not entitled to protection under the privilege in subdivision (b).

(2) *To Spousal Incapacity and Confidential Communications.* There is no privilege under subdivisions (a) or (b):

(A) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;

(B) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in subdivision (a), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other, or with respect to the privilege in subdivision (b), the relationship was a sham at the time of the communication; or

(C) In proceedings in which a spouse is charged, in accordance with Article 133 or 134, with importing the other spouse as an alien for prostitution or other immoral purpose in violation of 18 U.S.C. § 1328; with transporting the other spouse in interstate commerce for prostitution, immoral purposes, or another offense in violation of 18 U.S.C. §§ 2421–

2424; or with violation of such other similar statutes under which such privilege may not be claimed in the trial of criminal cases in the United States district courts.

(d) *Definitions.* As used in this rule:

(1) "A child of either" means a biological child, adopted child, or ward of one of the spouses and includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this rule only, a child is:

(A) an individual under the age of 18; or

(B) an individual with a mental handicap who functions under the age of 18.

(2) "Temporary physical custody" means a parent has entrusted his or her child with another. There is no minimum amount of time necessary to establish temporary physical custody, nor is a written agreement required. Rather, the focus is on the parent's agreement with another for assuming parental responsibility for the child. For example, temporary physical custody may include instances where a parent entrusts another with the care of his or her child for recurring care or during absences due to temporary duty or deployments.

(3) As used in this rule, a communication is "confidential" if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

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1. Rule 504 reflects the Supreme Court's decision in *Trammel v. United States*, 445 U.S. 40 (1998), in which the Court held that the witness spouse alone has a privilege to refuse to testify, and a defendant spouse may assert only the privilege concerning confidential communications. Thus, one spouse may refuse to testify against the other. Confidential communications made during marriage are privileged, and that privilege may be asserted by the spouse who made the communication, or on his behalf by or the spouse to whom it was made during or after the marital relationship. *See United States v. Durbin*, 68 M.J. 271 (C.A.A.F. 2010) (allowing a witness spouse to testify concerning statements she made during a confidential marital communication so long as those statements did not repeat or reveal the accused spouse's privileged statements).

2. The rule contains several exceptions to the privilege, most importantly: (1) when the accused is charged with a crime against the person or property of the spouse ***or a child of either***, and (2) when, at the time of the testimony is to be given, the marriage has been terminated by divorce or annulment. To prevent unwarranted discrimination among child victims, the term "a child of either" was amended in 2007 to include "not only a biological child, adopted child, or ward of one of the spouses but also includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this rule only, a child is: (i) an individual under the age of 18; or (ii) an individual with a mental handicap who functions under the age of 18." Prior to this amendment, there was no *de facto child* privilege in the military. *See United States v. McCollum*, 58 M.J. 323(2003) (holding that Rule 504(c)(2)(A) requires a lawful parental relationship, as opposed to a custodial relationship, to trigger the "child of either" exception).

3. <u>Adultery</u>. *United States v. Taylor*, 64 M.J. 416 (C.A.A.F. 2007). Adultery constitutes a crime "against the person or property of the other spouse." Thus, when one spouse is charged with adultery, the marital privilege, pursuant to MRE 504(c)(2)(A) does not apply to communications involving the adultery.

4. <u>Presumption of Confidentiality</u>. In *United States v. McCollum*, 58 M.J. 323 (2003), the appellant raped his wife's 14-year-old sister, who was staying with the family for a summer visit. He made several statements to his wife about the incident. At trial, the military judge admitted two of the statements, claiming that the appellant did not establish the intent to hold the

communications confidential. The CAAF reversed, holding that marital communications carry a presumption of confidentiality. Once the party asserting the privilege has established that the communication was made privately during a valid marriage, the burden shifts to the opposing party to overcome the presumption.

5. Joint-Participant Exception. Although civilian federal courts recognize the joint-participant exception to the marital privilege, the joint-participant exception does not apply in military cases. *See United States v. Custi*s, 65 M.J. 366 (C.A.A.F. 2007). In *Custis*, the CAAF reasoned that unlike privileges in the federal civilian courts that evolve based on case law, privileges in the military system are specifically delineated. Hence, the only exceptions are those expressly authorized. Consequently, there is no joint-participant exception to the marital privilege. Note that the ACCA in *United States v. Davis*, 61 M.J. 530 (A. Ct. Crim. App. 2005) had previously recognized a joint-participant exception to marital communications privilege.

F. Rule 509. Deliberations of Courts and Juries.

1. Rule 509 preserves the sanctity of the factfinder's deliberative process.

2. Rule 606(b) provides an exception and permits intrusion into the factfinder's deliberative process when there are questions concerning:

a) Whether extraneous prejudicial information was brought to bear upon any member;

b) Whether any outside influence was improperly brought to the member's attention; or

c) Whether there was unlawful command influence.

3. Note that the deliberative process of military judges, like that of a panel, is protected from post-trial inquiry. *United States v. Matthews*, 68 M.J. 29 (C.A.A.F. 2009)

G. Rule 513. Psychotherapist Patient Privilege.

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Rule 513. Psychotherapist-patient privilege

(a) *General Rule*. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions*. As used in this rule:

(1) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) "Psychotherapist" means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State, territory, possession, the District of Columbia, or Puerto Rico to perform professional services as such, or who holds credentials to provide such services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) "Assistant to a psychotherapist" means a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who May Claim the Privilege*. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission; or

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice.

(e) *Procedure to Determine Admissibility of Patient Records or Communications*.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be

heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial comprised of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

(A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subdivision(d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) of this Rule.

(5) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and must remain under seal unless the military judge or an appellate court orders otherwise.

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1. Rule 513 is a now-distant derivative of the Supreme Court's decision in *Jaffe v. Redmond* (518 U.S. 1 (1996)), and safeguards the confidentiality of communications between patients and psychotherapists and other counselors. The privilege applies "at all stages of a case or proceeding" (*see* MRE 1101(c)) in actions arising under the UCMJ, but it is not a broader doctor-patient privilege (which is excluded from the Rules under Mil. R. Evid. 501(d)). While military courts were initially reluctant to implement psychotherapist-patient privilege, the rule has become more firmly rooted over time, and has been recently modified by statute.

a) *United States v. Rodriguez*, 54 M.J. 156 (2000). The CAAF affirmed the Army Court's ruling that *Jaffee v. Redmond* did not create a psychotherapist-patient privilege in the military.

b) *United States v. Paaluhi*, 54 M.J. 181 (2000). Consistent with *Rodriguez*, the court ruled that *Jaffe v. Redmond* did not create a psychotherapist-patient privilege in the military. The CAAF reversed the conviction on other grounds, finding ineffective assistance on the part of defense counsel to tell the accused to talk to a Navy psychologist without first having the psychologist appointed to the defense team.

c) While *Rodriguez* and *Paaluhi* were not decided until 2000, in 1999 President Clinton directed the inclusion of MRE 513 in Executive Order 13,140 (6 October 1999).

d) *U.S. v. Jenkins*, 63 M. J. 426 (CAAF, 2006). Doctor's testimony was permitted under MRE 513(d)(4) and (6) because the privilege under MRE 513 reflects a more limited

privilege based on the "specialized society" of the military and "the needs of military readiness and national security."

e) *United States v. Bazar*, 2012 WL 2505280 (AFCCA, 2012). Judge did not allow evidence from mental health records to impeach victim during sentencing; not constitutionally required and properly excluded by MRE 403.

f) *U.S. v. Hudgins*, 2014 CCA LEXIS 227 (AFCCA, 2014). Mental health records indicating marginal dissatisfaction with relationship do not meet the "constitutionally required" standard.

g) *U.S. v. Klemick*, 65 M.J. 576 (N–M. C.C.A., 2006). In *Klemick*, the N–M. C.C.A. considered what threshold should apply to directing the production of privileged psychotherapist-patient records under MRE 513. Finding no precedent in military or federal case law, the court turned to analyze state law on the issue. The court ultimately adopted the treatment afforded these records under a Wisconsin state court decision. Finding that "a threshold showing is required prior to an in camera review" of privileged communications, based on three considerations:

(1) Did the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to Mil. R. Evid. 513;

(2) Is the information sought merely cumulative of other information available; and

(3) Did the moving party make reasonable efforts to obtain the same or substantially similar information from unprivileged sources? *Klemick*, 65 M.J. 576, at 580.

2. Statutory amendments. The standard announced in *Klemick* was adopted (with an additional element) by Congress in the changes to MRE 513 mandated by the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 (2014) [hereinafter 2015 NDAA]. In general, those provisions Congress added in the 2015 NDAA clarify the scope of the privilege, curtail exceptions, enhance procedural remedies for patients, and make it more difficult to obtain and admit privileged matter. The 2015 NDAA also added an enforcement mechanism for MREs 412 and 513 by amending Article 6b of the UCMJ to provide that victims who believe their rights under those rules have been violated by the military judge may petition the Courts of Criminal Appeals (CCA) for a writ of mandamus. *See* 2015 NDAA, § 535 (2014). Congress subsequently amended Article 6b to both expand and extend that mandamus practice to include MREs 514 and 615, as well as permitting victims to seek a writ from the decisions of a Preliminary Hearing Officer at Article 32 hearings. *See* § 531 of the National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 (2015) [hereinafter 2016 NDAA].

3. The rule. The most prominent feature of the modifications directed in the FY 2015 NDAA was removal of the "constitutionally required" exception under MRE 513(d)(8). In addition, MRE 513(e)(3) imposes a clearly stated burden of proof (preponderance of the evidence) where a party seeks production of privileged records or communications (even for *in camera* review). Because the modified *Klemick* standard announced in the rule requires proof by a preponderance that "the requested information meets one of the ***enumerated*** exceptions under subsection (d)[,]" (emphasis added) in theory a party cannot prevail on a motion for production or admissibility of privileged records because the "constitutionally required" exception is no longer enumerated. This issue has not yet been directly addressed by C.A.A.F. However, the Army Court of Criminal Appeals (A.C.C.A) in *Lk v. Acosta*, 76 M.J. 611 (A.C.C.A 2017 discussed the constitutional exception's removal. In its opinion, A.C.C.A distinguishes the right to discovery

and the 6th Amendment right to a fair trial. The opinion makes it clear that Congress cannot remove the constitutional considerations for admissibility of such evidence and reminds parties that there is no constitutional right to discovery. The Navy Marine Corps Court of Appeals (N.M.C.C.A) reached a similar conclusion with respect to Congress' ability to remove 6th Amendment considerations in *J.M. v. Payton-O-Brien*, 76 M.J. 782 (N.M.C.C.A 2017). Like A.C.C.A, the N.M.C.C.A concluded that removing the exception did not remove the constitutional reach of the 6th Amendment at trial, however, the court did not distinguish the right to discovery of privileged information from the right to have the privileged information admitted at trial. Thus when a judge concludes that the Constitution requires an *in camera* review or subsequent admission at trial, the privilege must be waived or the court should provide a remedy (e.g. abatement).

4. Cases. The military courts have, however, addressed jurisdiction and procedural defects encountered at trial.

a) In *D.B. v. Lippert*, No. 20150769, 2016 CCA LEXIS 63 (A.C.C.A., 2016), the Army appellate court set aside the trial court's ruling on MRE 513 because the trial judge directed production of the records *prior to conducting the required hearing* under MRE 513(e). In addition, ACCA noted that the modification of Article 6b established a distinct basis for jurisdiction at the CCA. *D.B.*, Slip Op. at 4.

b) In *E.V. v. United States*, 75 M.J. 331, 334 (C.A.A.F., 2016), CAAF dismissed a victim's petition for review and held that, while Article 6b is an independent grant of jurisdiction to the CCAs, it does not grant appellate jurisdiction of those petitions at CAAF. In *Randolph v. H.V.*, No. 16–0678 (C.A.A.F., Feb. 2, 2017), CAAF reaches the same conclusion in dismissing a petition for review of the Coast Guard CCA brought by the accused.

c) In *Lk v. Acosta*, 76 M.J. 611 (A.C.C.A 2017), the Army appellate court held that M.R.E 513 is not a rule of discovery, and the judge's ruling that a child's records had to be produced was made without benefit of the court's conclusion that the exception to the privilege in Rule 513(d)(2), which allowed release of records in cases where an alleged victim was a child of the accused's spouse, applied only to admission of privileged communications at trial.

5. Quasi psychotherapist-patient privilege also exists under limited circumstances:

a) Where psychiatrist or psychotherapist is detailed to assist the defense team, communications are protected as part of attorney-client confidentiality. *United States v. Tharpe*, 38 M.J. 8, 15 n.5 (C.M.A. 1993).

b) Communications made by an accused as part of a sanity inquiry under Rule 302. *United States v. Toledo*, 26 M.J. 104 (C.M.A.), *cert. denied*, 488 M.J. 889 (1988). Note that confidentiality privilege for statements made during mental responsibility exams may not automatically apply retroactively to exams which the military judge deems as adequate substitute for court-ordered RCM 706 examinations. *United States v. English*, 44 M.J. 612 (N-M. Ct. Crim. App. 1996), *rev'd on other grounds*, 47 M.J. 215 (1997).

H. Rule 514. Victim Advocate-Victim Privilege.

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Rule 514. Victim advocate-victim and Department of Defense Safe Helpline staff-victim privilege.

(a) *General rule.* A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate or

between the alleged victim and Department of Defense Safe Helpline staff, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating advice or assistance to the alleged victim.

(b) *Definitions.* As used in this rule:

(1) "Victim" means any person who is alleged to have suffered direct physical or emotional harm as the result of a sexual or violent offense.

(2) "Victim advocate" means a person who:

(A) is designated in writing as a victim advocate in accordance with service regulation;

(B) is authorized to perform victim advocate duties in accordance with service regulation and is acting in the performance of those duties; or

(C) is certified as a victim advocate pursuant to federal or state requirements.

(3) "Department of Defense Safe Helpline staff" are persons who are designated by competent authority in writing as Department of Defense Safe Helpline staff.

(4) A communication is "confidential" if made in the course of the victim advocate-victim relationship or Department of Defense Safe Helpline staff-victim relationship and not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of advice or assistance to the alleged victim or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a victim's records or communications" means testimony of a victim advocate or Department of Defense Safe Helpline staff, or records that pertain to communications by a victim to a victim advocate or Department of Defense Safe Helpline staff, for the purposes of advising or providing assistance to the victim.

(c) *Who may claim the privilege.* The privilege may be claimed by the victim or the guardian or conservator of the victim. A person who may claim the privilege may authorize trial counsel or a counsel representing the victim to claim the privilege on his or her behalf. The victim advocate or Department of Defense Safe Helpline staff who received the communication may claim the privilege on behalf of the victim. The authority of such a victim advocate, Department of Defense Safe Helpline staff, guardian, conservator, or a counsel representing the victim to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) when the victim is dead;

(2) When federal law, state law, Department of Defense regulation, or service regulation imposes a duty to report information contained in a communication;

(3) When a victim advocate or Department of Defense Safe Helpline staff believes that a victim's mental or emotional condition makes the victim a danger to any person, including the victim;

(4) If the communication clearly contemplated the future commission of a fraud or crime, or if the services of the victim advocate or Department of Defense Safe Helpline staff are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;

(5) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission; or

(6) when admission or disclosure of a communication is constitutionally required.

(e) *Procedure to Determine Admissibility of Victim Records or Communications.*

(1) In any case in which the production or admission of records or communications of a victim is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless

the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practicable, notify the victim or the victim's guardian, conservator, or representative that the motion has been filed and that the victim has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a victim's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the victim, and offer other relevant evidence. The victim must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence, or a proffer thereof, in camera if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

(A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored

to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) of this rule and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) of this rule.

(5) To prevent unnecessary disclosure of evidence of a victim's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and must remain under seal unless the military judge or appellate court orders otherwise.

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1. Rule 514 creates a privilege for confidential communications between victims of sexual or violent offenses and their victim advocate. Confidential communications protected under this rule are those that made "in the furtherance of the rendition of advice or assistance." MRE 514(b)(3).

2. "A communication is 'confidential' if made in the course of the victim advocate – victim relationship . . . and not intended to be disclosed to third persons." M.R.E 514 (b)(4). When communications are made in the presence third parties, or when otherwise confidential communications are revealed to third parties, the communications are not generally confidential and thus not protected by the privilege. *Harpole*, at 235, citing *United States v. McElhaney*, 54 M.J. 120, 131-2 (C.A.A.F 2000). However, relationships by blood, marriage, or a "commonality of interest" between the holder of the privilege and the third party may keep the privilege intact.

United States v. Shelton, 64 M.J. 32 at 39 (quoting In re Grand Jury Investigation, 918 F. 2d 374, 385-88 (3d Cir. 1990)).

3. The plain meaning of the phrase, in the furtherance of the rendition of advice or assistance, "requires the communication to the third person to be for the purpose of facilitating the victim advocate in providing advice or assistance to the victim." *United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018).

4. The party claiming the privilege has the burden of proof by a preponderance of the evidence. *United States v. McCollum*, 58 M.J. 323, 336 (C.A.A.F. 2003).

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XIII. WITNESS RULES

A. Rule 601. Competency.

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Rule 601. Competency to testify in general
Every person is competent to be a witness unless these rules provide otherwise.
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1. The rule eliminates the categorized disabilities which existed at common law and under prior military law. *United States v. Morgan*, 31 M.J. 43 (C.M.A. 1990*), cert. denied*, 498 U.S. 1085 (1991). The very young (4 year old child here) are competent, even if hesitant, apprehensive, and afraid.

2. In the event that the competency of a witness is challenged, e.g., a child, the proponent of the witness must demonstrate that the witness has: capacity to observe; capacity to remember; capacity to relate; and recognition of the duty to tell the truth.

B. Rule 602. Personal Knowledge.

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Rule 602. Need for personal knowledge
A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Mil. R. Evid. 703.
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1. As long as the panel could find that the witness perceived the event, the testimony should be admitted. Note, however, the term "sufficient," which affirms that the military judge retains power to reject evidence if it could not reasonably be believed.

2. To demonstrate personal knowledge, the proponent must show the witness was in a position to perceive the event, and did actually perceive it.

C. Rule 605. The military judge.

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Rule 605. Military judge's competency as a witness
(a) The presiding military judge may not testify as a witness at any proceeding of that court-martial. A party need not object to preserve the issue.

(b) This rule does not preclude the military judge from placing on the record matters concerning docketing of the case.
==========

1. *United States v. Howard*, 33 M.J. 596 (A.C.M.R. 1991). Without any supporting evidence at trial, the military judge used his own specialized knowledge of drug use in Germany to conclude the accused used hashish instead of leaf marijuana, how a pipe was used in the process, and that the charged offense was not the accused's first use of marijuana. In doing so, the judge became a witness, was disqualified, and all actions from then on were void.

2. The rule is an exception to Rule 103 waiver rule. It does not apply to:

a) Subsequent proceedings concerning trial presided over; e.g., limited rehearing such as those ordered pursuant *to United States v. Dubay*, 37 C.M.R. 411 (1967).

b) Judicial notice under Rule 201.

D. Rule 607. Who May Impeach.

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Rule 607. Who may impeach a witness
Any party, including the party that called the witness, may attack the witness's credibility.
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1. Under prior practice, the party calling a witness was said to "vouch" for the witness. Ordinarily, that meant the party could not attack the credibility of that witness. That is no longer the case. Under the current rules a party may impeach its own witness, and may even call a witness for the sole purpose of impeachment. *See* 2013 Supplement to Manual for Courts-Martial, at A22–54.

2. Rule 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." The rule contemplates impeachment, however, not the attempted introduction of evidence which otherwise is hearsay. Put differently, the Government may not use impeachment by prior inconsistent statement as a "subterfuge" to avoid the hearsay rule. *United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985). *United States v. Ureta*, 44 M.J. 290 (1996), *cert. denied*, 117 S. Ct. 692 (1997).

E. Methods of Impeachment.

1. Attacks focused on: Defects in capacity to observe, remember or relate; untruthful character; bias, partiality, interest in the outcome; prior convictions; prior inconsistent statements; or delay in reporting abuse or subsequent recantation.

2. Defects in Capacity. Here the focus is on the witness's ability to observe, remember, and relate the information.

a) Observation. The common mode of attack is that the witness could not adequately see/hear the incident in question because of poor lighting, cross-racial identification problems, distance from the scene, etc.

b) Recall. Because of the witness's age, mental condition at the time of the incident or at the time of trial, time lapse between the incident and their in-court testimony, etc., the witness cannot accurately remember the incident.

c) Relate. Because of the witness's age, mental condition, lack of expertise, etc., the witness cannot accurately relate the information.

F. Rule 608. Untruthful Character.

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Rule 608. A witness's character for truthfulness or untruthfulness
(a) *Reputation or Opinion Evidence*. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. Evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
(b) *Specific Instances of Conduct*. Except for a criminal conviction under Mil. R. Evid. 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. The military judge may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
(1) the witness; or
(2) another witness whose character the witness being cross-examined has testified about. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

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1. Once a witness testifies, including the accused or a hearsay declarant, his or her credibility becomes an issue. Evidence of character is then relevant. Rule 608(a) limits the relevance to truthfulness or untruthfulness. Methods of proving character are set out in Rule 405. Under 608(a), the character must be attacked before it may be rehabilitated. Thus, bolstering is prohibited by the rule. Once attacked, the witness' character for being truthful may be rehabilitated with opinion or reputation evidence. *See United States v. Jenkins*, 50 M.J. 577 (N. M. Ct. Crim. App. 1999), witness cannot comment directly about the credibility of another witness's testimony.

a) The foundational elements:

(1) Reputation witness must show he or she is a member of the same community as the witness to be attacked or rehabilitated and that he or she has lived or worked there long enough to have become familiar with the witness' reputation for truthfulness or the untruthfulness. *United States v. Toro*, 37 M.J. 313 (C.M.A. 1993).

(2) Opinion witness must demonstrate that he or she is personally acquainted with witness and on that basis is able to have formed an opinion about the truthfulness or the lack thereof. *United States v. Perner*, 14 M.J. 181 (C.M.A. 1982).

b) When cross-examination is conducted in such a manner as to induce the belief of untrustworthiness, rehabilitation is permitted. *United States v. Allard*, 19 M.J. 346 (C.M.A. 1985). Also, a "slashing cross-examination" will satisfy the "or otherwise" component of Rule 608(a). *United States v. Everage*, 19 M.J. 189 (C.M.A. 1985). Note, however, that merely introducing evidence that contradicts a witness's testimony or statement is not an "or otherwise" attack under Rule 608(a).

c) Rule 608(b)(2) provides that a character witness can be asked questions about specific acts of the person whose credibility has been attacked or rehabilitated as a means of "testing" the character witness.

2. The questioner is precluded from introducing extrinsic evidence in support of his inquiry. This avoids a "trial within a trial." If witness denies knowledge of the specific acts, no extrinsic evidence of specific acts is permitted. You are "stuck with the answer." *United States v. Cerniglia*, 31 M.J. 804 (AFCMR 1991).

a) Operation of the "Collateral Fact Rule." Under the rule, extrinsic evidence is inadmissible to impeach witnesses on collateral facts. The purpose of the rule is to prevent digression into unimportant matters, since the potential for wasting time and confusing the factfinder is particularly high when extrinsic evidence is used to impeach. It does not limit the cross-examiner's questioning a witness about collateral facts, subject to the general discretion of the court.

(1) The rule *applies* to: Impeachment under Rule 608(b) and the cross-examination of a character witness under Rule 405(a).

(2) When the rule does not apply, the cross-examiner may question the witness and offer extrinsic evidence. The rule does not apply to:

(a) Bias under Rule 608(c);

(b) Defects in capacity (*United States v. White*, 45 M.J. 345 (1996));

(c) Prior inconsistent statements under Rule 613 and 801(d)(1)(A);

(d) Impeachment by contradiction; or

(e) Impeachment under Mil.R.Evid. 609.

b) "Human Lie Detector" Testimony. In *United States v. Kasper*, 58 M.J. 314 (2003), the CAAF held that "human lie detector" testimony by an OSI agent violates the limits on character evidence in Rule 608(a) because it offers an opinion of the declarant's truthfulness on a specific occasion. At trial, an OSI agent testified that her training had helped her to identify whether subjects were being truthful in interviews. In *U.S. v. Knapp* (73 M.J. 33 (C.A.A.F., 2014), CAAF found similar techniques evaluating nonverbal cues of an accused during an interview to be inadmissible human lie detector testimony, and set aside the findings and sentence.

G. Rule 608(c): Bias.

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Rule 608. A witness's character for truthfulness or untruthfulness
(c) *Evidence of Bias*. Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.
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1. Ulterior motives are <u>never</u> collateral and may be proved extrinsically. The three categories under 608(c) are a representative list, not an exhaustive one.

2. Rules should be read to allow liberal admission of bias-type evidence. *United States v. Hunter*, 21 M.J. 240 (C.M.A.), *cert. denied*, 476 U.S. 1142 (1986). *See United States v. Aycock*, 39 M.J. 727 (N.M.C.M.R. 1993) (the military judge abused his discretion and committed prejudicial error in excluding extrinsic evidence of a government witness' bias and motive to testify falsely (anger and resentment toward the appellant through loss of $195 wager)). But See *United States v. Sullivan*, 70 M.J. 110 (C.A.A.F. 2011) (requiring a stronger showing other than the mere fact that a victim has undergone psychological counseling to inquire into a victim's medical history in order to attack victim's bias and credibility).

3. Constitutional dimensions:

a) *United States v. Bahr*, 33 M.J. 228 (C.M.A. 1991). 14 year-old prosecutrix testified concerning sodomy and indecent acts by her stepfather. Defense sought to introduce extracts

from her diary showing a profound dislike of her mother and home life. The military judge ruled the extracts were inadmissible, and kept the defense from examining the prosecutrix concerning a prior false claim of rape, and alleged advice to her friends to turn in their family members for child sexual abuse. These rulings were evidentiary and constitutional error. Prosecutrix's hatred of her mother could be motive to hurt mother's husband.

b) *United States v. Moss*, 63 M.J. 233 (2006). Does the exclusion of evidence of bias under Rule 608(c) raise issues regarding an accused's Sixth Amendment right to confrontation? Yes. An accused's right under the Sixth Amendment to cross-examine witnesses is violated if the military judge precludes an accused from exploring an entire relevant area of cross-examination. The military judge erred when he excluded evidence that the accused sought in order to challenge the credibility of the alleged victim. It is the members' role to determine whether an alleged victim's testimony is credible or biased. As such, bias evidence, if logically and legally relevant, are matters properly presented to the members.

c) The test is to determine whether a limitation on the presentation of evidence of bias constitutes a Sixth Amendment violation is "whether '[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'" *United States v. Collier*, 67 M.J. 347, 352 (C.A.A.F. 2009).

H. Rule 609. Impeachment with a Prior Conviction.

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Rule 609. Impeachment by evidence of a criminal conviction

(a) *In General*. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) For a crime that, in the convicting jurisdiction, was punishable by death, dishonorable discharge, or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Mil. R. Evid. 403, in a court-martial in which the witness is not the accused; and

(B) must be admitted in a court-martial in which the witness is the accused, if the probative value of the evidence outweighs its prejudicial effect to that accused; and

(2) For any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(3) In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(b) *Limit on Using the Evidence After 10 Years*. Subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) *Effect of a Pardon, Annulment, or Certificate of Rehabilitation*. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and

the person has not been convicted of a later crime punishable by death, dishonorable discharge, or imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile Adjudications*. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) the adjudication was of a witness other than the accused;

(2) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(3) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) *Pendency of an Appeal*. A conviction that satisfies this rule is admissible even if an appeal is pending, except that a conviction by summary court-martial or special court-martial without a military judge may not be used for purposes of impeachment until review has been completed under Article 64 or Article 66, if applicable. Evidence of the pendency is also admissible.

(f) *Definition*. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

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1. This method of impeachment can be done in cross-examination, with extrinsic evidence, or both. An important element in the analysis is the type of crime for which the witness was convicted.

2. *Crimen falsi* convictions are crimes such as perjury, false statement, fraud, or embezzlement, which involve deceitfulness or untruthfulness bearing on the witness's propensity to testify truthfully. For *crimen falsi* crimes, the maximum punishment is irrelevant and the military judge must admit proof of the conviction.

3. Non *crimen falsi* crimes involve convictions for offenses punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law of the prosecuting jurisdiction. The key is the maximum punishment the witness faced, not the actual punishment the witness received.

a) Balancing test for witnesses: Admissibility of non *crimen falsi* convictions of witnesses is governed by Rule 403. The military judge can exclude this evidence if the probative value is substantially outweighed by unfair prejudice.

b) Balancing test for the accused witness: Admissibility of non *crimen falsi* convictions of the accused is more restrictive than Rule 403. Convictions are only admissible if the military judge determines the probative value outweighs the prejudicial effect. See *United States v. Ross*, 44 M.J. 534 (A.F. Ct. Crim. App. 1996).

4. Time Limit. Conviction generally inadmissible if more than 10 years old. May be admitted if: Interests of justice require; probative value substantially outweighs prejudicial effect; proponent provides other party with notice. Although not specifically stated in the rule, most commentators believe the ten year limitation applies to *crimen falsi* as well as non *crimen falsi* convictions.

5. Juvenile Adjudications. Generally not admissible unless necessary to a fair resolution of the case, and evidence would have been admissible if witness previously had been tried as an adult. Juvenile proceedings may be used against an accused in rebuttal when he testifies that his record is clean. *See United States v Kindler*, 34 CMR 174 (C.M.A. 1964).

6. Summary courts-martial are allowed only if the accused was represented by counsel or representation was affirmatively waived. *United States v. Rogers*, 17 M.J.990 (A.C.M.R. 1984).

I. Rule 613. Impeachment with Prior Statements.

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Rule 613. Witness's prior statement
(a) *Showing or Disclosing the Statement During Examination*. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. The party must, on request, show it or disclose its contents to an adverse party's attorney.
(b) *Extrinsic Evidence of a Prior Inconsistent Statement*. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. Subdivision (b) does not apply to an opposing party's statement under Mil R. Evid. 801(d)(2).
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1. Evidence that on a previous occasion a witness made a statement inconsistent with his or her present testimony is "probably the most effective and most frequently employed" attack on witness credibility. Saying one thing on the stand and something different previously raises a doubt as to the truthfulness of both statements. A prior inconsistent statement (PIS) casts doubt on the general credibility of the declarant. Such evidence is considered only for purposes of credibility, not to establish the truth of the contents (avoiding a hearsay issue). Thus, a limiting instruction would be appropriate.

2. A witness may be impeached with competent evidence to show that he or she made a previous statement, oral or written, inconsistent with his or her in-court testimony. The evidence may be:

a) Intrinsic: controlled by 613(a), involving interrogation of the witness concerning the prior statement, or

b) Extrinsic: controlled by 613(b), involving extrinsic proof (testimony or documents) of the inconsistent statement.

3. Impeachment, however, is not the only possible use of a prior inconsistent statement. Pursuant to Rule 801(d)(1)(A), such statements are admissible substantively, and may be considered by the fact-finder for the truth of the matter asserted, as an exemption to the rule against hearsay when three requirements are met: The statement is inconsistent with the declarant's testimony; the declarant made the statement under oath subject to the penalty of perjury; and the statement was made at a trial, hearing, or other proceeding, or in a deposition.

J. Rule 611. Mode and Order of Interrogation and Presentation

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Rule 611. Mode and order of examining witnesses and presenting evidence
(a) *Control by the Military Judge; Purposes*. The military judge should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
(1) make those procedures effective for determining the truth;
(2) avoid wasting time; and
(3) protect witnesses from harassment or undue embarrassment.
(b) *Scope of Cross-Examination*. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The military judge may allow inquiry into additional matters as if on direct examination.
(c) *Leading Questions*. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the military judge should allow leading questions:
(1) on cross-examination; and

(2) when a party calls a hostile witness or a witness identified with an adverse party.

(d) Remote live testimony of a child.

(1) In a case involving domestic violence or the abuse of a child, the military judge must, subject to the requirements of subdivision (d)(3) of this rule, allow a child victim or witness to testify from an area outside the courtroom as prescribed in R.C.M. 914A.

(2) Definitions. As used in this rule:

(A) "Child" means a person who is under the age of 16 at the time of his or her testimony.

(B) "Abuse of a child" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.

(C) "Exploitation" means child pornography or child prostitution.

(D) "Negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to endanger seriously the physical health of the child.

(E) "Domestic violence" means an offense that has as an element the use, or attempted or threatened use of physical force against a person by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim.

(3) Remote live testimony will be used only where the military judge makes the following three findings on the record:

(A) that it is necessary to protect the welfare of the particular child witness;

(B) that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; and

(C) that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis.

(4) Remote live testimony of a child will not be used when the accused elects to absent himself from the courtroom in accordance with R.C.M. 804(d).

(5) In making a determination under subdivision (d)(3), the military judge may question the child in chambers, or at some comfortable place other than the courtroom, on the record for a reasonable period of time, in the presence of the child, a representative of the prosecution, a representative of the defense, and the child's attorney or guardian ad litem.

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1. This rule is the basic source of the military judge's authority to control proceedings at court-martial.

2. Scope of examination.

a) *United States v. Stavely*, 33 M.J. 92 (1992). When cross-examination goes to witness credibility, military judge should afford counsel wide latitude.

b) *United States v. Barnard*, 32 M.J. 530 (A.F.C.M.R. 1990). An accused who chooses to testify on the merits is subject to same cross-examination as any other witness. Here, TC did not impermissibly comment on right to counsel when he asked accused if he saw a lawyer before making a pretrial statement.

c) Controlling examination to avoid constitutional problems. In *United States v. Mason*, 59 M.J. 416 (2004), the CAAF held that it was error to permit a trial counsel to ask on re-direct whether the accused had ever requested a re-test of the DNA evidence in his case, because the question tended to improperly shift the burden of proof in the case to the defense.

d) Alternatives to in-court testimony. The 1995 Amendments to Drafter's Analysis provides that "when a witness is unable to testify due to intimidation by the proceedings, fear of the

accused, emotional trauma, or mental or other infirmity, alternatives to live in-court testimony may be appropriate.

K. Rule 612. Refreshing Recollection.

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Rule 612. Writing used to refresh a witness's memory
(a) *Scope*. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:
(1) while testifying; or
(2) before testifying, if the military judge decides that justice requires the party to have those options.
(b) *Adverse Party's Options; Deleting Unrelated Matter*. An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated or privileged matter, the military judge must examine the writing in camera, delete any unrelated or privileged portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.
(c) *Failure to Produce or Deliver the Writing*. If a writing is not produced or is not delivered as ordered, the military judge may issue any appropriate order. If the prosecution does not comply, the military judge must strike the witness's testimony or—if justice so requires—declare a mistrial.
(d) *No Effect on Other Disclosure Requirements*. This rule does not preclude disclosure of information required to be disclosed under other provisions of these rules or this Manual.
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1. This is **NOT** Rule 803(5), the recorded recollection hearsay exception.

2. Foundation and Procedure. Show the memory of the witness has failed; show there is some means available which will refresh the recollection of the witness; have the witness read/examine the refreshing document silently; recover the refreshing document; proceed with questioning; make the refreshing document an appellate exhibit and append it to the record of trial; protect privileged matters contained in the writing; nothing is read into the record. Refreshing document need not be admissible; and opposing counsel may inspect the writing, use it in cross examination, and introduce it into evidence.

XIV. EXPERTS AND SCIENTIFIC EVIDENCE

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Rule 702. Testimony by expert witnesses
A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.
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A. Rule 702. Expert Witnesses

1. Trial judges decide preliminary questions concerning the relevance, propriety and necessity of expert testimony, the qualification of expert witnesses, and the admissibility of his or her testimony. *See* Rule 104(a).

a) *United States v. Warner*, 62 M.J. 114 (2005), the CAAF held "Article 46 is a clear statement of congressional intent against government exploitation of its opportunity to obtain an expert vastly superior to the defense's." Where the government provides itself with a top expert, it must provide a reasonably comparable expert to the defense.

b) *United States v. Lee*, 64 M.J. 213 (2006), commenting on *Warner* and Article 46, CAAF held the playing field is even more uneven when the government benefits from scientific evidence and expert testimony and the defense is denied a necessary expert to prepare for and respond to the government's expert. Arguably, *Warner* and *Lee* can be read together to give the defense a much stronger argument for not only the need for an expert witness (especially if the government has an expert), but the need for a particular expert witness (or one comparable to the government's expert).

c) *United States v. McAllister*, 64 M.J. 248 (2007), the issue on appeal was: Whether the appellant's right to present his defense was violated when he was prevented from employing and utilizing a necessary DNA expert at his trial? The CAAF answered the question in the affirmative. Had the military judge granted the defense request for a PCR expert, the members would have heard testimony about the discovery of DNA from three previously unidentified individuals. The defense could have used this evidence to attack not only the thoroughness of the original test, but the weight that the members should have given to the government's expert testimony. Additionally, the CAAF believed the new evidence would have changed the evidentiary posture of the case. At trial, the defense had nothing to contradict the character of the government's DNA evidence which excluded all known suspects other that the appellant. The DNA evidence, according to the CAAF, was the linchpin of the government's case. The additional evidence from TAI was hard evidence that someone other than the appellant, or any other known suspect, was in physical contact with the victim at or near the time of her death. It was error for the military judge to have denied the defense request for an additional expert and retesting of the government's sample. The CAAF concluded that this evidence could have raised a reasonable doubt as to guilt. As such, the CAAF held that the appellant was deprived of his constitutional right to a fair hearing as required by the Due Process Clause. The error in denying the defense request for expert assistance was not harmless beyond a reasonable doubt. As such, the findings of guilt with regards to the unpremeditated murder and the sentence were set aside.

2. In *United States v. Houser*, 36 M.J. 392 (1993) the CAAF set out six factors that a judge should use to determine the admissibility of expert testimony. Although Houser is a pre-Daubert case, it is consistent with Daubert, and the CAAF continues to follow it. *See United States v. Griffin*, 50 M.J. 278, 284 (1999) and *United States v. Billings*, 61 M.J. 163 (2005). They are:

a) Qualified Expert. To give expert testimony, a witness must qualify as an expert by virtue of his or her "knowledge, skill, experience, training, or education." *See* Rule 702

b) Proper Subject Matter. Expert testimony is appropriate if it would be "helpful" to the trier of fact. It is essential if the trier of fact could not otherwise be expected to understand the issues and rationally resolve them. *See* Rule 702.

c) Proper Basis. The expert's opinion may be based on admissible evidence "perceived by or made known to the expert at or before the hearing" or inadmissible hearsay if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or

inferences upon the subject. . . ." The expert's opinion must have an adequate factual basis and cannot be simply a bare opinion. *See* Rule 702 and 703.

d) Relevant. Expert Testimony must be relevant. *See* Rule 402.

e) Reliable. The expert's methodology and conclusions must be reliable. *See* Rule 702.

f) Probative Value. The probative value of the expert's opinion, and the information comprising the basis of the opinion must not be substantially outweighed by any unfair prejudice that could result from the expert's testimony. *See* Rule 403.

B. Rule 702. The Expert's Qualification to Form an Opinion.

1. Knowledge, Training, and Education Foundation. Show degrees attained from educational institutions; show other specialized training in the field; show the witness is licensed to practice in the field and has done so (if applicable) for a long period of time; show teaching experience in the field; show the witness' publications; and show membership in professional organizations, honors or prizes received, previous expert testimony.

2. Skill and Experience Foundation. An expert due to specialized knowledge. *See United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986).

a) *United States v. Banks*, 36 M.J. 150 (C.M.A. 1992). Military judge erred when he refused to allow defense clinical psychologist to testify about the relevance of specific measurements for a normal prepubertal vagina, solely because the psychologist was not a medical doctor. As the court noted, testimony from a qualified expert, not proffered as a medical doctor, would have assisted the panel in understanding the government's evidence.

b) *United States v. Harris*, 46 M.J. 221 (1997). Military judge did not err in qualifying a highway patrolman who investigated over 1500 accidents, as an expert in accident reconstruction.

c) *United States v. McElhaney*, 54 M.J. 120 (2000). During the sentencing phase, the government called an expert on future dangerousness of the accused. The expert said he could not diagnose the accused because he had not interviewed him nor had he reviewed his medical records. In spite of this and objections by defense counsel, the expert did testify about pedophilia and made a strong inference that the accused was a pedophile who had little hope of rehabilitation. The CAAF held that it was error for the judge to admit this evidence. Citing *Houser*, the court noted that the expert lacked the proper foundation for this testimony, as noted by his own statements that he could not perform a diagnosis because of his lack of contact with the accused.

d) *United States v. Billings*, 61 M.J. 163 (2005). To link the appellant to a stolen (and never recovered) Cartier Tank Francaise watch, the Government called a local jeweler as an expert witness in Cartier watch identification to testify that a watch the appellant was wearing in a photograph had similar characteristics as a Tank Francaise watch. Although the jeweler had never actually seen a Tank Francaise watch, his twenty-five years of experience and general familiarity with the characteristics of Cartier watches qualified him as a technical expert.

C. Proper Subject Matter ("Will Assist")

1. Helpfulness. Expert testimony is admissible if it will assist the fact finder. There are two primary ways an expert's testimony may assist.

a) Complex Testimony. Experts can explain complex matters such as scientific evidence or extremely technical information that the fact finders could not understand without expert assistance.

b) Unusual Applications. Experts can also help explain apparently ordinary evidence that may have unusual applications. Without the expert's assistance, the fact finders may misinterpret the evidence. *See, United States v. Rivers*, 49 M.J. 434 (1998); *United States v. Brown*, 49 M.J. 448 (1998).

2. *United States v. Traum*, 60 M.J. 226 (2004). To answer the question of why a parent would kill her child, the government called a forensic pediatrician, who testified to the following matters: (1) overwhelmingly, the most likely person to kill a child would be his or her biological parent; (2) the most common cause of trauma death for children under four is child maltreatment; (3) for 80% of child abuse fatalities, there are no prior instances of reported abuse; (4) Caitlyn died of non-accidental asphyxiation. The CAAF held that there was no error in admitting "victim profile" evidence regarding the most common cause of trauma death in children under four and the fact that most child abuse deaths involve first-time abuse reports for that child. The CAAF held that the military judge erred in admitting evidence that overwhelmingly, the most likely person to kill a child is its biological parent. In context, however, the error was harmless because the government already had admitted the appellant's confession.

3. *United States v. Cendejas*, 62 M.J. 334 (2006). Do you need expert testimony in a child pornography prosecution based upon the Child Pornography Prevention Act (CPPA), to prove actual children were used to produce the images? No. A factfinder can make a determination as to whether actual children were used to produce the images based upon a review of the images alone, without expert testimony. *See also United States v. Wolford*, 62 M.J. 418 (2006).

D. Form of the Opinion.

1. The foundation consists of no more than determining that the witness has formed an opinion, and of what that opinion consists.

2. Rule 704.

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Rule 704. Opinion on an ultimate issue

An opinion is not objectionable just because it embraces an ultimate issue.

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a) The current standard is whether the testimony assists the trier of fact, not whether it embraces an "ultimate issue" so as to usurp the panel's function. At the same time, ultimate-issue opinion testimony is not automatically admissible. Opinion must be relevant and helpful as determined through Rules 401-403 and 702.

b) In *United States v. Diaz*, 59 M.J. 79 (2003), the CAAF held that it was improper for an expert to testify that the death of appellant's child was a homicide and that the appellant was the perpetrator, when the cause of death and identity of the perpetrator were the primary issues at trial.

c) One recurring problem is that an expert should not opine that a certain witness's rendition of events is believable or not. *See, e.g., United States v. Petersen*, 24 M.J. 283, 284 (C.M.A. 1987) ("We are skeptical about whether any witness could be qualified to opine as to the credibility of another.") The expert may not become a "human lie detector." *United States v. Palmer*, 33 M.J. 7, 12 (C.M.A. 1991); *see also United States v. Brooks*, 64 M.J. 325 (2007)

(discussing that in a child sexual abuse case, where the government expert's testimony suggested that there was better than a ninety-eight percent probability that the victim was telling the truth, such testimony was the functional equivalent of vouching for the credibility or truthfulness of the victim, and implicates the very concerns underlying the prohibition against human lie detector testimony.

(1) Questions such as whether the expert believes the victim was raped, or whether the victim is telling the truth when she claimed to have been raped (i.e. was the witness truthful?) are impermissible.

(2) However, the expert **may** opine that a victim's testimony or history is consistent with what the expert's examination found, and whether the behavior at issue is **typical** of victims of such crimes. Focus on symptoms, not conclusions concerning veracity. *See United States v. Birdsall*, 47 M.J. 404 (1998) (expert's focus should be on whether children exhibit behavior and symptoms consistent with abuse; reversible error to allow social worker and doctor to testify that the child-victims were telling the truth and were the victims of sexual abuse). Example: An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms. *United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990).

E. Rule 703. Basis For the Expert's Testimony.

1. Rule 703 provides:

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Rule 703. Bases of an expert's opinion testimony
An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. If the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the members of a court-martial only if the military judge finds that their probative value in helping the members evaluate the opinion substantially outweighs their prejudicial effect.
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2. The language of the rule is broad enough to allow three types of bases: facts personally observed by the expert; facts posed in a hypothetical question; and hearsay reports from third parties. *United States v. Reveles*, 42 M.J. 388 (1995), expert testimony must be based on the facts of the case.

a) Hypothetical questions (no longer required). No need to assume facts in evidence, but, if used, must be reasonable in light of the evidence. *United States v. Breuer*, 14 M.J. 723 (A.F.C.M.R. 1982). The proponent may specify historical facts for the expert to assume as true, or may have the expert assume the truth of another witness or witnesses.

b) Personal Perception. *United States v. Hammond*, 17 M.J. 218 (C.M.A. 1984). The fact that expert did not interview or counsel victim did not render expert unqualified to arrive at an opinion concerning rape trauma syndrome. *United States v. Snodgrass*, 22 M.J. 866 (A.C.M.R. 1986*); United States v. Raya*, 45 M.J. 251 (1996). Defense objected to social worker's opinion that victim was exhibiting symptoms consistent with rape trauma accommodation syndrome and suffered from PTSD on basis that opinion was based solely on observing victim in court, reading reports of others and assuming facts as alleged by victim were true. Objection went to weight to be given expert opinion, not admissibility. The

foundational elements include: Where and when the witness observed the fact; who was present; how the witness observed the fact; and a description of the observed fact.

c) Facts presented out-of-court (non-record facts), if "of a type reasonably relied upon by experts in the particular field" (even if inadmissible). "The rationale in favor of admissibility of expert testimony based on hearsay is that the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion. This relates directly to one of the functions of the expert witness, namely to lend his special expertise to the issue before him." *United States v. Sims*, 514 F.2d 147, 149 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975). There is a potential problem of smuggling in otherwise inadmissible evidence.

(1) *United States v. Neeley*, 25 M.J. 105 (C.M.A. 1987), *cert. denied*, 484 U.S. 1011 (1988). Psychiatrist's testimony that she consulted with other psychologists in reaching her conclusion that accused had inflated results of psychiatric tests and her opinion was the consensus among these people was hearsay and inadmissible. Military judge may conduct a 403 balancing to determine if the probative value of this foundation evidence is outweighed by unfair prejudice.

(2) *United States v. Hartford*, 50 M.J. 402 (1999). Defense was not allowed to cross-examine the government expert about contrary opinions from two colleges. The defense did not call the two as witnesses and there was no evidence that the government expert relied on the opinions of these colleges. The CAAF held the MJ did not err in excluding this questioning as impermissible smuggling under Rule 703.

(3) The elements of the foundation for this basis include: The source of the third party report; the facts or data in the report; if the facts are inadmissible, a showing that they are nonetheless of the type reasonably relied upon by experts in the particular field. In *United States v. Traum*, 60 M.J. 226 (2004), the CAAF emphasized that the key to evaluating the expert's basis for her testimony is the type of evidence relied on by other experts in the field.

(4) *United States v. Ellis*, 68 M.J. 341 (C.A.A.F. 2010). Over defense objection, the government's expert testified that the accused had a moderately high risk of recidivism without having personally interviewed the accused. The expert had reviewed the accused's records, the charges and specifications, the stipulation of fact, chat logs, and the expert had listened to the accused's providency inquiry. The CAAF found that the military judge had not abused his discretion, stating that "[t]here can be no hard and fast rule as to what constitutes 'sufficient information and knowledge about the accused' necessary for an expert's opinion as to an accused's rehabilitation potential."

(5) *United States v. Mullins*, 69 M.J. 113 (C.A.A.F. 2010). Appellant was charged with sexually abusing his daughters who were seven and nine years old. The girls testified to sexual abuse that included rape, oral and anal sex, and masturbation. The Government called a forensic child interviewer as an expert witness. On redirect, the expert witness testified that the frequency of children lying about sexual abuse was less than 1 out of 100 or 1 out of 200. Defense counsel did not object. The CAAF held that it was error to allow the expert testimony which impermissibly invaded the province of the panel.

F. Relevance.

1. Expert testimony, like any other testimony must be relevant to an issue at trial. *See* Rule 401, 402; *Daubert, v. Merrell Dow Pharmaceuticals, Inc*. 509 U.S. 579 (1993).

2. If the expert testimony is not relevant, it is de facto not helpful to the trier of fact.

G. Reliability.

1. The Test for Scientific Evidence. In *Daubert v. Merrell Dow Pharmaceuticals Inc*., 509 U.S. 579 (1993), the Supreme Court held that nothing in the Federal Rules indicates that "general acceptance" is a precondition to admission of scientific evidence. The rules assign the task to the judge to ensure that expert testimony rests on a reliable basis and is relevant. The judge assesses the principles and methodologies of such evidence pursuant to Rule 104(a).

a) The role of the judge as a "gatekeeper" leads to a determination of whether the evidence is based on a methodology that is "scientific," and therefore reliable. The judgment is made before the evidence is admitted, and entails "a preliminary assessment of whether the reasoning or methodology is scientifically valid." Trial court possessed with broad discretion in admitting expert testimony; rulings tested only for abuse of discretion. *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997). *See also United States v. Kaspers*, 47 M.J. 176 (1997); *United States v. Sanchez*, 65 M.J. 145 (2007).

b) Factors. The Supreme Court discussed a nonexclusive list of factors to consider in admitting scientific evidence, which included the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) test as a separate consideration:

(1) whether the theory or technique can be and has been tested;

(2) whether the theory or technique has been subjected to peer review and publication;

(3) whether the known or potential rate of error is acceptable;

(4) whether the theory/technique enjoys widespread acceptance.

2. Non-Scientific Evidence. The Supreme Court resolved whether the judge's gatekeeping function and the *Daubert* factors apply to non-scientific evidence. In *Kumho Tire v. Carmichael*, 119 S. Ct. 1167 (1999), the Court held that the trial judge's gatekeeping responsibility applies to all types of expert evidence. The Court also held that to the extent the *Daubert* factors apply, they can be used to evaluate the reliability of this evidence. Finally, the Court ruled that factors other than those announced in *Daubert* can also be used to evaluate the reliability of non-scientific expert evidence.

3. Other Factors. Other factors courts have considered to evaluate the reliability of scientific and non-scientific testimony include:

a) Was the information developed for the purpose of litigation?

b) Did the expert unjustifiably extrapolate facts to support conclusions?

c) Are there alternative explanations?

d) Is the expert being as careful as they would be in their regular professional work outside paid litigation?

e) Is there a well-accepted body of learning in this area?

f) How much practical experience does the expert have and is there a close fit between the experience and the testimony?

g) Is the testimony based on objective observations and standards?

H. Probative Value

1. The probative value of the expert's opinion and the information comprising the basis of the opinion must not be substantially outweighed any unfair prejudice that could result from the expert's testimony.

2. This is a standard Rule 403 balancing.

XV. HEARSAY

A. The Rule Against Hearsay. Military Rule of Evidence 802 prohibits the introduction of hearsay unless a federal statute applicable to trials by courts-martial or the Mil. R. Evid. Provide otherwise.

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Rule 801. Definitions that apply to this section; exclusions from hearsay
(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
(b) Declarant. "Declarant" means the person who made the statement.
(c) Hearsay. "Hearsay" means a statement that:
(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.
(d) Statements that Are Not Hearsay. A statement that meets the following conditions is not hearsay:
(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
(B) is consistent with the declarant's testimony and is offered:
(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
(C) identifies a person as someone the declarant perceived earlier.
(2) An Opposing Party's Statement. The statement is offered against an opposing party and:
(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;
(C) was made by a person whom the party authorized to make a statement on the subject;
(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(E) was made by the party's co-conspirator during and in furtherance of the conspiracy.
The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).
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B. Definitions.

1. Hearsay is an oral, written or nonverbal assertion made while not testifying at the current trial or hearing which is offered to prove the truth of what's asserted in the statement. Pursuant to MRE 802, hearsay is inadmissible unless an exception to that general rule of prohibition applies.

2. Under Rule 801(b), the declarant is a "person" who makes a statement, not a computer, a drug detection dog, or other animal (although the data entered into a computer may be a statement of a person).

3. Out-of-court means that at the time the person made the statement, the person was not in the courtroom, unless it satisfies the requirements of Rule 801(d).

4. Proving the Truth of the Matter Asserted: This is the definitional prong that addresses the advocate's need to cross-examine the declarant. The proponent must offer the statement to prove the truth of an assertion contained in the statement. If the statement is logically relevant to another theory, it is non-hearsay. In other words, the value of the statement lies in the fact that it was made. For example, an uttered statement that constitutes an element of an offense is not hearsay, but may be called an operative fact or a verbal act, e.g.: disrespectful language; swearing, provoking language, threats, etc. Other common non-hearsay uses include using the statement as circumstantial evidence of the declarant's state of mind (e.g., premeditation), using the statement to show its effect on the state of mind of the hearer or reader.

C. Exemptions From Hearsay. There are several types of statements which are expressly defined under MRE 801(d) as "not hearsay," even though they might otherwise meet the definition of hearsay in MRE 801(a). Subject to the other rules of evidence (for example, MRE 403), these non-hearsay statements are admissible to prove that what they say is true (they are "substantively" admissible):

1. Prior statements of a declarant-witness: Both prior inconsistent and consistent statements may be non-hearsay under MRE 801(d) if the declarant testifies at the trial or hearing and is subject to cross-examination, and the out of court assertion:

a) Is ***inconsistent*** with the declarant's trial testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or deposition (MRE 801(d)(1)(A); or

b) Is ***consistent*** with the declarant's trial testimony and is offered either:

(1) To rebut an express or implied charge of recent fabrication, improper influence, or improper motive in testifying (MRE 801(d)(1)(B)(i); or

(2) To rehabilitate the declarant's credibility as a witness when attacked on another ground (MRE 801(d)(1)(B)(ii). *Note*: the exemption under MRE 801(d)(1)(B)(ii) providing for substantive admissibility of prior consistent statements parallels an identical change to the Federal Rules of Evidence, and was implemented in 2016. *See* Exec. Order No. 13,730, 81 Fed. Reg. 33331, 33355 (May 20, 2016) (creating MRE 801(d)(1)(B)(ii)).

2. A prior statement of identification of a person made after perceiving the person is admissible as substantive evidence of guilt. Rule 801(d)(1)(c). The foundation includes: The witness is on the stand subject to cross-examination; the testifying witness made a prior out-of-court identification of a person; where and when the identification occurred; and who was present.

3. An Opposing Party's Statement. Rule 801(d)(2).

a) The logical underpinning of the admissions doctrine derives from the simple fact that a party cannot be heard to complain that it should have an opportunity to cross-examine itself. There are three kinds of admissions: personal, adoptive, and vicarious.

b) Personal admissions are statements by the party, and should not be confused with statements against interest in Rule 804(b)(3). The latter derives its guarantee of reliability from the fact that it was against the declarant's interest when made. No similar rule is imposed on the admission, although for the accused there frequently will be constitutional and statutory rights that must be protected. The proponent must show: The declarant, identified by the witness as the accused, made a statement; if rights warning necessary, the accused was warned of his or her rights and waived them; the oral or written statement was voluntary; and the statement is offered against the accused.

c) Adoptive admissions. *See, e.g., United States v. Potter*, 14 M.J. 978 (N.M.C.M.R. 1982) (accused adopted another's statement when he introduced it at his own magistrate's hearing). *See also United States v. Datz*, 61 M.J. 37 (2005) (holding that a nod in response to equivocal and confusing compound questions was not an adoptive admission). The doctrine requires proof that the declarant made a statement in the party's presence; the party heard, read, or understood the statement; the party made a statement which expressed agreement with the declarant's statement; and the statement is offered against the party. Where a "tacit admission" is averred, that is, an adoption by silence, the critical inquiry is whether the accused was faced with self-incrimination issues (i.e., official questioning). If not, the proponent must show the accused had the opportunity to deny the statement, that a reasonable innocent person would have denied it, and that the accused did not do so. While this exemption can cover authorized spokespersons or agents, the most common use is the co-conspirator's statement: the proponent must show a conspiracy existed; the declarant was part of the conspiracy at time of statement; the statement was made in furtherance of the conspiracy; and the statement was offered against the accused.

D. Common Hearsay Exceptions—Availability of the Declarant Immaterial. As noted above, otherwise inadmissible hearsay is admissible if an exception applies. Most exceptions fall under two broad categories: those assessing reliability (and for which the availability of the declarant is immaterial) under Mil. R. Evid. 803; and those based on the unavailability of an important piece of evidence unless an exception to the hearsay rule applied. The second category (under Rule 804) requires that the declarant be unavailable for the present trial, and is addressed later in this outline. The text of Rules 803 and 804 are omitted from this outline due to their length; please refer to your current copy of the Rules.

1. Present Sense Impressions and Excited Utterances.

a) Present sense impression, unlike excited utterance, does not require the perceived event to be a startling one. It does, however, apply only to statements made at the time the event is "perceived" or "immediately thereafter." The proponent must show: an event occurred; the declarant had personal knowledge of the event; the declarant made the statement soon after the event; and the statement "describes or explains" an event.

b) The excited utterance requires a showing that the event occurred; was startling; the declarant was acting under the stress of excitement cause by the event; and statement "relates" to a startling event. The time element or factor may determine whether the declarant was acting under the stress of excitement. *See United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987), *cert. denied*, 484 U.S. 1060 (1988) (12 hours until first opportunity*); United States v. Le Mere*, 22 M.J. 61 (C.M.A. 1986) (3 year-old victim after 16 hours*); United States v. Armstrong*, 30 M.J. 769 (A.C.M.R. 1990) (4 to 5 days too long for an excited utterance), *rev'd*, 36 M.J. 311 (1993); *United States v. Knox*, 46 M.J. 688 (N.M. Ct. Crim. 1996). App. 1997) (one year too long). *See also United States v. Miller*, 32 M.J. 843 (N.M.C.M.R. 1991), *aff'd*, 36 M.J. 124 (C.M.A. 1992). Spontaneous statement by crying, upset student to teacher concerning her father's sexual molestation 18 hours earlier held admissible. Focus is not on lapse of time since the exciting incident, but whether declarant is under stress of excitement so as to lack opportunity to reflect and to fabricate an untruthful statement. *See also United States v. Morgan*, 40 M.J. 405 (C.M.A. 1994), *cert. denied*, 115 S. Ct. 907 (1995) (textbook example of excited utterance). The proponent must show: A startling or stressful event occurred; the declarant had personal knowledge of the event; the declarant made a statement about the event; and the declarant made the statement while he or she was in a state of nervous excitement.

c) *United States v. Grant*, 42 M. J. 340 (1995). Accused charged with various sexual offenses against his seven-year-old stepdaughter. Trial counsel offered victim's statements made to family friend 36-48 hours after one of the alleged incidents, both as excited utterance and residual hearsay. MJ admits as excited utterance but rejects as residual hearsay. While passage of time is not dispositive, CAAF concluded the requirements of 803(2) were not met where, as here, statements were the product of sad reflection and not made under the stress or excitement of the event. The statement was, however, admissible under the residual exception based on its spontaneity, lack of suggestiveness, corroboration, the non-threatening home environment, and its general similarity to an excited utterance. Case demonstrates the importance of using alternative theories for admissibility of evidence.

d) In *United States v. Feltham*, 58 M.J. 470 (2003), the CAAF held that a military judge did not abuse his discretion in admitting the statements a male sailor made to his roommate approximately one hour after appellant forcibly orally sodomized him. The military judge specifically found that the victim was still under the stress of a startling event; therefore, the lapse of time was not dispositive.

e) In *United States v. Donaldson*, 58 M.J. 477 (2003), the CAAF upheld the admission as an excited utterance of a 3-year-old sexual assault victim's statements to her mother 12 hours after the incident. Although the girl had spent the entire day with her mother, they had always been in the company of others. Her statement represented the first opportunity she had to be alone with and speak to a trusted adult.

f) In *United States v. Bowen*, CAAF applies the factors noted in *Arnold, supra*, ((1) the statement must be spontaneous; (2) the event must be startling; and (3) the declarant must be under the stress or excitement of that event). *See Bowen*, 76 M.J. 83 (C.A.A.F. 2017). In *Bowen*, the declarant was both severely intoxicated and impaired by the beating at issue in the case. Analyzing the nonverbal assertion by the victim of nodding her head when asked leading questions by an investigator, CAAF held that the military judge did not properly determine whether the declarant had sufficient mental capacity to be under the stress or excitement of the event as required by the third prong of the *Arnold* test. Accordingly, the head nods were not properly excited utterances under MRE 803(2), and were inadmissible.

2. Statements for purposes of medical diagnosis or treatment.

a) Proponent must show declarant had some expectation of promoting well-being (and thus incentive to be truthful), and statement was made for purposes of medical diagnosis or treatment. As small children typically cannot articulate that they expected some benefit from treatment, it is important that someone, like a mother or father, explain to them why they are going to the doctor, the importance of the treatment, and they need to tell what happened to feel better. CAAF also recommends the caretakers identify themselves as such and engage in activity which could be construed as treatment by the child. *United States v. Siroky*, 44 M.J. 394 (1996).

b) If statement is in response to questioning, the questioning must be of medical necessity. *United States v. Haner*, 49 M.J. 72 (1998). *United States v. Armstrong*, 36 M.J. 311 (C.M.A. 1993) (statement made to TC was in preparation for trial, and repetition to the psychologist several days later did not "change the character of the statements.") *See United States v. Henry*, 42 M.J. 593 (A. Ct. Crim. App. 1995). Statements made to medical personnel not made with expectation of receiving medical benefits but instead for the purpose of facilitating collection of evidence. NOTE: 803(4) not limited to patient-declarants. *United States v. Yazzie*, 59 F.3d 807 (9th Cir. 1995) (mother's statements to docs ok). *United States v. Austin*, 32 M.J. 757 (A.C.M.R. 1991) (child's mom to social services).

c) *United States v. Rodriguez-Rivera*, 63 M.J. 372 (2006). Referral of a victim to a medical professional by trial counsel "is not a critical factor in deciding whether the medical exception applies to the statements she gave to those treating her. The critical question is whether she had some expectation of treatment when she talked to the caregivers." *United States v. Haner*, 49 M.J. 72, 76 (1998). Under the circumstances of this case, the fact the trial counsel initiated the examination of JK by Dr. Craig is not a sufficient reason to hold that the military judge erred by concluding the medical exception applied. The military judge's findings that Dr. Craig saw JK for the purpose of medical diagnosis and treatment, and that JK expected to receive medical treatment when she saw Dr. Craig, support his decision to admit the statement made by JK to Dr. Craig under Rule 803(4). As such, the military judge's decision was not an abuse of discretion.

3. Recorded Recollection.

a) Foundation and Procedure: Attempt refreshing memory; establish that the memory of the witness cannot be refreshed; establish that this witness made a record when the matter was fresh in the memory of this witness; establish that the record made accurately reflects the knowledge of the witness at the time of the making; then have the witness read the recorded recollection into evidence.

b) Note: The record could be marked as a prosecution or defense exhibit for identification, or as an appellate exhibit. It should not be admitted unless offered by the adverse party. Attach it to the record of trial. It should not go to the deliberation room unless offered by the adverse party. *United States v. Gans*, 32 M.J. 412 (C.M.A. 1991). Excellent case detailing the differences between using writings to refresh memory under Rule 613 and writings used to establish past recollection recorded under Rule 803(5).

4. Records of Regularly Conducted Activities (Business Records).

a) Effective 1 January 2019, there is a foundational burden shift. Rule 803(6)(E) now requires a challenging opponent to show that the source of information or the method or circumstance of preparation indicates a lack of trustworthiness by a preponderance of the evidence. If the remaining foundational requirements are satisfied and there is no showing the record is untrustworthy, it is admissible subject to Rule 403.

(1) Bank Records. Must lay the foundation specified in the Rule: Timely recording by a regularly conducted business activity in accordance with a regular practice of recording. When laying the business records foundation, witness familiarity with the records-keeping system must be sufficient to explain the system and establish the reliability of the documents. Witnesses need not be those who made the actual entries or even the records custodian. *United States v. Garces*, 32 M.J. 345 (C.M.A. 1991) *and United States v. Tebsherany*, 32 M.J. 351 (C.M.A. 1991). *United States v. Brandell*, 35 M.J. 369 (C.M.A. 1992). Bank records not admissible under this provision unless a custodian or other qualified person testifies.

(2) NCIC Reports. *United States v. Littles*: 35 M.J. 644 (N.M.C.M.R. 1992): NIS agent testified that he saw a National Crime Information Center (NCIC) report showing criminal activity and conviction of, the accused's father. The report was hearsay, and based upon the evidence presented, did not qualify for admission under Rule 803(6) or 803(8) (*i.e.*, not shown to have been made at or near the time by a person with knowledge; the testifying agent was not the custodian of the record, nor did he show familiarity with the records-keeping system; the "rap" sheet was not a record or report of the activities of NCIC).

(3) Lab Reports. *United States v. Schoolfield*, 36 M.J. 545 (A.C.M.R. 1992), *aff'd*, 40 M.J. 132 (CMA 1994): The accused alleged error in the admission of blood sample medical records (4 serology reports and a Western Blot test result) pursuant to Rule 803(6). He argued the records were not kept in the ordinary course of business, no chain of custody was established, and that errors called into question the reliability of the records. ACMR disagreed, finding no abuse of discretion by the military judge. The medical director of WRAMC Institute of Research was qualified to testify as to the record keeping system and maintenance of records. Lab reports and chain of custody documents are admissible. *United States v. Vietor*, 10 M.J. 69 (C.M.A. 1980); *United States v. Robinson*, 14 M.J. 903 (N.M.C.M.R. 1982). Admission under the rule does not preclude the defense from calling the lab technicians to attack the report. *United States v. Magyari*, 63 M.J. 123 (2006). Is data in a lab report a testimonial statement giving an accused the right to confront the makers of those statements pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004)? MAYBE. In the context of random urinalysis screening, where the lab technicians do not equate specific samples with particular individuals or outcomes, and the sample is not tested in furtherance of a particular law enforcement investigation, the data entries of the technicians are not "testimonial" in nature. IF, however, the lab reports were prepared at the behest of law enforcement in anticipation of a prosecution, the reports may become "testimonial." *See United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008) (finding lab reports to be testimonial since law enforcement requested the report).

(4) Computer Phone Records. *United States v. Casey*, 45 M.J. 623 (N.M. Ct. Crim. App. 1996). Computer system does not have to be foolproof, or even the best available, to produce records of adequate reliability.

(5) VHS Videotapes. Rule 803(6) Business records. *U.S. v. Harris*, 55 M.J. 433 (2001). The CAAF adopted the prevailing view of state and federal courts regarding the "silent witness" theory of admissibility vis-à-vis videotapes. The court noted that over the last 25 years, the "silent witness" theory of authentication has developed in almost all jurisdictions to allow photographs to substantively "speak for themselves" after being authenticated by evidence that supports the reliability of the process or system that produced the photographs. The court adopted the silent witness theory, noting that "any doubts about the general reliability of the video cassette recording technology had gone the way of the beta tape". The court also addressed when a witness could meet the requirements of 803(6). They noted that in order for a witness to meet the qualification requirements of 803(6) they must be "generally familiar" with the process.

(6) Duty Rosters. In *U.S. v. Bess*, after members had adjourned to deliberate on the merits, they forwarded questions to the military judge about documents which had been mentioned during cross-examination. During an Article 39(a) session, the military judge heard evidence from witnesses which established the foundation to admit those documents as business records. The defense cross examined government witnesses and presented a witness of its own, after which the trial judge granted the government's motion to admit the records over defense objection. The judge denied the defense request to examine the witnesses before the members in order to attack the reliability of the records. CAAF found this to violate the constitutional rights of the accused to due process, confrontation, and presenting a defense. *See U.S. v. Bess*, 75 M.J. 70 (C.A.A.F. 2016).

5. Public Records and Reports. Rule 803(8).

a) Effective 1 January 2019, there is a foundational burden shift. Rule 803(8)(B) now requires a challenging opponent to show that the source of information or the method or circumstance of preparation indicates a lack of trustworthiness by a preponderance of the evidence. If the remaining foundational requirements are satisfied and there is no showing the record is untrustworthy, it is admissible subject to Rule 403.

(1) Permits introduction of evidence from public office or agency where the data and source of information are indicative of trustworthiness and set forth (a) the activities of the office; or (b) matters observed pursuant to a duty imposed by law; or (c) (against the Government) factual findings resulting from an investigation made pursuant to authority granted by law. Presumption of regularity. Substantial compliance with regulation is sufficient. Irregularities material to the execution preclude admissibility. *United States v. Anderson*, 12 M.J. 527 (N.M.C.M.R. 1981). Excludes matters observed by police or personnel acting in a law enforcement capacity, if offered by the Government. Defense can admit police reports under Rule 803(8)(c). Purely ministerial recordings of police may be admissible. *United States v. Yeoman*, 22 M.J. 762 (N.M.C.M.R. 1986), *aff'd*, 25 M.J. 1 (C.M.A. 1987) (the reporting of a filed complaint).

(2) In *United States v. Taylor*, 61 M.J. 157 (2005), the CAAF held that a military judge erred by admitting a document with undecipherable content under the public records exception; the custodian could not explain the origin or meaning of the undecipherable content. The CAAF further held that any underlying documents used to create a public record must satisfy a hearsay exception to satisfy Rule 805.

(3) *United States v. Rankin*, 64 M.J. 243 (2007). Are service record entries documenting an accused's period of unauthorized absence "testimonial" for purposes of the Confrontation Clause? No. Service records documenting absence are not prepared by law enforcement or any prosecutorial agency, rather, they are routine personnel documents that chronicle the relevant dates, times, and locations of the accused. Additionally, at the time the documents are created, an objective witness would not reasonably believe the statement would be available for use at a later trial. *But see Whorton v. Bockting*, 127 S. Ct. 1173 (2007) (changing the analysis of non-testimonial statements under the Confrontation Clause, "Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.")

6. Contents of Learned Treatises.

a) Main requirement for using the exception, whether on direct or cross-examination, is the establishment of the treatise, periodical, or pamphlet as reliable authority. *See generally* David F. Binder, *Hearsay Handbook*, ch. 7 §19.01 at 337 (3d ed. 1991). The proponent of the evidence accomplishes this task either by obtaining an admission from an expert witness concerning the reliability or authority of the statement. The provision concerning calling the treatise to the attention of the expert in cross-examination, or having the expert rely upon the treatise on direct examination "is designed to ensure that the materials are used only under the sponsorship of an expert who can assist the fact finder and explain how to apply the materials." 2 C. McCormick, *McCormick on Evidence* ch. 34, §321 at 352 (4th ed. 1992). Another method is through judicial notice. "Given the requirements for judicial notice, Rule 201, and the nature and importance of the item to be authenticated, the likelihood of judicial notice being taken that a particular published authority other than the most commonly used

treatises is reliable is not great." Michael H. Graham, *Federal Practice and Procedure-Evidence* §6769 at 714, note 4 (1992).

b) As is the case with the hearsay exception for recorded recollections, Rule 803(18) provides that statements from the learned treatise are read into evidence; the learned treatise itself does not become an exhibit.

7. Residual Hearsay Rule—The "Catchall". The residual hearsay rule formerly appeared under Rules 803(24) and 804(b)(5), but has been transferred to Rule 807.

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Rule 807. Residual exception.
(a) *In General*. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Mil. R. Evid. 803 or 804:
(1) the statement has equivalent circumstantial guarantees of trustworthiness;
(2) it is offered as evidence of a material fact;
(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
(4) admitting it will best serve the purposes of these rules and the interests of justice.
(b) *Notice*. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.
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a) The proponent must demonstrate "equivalent circumstantial guarantees of trustworthiness";

b) Inherent Reliability. *Idaho v. Wright*, 497 U.S. 805 (1990) (admissibility of child's statement to doctor regarding abuse pursuant to residual hearsay rule requires a showing of indicia of reliability <u>at the time statement made</u>, not through corroborating evidence.)

c) *United States v. Morgan*, 40 M.J. 405 (CMA 1994), *cert. denied*, 115 S. Ct. 907 (1995): Military judge properly admitted sworn statement of rape complainant under residual exception. The statement was made near to the time of the attack and was consistent with earlier excited utterances.

d) Establish the evidence is offered to prove a material fact in issue;

e) Show evidence offered is more probative of the point than any other evidence reasonably available;

(1) All the prerequisites for use must be met, including the requirement that it be more probative than any other evidence on the point for which it is offered. *United States v. Pablo*, 50 M.J. 658 (A. Ct. Crim. App. 1999), testimony of school counselor inadmissible hearsay because victim testified on the same issues and counselor's testimony did not shed any new light on the issue.

(2) *United States v. Czachorowski*, 66 M.J. 432 (2008). The military judge ruled that the alleged child-victim was unavailable based on the trial counsel's proffer that the child had forgotten the alleged instances of abuse. The military judge admitted the child's statements of the alleged incident to both the mother and the grandparents as residual hearsay. The CAAF found that the government failed to meet its burden that it could not obtain more probative evidence despite "reasonable efforts." The government offered

nothing to corroborate its assertions that the child had forgotten the alleged incident, and the military judge relied solely on government's assertions without seeking any corroboration before declaring the child unavailable. Because the residual hearsay exception should be rarely used, "Absent personal observation or a hearing, there must be some specific evidence of reasonable efforts to obtain other probative evidence."

f) Demonstrate that admission of the evidence fosters fairness in the administration of justice; and

g) Provide notice of intended use.

(1) *United States v. Holt*, 58 M.J. 227 (2003). During the sentencing phase of appellant's court-martial for writing bad checks, the military judge admitted a letter from one of the victims to show victim impact and the full circumstances of the offenses. The letter was not admitted for the truth of the matters asserted therein. On appeal, the AFCCA held that the contents of the letter were admissible as residual hearsay under Rule 807. The CAAF reversed, holding that the AFCCA failed to apply the notice and foundational requirements of Rule 807. In order to admit evidence under Rule 807, the appellant must be afforded sufficient notice in advance of the trial or hearing to prepare to meet the evidence; this requirement applies equally to trial and appellate proceedings.

(2) *United States v. Czachorowski*, 66 M.J. 432 (2008). The CAAF took a flexible approach and found that the advance notice requirement applies to the statements and not the means that the proponent intended to use to seek admission of the statements. While the trial counsel gave no formal notice, the defense counsel knew about the statements and the trial counsel's intent to offer the statements. Notice was satisfied.

h) Harmless Error Test. In *United States v. Lovett*, 59 M.J. 230 (2004), the appellant was convicted of raping his 5-year-old daughter. The daughter testified at trial. The Government also introduced several hearsay statements of the victim through written statements by her mother and the testimony of a family friend. The CAAF refused to rule as to whether admission of these items was error, holding instead that any errors in admitting the evidence were harmless because the statements were cumulative to and consistent with the victim's in-court testimony, and some of the statements were contained in another Government exhibit that was entered into evidence without defense objection.

E. Rule 804. Common Hearsay Exceptions - Unavailability.

1. 804(a)(1): Claim of privilege (which cannot be remedied by grant of testimonial immunity*). United States v. Robinson*, 16 M.J. 766 (A.C.M.R. 1983).

2. 804(a)(4): Death, Physical Inability, Mental Incapacity, or Intimidation. *United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988), *cert. denied*, 489 U.S. 1011 (1989) (child intimidated); *United States v. Ferdinand*, 29 M.J. 164 (C.M.A. 1989), *cert. denied*, 493 U.S. 1044 (1990) (A child victim may become unavailable if testifying would be too traumatic). *But see United States v. Harjak*, 33 M.J. 577 (N.M.C.M.R. 1991) (notwithstanding judge's empathetic concerns for child, unauthenticated medical reports detailing victim's physical and psychological condition to demonstrate unavailability irrelevant as reports did not discuss her current condition).

3. 804(a)(5): Absence. Inability to locate or procure attendance or testimony through good faith, major efforts: *United States v. Hampton*, 33 M.J. 21 (C.M.A. 1991). The victim refused to return for the trial and the military judge had no means to compel the victim's attendance. She properly was determined to be unavailable under Rule 804(a)(5). Under these circumstances, the pretrial deposition was admissible.

4. *United States v. Gardinier*, 63 M.J. 531 (A. Ct. Crim. App. 2006). Military judge erred when he determined a child-witness was unavailable within the meaning of Rule 804(a). Even though a child-witness may not provide any "helpful" information, this is not a valid basis for a finding of unavailability. The Confrontation Clause guarantees only an opportunity for effective cross-examination, not necessarily effective cross-examination.

F. Rule 804(b). Former Testimony.

1. The foundational requirements are: The first hearing was a fair one; the witness testified under oath at the first hearing; the opponent was a party in the first hearing; the opponent had an opportunity to develop the witness' testimony; the opponent had a motive to develop the witness' testimony at the first hearing; the witness is unavailable; and there is a verbatim transcript of the first hearing.

2. Despite wording of Rule 804(b)(1), admissibility of Article 32 testimony under former testimony exception depends on opponent's opportunity to cross-exam, not whether cross-examination actually occurred or the intent of the cross-examiner. *United States v. Connor*, 27 M.J. 378 (C.M.A. 1989); *United States v. Hubbard*, 28 M.J. 27 (C.M.A.), cert. denied, 493 U.S. 847 (1989). *United States v. Austin*, 35 M.J. 271 (C.M.A. 1992): UCMJ art. 32 testimony was admitted under Rule 801(d)(1)(A) and 804(b)(1). After the testimony was read to the members, they were permitted to take it into deliberations, over defense objection. Analogizing to a deposition, which is not taken into deliberations (See RCM 702(a) discussion), COMA concluded the verbatim Article 32 testimony was not an "exhibit" within the meaning of RCM 921(b). *See also United States v. Montgomery*, CM 9201238, (A.C.M.R. 28 July 1994) (per curiam) (unpub.), the A.C.M.R. applied a similar analysis to a verbatim transcript of a prior trial.

G. Rule 804(b)(3). Statement Against Pecuniary, Proprietary, or Penal Interests.

1. The foundational requirements include: The declarant is unavailable; the declarant previously made a statement; the declarant subjectively believed that the statement was contrary to his or her interest; the interest was of a recognized type; and if the defense offers a statement which tends to expose the declarant to criminal liability, to exculpate the accused, there must be corroboration to show the statement is trustworthy. *United States v. Perner*, 14 M.J. 181 (C.M.A. 1982).

H. Rule 804(b)(6). Forfeiture by wrongdoing.

1. *Giles v. California*, 128 S. Ct. 2678 (2008) (holding that before finding that a defendant forfeited his right to confrontation by his wrongdoing, the government must prove that the defendant intended to prevent a witness from testifying.)

2. *United States v. Marchesano*, 67 M.J. 535 (A. Ct. App. 2008) (adopting a four- part test for determining whether a party "acquiesced in the wrongdoing." (1) Whether "the witness was unavailable through the actions of another;" (2) whether "the act of another was wrongful in procuring the unavailability of the witness;" (3) whether "the accused expressly or tacitly accepted the wrongful actions of another;" and (4) whether "the accused did so with the intent that the witness be unavailable."

I. Rule 805 and 806. Hearsay within Hearsay; Attacking and Supporting Credibility of Declarant.

1. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. *United States v. Little*, 35 M.J. 644 (N.M.C.M.R. 1992).

2. When a hearsay statement, or a statement defined in rule 801(d)(2)(c), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.

XVI. MISCELLANEOUS RULES

A. Rule 1101. Applicability of Rules.

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Rule 1101. Applicability of these rules
(a) *In General*. Except as otherwise provided in this Manual, these rules apply generally to all courts-martial, including summary courts-martial, Article 39(a) sessions, limited fact-finding proceedings ordered on review, proceedings in revision, and contempt proceedings other than contempt proceedings in which the judge may act summarily.
(b) *Rules Relaxed*. The application of these rules may be relaxed in presentencing proceedings as provided under R.C.M. 1001 and otherwise as provided in this Manual.
(c) *Rules on Privilege*. The rules on privilege apply at all stages of a case or proceeding.
(d) *Exceptions*. These rules - except for Mil. R. Evid. 412 and those on privilege - do not apply to the following:
(1) the military judge's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;
(2) pretrial investigations under Article 32;
(3) proceedings for vacation of suspension of sentence under Article 72; and
(4) miscellaneous actions and proceedings related to search authorizations, pretrial restraint, pretrial confinement, or other proceedings authorized under the Uniform Code of Military Justice or this Manual that are not listed in subdivision (a).

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1. The Military Rules apply generally to all courts-martial, including summary courts-martial; to proceedings pursuant to Article 39(a); to limited fact-finding proceedings ordered on review; to proceedings in revision; and to contempt proceedings except those in which the judge may act summarily.

2. The application of the rules may be relaxed in sentencing proceedings.

3. The Military Rules do not apply (except for MREs 412 and the rules governing privilege) in investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence pursuant to Article 72; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the Uniform Code of Military Justice or the MCM and not listed in rule 1101(a).

B. Rule 1102. Amendments and exceptions.

1. The Rule provides that “Amendments to the Federal Rules of Evidence—other than Articles III and V—will amend parallel provisions of the Military Rules of Evidence by operation of law 18 months after the effective date of such amendments, unless action to the contrary is taken by the President.”

2. Rule 1102 also reflects the judgment of the President that Federal Rules of Evidence 301, 302, 415, and 902(12) do not apply in military proceedings.

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CHAPTER 25
CONFRONTATION CLAUSE

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IV.	Literal Face-to-Face Confrontation
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I. INTRODUCTION

A. General

1. The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…." U.S. Const. amend. VI.

2. The protections of the Sixth Amendment's Confrontation Clause apply in prosecutions of members of the armed forces. *United States v. Jacoby*, 29 C.M.R. 244, 246-247 (C.M.A. 1960) (Overruling *United States v. Sutton*, 11 C.M.R.220 (C.M.A. 1953) and *United States v. Parrish*, 22 C.M.R. 127 (C.M.A. 1956)

B. Organization of Outline

1. Part II discusses satisfying the Confrontation Clause through witness production, waiver, and forfeiture by wrongdoing.

2. Parts III and IV discuss two broad categories of Confrontation Clause cases. **Part III** discusses the law involving **restrictions imposed by law** or by a court on the scope of cross-examination. **Part IV** discusses the law involving the **admissibility of out-of-court statements** and reflecting the right to **literally confront** a witness at trial. [Note: the classification of cases in Part IV is modeled in part on the organizing principles of the National District Attorney Association's "*Crawford* Outline."]

3. Part V discusses the appellate review issues for Confrontation Clause cases.

4. The appendices contain Confrontation Clause analysis charts.

II. SATISFYING THE CONFRONTATION CLAUSE THROUGH OPPORTUNITY TO CROSS-EXAMINE, WAIVER, AND FORFEITURE

A. Opportunity to Cross Examine.

1. Producing the witness will satisfy the Confrontation Clause even if the witness cannot be cross-examined effectively. The Confrontation Clause guarantees only an *opportunity* to cross-examine witnesses. There is no right to meaningful cross-examination. Generally speaking, an opportunity to cross-examine a forgetful witness satisfies the confrontation clause. If, however, a witness is unable or refuses to testify (even though the witness is on the witness stand), it follows that the witness cannot be cross-examined.

2. *Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam). The Court held that an expert witness' inability to recall what scientific test he had used did not violate the Confrontation Clause even though it frustrated the defense counsel's attempt to cross-examine him. "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness' testimony."

3. *United States v. Owens*, 484 U.S. 554 (1988). While in the hospital, the victim identified the accused to an FBI agent. At trial, due to his injuries, which affected his memory, the victim could only remember that he earlier identified the accused, but not the reason for the identification. The victim was under oath and subject to cross-examination; the Confrontation Clause was satisfied.

4. *United States v. Rhodes*, 61 M.J. 445 (2005). Witness against accused testified but claimed a lack of memory. The previous confession of the witness, implicating accused, was admitted against appellant with certain conditions. The defense argued that the appellant's confrontation rights were violated because the witness did not "defend or explain" his statement as required by *Crawford v. Washington*. The court ruled that the Supreme Court's previous case of *United States v. Owens* was not overruled by *Crawford*. By presenting the witness, the government met the confrontational requirements of the Sixth Amendment.

5. *United States v. Gans*, 32 M.J. 412 (C.M.A. 1991). The military judge admitted a sexual abuse victim's statement given thirty months earlier to MPs as past recollection recorded (MRE 803(5)). At trial, victim could not remember details of sexual abuse incidents. Appellant claimed that because the daughter's recollection was limited, his opportunity to cross-examine was also limited. The Court of Military Appeals disagreed, relying on the *Fensterer* and *Owens* decisions that there is no right to meaningful cross-examination**.**

B. Waiver.

1. Affirmative waiver of confrontation by the accused will satisfy the Sixth Amendment. Waiver cases generally arise when the defense makes a tactical decision not to cross-examine a witness, then asserts a Confrontation Clause violation.

2. *United States v. Martindale*, 40 M.J. 348 (C.M.A. 1994). During a deposition and again at an Article 39(a) session, a 12-year-old boy could not or would not remember acts of alleged sexual abuse. The military judge specifically offered the defense the opportunity to put the boy on the stand, but defense declined. Confrontation was waived and the boy's out-of-court statements were admissible.

a) *United States v. McGrath*, 39 M.J. 158 (C.M.A. 1994). Government produced the 14-year-old daughter of the accused in a child sex abuse case. The girl refused to answer the trial counsel's initial questions, but conceded that she had made a previous statement and had not lied in the previous statement. The military judge questioned the witness, and the defense declined cross-examination. The judge did not err in admitting this prior statement as residual hearsay.

b) *United States v. Bridges*, 55 M.J. 60 (2001). The Court of Appeals for the Armed Forces (CAAF) held that the Confrontation Clause was satisfied when the declarant took the stand, refused to answer questions, and was never cross-examined by defense counsel. The military judge admitted the declarant's hearsay statements into evidence. While a true effort by the defense counsel to cross-examine the declarant may have resulted in a different issue, the defense's clear waiver of cross-examination in this case satisfied the Confrontation Clause. Once the Clause was satisfied, it was appropriate for the military judge to consider factors

outside the making of the statement to establish its reliability and to admit it during the government case-in-chief under the residual hearsay exception.

C. Forfeiture by Wrongdoing.

1. An accused may forfeit his right to confront a witness if he engaged in wrongdoing that was intended to, and did, procure the unavailability of the witness.

2. *Crawford v. Washington*, 541 U.S. 36, 62 (2004). "[T]he rule of forfeiture by wrongdoing…extinguishes confrontation claims on essentially equitable grounds."

3. *Giles v. California*, 128 S. Ct. 2678 (2008). The doctrine of forfeiture by wrongdoing requires the government to show that the accused intended to make the witness unavailable when he committed the act that rendered the witness unavailable. This interpretation is consistent with the Federal and identical Military Rule of Evidence 804(b)(6). It is not enough to simply show that the accused's conduct caused the unavailability.

4. *United States v. Clark*, 35 M.J. 98 (C.M.A. 1992). Accused's misconduct in concealing the location of the victim and her mother waived any constitutional right the accused had to object to the military judge's ruling that the victim was "unavailable" as a witness.

5. Forfeiture of hearsay rights versus confrontation rights. The constitutional doctrine of forfeiture and the codification of that doctrine in the evidentiary hearsay rules are related, but functionally separate, concepts.

a) Military Rule of Evidence 804(b)(6) provides that "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is not excluded by the hearsay rule if the declarant is unavailable. The overwhelming majority of federal courts apply a preponderance of the evidence standard to determine whether an accused engaged or acquiesced in wrongdoing. 2 Stephen A. Saltzburg, Lee D. Schinasi, and David A. Schlueter, Military Rules of Evidence Manual 804.05[3][f] (2003).

b) *Giles v. California*, 128 S. Ct. 2678, 2686 (2008). "No case or treatise that we have found…suggested that a defendant who committed wrongdoing forfeited his confrontation rights but not his hearsay rights."

c) *United States v. Marchesano*, 67 M.J. 535 (Army Ct. Crim. App. 2008). Indicates that an accused could forfeit his hearsay rights under MRE 804(b)(6) through wrongdoing *by acquiescence* but perhaps not his confrontation rights (confrontation forfeiture requires some intent or design on the behalf of the accused).

d) Standard of proof at trial for judge's determination of forfeiture: Preponderance of evidence. *United States v. Marchesano*, 67 M.J. 535, 544 (Army Ct. Crim. App. 2008).

III. RESTRICTIONS ON CONFRONTATION IMPOSED BY LAW

A. Limitations on Cross-Examination

1. Cross-examination is an important part of the right to confront witnesses. The right to confrontation, however, is not absolute. The courts balance the competing state interest(s) inherent in rules limiting cross-examination with the accused's right to confrontation.

a) "The right of cross-examination is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'" *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

b) Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

c) "[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability – even if the defendant would prefer to see that evidence admitted." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

d) "[T]he right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295.

e) "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

f) Although a criminal defendant waived his rights under the Confrontation Clause to object to the admission of hearsay statements because of his misconduct in intimidating a witness, he did not also forfeit his right to cross-examine that same witness. *Cotto v. Herbert*, 331 F.3d 217 (2d Cir. 2003).

2. **Juvenile Convictions of Key Prosecution Witness.** *Davis v. Alaska*, 415 U.S. 308 (1974). The exposure of a witness's motivation is a proper and important function of cross-examination, notwithstanding state statutory policy of protecting the anonymity of juvenile offenders.

3. **Voucher Rule.** *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973*).* The defendant was deprived of a fair trial when he was not allowed to cross-examine a witness who had confessed on numerous occasions that he committed the murder. The Court observed that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined (citations omitted).

4. **Ability to remember.** *United States v. Williams*, 40 M.J. 216 (C.M.A. 1994). Judge erred in precluding defense from cross-examining government witness (and accomplice) to robbery about drug use the night of the robbery.

5. **Bias.**

a) *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Judge improperly restricted defense cross-examination of government toxicology expert who owned stock in the lab that tested accused's urine sample pursuant to a government contract. Questions about the expert's salary were relevant to explore bias. Judge also erred in preventing defense from asking the defense expert about possible sources of contamination of the urine sample.

b) *United States v. Gray*, 40 M.J. 77 (C.M.A. 1994). Accused was charged with indecent acts with nine-year-old daughter of SGT M and sodomy and adultery with SGT M's wife. Evidence that DHS had investigated the "victim's" family was improperly excluded. Mrs. M. could have accused Gray of the offenses to divert attention away from her dysfunctional

family and the evidence would have corroborated Gray's claim that he visited Mrs. M's home in response to requests for help. This violated accused's right to present a defense.

6. **Motive to lie.** *United States. v. Everett,* 41 M.J. 847 (A.F.C.M.R. 1994). The military judge improperly prevented the defense counsel from cross-examining a rape victim about her husband's infidelity and his physical abuse of her.

7. **Discrepancy in Laboratory Tests**. *United States v. Israel*, 60 M.J. 485 (2005). In a urinalysis case, the military judge limited the defense ability to cross-examine witnesses regarding the possibility of error in the testing process by precluding the defense from confronting expert witnesses with material impeachment evidence. The CAAF held that the military judge abused his discretion in limiting the ability of the defense to cross-exam the government experts, and that the error was not harmless beyond a reasonable doubt.

8. **Rule 403.**

a) *United States v. Carruthers,* 64 M.J. 340 (2007). Appellant was convicted of stealing over a million dollars' worth of military property from the Defense Reutilization and Marketing Office (DRMO) at Fort Bragg over a three year period. At trial, one of his coconspirators, SFC Rafferty, testified for the government in return for an agreement to plead guilty in federal court to one count of larceny of government property valued over one thousand dollars. Appellant's civilian defense counsel cross-examined SFC Rafferty at length about his agreement with the government, however the government objected when the defense counsel attempted to delve further into the possible punishments SFC Rafferty might receive at his federal trial. The military judge sustained the objection. The issue was whether appellant was denied his Sixth Amendment right to confrontation when the military judge limited cross-examination of a key government witness regarding the possible sentence under the witness's plea agreement. (There were two issues granted, the other involved instructions given by the military judge) The holding was: No, sufficient cross-examination was permitted, and the military judge properly identified and weighed the danger of misleading the members under MRE 403. The military judge in this case had already allowed plenty of inquiry into the witness's bias as a result of his agreement with the government, and merely limited the defense from further questioning on another aspect of the agreement. Since sufficient cross-examination into bias as a result of the plea agreement was permitted, appellant's Sixth Amendment right to Confrontation was not violated by the military judge's limitation.

b) *United States v. James,* 61 M.J. 132 (2005). Before members, appellant pleaded guilty to using and distributing ecstasy. During the sentencing phase of the trial, appellant sought to cross-exam a witness whom the appellant argued had convinced him to try ecstasy. Specifically, appellant sought to cross-examine the witness concerning the specific terms of the witness' pretrial agreement with the government. The purpose of the cross-examination into the quantum of the agreement would be to establish that the friend had a reason to lie given the benefit of the deal afforded to him (his agreement was for eighteen months confinement from a maximum of fifty-two years). The military judge precluded cross-examination of the specifics of the agreement, but allowed the defense to cross-examine the witness on the existence and general nature of the agreement, the order by the convening authority to the witness to testify, the grant of immunity to the witness, and the considerations of pending clemency. The court found that that military judge did not err by reasonably limiting the scope of cross-examination to avoid the confusion of the issues.

9. **Rule 412.**

a) *United States v. Savala*, 70 M.J. 70 (C.A.A.F. 2011). The military judge denied the accused's initial MRE 412 motion to cross examine the victim on a prior, unfounded rape allegation. During direct examination the government opened the door by using it to bolster her reason for delayed reporting the current allegation. The court found it error to deny the accused the ability to cross examine on it after the government opened the door. Denying the accused the right to confront the victim with her previous allegation of rape under MRE 412(b)(1)(c) after the government opened the door on direct examination in an effort to bolster her credibility denied the accused his right to confrontation despite the military judge's earlier ruling to exclude the evidence in pretrial motions. A key component of the Confrontation Clause is the crucible of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 316-317 (1974). This right becomes even broader when the prosecution opens the door to impermissible evidence during their case in chief. A failure by the intermediate court was not recognizing that witness credibility is an issue for the fact finder.

b) *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). The C.A.A.F. held that the prior decision in *United States v. Banker*, see below, was wrong when it held that the victim's privacy interests should be balanced against an accused's constitutional rights when determining admissibility under MRE 412. While the balancing test itself is not per se unconstitutional, it could be applied in an unconstitutional manner. Where evidence is constitutionally required and survives the balancing test under MRE 403, an accused will be allowed to confront his accuser with the same regardless of the level of invasive to a victim's privacy. Despite this holding, the facts of this case did not allow the accused to confront the victim with evidence under MRE 412. The accused in this case did not make a showing that the evidence found in e-mails alluding to the victim being sexually active was constitutionally required under MRE 412(b)(1)(c). The military judge did allow cross-examination on the e-mails without allowing questions into the content by using MRE 611 MRE 611. While an accused has a right to confront his accuser, that right is not without limitations. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). The Confrontation Clause protects a person's rights to a fair cross-examination of a witness to establish bias or motive to lie. That cross-examination can be curtailed when the probative value is outweighed by the danger of unfair prejudice. These dangers of unfair prejudice include harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. In *Delaware v. Van Arsdall*, 475 U.S. 673, 678–79 (1986). Here, the judge had already determined that there was insufficient probative value in the e-mails to rise to the level of constitutionally required evidence. As such, he may be allowed an opportunity to expose her motive to lie, but not in every possible manner. The military judge placed limits on the inquiry, and CAAF held that the judge had admitted sufficient evidence to establish TE's motive to lie. Excluding the sexual nature of the worrisome e-mails did not violate the constitutional rights of the accused. The court did not conduct any MRE 403 analysis.

c) *United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011). The C.A.A.F. held that in an Article 120 case it was error for the military judge to exclude evidence that the victim had an extra marital affair two years prior. When she disclosed the earlier affair to her husband, he became enraged and kicked down the wife's lover's door. The court found that the military judge prevented Ellerbrock from presenting a theory that a previous affair made it more likely that CL would have lied in this case; that it was a fair inference that a second affair would be more damaging to CL's marriage than a single event; and there was evidence in the record to support this inference, particularly the evidence that the husband had had a prior violent reaction when learning about CL's affair. The court found that the proffered evidence had a direct and substantial link to CL's credibility, and her credibility was a material fact in the

case. The probative value of the evidence was high because the other evidence in the case was so conflicting, and was not outweighed by other

d) *United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004). ***Abrogated by United States v. Gaddis,*** 70 M.J. 248 (C.A.A.F. 2011). The C.A.A.F. held that evidence proffered under the constitutionally required exception under MRE 412(a) is admissible only if the evidence is 1) relevant; 2) material; and 3) favorable to the defense **AND** it is not outweighed by the victim's privacy. This balancing test, applied in this manner, is unconstitutional under *United States v. Gaddis.* While other sections of *Banker* may be useful in helping counsel determine relevant and material, if evidence is found constitutional, the victim's privacy cannot be used to exclude it regardless of the significance.

e) *United States v. Roberts*, 69 M.J. 23 (C.A.A.F. 2010). In a marital rape and assault case, the CAAF held that, although the trial judge's exclusion of extrinsic evidence of an alleged relationship between the accused's wife and another man did violate the accused's constitutional right to confrontation, but that the error was harmless beyond a reasonable doubt. *See also, United States v. Smith*, 68 M.J. 445 (C.A.A.F. 2010)

10. **Rule 513.** Appellant argued that the military judge's failure to conduct an in camera review and to require disclosure of the mental health records of the two primary witnesses deprived him of his right to confront those witnesses in violation of the Sixth Amendment right to cross examine these witnesses. The C.A.A.F. concluded that the Appellant in this case was able to fully cross-examine the witnesses on their credibility and motive to misrepresent and that in order for Appellant to prevail, there must be an abuse of discretion by the military judge to not order the in camera review and/or disclosure of records and that abuse of discretion materially prejudiced Appellant's substantial rights. *See United States v. Chisum*, 77 M.J. 176 (C.A.A.F. 2018).

B. Limits on Face-To-Face Confrontation (Remote & Screened Testimony)

1. The issue in remote and screened testimony is balancing confrontation rights against state's interest in protecting certain witnesses. Arguably, this section could also fit under the category of "Literal Confrontation: The Admissibility of Out-of-Court Statements" at Part IV, *Supra. See, Maryland v. Craig*, 497 U.S. 836 (1990) (Scalia, J., joined by Brennan, J., Marshall, J., and Stevens, J., dissenting).

2. The Supreme Court.

a) *Maryland v. Craig*, 497 U.S. 836 (1990). The child victim testified by one-way closed circuit television with a defense counsel and a prosecutor present. The testimony was seen in the courtroom by the accused, jury, judge, and other counsel.

(1) The preference for face-to-face confrontation may give way if it is necessary to further an important public policy, but only where the reliability of the testimony can otherwise be assured.

(2) Necessity. Before allowing a child victim to testify in the absence of face-to-face confrontation with the accused, the government must make a case specific showing that:

(a) The procedure proposed is necessary to protect the child victim,

(b) The child victim would be traumatized by the presence of the accused, and

(c) The emotional distress would be more than *de minimis*. What does *de minimis* mean? Generally, "more than 'mere nervousness or excitement or some reluctance to testify.'" See *United States v. McCollum*, 58 M.J. 323 (2003) (citing *Maryland v.*

Craig, 497 U.S. 836 (1990).What's the constitutional minimum required? See *Marx v. Texas*, 987 S.W.2d 577 (Tex.).

(3) Important Public Policy. The state's interest in "protecting child witnesses from the trauma of testifying in a child abuse case" is an important state interest.

(4) Reliability Assured. The Court stated that confrontation has four component parts that assure reliability. You preserve reliability by preserving as many of these component parts as possible in the proposed procedure.

(a) Physical presence;

(b) Oath;

(c) Cross-examination;

(d) Observation of the witness by the fact finder.

3. Military Cases.

a) *United States v. Pack*, 65 M.J. 381 (2008). Remote live testimony by a child victim witness. The CAAF held that the Supreme Court opinion in *Crawford* did not affect its earlier opinion in *Maryland v. Craig*, which laid out the standards for remote live testimony of child abuse victims. In so holding, the CAAF acknowledged that *Crawford* appeared inconsistent with *Craig*, but, because the Supreme Court did not expressly overrule *Craig*, the CAAF would continue to apply the *Craig* standard.

b) *United States v. Anderson*, 51 M.J. 145 (1999). The court approved the government's repositioning of two child victims such that they did not face the accused and the government's use of a screen and closed circuit television. Closed circuit television was used so the military judge, counsel, and the reporter could all see the testimony.

c) *United States v. McCollum*, 58 M.J. 323 (2003). The CAAF approved the military judge's decision to permit a 12-year-old child victim to testify via two-way closed circuit television after finding the witness would be traumatized if required to testify in open court in the presence of the accused and that the witness would be unable to testify in open court in the accused's presence because of her fear that the accused would beat her. Accused absented himself from the courtroom pursuant to RCM 804. The military judge found that the victim would be unable to testify in the accused's presence because of both fear and trauma, linking the two concepts. CAAF noted that MRE 611(d)(3)(A) and (B) are sufficient independent of each of each other, meaning that military judge must find that a witness will be unable to testify reasonably because of fear or trauma caused by the accused's presence. Further, as long as the finding of necessity is based on the fear or trauma caused by the accused's presence alone, "it is irrelevant whether the child would also suffer some fear or trauma from testifying generally." The CAAF also determined that a military judge is not required under the Sixth Amendment nor MRE 611(d) to interview or observe a child witness before making a necessity ruling. Further, the fear of a witness need not be fear of imminent harm nor need it be reasonable. Rather, the fear required under the rule must "be of such a nature that it prevents the child from being able to testify in the accused's presence."

4. Options. Several ways have been tried and approved by courts. They include:

a) One-way closed circuit television. *Maryland v. Craig*, 497 U.S. 836 (1990); *U.S. v. Longstreath*, 45 M.J. 366 (1996).

b) Two-way closed circuit television. RCM 914A; 18 U.S.C. § 3509.

c) A partition. *United States v. Batten*, 31 M.J. 205 (C.M.A. 1990). An elaborate courtroom arrangement to protect the child victim, which included screens and closed circuit television. Testimony by a psychologist to show the impact conventional testimony would have on the witness. Special findings by the military judge (judge alone trial) that he relied on the child's excited utterance and not on her courtroom testimony. Harmless error analysis by CMA as allowed by US Supreme Court in *Coy* and *Craig*. Case affirmed.

d) Witness testifying with her back to the accused but facing the judge, and counsel. *United States v. Thompson*, 31 M.J. 168 (C.M.A. 1990). The child victims testified at a judge alone court-martial with their backs to the accused. The military judge, defense counsel, and trial counsel could see them. A psychologist testified for the government in support of the courtroom arrangement.

e) Profile to the accused. *United States v. Williams*, 37 M.J. 289 (C.M.A. 1993). Child victim testified from a chair in the center of the courtroom, facing the military judge with the defense table to the immediate left of her chair. The accused was not deprived of his right to confrontation even though he could not look into the witness' eyes. The witness testified in the accused's presence and he could see her face and demeanor.

f) Whisper Method. *United States v. Romey*, 32 M.J. 180 (C.M.A.). The child victim whispered her answers to her mother who repeated the answers in open court. The mother was certified as an interpreter. *Craig* was satisfied when "[t]he judge impliedly made a necessity finding in this case" (emphasis added). The military judge relied on representations made about the Article 32 testimony; trial counsel's pretrial discussions with the child witness; and the military judge's observations of the child at an Article 39(a) session in the accused's presence. The Court also held that the child victim was available for cross-examination, and the accused's due process rights were not violated.

5. Article 32 Investigation. *United States v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990). The child victim testified behind a partition at the Article 32 investigation. Accused could hear but not see the victim, but the defense counsel cross-examined him. The child testified at the court-martial without the partition. Held: (1) right to face-to-face confrontation is a trial right; (2) Article 32, UCMJ, only provides for the right of cross-examination, not confrontation; (3) an Article 32 investigation is not a critical stage of the trial; (4) *Bramel* is comparable to *Kentucky v. Stincer*, 482 U.S. 730 (1987) (defendant excluded from competency hearing of child witness); and (5) the accused did not have the right to proceed pro se at the Article 32 investigation.

6. Do not remove the accused from courtroom. See *United States v. Daulton*, 45 M.J. 212 (1996) (accused watched testimony of daughter over closed circuit television; confrontation rights violated); *United States v. Rembert*, 43 M.J. 837 (Army Ct. Crim. App. 1996) (accused watched testimony of 13-year-old carnal knowledge victim via two-way television in the deliberation room; without ruling on Sixth Amendment, the Army court agreed that accused's due process rights were violated). The accused may, under RCM 804(c), voluntarily leave the courtroom to preclude the use of the procedures outlined in RCM 914A.

7. Can witnesses who are not victims use remote procedures? Yes. Federal courts have interpreted 18 U.S.C. § 3509 to allow non-victim child witnesses to testify remotely. *United States v. Moses*, 137 F.3d 894 (6th Cir. 1998); *United States v. Quintero*, 21 F.3d 885 (9th Cir. 1994). Both cases interpret *Maryland v. Craig*. Both cases focus on the Court's approval of the state interest: "the state interest in protecting child witnesses from the trauma of testifying in a child abuse case." The courts do not comment on the fact that the four witnesses in *Craig* who testified remotely were all victims.

8. Other issues in remote testimony.

a) *United States v. Yates*, 2006 U.S. App. LEXIS 3433 (11th Cir. 2006). Prosecution witnesses living in Australia declined to travel to the United States for trial. The witnesses testified at trial via live, two-way video conference. The Eleventh Circuit, following an en banc hearing, held that this arrangement violated the defendants' Sixth Amendment right to confront witnesses against them. Citing to *Maryland v. Craig* as the controlling case, the court found that the prosecutor's need for the video conference testimony to make a case and expeditiously resolve it were not the type of public policies that were important enough to outweigh defendants' rights to confront their accusers face-to-face. The court further found that the prosecution had failed to establish the necessity for the use of remote testimony when another viable option, deposition under the Federal Rules for Criminal Procedure, was available to the government.

b) *Harrell v. Butterworth*, 251 F.3d 926 (11th Cir. 2001). Appellant was convicted of robbing an Argentinean couple. At trial, the victims were unavailable to testify in person because of illness and unwillingness to return to the United States. The trial judge agreed to allow testimony via satellite over defense objection. Citing to *Maryland v. Craig*, the Florida Supreme Court pointed out that the Confrontation Clause does not guarantee an absolute right to a face-to-face meeting between a defendant and witnesses; rather, the underlying purpose is to ensure the reliability of trial testimony. In this case, *Maryland v. Craig* was satisfied because (1) public policy considerations justified an exception to face-to-face confrontation, given the state interest "to expeditiously and justly resolve criminal matters that are pending in the state court system;" (2) the remote testimony was necessary, given the fact that the witnesses were absolutely essential to the government case and lived beyond the court's subpoena power; and (3) the testimony was reliable because the witnesses were able to see the jury and the defendant, they were sworn by the clerk of court, the jury and the defendant were able to observe the witnesses testifying, and they were subject to cross-examination. On habeas review, the 11th Circuit concluded that Florida Supreme Court's decision was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court.

c) *United States. v. McDonald*, 55 M.J. 173 (2001). Shortly before the presentencing portion of the court-martial, the government's only witness was notified of a unit deployment to the Middle East. He was at Fort Stewart, some distance from the trial location and was scheduled to report to the terminal at midnight that night for a departure at 0600 hours the next morning. Over defense objection, the military judge allowed the witness to testify by telephone. On appeal, the issue was whether the Sixth Amendment's Confrontation Clause applies to the presentencing portion of a court-martial. Agreeing with the Navy-Marine Corps Court of Criminal Appeals, the CAAF held that the Confrontation Clause does not apply to non-capital presentencing proceedings. However, the Due Process Clause of the Fifth Amendment requires that the evidence introduced in sentencing meet minimum standards of reliability. The Court pointed out that while the safeguards in the rules of evidence applied to the prosecution's sentencing evidence, the language of RCM 1001(e)(2)(D) allowed relaxation of the evidence rules and did not specifically prohibit telephonic testimony. The CAAF also emphasized that this was an unusual situation causing the military judge to "craft a creative solution," lest the testimony be temporarily lost.

d) *United States v. Shabazz*, 52 M.J. 585 (N-M. Ct. Crim. App. 1999). The military judge allowed a government witness to testify via video teleconference (VTC). The trial was in Japan; the witness testified from California. The Navy-Marine Corps Court found a violation

of the right to confrontation because the trial judge did not do enough to control the remote location.

e) *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). The U.S. government asserted that Gigante was the boss of the Genovese crime family and supervised its criminal activity. Gigante was convicted of racketeering, criminal conspiracy under the RICO statute, conspiracy to commit murder, and a labor payoff conspiracy. The government proved its case with six former members of the Mafia, including Peter Savino. Savino was allowed to testify via closed circuit television because he was in the Federal Witness Protection Program and was in the final stages of an inoperable, fatal cancer. The Court held the trial judge did not violate Gigante's right to confront Savino. See also *Minnesota v. Sewell*, 595 N.W.2d 207 (Minn. App. 1999).

9. Testimony in disguise. *Romero v. State*, 136 S.W.3d 680 (Tex. Ct. App. 2004). A state's witness testified wearing dark sunglasses, a baseball cap pulled low over his eyes, and a jacket with an upturned collar, leaving visible only his ears. The trial court made no finding of necessity to justify the witness's appearance. The court held that the defendant's right to confrontation was violated.

C. Right To Be Present at Trial

1. General Rule. The accused has a right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. 97, 105-6 (1934).

2. Disruptive Accused.

a) In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court held that a disruptive defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can be reclaimed if the defendant is willing to conduct himself consistently with the decorum and respect inherent in judicial proceedings.

b) RCM 804. A military judge faced with a disorderly and disruptive accused has three constitutionally-permissible responses:

(1) Bind and gag the accused as a last resort, thereby keeping him present;

(2) Cite the accused for criminal contempt;

(3) Remove the accused from the courtroom until he promises to conduct himself properly.

3. Intentionally absent accused. Trial may continue in the absence of the accused when the accused voluntarily absents himself from trial. RCM 804(b) and *United States v McCollum*, 56 M.J. 837 (A.F. Ct. Crim. App. 2002), *aff'd*, 58 M.J. 323, (2003) (accused voluntarily absented himself so that child-victim could testify in the courtroom).

D. Comment on Exercising Sixth Amendment Rights

1. *United States v. Kirt*, 52 M.J. 699 (N-M. Ct. Crim. App. 2000). The accused testified at trial and was asked during cross-examination, "Do you admit here today that you are the only witness in this court who has heard the testimony of every other witness?" On appeal, the accused argued that this question improperly invited the members to infer guilt from the appellant's exercise of

his constitutional right to testify and confront the witnesses against him. The Court held that the question did not constitute error, but if it did, it was waived and did not constitute plain error.

2. *Portuondo v. Agard*, 529 U.S. 61 (2000). In summation, the prosecutor commented that the defendant had the benefit of getting to listen to all other witnesses before testifying, giving the defendant a "big advantage." The defendant argued that the prosecutor's comments on his presence and ability to fabricate unlawfully burdened his Sixth Amendment right to be present at trial and to be confronted with witnesses against him and his Fifth and Sixth Amendment right to testify on his own behalf. The Court rejected the defendant's arguments distinguishing comments that suggest exercise of a right is evidence of guilt and comments that concern credibility as a witness.

IV. LITERAL FACE-TO-FACE CONFRONTATION: THE ADMISSIBILITY OF OUT-OF-COURT STATEMENTS

A. Introduction

1. The *Crawford* Rule: Under *Crawford v. Washington*, 541 U.S. 36 (2004) "testimonial" statements are admissible only if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford* overturned the *Ohio v. Roberts*, 448 U.S. 56 (1980) decision, under which judges determined the substantive reliability of out-of-court statements. *Crawford* returned to the historical roots of the Confrontation Clause, which is a procedural guarantee "not that evidence be reliable, but that reliability be assessed in a particular manner; by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

2. **What is Testimonial?** The *Crawford* Court declined to provide a comprehensive definition of "testimonial." The definition has been the subject of thousands of judicial decisions since the Court decided *Crawford*, and is discussed in Part IV.B., below.

3. Witness Present at Trial. "[W]hen the declarant appears for cross-examination at trial the Confrontation Clause places no constraints at all on the use of his prior testimonial statements….The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford*, 541 U.S. at 59.

4. Hearsay and the Confrontation Clause.

a) It is important to remember that issues regarding evidentiary hearsay rules and issues regarding Confrontation Clause are separate and require a **separate analysis**. "Although the hearsay rules and the Confrontation Clause are generally designed to protect similar values, they do not completely overlap. Thus, a statement properly admitted under a hearsay exception may violate confrontational rights. Similarly, a violation of the hearsay rules may not infringe upon the Sixth Amendment." *United States v. Russell*, 66 M.J. 597, 602 (A. Ct. Crim. App. 2008) (internal quotations omitted).

b) Application of the Confrontation Clause to Non-Hearsay. "The Clause…does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59.

5. **Problem-solving**. A Confrontation Clause analysis chart is provided at Part VI., below.

B. What Statements are "Testimonial"?

1. U.S. Supreme Court Cases.

a) *Crawford v. Washington*, 541 U.S. 36 (2004).

(1) Articulated **three categories of testimonial statements** that defined the Confrontation Clause's "coverage at various levels of abstraction." The Court held that statements that fell within one or more of these three categories were testimonial. These categories, or "formulations," were

(a) "Ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially…"

(b) "Extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions…"

(c) "Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

(2) At a minimum, the term "testimonial" applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *But see*, *Davis v. Washington*, 547 U.S. 813 (2006) (statement given in response to police interrogation is nontestimonial where primary purpose of police is meeting an ongoing emergency) and *United States v. Squire*, 72 M.J. 285 (2013) (statements by child to medical providers where the primary purpose was medical treatment).

b) *Davis v. Washington*, 547 U.S. 813 (2006) (companion case with *Hammon v. Indiana*, 547 U.S. 813 (2006)).

(1) *Davis* and *Hammon* are cases that dealt with statements made to government officials after domestic violence situations. The Court held that statements made to the police at the scene of a domestic dispute, but after the actual incident, were testimonial and could not be admitted where the victim did not testify at trial, but that statements made in response to questions from a 911 operator immediately after the domestic assault occurred (and assailant had just left the premises) were nontestimonial, and thus could be admitted at trial even though the victim did not testify.

(2) "Statements are **nontestimonial** when made in the course of **police interrogation** under circumstances objectively indicating that the **primary purpose** of the interrogation is to enable police assistance to meet an **ongoing emergency**. They are **testimonial** when the circumstances objectively indicate that there is no such ongoing emergency and that the **primary purpose** of the interrogation is to **establish or prove past events** potentially relevant to later criminal prosecution."

c) *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143 (2011) (The Emergency Exception Doctrine)

(1) <u>Procedural History</u>: A jury convicted the defendant of second degree murder, possession of a firearm by a felon, and possession of a firearm during commission of a felony. The Michigan Court of Appeals affirmed, the Michigan Supreme Court returned the case for reconsideration. The appellate court then affirmed again. The Michigan Supreme Court reversed and SCOTUS granted certiorari.

(2) <u>Facts</u>: Police were dispatched to a local gas station following a shooting. The victim lay in the parking lot with mortal gunshot wounds. Police spoke with him and he told them that the suspect, Bryant, had shot him when he was outside of Bryant's house and then he drove himself to the gas station. Once medical services arrived, the police called

for backup and went in search of Bryant, though they did not find him that day. The victim died at the hospital.

(3) At trial, the victim's statements were admitted through the police officer. The trial occurred pre-*Crawford*. The case was reversed on appeal, post-*Crawford*, when the statements were found testimonial.

(4) Issues: Whether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because they were "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual??

(5) Holding: Yes. The objective circumstances of the victim's statement indicate the "primary purpose" of the interrogation was to assist in an ongoing emergency.

(6) Discussion: This case expands the usual emergency exception doctrine because it looks to the totality of the circumstances, not just the emergency itself. The victim's statements do not focus on the threat to the immediate environment, usually a domestic situation or an individual, but rather the public at large and for a longer period of time. Further, the victim went into greater detail about the circumstances of what happened. Despite this, court relied on an objective analysis of the encounter between the two individuals. First, it occurred at a crime scene rather than a formal, station house setting. Second, the existence of an emergency of Bryant's at large status was a threat to the public even if the threat to the current victim had passed. Finally, while the analysis is objective, the court does look at the victim's condition to determine the purpose in providing information to police.

(7) Dissent: Justice Scalia, as the author and torch-bearer of *Crawford*, provides interesting and entertaining reading in his dissent, which begins "[t]oday's tale . . ." continues assuming a fantasy in the majority's decision. Whether it takes a hardline on *Crawford* or just a hard jab the majority's lack of understanding about the distinction between investigating and responding to an emergency, it's certainly an effort to keep the court closer to the *Crawford* line of cases as he sees the majority decision as looking at reliability factors, something we abandoned when we left the *Ohio v. Roberts* sinking ship in 2004.

d) *Ohio v. Clark*, 576 U.S. ____ (2015).

(1) Facts: A preschool teacher (who was a "mandatory reporter" to law enforcement under Ohio law) became suspicious of several injuries she observed on a three-year-old child, L.P. The teacher brought the injuries to the attention of a lead teacher at the school, asked the child about the injuries. The child told the teachers that the accused had inflicted the injuries.

(2) Procedural History: The trial judge conducted a hearing pursuant to Ohio law, and determined that the child was not competent to testify. The statements were admitted as residual hearsay under Ohio Rule of Evidence 807, over defense objection. On appeal, the Ohio Appellate and Supreme Courts both found the admission of L.P.'s statements to the teachers to violate the Confrontation Clause. The Supreme Court reversed and remanded.

(3) Issue: Whether statements made by young children to "mandatory reporters" are testimonial hearsay under *Crawford*.

(4) Holding: No. "Because neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial." *Clark*, slip op. at 1.

(5) Analysis: Writing for the majority, Justice Alito applies the Court's prior analysis in *Hammon, Davis, and Bryant*. In particular, Justice Alito noted factors such as the lack of investigative purpose on the part of the listeners and declarant; the informality of the conversation; the fact that the listeners were teachers, not police; the potential that the listeners were responding to an ongoing emergent situation involving child abuse; and the very young age of the declarant.

e) *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009).

(1) Facts: Accused was convicted on drug charges. Police sent cocaine connected to the accused to state forensic lab for analysis. The lab analysts issued three sworn "certificates of analysis" attesting to the results of their analysis. In accordance with state law, the certificates were introduced at trial as "prima facie evidence of the composition, quality, and the net weight of the narcotic…analyzed." The analysts who wrote the statements did not testify at trial. Melendez-Diaz objected to the admission of the statements as a violation of his right of confrontation, citing *Crawford*.

(2) Procedural History: The Appeals Court of Massachusetts affirmed the conviction, rejecting Melendez-Diaz's Sixth Amendment claim under *Crawford*. In doing so the court relied on the Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Verde*. The *Verde* court concluded that a drug analysis certificate is "akin to a business or official record" and was thus not testimonial under *Crawford*. After the Massachusetts Supreme Judicial Court denied review without comment, Melendez-Diaz appealed to the U.S. Supreme Court, arguing that the *Verde* holding was in conflict with the *Crawford* decision. The Supreme Court granted certiorari and the case was argued in November 2008.

(3) Issue: Whether affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to a defendant was cocaine were "testimonial," rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment.

(4) Holding: Justice Scalia, writing for the majority and joined by Justices Stevens, Souter, Thomas, and Ginsberg, held: The affidavits were "testimonial" statements, and the affiants were "witnesses" for purposes of the Sixth Amendment; admission of the affidavits violated the defendant's right to confrontation.

(5) Analysis.

(a) The Court found that the affidavits fell within the "core class of testimonial statements" under Crawford. Noting that its description of the core class mentioned affidavits twice, the Court found that a "certificate of analysis" was an "affidavit," because it was a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (Citing *Crawford*, 541 U.S. at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828))).

(b) In addition to being "affidavits", the Court found that the certificates of analysis were also "'made under circumstances which would lead an objective witness

reasonably to believe that the statement would be available for use at a later trial.'" (Citing *Crawford*, 541 U.S. at 52). As evidence, the Court pointed out that, according to Massachusetts law, the "sole purpose" of the certificates was to provide "prima facie evidence" about the tested substance. The Court surmised that the analysts who prepared the certificates must have been aware of this purpose, as it was reprinted on the certificates.

(6) Chain of custody evidence. The Court, in a footnote, made clear that it did not hold "that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device must appear in person." The Court reasoned that "gaps in the chain of custody go to weight, not admissibility" but also held that any chain of custody evidence presented must be presented live.

f) *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010). In accordance with Virginia law, the prosecution introduced a certificate of a forensic laboratory analysis without presenting the testimony of the analyst who prepared the certificate. Under the law, the accused has a right to call the analyst as his own witness. In a per curiam opinion, the Court vacated the judgment of the Virginia Supreme Court and remanded the case (along with a companion case, Cypress) for further proceedings not inconsistent with the U.S. Supreme Court's opinion in *Melendez-Diaz v. Massachusetts*, 557 U.S. ----, 129 S.Ct. 2527 (2009).

g) *Bullcoming v. New Mexico*, 562 U.S. ___, 131 S.Ct. 2705 (2011)

(1) Procedural History: Defendant was convicted of Driving while Under the Influence of Intoxicating Liquor (DWI). The New Mexico Court of Appeals and New Mexico Supreme Court affirmed. SCOTUS granted certiorari.

(2) Facts: Following his arrest for DWI, police collected a blood sample from the defendant. An analyst named Caylor tested the sample at New Mexico's state lab. At trial, the government did not call Caylor because he was on unpaid leave. Defense objected (they did not have prior notice of this change). Government offered a surrogate witness, Razatos, who had neither certified, performed nor observed the testing on the defendant's sample. The court overruled the objection and admitted the entire report as a business record. The report contained statements about proper procedures being followed, results of the testing, the state of the sample upon receipt, the validity of the process, etc.

(3) *Melendez-Diaz v. Massachusetts* came down during this appeal, holding that forensic reports affidavits were testimonial. The New Mexico Supreme Court recognized this decision and found the certificate testimonial but that it did not violate the Confrontation Clause because Caylor, the testing analyst was merely a "scrivener" who wrote down machine generated results and Razatos, the surrogate witness, was more than qualified as an expert to testify about how the machines work.

(4) Issue: Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification through the in-court testimony of a scientist who did not sign the certification or perform or observe the test?

(5) Holding: No. Surrogate testimony does not satisfy the Confrontation Clause. The accused has a right to confront the witness who made the certification. If he or she is unavailable, there must have been a prior opportunity for cross-examination.

(6) Discussion: *Bullcoming* answers an unanswered question for military courts, one that C.A.A.F. is seeking answers to, "are statements in documents and certifications that all

procedures were properly followed, such as on specimen custody documents, testimonial?" *Bullcoming* tells us, "yes." The declarant is necessary for these types of statements. Everything the analyst does to get the sample from the first step into the testing machine is ripe for cross-examination. They go beyond machine generated data. They are assertions you cannot get from a surrogate witness or a document. This question is not quite reached in the cases we've had before our courts.

(a) *Bullcoming* does tell us that the C.A.A.F. was ahead of its time in *Blazier II* by confirming the general holding that an expert may "consistent with the Confrontation Clause and Rules of Evidence, rely on, but not repeat, testimonial hearsay that is otherwise an appropriate basis for an expert opinion, so long as the expert opinion arrived at is the expert's own."

(b) Justice Sotomayor writes a concurrence that provides food for thought. While Blazier II's general holding stands, she suggests that not every situation might work this way and gives several hypothetical situations that might change the outcome. One situation that military practitioners should concern themselves with is ensuring your expert is relying on far more than testimonial hearsay. You may face an impossible battle under MRE 703 presenting a surrogate expert and saying he formed his own opinion if he relied solely on testimonial hearsay. The machine generated data is still your "key to freedom" where non-declarant experts are concerned in this area of the law.

h) *Williams v. Illinois*, 132 S.Ct. 2221 (2012)

(1) Procedural History: Williams is tried for sexual assault in Illinois state court. The government uses DNA evidence at his trial presented through a state lab analysis who did not conduct either test. Defense alleges a Confrontation Clause violation, which the trial judge overrules. The appellate court concurs and SCOTUS grants certiorari.

(2) Facts: DNA is collected during a sexual assault examination. That DNA sample (semen sample) is tested by a private lab though there is no suspect for comparison at the time of the assault. The lab produces a document for the profile and returns it to the state. A few months after the assault, Williams is arrested on unrelated charges. Because of that arrest, his DNA is taken and entered into the state crime computer by the state crime lab. Shortly thereafter, an analyst at the state crime lab runs the DNA profile from the private lab's semen sample against the state crime computer. She gets a match to Williams DNA sample taken from his unrelated crime. At a judge alone trial, the government calls the state crime lab personnel as their expert. She testifies about running the samples and getting a match and explains, as an expert, how the samples compare and the DNA profile is a match. During her testimony, she refers to the DNA profile generated by the private lab and its origin from the semen sample taken from the victim during the sexual assault exam. She testifies that she used this profile to form her opinion that the samples matched. The government did not admit the private lab's report.

(3) Issue: Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause.

(4) Holding: No. In a plurality opinion, the court found that this testimony did not violate the confrontation clause. The report was not admitted and the testimony that the expert gave referring to the DNA report done by the private lab was used for a non-hearsay purpose-to show how she formed her opinion-and not for its truth. The court

reasoned that this type of testimony has been allowed by experts under FRE 703 (or the state equivalent rule).

(5) Discussion: The Justices dissent greatly in not only the holding but even the reasoning within the plurality opinion. This case follows a series of cases that prohibit use of the report and reading its results when the analyst who performed, supervised, observed or certified the results is not the testifying witness. Here, the plurality made a distinction, possibly without a difference, but a distinction under the law just the same. Because this witness testified as an expert, she is allowed to comment on what she used to form her opinion, Under our own rule 703, an expert can refer to evidence that is otherwise inadmissible hearsay to let the fact-finder know what they used to form their opinion. This goes to the weight to be given the experts opinion. The hearsay evidence itself is not admitted as a document or generally read from, in most cases. The dissent strongly urges that this practice, under this scenario, bypasses the Constitution by allowing the government to smuggle in a report and its results that they could otherwise not admit without the proper witness. Even within those who join the plurality decision, some Justices disagree with the idea that this is permissible in this case; however, they agree that that the testimony did not violate the Confrontation Clause because when the DNA profile was created from the semen sample, there was no suspect, he was still at large and it was not a formalized report or affidavit. This reasoning relies on the type of reasoning we see in the Emergency Exception/Primary Purposes cases like *Hammon, Davis and Michigan v. Bryant*.

(6) Practice Point: The reach of MRE 703 is broad. An expert can often smuggle in hearsay where you have another purpose for offering it, that you could not get in through documents or lay witnesses. However, keep in mind that this decision is based on a judge alone trial and a rule that permitted such testimony in judge alone cases. Where your fact finder is a panel, who is not trained to separate "truth of the matter" from other purposes, this holding may prove no more helpful than *Bullcoming* and its predecessors for admitting expert testimony.

2. Military Cases

a) **Tests for Determining if a Statement is "Testimonial".** *United States v. Rankin*, 64 M.J. 348 (C.A.A.F. 2007).Military courts use the following analytical framework to analyze statements falling within the *Crawford* third category of potential testimonial statements (the "objective witness" category): "First, was the statement at issue elicited by or made in response to a law enforcement or prosecutorial inquiry? Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?" *See also*, *United States v. Foerster*, 65 M.J. 120 (C.A.A.F. 2007); *United States v. Gardinier*, 65 M.J. 60 (C.A.A.F. 2007).

b) **Affidavits**. *United States v. Foerster*, 65 M.J. 120 (2007). SGT Porter was deployed when he discovered somebody was using his identity to cash checks in his name. When he returned to home station he went to the bank and filled out a "forgery affidavit" containing the facts of his situation. Specifically, the sworn affidavit contained the check numbers and amounts he believed were false. This document was required by the bank in order for SGT Porter to get his money back. When the time came for trial, SGT Porter was already deployed again, and thus not available to testify. The government admitted the affidavit over defense objection in the place of SGT Porter's live witness testimony. The granted issue was whether an affidavit filled out by a victim of check fraud pursuant to internal bank procedures

and without law enforcement involvement in the creation of the document is admissible as a nontestimonial business record in light of *Crawford v. Washington* and *Washington v. Davis*. The court held that the affidavit was nontestimonial and properly admissible under the business records exception. The CAAF used the three factors previously identified in *Rankin* to analyze whether the bank affidavit in this case was testimonial. First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Here there was no governmental involvement in the making of the affidavit at all. The affidavit was made out before appellant had even been identified as the forger, long before there was any request aimed at preparation for trial. Second, did the "statement" involve more than a routine and objective cataloging of unambiguous factual matters? The information contained in the affidavit merely cataloged objective facts, specifically the check numbers and amounts, and SGT Porter's signature. Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial? Looking at the context in which the affidavit was made, it is clear that the purpose of the document was to protect the bank from being defrauded by an account holder. The CAAF acknowledged that the Supreme Court opinion in *Crawford* uses the term "affidavit" several times to describe documents considered testimonial hearsay, however the CAAF does not believe the Court intended for every document titled affidavit to be considered testimonial. If there is no governmental involvement in the making of a statement, then it is unlikely to be considered testimonial.

c) **Statements made to a Sexual Assault Medical Forensic Examiner (SAMFE) or Sexual Assault Nurse Examiner (SANE).** *United States v. Gardinier*, 65 M.J. 60 (2007). Appellant was convicted of indecent acts and indecent liberties with a child under age 16 and the convening authority approved the sentence to a BCD, three years confinement, and reduction to E-1. The victim was appellant's five-year-old daughter, KG. KG received a medical exam the day she reported the acts. She was then interviewed a couple days later by a detective and a social worker, followed by a second interview with a sexual assault nurse examiner (SANE). The military judge admitted the "forensic medical form" completed by the SANE and also allowed her to testify about what KG had told her during the exam. The granted issue was whether statements KG made to the SANE were testimonial under *Crawford*. (There were three granted issues, but only this one implicated the Confrontation Clause. Of the other two issues, one involved Article 31 rights and the other admission of a videotaped statement.) The CAAF held KG's statements to the SANE were testimonial hearsay and their admission into evidence at the court-martial was error. The CAAF used the three factors previously identified in its opinion in *United States v. Rankin*, 64 M.J. 348 (2007) for distinguishing between testimonial and nontestimonial hearsay to analyze the statements KG made to the SANE. Taking the first and third *Rankin* factors together, the CAAF reasoned that on balance the statements were made in response to government questioning designed to produce evidence for trial. The SANE testified at trial that she conducts examinations for treatment, however the form itself is called a "forensic" medical examination form. She also asked questions beyond what might be necessary for mere treatment, including questions about what KG had told the police investigators. Also, the examination was arranged and paid for by the local sheriff's department. The totality of the circumstances indicated the statements made to the SANE were testimonial. But see *United States v. Squire*, 72 M.J. 285, 289 (C.A.A.F. 2013).

d) Alcohol, Urine and Drug Analysis Results

(1) **Random Urinalysis.** *United States v. Magyari, 63 M.J. 123 (2006);* ***overruled by United States v. Sweeney,*** *70 M.J. 296 (C.A.A.F. 2011), infra, (holding that the test for*

testimonial does not turn on random or non-random urinalysis procedures). The CAAF granted on the following issue: Whether, in light of *Crawford v. Washington*, appellant was denied his Sixth Amendment right to confront the witnesses against him where the government's case consisted solely of appellant's positive urinalysis. Holding: "in the context of random urinalysis screening, where the lab technicians do not equate specific samples with particular individuals or outcomes, and the sample is not tested in furtherance of a particular law enforcement investigation, the data entries of the technicians are not "testimonial" in nature."

(2) **Urinalysis Based on Individualized Suspicion.** *United States v. Harris*, 65 M.J. 594 (N-M Ct. Crim. App. 2007). Appellant was arrested for trespassing by local police after he was discovered digging in his neighbor's yard in the pouring rain, wearing only a pair of muddy shorts. One of his explanations for his unusual behavior was that he was "digging for diamonds." After he admitted to using crystal methamphetamine, he was ordered to undergo a command directed urinalysis based on probable cause. His urinalysis result came back positive, and was introduced against him at trial. The issue was whether the Navy Drug Lab Report on a command directed urinalysis admitted against appellant testimonial hearsay. (There were five assignments of error, however only one implicated the Sixth Amendment.) The holding was: No, the lab report was nontestimonial, and its admission did not violate appellant's Confrontation rights under the Sixth Amendment. Although the CAAF opinion in *Magyari* was limited to cases of random urinalysis, the result is the same here in the case of a command directed urinalysis because the lab procedures are the same regardless of the origin of the sample. More specifically, urinalysis samples are processed by the Navy lab in batches of 100, and given a separate identification number, such that there is no way for any lab technician to know which sample is being tested. The lab employees don't know whether prosecution is anticipated or whether the sample is from a random urinalysis. Therefore, urinalysis lab reports from testing processed in the way it is done at the Navy lab, are nontestimonial hearsay admissible under the business records exception. *But see Blazier I & II, infra; see also Sweeney*, which finds that the analysis of whether a statement is testimonial is done at the time they are made, not when a sample is provided.

(3) **Physical Evidence Sent to Lab Post-Arrest.** *United States v. Williamson*, 65 M.J. 706 (Army Ct. Crim. App. 2007). Appellant was convicted of wrongful possession with intent to distribute over three pounds of marijuana, based on his possession of a FedEx package containing three bundles of marijuana he mailed to himself on leave in New Orleans. He mailed the package from El Paso, where it was detected by DEA agents using a drug dog. Agents effected a controlled delivery to the address on the package in New Orleans, and executed a search warrant fifteen minutes later. After seizing the package, it was sent to the United States Army Criminal Investigation Laboratory (USACIL), where the substance contained in the three bundles was confirmed to be marijuana. At trial, the government admitted the lab report over defense objection. The military judge admitted the lab report under the business records exception to the hearsay rules. The issue was whether the forensic lab report produced by USACIL at the request of the government after appellant had been arrested constitutes testimonial hearsay. The holding was: Yes, the forensic lab report does constitute testimonial hearsay where the lab report was requested after local police had arrested appellant. The court first briefly reviewed Supreme Court and CAAF case law on the Confrontation right since *Crawford*, before analyzing the facts of this case primarily using the three factors the CAAF enunciated in *Rankin*. First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the "statement" involve more

than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial? Clearly the testing was done and the report produced in response to a specific request by law enforcement. The lab report was limited to the identity and amount of the tested substance, however, the purpose of the testing was to produce incriminating evidence for use at trial. The court pointed out that this circumstance was described by the CAAF in *Magyari* as a situation where a lab report would likely be considered testimonial, i.e. prepared at the request of the government, while appellant was already under investigation, for the purpose of discovering incriminating evidence. Critical to the court's reasoning was the fact that the testing was done after appellant had been arrested and charges had been preferred.

(4) **Physical Evidence Sent to Lab Post-Arrest.** *United States v. Harcrow*, 66 M.J. 154 (2008). Appellant was found guilty of use and manufacture of various illegal drugs among other offenses. NCIS and local law enforcement officials arrested him at his house in Stafford County, Virginia, pursuant to a warrant issued on probable cause that he was manufacturing methamphetamine at his residence. While searching the house, plastic bags and metal spoons were seized as evidence consistent with the manufacture of methamphetamine. The plastic bags and spoons were subsequently tested by the Virginia forensic science lab and found to contain heroin and cocaine residue. The government introduced the lab reports against appellant at trial. The Confrontation issue was whether the forensic lab reports constituted testimonial hearsay prohibited by the Sixth Amendment. CAAF used its three factors from *Rankin* along with its reasoning in *Magyari* to conclude the lab reports were testimonial. The case is important as the first CAAF case to find a lab report inadmissible as a testimonial statement rather than admissible as a nontestimonial business record.

(5) **Urinalysis.** *United States v. Blazier (Blazier I)*, 68 M.J. 439 (C.A.A.F. 2010).

(a) Accused convicted of wrongful use of controlled substances based on a random and a consent urinalysis. The command requested "the drug testing reports and specimen bottles" from the lab, stating that they "needed for court-martial use." The lab sent the command two Drug Testing Reports (DTR) consisting of 1) a cover memo that described and summarized the tests and the results; 2) attached records that included, among other things, the underlying testing data, chain of custody documents, and some handwritten annotations of employees of the lab. The cover memos were signed by the "Results Reporting Assistants" and contained a signed, sworn declaration by Dr. Vincent Papa, the lab's forensic toxicologist and "Laboratory Certifying Official." Dr. Papa's declaration confirmed the authenticity of the records and stated that they were "made and kept in the course of the regular conducted activity" at the lab.

(b) <u>Held</u>: The portions of the drug testing report cover memoranda which summarized and set forth the "accusation" that certain substances were confirmed present in Blazier's urine at concentrations above the DOD cutoff level were testimonial.

(c) The court declined to decide the entire question before it, and instead ordered additional briefings from the parties on the following issues not previously raised by the parties: While the record establishes that the drug testing reports, as introduced into evidence by the prosecution, contained testimonial evidence (the cover memoranda of August 16), and the defense did not have the opportunity at trial to

cross-examine the declarants of such testimonial evidence, (a) was the Confrontation Clause nevertheless satisfied by testimony from Dr. Papa?; or (b) if Dr. Papa's testimony did not itself satisfy the Confrontation Clause, was the introduction of testimonial evidence nevertheless harmless beyond a reasonable doubt under the circumstances of this case if he was qualified as, and testified as, an expert under MRE 703 (noting that "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data [upon which the expert relied] need not be admissible in evidence in order for the opinion or inference to be admitted")? See, *Blazier II*, infra.

(6) **Urinalysis.** *United States v. Blazier (Blazier II)*, 69 M.J. 218 (C.A.A.F. 2010).

(a) Held: "Cross-examination of Dr. Papa was not sufficient to satisfy the right to confront [the lab personnel who prepared the testimonial portions of the cover memoranda], and the introduction of their testimonial statements as prosecution exhibits violated the Confrontation Clause."

(b) Held: "[W]here testimonial hearsay is admitted, the Confrontation Clause is satisfied only if the declarant of that hearsay is either (1) subject to cross-examination at trial, or (2) unavailable and subject to previous cross examination. We further hold that an expert may, consistent with the Confrontation Clause and the rules of evidence, (1) rely on, repeat, or interpret admissible and non-hearsay machine-generated printouts of machine-generated data…, and/or (2) rely on, but not repeat, testimonial hearsay that is otherwise an appropriate basis for an expert opinion, so long as the expert opinion arrived at is the expert's own…. However, the Confrontation Clause may not be circumvented by an expert's repetition of otherwise inadmissible testimonial hearsay of another."

(c) The court reversed the Air Force court's decision and remanded the case for the lower court to conduct a harmlessness analysis.

(7) *United States v. Dollar*, 69 M.J. 411 (C.A.A.F. 2011)

(a) Procedural History: Appellant was convicted of adultery and wrongful use of cocaine in violation of Articles 134 and 112a, U.C.M.J. The Air Force Court of Criminal Appeals initially affirmed, but reconsidered its decision following *Blazier II*. Upon reconsideration, the AFCCA found harmless error in the admission of testimonial hearsay of a laboratory cover memorandum and surrogate witness. The C.A.A.F. granted review.

(b) Facts: The Appellant tested positive for cocaine through random urinalysis. At trial, over defense objection, the government pre-admitted, the lab report including the cover memorandum. Further, they called a witness from the lab who was not involved in the testing who provided an expert opinion that included testifying verbatim from portions of the report that were not machine generated.

(c) Issue: Whether the lower court erred after finding that the testimonial evidence was improperly admitted at trial, then concluding that the Appellants Confrontation rights were satisfied by a surrogate witness, or that it was harmless error beyond a reasonable doubt.

(d) Holding: No. The Appellant's rights were not satisfied by a surrogate witness and the lower court's factual findings used to support harmless error were incorrect.

(e) Discussion: While Dollar does not add much to Confrontation jurisprudence, it reaffirms that surrogate witnesses, while able to rely on non-testimonial hearsay to reach conclusions, cannot smuggle in testimonial hearsay. More importantly, Dollar was the first case to take a step in the direction of questioning *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006), which drew a distinction between random urinalysis reports and those generated for law enforcement purposes.

(8) *United States v. Cavitt*, 69 M.J. 413 (C.A.A.F. 2011)

(a) Procedural History: The Appellant was convicted of wrongful use of marijuana and assault in violation of Articles 112a and 128, U.C.M.J. The Air Force Court of Criminal Appeals found error in admission of the laboratory cover memorandum but found the error harmless. C.A.A.F. granted review.

(b) Facts: Appellant consented to a drug tested following a period of unauthorized absence. The lab report, containing a cover memorandum, custody document, confirmation intervention log, quality control memorandum, chain of custody documents and machine generated data were admitted at trial over defense objection. The AFCCA found error in the memorandum but found the remainder of the report admissible as a business record.

(c) Issue: Did the military judge abuse his discretion when he allowed the lab expert to testify using testimonial hearsay and did admission of the report without the declarant who conducted the testing being present violate the Appellant's Sixth Amendment's Confrontation right?

(d) Holding: The case was reversed and remanded for reconsideration in light of *Blazier II*.

(e) Discussion: The court explained that the AFCCA incorrectly relied on the business records exception as a firmly rooted exception for lab reports based on *Ohio v. Roberts*, 448 U.S. 56 (1980) . This does not satisfy the Confrontation Clause. Even without *Blazier II*, AFCCA should have identified this problem relying solely on *Crawford v. Washington*, 541 U.S. 36 (2004). The question before the court was not one of hearsay, rather one of Confrontation and the landscape changed in 2004 from *Roberts* to *Crawford*. Beyond that, the court pointed out that the military judge failed to address the issue of the expert repeating testimonial hearsay during his testimony. Again in this case, *Magyari* raises its ugly head on the issue of random vs. non-random urinalysis.

(9) *United States v. Lusk*, 70 M.J. 278 (C.A.A.F. 2011)

(a) Procedural History: An officer panel convicted the Appellant of wrongful use of cocaine in violation of Article 112a, U.C.M.J. The Air Force Court of Criminal Appeal found harmless error in failure to give an instruction and affirmed. C.A.A.F. granted review.

(b) Facts: Appellant provided a urine sample during a unit inspection. On request by trial counsel, Appellant's sample was tested by both the AFDTL and AFIP. Both yielded positive results. In pretrial motions, the military judge excluded the AFIP reported stating it violated the accused's Sixth Amendment Confrontation rights. He reserved ruling on whether it could be used later, in rebuttal. During cross-examination of government's expert witness, defense counsel challenged the validity and reliability of the AFDTL report. The prosecution moved to use the AFIP report

to rebut the attack. The military judge ruled that the government's expert could testify about his reliance on the AFIP report to form his opinion under MRE 703, but that the report would not be admitted into evidence. The judge stated he would give an instruction that the report or results could not be used for the truth but only to show how the expert reached his conclusions. However, after extensive cross-examination by defense counsel, the judge determined he would not give the instruction.

(c) Issue: Did the military judge error in admitting the testimonial hearsay of the AFIP report in violation of the accused's Sixth Amendment Confrontation rights through the surrogate expert and then further error by failing to give a limiting instruction that such information could only be used to show how the expert formed his opinion? If it was error, was the error harmless?

(d) Holding: The intermediate court erred in not considering how unrestricted use of inadmissible testimonial hearsay, admitted through a surrogate witness in violation of the Sixth Amendment, influenced the conviction. The court held the failure to give the limiting instruction, regardless of how both sides used the information, was error. As such, the findings of the intermediate court are set aside and the case is remanded for a review.

(e) Discussion: Lusk tells us that the court intends to closely follow its holding in Blazier II where the government attempts to "smuggle" in testimonial hearsay through anyone other than the declarant from the testing laboratory. Government counsel should proceed with caution even when using a surrogate expert who will give an opinion based on reviewing a report. Carefully form questions to ensure that no testimonial hearsay is repeated. While the counsel in this case were obviously over the line, it is easy to see how C.A.A.F. is scrutinizing records to ensure that only machine generated data and nontestimonial hearsay is repeated by surrogate experts and requiring limiting instructions even where defense counsel have used the evidence themselves during cross-examination.

(10) *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011)

(a) Procedural History: Appellant was convicted of several offenses, to include one specification of wrongful use of cocaine in violation of Article 112a. This case was tried prior to *Melendez Diaz v. Massachusetts*, et. al. The Navy-Marine Corps Court of Criminal Appeals found no error and affirmed. C.A.A.F. granted review.

(b) Facts: The government called an expert witness from the lab who neither tested, observed nor signed the cover memorandum for the urinalysis sample. The expert was the FLCO (final lab certifying official) who reviews all the data after the fact and essentially says everything was conducted IAW DoD procedures. The court admitted the lab report, which included a cover memorandum as well as a specimen custody document containing notations about the test results and procedures. The NMCCA, relying heavily on *Magyari*, found no error. That court reasoned that the lab report was not generated for court-martial use and as such, could not be testimonial in nature. Therefore, the court found the report admissible as a business record using the reliability test from *Ohio v. Roberts*, 448 U.S. 56 (1980).

(c) Issues: Whether, in light of the U.S. Supreme Court's ruling in *Melendez-Diaz v. Massachusetts*, the admission of the laboratory documents violated the appellant's Sixth Amendment right to confrontation. Whether defense counsel's objection to the

laboratory report constituted a valid Crawford objection and, if not, whether the objection was waived or forfeited. If it was forfeited, did admission constitute plain error?

(d) Holding: Admitting the cover memorandum was error (consistent with previous decisions); however, admitting the specimen custody document (DD Form 2426) without the testimony of the certifying/testing parties was plain and obvious error. Defense counsel had no "colorable objection" under the law at the time of this trial so he did not forfeit the Appellant's rights. The NMCCA decision is reversed and remanded for a decision on whether the error was harmless beyond a reasonable doubt.

(e) Discussion: The newest development in this line of cases is the specimen custody document. The court found it contained testimonial hearsay (notations) and violated the Confrontation clause being admitted and/or discussed by anyone other than the declarant. This ruling is seen by many as a long time coming and is consistent with the recent ruling in *Bullcoming v. New Mexico*, 564 U.S. ___ (2011). While the cover memorandum is understood as testimonial, prior decisions have never ruled out the possibility that other parts of the lab report could contain testimonial hearsay. In this case, it happens to be that notations were made on the specimen custody document certifying the results and quality of the procedures.

(f) In taking on the second issue, the court again approached *United States v. Magyari* and declared it a dead letter. In *Magyari*, the court focused the testimonial determination on the initial purpose of the sample being collected for testing, the technicians having no reason to know which sample belonged to an accused, and the lab being under no pressure to reach a particular conclusion. Sweeney recognizes the error in this logic. Once an accused's sample tests positive in an initial screening, an analyst must "reasonably understand themselves to be assisting in the production of evidence when they perform re-screens . . . and subsequently make formal certifications." *Sweeney* confirms that the testimonial determination should turn on the purpose for which the statements in the report are made. If not for use later as evidence, why make a certification at all? There would be no need for any type of formal verification; administrative proceedings require much less formality, due process and would not trigger Sixth Amendment Confrontation rights. Additionally, such formal certifications are requested after a decision to court-martial is made, leaving no question what the purpose is for. Finally, the lower court reliance on the business records exception is outdated. *Crawford's* testimonial determination, not the *Ohio v. Roberts* reliability test, is the controlling law for Confrontation.

(g) Dissent: The dissent, written by Judge Baker and joined by Judge Stucky, disagrees with the majority's reasoning concerning the specimen custody document. The dissents focuses on the primary purpose behind the military's testing program, arguing that it is not for court-martial and is a command program for readiness and fitness for duty. For a follow up on this discussion, see *United States v. Tearman*, 72 M.J. 54 (2013) below.

(h) Note: Practitioners should not read Sweeney as necessitating the testing official to prove every urinalysis case nor that nothing on the specimen custody document is every admissible (as we see one year later in *Tearman*); however, it should be read as requiring greater scrutiny in what documents and when they were created. Moreover, understanding the limitations of what your surrogate witness can testify about. What

remains of your case may be a testifying expert that can't give you the testimony you need about the quality of the procedures followed (See *Bullcoming*). That does not mean there won't be cases where issues arise that require the actual declarant (see *Bullcoming*) because of issues with testing, etc. Upcoming cases may further define the limits of *Blazier*, *Sweeney* and *Bullcoming*.

(11) *United States v. Tearman*, No. 12-0313 (CAAF March 19, 2013)

(a) Procedural History: Appellant stands convicted of one specification of Article 112a, UCMJ for wrongfully using marijuana; this case is the result of a positive UA from a random urinalysis. NMCCA affirmed and CAAF granted review.

(b) Facts: At trial, the government admitted the certified results and official testing results contained on the DD 2624 (specimen custody document). They admitted this both as a business record and through surrogate witness testimony. Further, the government admitted, as business records, the chain-of-custody documents and internal review worksheets, used by the lab to document procedures of handling and processing during testing.

(c) Issues: Whether the chain-of-custody and internal review worksheets are testimonial and violate the confrontation clause and whether the results and certification on the DD Form 2624 violated the accused's confrontation rights and if so, was the admission harmless beyond a reasonable doubt.

(d) Holding: The chain-of-custody and internal review worksheets are non-testimonial and it was not error to admit them as business records. The blocks on the DD Form 2624 that contain the certification and the testing results are testimonial and it was error to admit them; however, that error was harmless in light of the opinion provided by the surrogate expert and other evidence in the case.

(e) Discussion/Notes: Judge Baker's concurrence provides a clear explanation of the case, where the majority often confuses the issues and the law prior to this case. Further, Judge Baker points out the many elephants in the room with this decision. There are many unanswered questions. How can *Tearman* exist in the same world with Sweeney? Notations about procedures in the lab made on the specimen custody document are testimonial there but notations on the internal worksheet and chain of custody are non-testimonial here-notations in both cases were made prior to any request by the command or government for a drug testing report as they had not been informed of a positive result in either case when those notations were made. Further, *Magyari* is discussed in *Tearman* where its logic was put to rest in *Sweeney* last term. The court in *Sweeney* recognized that the analysis of statements is at the time they are made, not when a sample is provided.

e) Casual Remarks / Statements to Family, Friends, Co-Workers, or Fellow Prisoners

(1) **Statements by child to parents.** *United States v. Coulter, 62 M.J. 520 (N-M. Ct. Crim. App. 2005)*. Two-year old sex abuse victim tells parents that "he touched me here" pointing to vaginal area. Statement admitted under residual hearsay exception (with an alternative theory of present sense impression). Agreeing with trial court, the Navy-Marine Corps court found the statement was nontestimonial as there was no expectation that the statement would be used prosecutorially nor was there any government involvement.

(2) **Statements to co-workers.** *United States v. Scheurer*, 62 M.J. 100 (2005). The accused and his wife were charged with various drug related offenses. Prior to the charges and over a period of months, the accused's wife engaged in a number of conversations in which she told her friend about the drug use of both herself and the accused. The friend eventually contacted OSI who in turn asked the friend to wear a wire and engage the wife in further conversations about the accused's drug use. Several inculpatory statements were obtained, some of which implicated the wife, some the accused, and some both the accused and the wife. At the accused's trial, the wife invoked spousal privilege and was thus declared unavailable. The trial court then admitted the statements of wife to her friend against the accused. Citing *United States v. Hicks*, 395 F.3d 173 (3d Cir. 2005), the court first determined that the statements taken covertly were not "testimonial" in nature. Such statements, the court reasoned, did not implicate the specified definitions of testimonial as enumerated in *Crawford*. Further, the court found that such statements would be nontestimonial when the declarant did not contemplate the use of those statements at a later trial.

f) **Personnel Records.** *United States v. Rankin*, 64 M.J. 348 (2007). The CAAF affirmed the lower court holding that service record entries for a period of unauthorized absences were not testimonial for the purposes of the Confrontation Clause. The CAAF found that three of the four documents introduced by the government were nontestimonial, and that although the fourth may have qualified as testimonial, the information it contained was cumulative with information in the other three. In analyzing the four documents, **the CAAF conducted a three factor analysis, looking first at prosecution involvement in the making of the statement. Second, the court asked whether the reports merely catalogued unambiguous factual matters. And third, the court used a primary purpose analysis derived from *Davis v. Washington*.** After using the three steps to find that three of the four documents were nontestimonial, the court went on to conduct the confrontation analysis in *Roberts v. Ohio* and conclude that the documents were properly admitted under the business records exception to the hearsay rules.

C. What Constitutes "Unavailability"?

1. A witness who is present in the witness box and responds (provides responsive answers) to questions is available for Confrontation Clause purposes, regardless of the content of the witness's answers. A witness will usually be considered "unavailable" for Confrontation Clause purposes if the witness is unavailable under MRE 804(a), except regarding lack of memory (MRE 804(a)(3)). *See, e.g., United States v. Owens*, 484 U.S. 554 (1988), *supra at* II.A.

2. *United States v. Lyons*, 36 M.J. 183 (C.M.A. 1992). Appellant convicted of raping the deaf, mute, mentally retarded, 17-year-old daughter of another service member. The victim appeared at trial, but her responses during her testimony were "largely substantively unintelligible" because of her infirmities. In light of her inability, the government moved to admit a videotaped re-enactment by the victim of the crime. The military judge admitted the videotape as residual hearsay over defense objection. Appellant asserted that his right to confrontation was denied because the daughter's disabilities prevented him from effectively cross-examining her. The lead opinion assumed that the victim was unavailable and decided the case on the basis of the admission of a videotaped re-enactment. Chief Judge Sullivan, Judges Cox and Crawford did not perceive a confrontation clause issue because the victim testified. *See also, United States v. Russell*, 66 M.J. 597, 601-602 (Army Ct. Crim. App. 2008) (implicitly accepting trial judge's ruling that a child victim who was "too young and too frightened to be subject to a thorough direct or cross-examination" was unavailable).

3. The Government must first make a "good faith" effort to produce a witness in order for that witness to be "unavailable" for Sixth Amendment purposes. *United States v. Cabrera-Frattini*, 65 M.J. 241, 245-246 (C.A.A.F. 2007). *See also, Ohio v. Roberts*, 448 U.S. 56, 74-75 ("The law does not require the doing of a futile act….[b]ut if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation."); *United States v. Crockett*, 21 M.J. 423 (C.M.A. 1986) (good faith does not extend to changing venue from Germany to Florida).

D. Nontestimonial Statements and the Confrontation Clause

1. Does the Confrontation Clause Apply to Nontestimonial Statements?

a) Generally

(1) It is uncertain whether military courts are required to apply a Confrontation Clause analysis to nontestimonial statements. Unless and until the CAAF clarifies the law in this regard, practitioners should apply the *Ohio v. Roberts* test to nontestimonial statements.

(2) The *Crawford* Court did not decide whether the Confrontation Clause was implicated by nontestimonial statements, stating "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 541 U.S. at 68. [Note: Military courts are not necessarily bound by this Supreme Court precedent. *See*, H.F. "Sparky" Gierke, *The Use of Article III Case Law in Military Jurisprudence*, Army Lawyer, Aug. 2005.]

(3) It seems likely that military courts will align their holdings with the Supreme Court regarding nontestimonial statements. As a logical proposition, it does not make sense to apply the Confrontation Clause to nontestimonial statements given the *Crawford* Court's explanation that the phrase "witnesses" in the Sixth Amendment only describes those who "bear testimony." In other words, a person is only a witness if he makes a "testimonial" statement.

b) Supreme Court Cases

(1) *Whorton v. Bockting*, 127 S. Ct. 1173 (2007). "Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability."

(2) *Davis v. Washington*, 547 U.S. 813, 823-824 (2006). "We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies. The answer to the first question was suggested in *Crawford*, even if not explicitly held: "The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter."

c) Military Cases

(1) *United States v. Rankin*, 64 M.J. 348 (2007). "The *Ohio v. Roberts* requirement for particularized guarantees of trustworthiness continues to govern confrontation analysis for nontestimonial statements." (Citing *United States v. Scheurer*, 62 M.J. 100, 106 (2005)). *But see, United States v. Czachorowski*, 66 M.J. 432 at n.3 (C.A.A.F. 2008) (citing, in dicta, *Whorton v. Bockting* for the proposition that "…the Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability…."); *United States v. Cucuzzella*, 66 M.J. 57 (C.A.A.F. 2008) (the Confrontation Clause is not implicated by nontestimonial statements) (Stucky, J., concurring); *United States v. Foerster*, 65 M.J. 120 (C.A.A.F. 2007) (Holding that admission of a nontestimonial statement did not violate the accused's confrontation rights while neglecting, without explanation, to apply *Ohio v. Roberts* to the statement. One possible explanation for this decision is that the statement at issue qualified as a "firmly rooted" hearsay exception under *Roberts*, and the Confrontation Clause and evidentiary analyses are identical for such statements).

(2) *United States v. Russell*, 66 M.J. 597, 604 (Army Ct. Crim. App. 2008). Held that the admission of nontestimonial statements do not violate a military accused's confrontation rights. However, the court applied a constitutional standard for determining prejudice because of **"the continuing uncertainty regarding the application of *Ohio v. Roberts*."** *See also United States v. Crudup*, 65 M.J. 907, 909 (Army Ct. Crim. App. 2008); *United States v. Diamond*, 65 M.J. 876, 883 (Army Ct. Crim. App. 2007).

2. Application of *Ohio v. Roberts* to Nontestimonial Statements

a) Under *Roberts*, a nontestimonial hearsay statement can be admitted if the proponent can show that it possessed adequate indicia of reliability. Indicia of reliability can be shown in one of two ways. First, if the statement fits within a firmly rooted hearsay exception, it satisfies the Confrontation Clause. If it doesn't fit within a firmly rooted hearsay exception, it can nevertheless satisfy the Confrontation Clause and be admitted if it possessed particularized guarantees of trustworthiness.

b) Particularized guarantees of trustworthiness could be shown using a nonexclusive list of factors such as mental state or motive of the declarant, consistent repetition, or use of inappropriate terminology. *See, e.g., Idaho v. Wright*, 497 U.S. 805, 821 (1990) (providing factors for use in analyzing the reliability of hearsay statements made by child witnesses in child sexual abuse cases); *United States v. Ureta*, 44 M.J. 290, 296 (1996) (giving examples of factors to consider when looking at the circumstances surrounding the making of a hearsay statement when the declarant is unavailable).

c) When analyzing particularized guarantees of trustworthiness, the proponent is limited to considering only the circumstances surrounding the making of the statement, i.e. extrinsic evidence was not permitted. *Idaho v. Wright*, 497 U.S. 805, 819-24 (1990). This can be confusing, since this limit on extrinsic evidence only applied to the Confrontation Clause analysis. Once a statement meets the Confrontation Clause hurdle, extrinsic evidence is perfectly acceptable for analysis under the hearsay rules. Another source of confusion in military caselaw is the fact that the CAAF has stretched the meaning of circumstances surrounding the making of the statement to include statements made close in time, yet before the actual making of a particular statement in at least one case. *See United States v. Ureta*, 44 M.J. 290 (1996).

d) *Idaho v. Wright*, 497 U.S. 805, 821 (1990). "Because evidence possessing 'particularized guarantees of trustworthiness' must be **at least as reliable as evidence admitted under a firmly rooted hearsay exception**, . . . we think that evidence admitted under the former

requirement must similarly be so trustworthy that adversarial testing would add little to its reliability."

e) The Confrontation Clause analysis chart at Part VI, below, provides a list of hearsay exceptions that are generally considered to be "firmly rooted".

V. APPELLATE REVIEW

A. Standard of Review

1. Appellate courts review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009).

2. When an error is not objected to at trial, appellate courts apply a plain error analysis. If the accused meets his burden to show plain error, "the burden shifts to the Government to prove that any constitutional error was harmless beyond a reasonable doubt." *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006)

3. Whether statements are testimonial under *Crawford* is a question of law that is reviewed *de novo*. *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009).

4. Availability of witnesses and the "good faith" of government efforts to procure witnesses is reviewed for an abuse of discretion. *United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007).

5. Harmlessness analysis

a) Any evidence admitted in violation of the Confrontation Clause is reversible unless it is harmless beyond a reasonable doubt. *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009)

b) "In assessing harmlessness in the constitutional context…[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009) (*citing Chapman v. California*, 386 U.S. 18 (1967)).

c) The C.A.A.F. "frequently looks to the factors set forth in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), to assess whether an error is harmless beyond a reasonable doubt." *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009).

d) The *Van Arsdall* factors include: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and…the overall strength of the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)

B. Retroactive Effect of *Crawford v. Washington*.

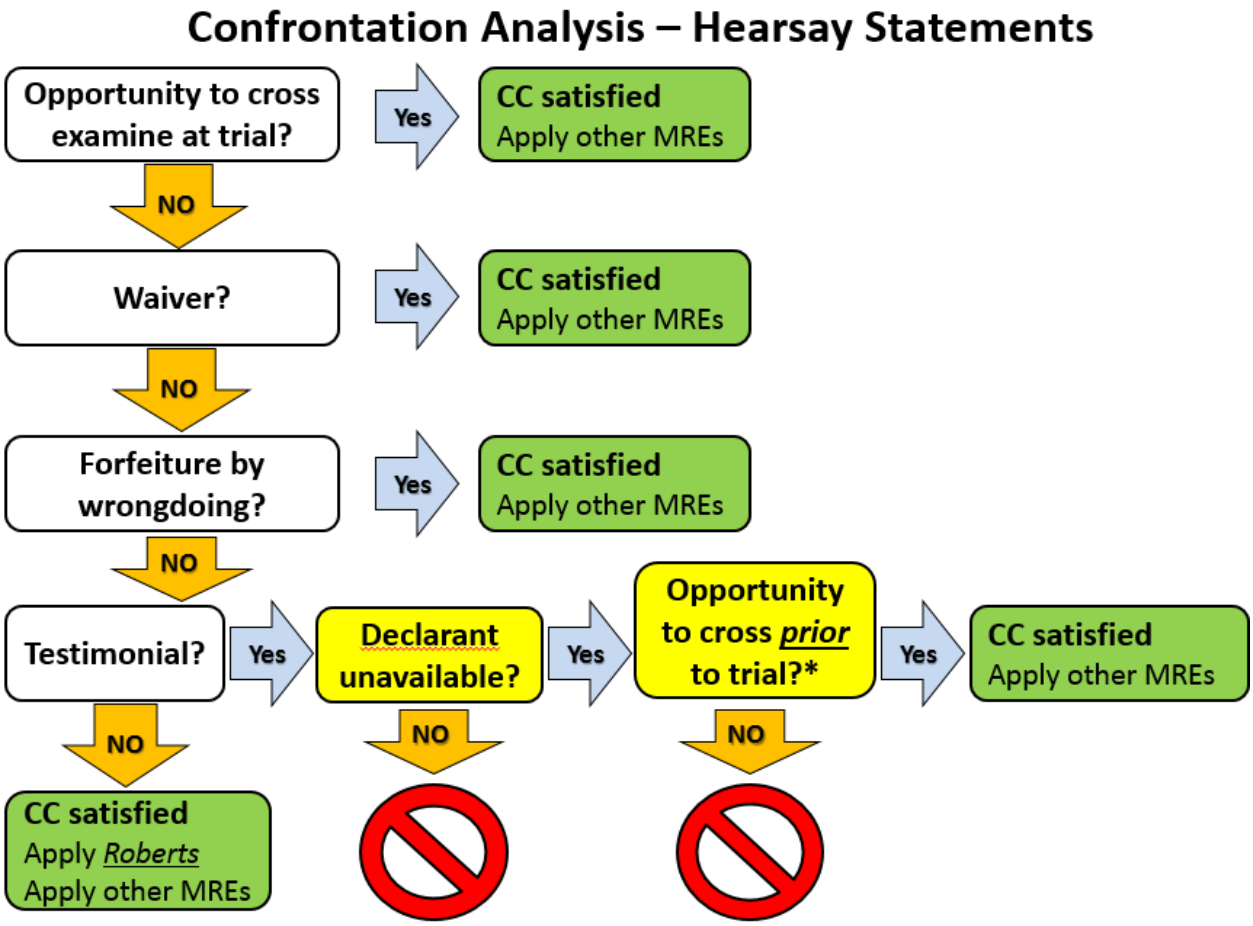
1. *Crawford* is a "new rule of law" for the conduct of criminal prosecutions and must be applied retroactively for all cases that are still pending on direct review. *United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007).

2. *Whorton v. Bockting*, 127 S. Ct. 1173 (2007).

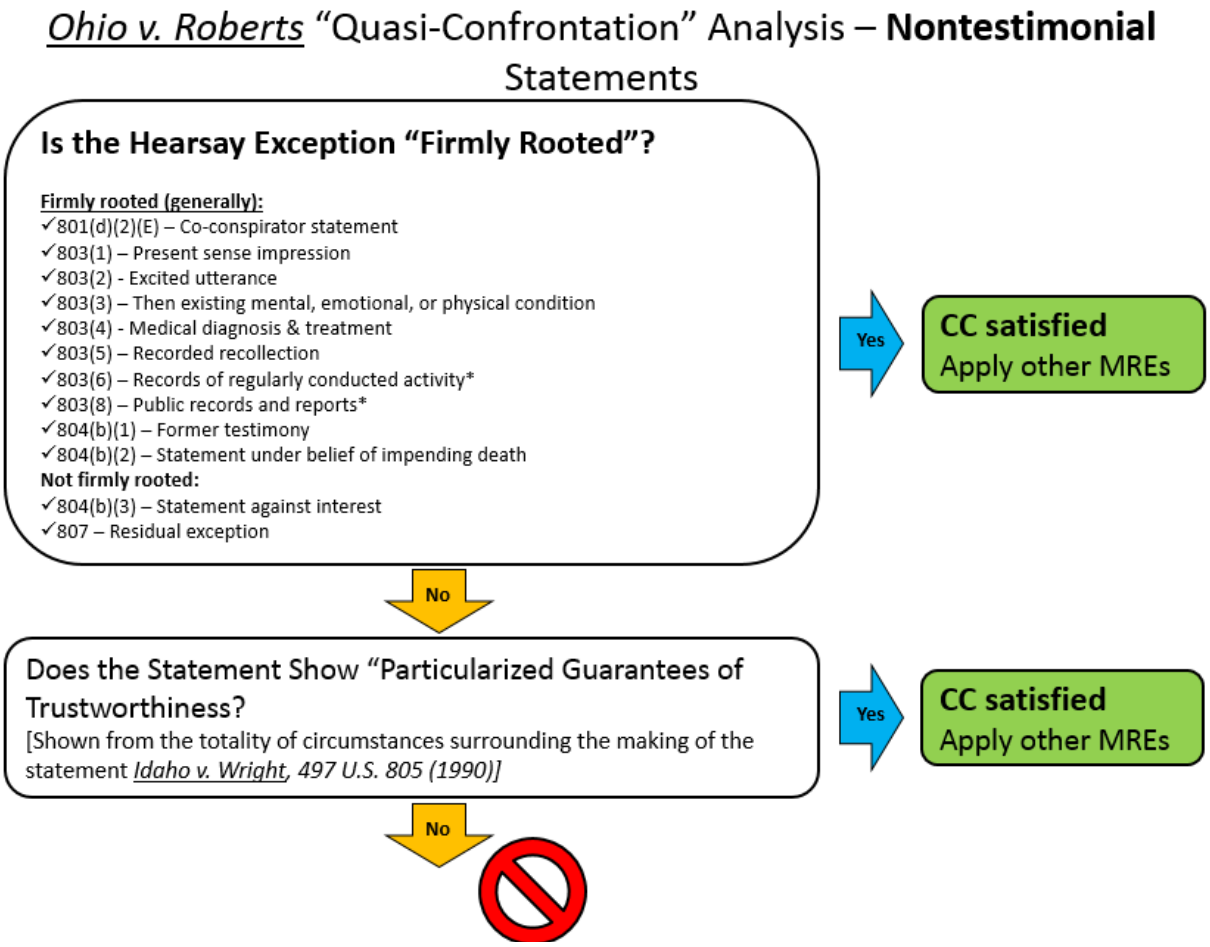
a) Issue: Whether the decision in *Crawford* is retroactive to cases already final on direct review (in other words, can *Crawford* be used to collaterally attack cases already final after direct review).

b) Held: *Crawford* is not retroactive to cases already final on direct review because its impact on criminal procedure is equivocal. *Crawford* results in the admission of fewer testimonial statements, while exempting nontestimonial statements from confrontation analysis entirely. Thus, it is not clear that in the absence of *Crawford* the likelihood of an accurate conviction was seriously diminished under the *Roberts* analysis. Since the *Crawford* rule did not significantly alter the fundamental fairness of criminal proceedings, it is not a watershed rule requiring retroactive effect on cases already final on direct review.

APPENDIX A
CONFRONTATION CLAUSE ANALYSIS CHART



APPENDIX B
CONFRONTATION – NONTESTIMONIAL STATEMENTS CHART



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CHAPTER 26
SEARCH & SEIZURE

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I. INTRODUCTION

A. The Fourth Amendment protects against unreasonable searches and seizures and requires warrants to be supported by probable cause. Although there is debate as to whether it applies to military members, military courts act as if it does. The Fourth Amendment, its requirements, and exceptions, are codified in military rules of evidence 311-317.

B. Text: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

C. The Fourth Amendment in the Military.

1. The Fourth Amendment applies to soldiers. *United States v. Stuckey*, 10 M.J. 347, 349 (C.M.A. 1981). *But see* Lederer and Borch, *Does the Fourth Amendment Apply to the Armed Forces?* 144 Mil. L. Rev. 110 (1994) (this article points out that the Supreme Court has never expressly applied the Fourth Amendment to the military).

2. The balancing of competing interests is different in military society. A soldier's reasonable expectation of privacy must be balanced against:

a) National security;

b) Military necessity (commander's inherent authority to ensure the safety, security, fitness for duty, good order and discipline of his command);

c) Effective law enforcement

3. The Military Rules of Evidence (Mil. R. Evid.) codify constitutional law.

a) Military Rules of Evidence that codify Fourth Amendment principles:

(1) Mil. R. Evid. 311, Evidence Obtained From Unlawful Searches and Seizures.

(2) Mil. R. Evid. 312, Body Views and Intrusions.

(3) Mil. R. Evid. 313, Inspections and Inventories in the Armed Forces.

(4) Mil. R. Evid. 314, Searches Not Requiring Probable Cause.

(5) Mil. R. Evid. 315, Probable Cause Searches.

(6) Mil. R. Evid. 316, Seizures.

(7) Mil. R. Evid. 317, Interception of Wire and Oral Communications.

b) Which law applies -- recent constitutional decisions or the Military Rules of Evidence?

(1) General rule: the law more advantageous to the accused will apply. Mil. R. Evid. 103(a) Drafters' Analysis. MCM, App. 22 (MCM 2016 ed.).

(2) Minority view: "These 'constitutional rules' of the Military Rules of Evidence were intended to keep pace with, and apply to the military, the burgeoning body of interpretive constitutional law . . . not to cast in legal or evidentiary concrete the Constitution as it was known in 1980." *United States v. Postle*, 20 M.J. 632, 643 (N.M.C.M.R. 1985).

II. LITIGATING FOURTH AMENDMENT VIOLATIONS

A. A person must claim that his own expectation of privacy was violated to assert a Fourth Amendment claim. The prosecution is required to disclose evidence seized from an accused prior to arraignment. The prosecution generally has the evidentiary burden (by a preponderance of evidence) that the search/seizure was proper.

B. Standing or "Adequate Interest."

1. General rule. To raise a violation of the Fourth Amendment, the accused's own constitutional rights must have been violated; he cannot vicariously claim Fourth Amendment violations of the rights of others.

a) *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). Police seized sawed-off shotgun and ammunition in illegal search of car. Only owner was allowed to challenge admissibility of evidence seized. Defendant passenger lacked standing to make same challenge.

b) *United States v. Padilla*, 508 U.S. 77 (1993). Accused lacked standing to challenge search of auto containing drugs driven by a conspirator in furtherance of the conspiracy, despite accused's supervisory control over auto.

c) *But see Brendlin v. California*, 551 U.S. 249 (U.S. 2007). When police conduct a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and may challenge the stop's constitutionality.

2. Lack of standing is often analyzed as lack of a reasonable expectation of privacy. *See United States v. Padilla*, 508 U.S. 77 (1993) and *United States v. Salazar*, 44 M.J. 464 (C.A.A.F. 1996).

C. Motions, Burdens of Proof, and Standards of Review.

1. Disclosure by prosecution. Prior to arraignment, the prosecution must disclose to the defense all evidence seized from the person or property of the accused that it intends to offer at trial. Mil. R. Evid. 311(d)(1). *See* Appendix A for sample disclosure.

2. Motion by the defense. The defense must raise any motion to suppress evidence based on an improper search or seizure prior to entering a plea. Absent such a motion, the defense may not raise the issue later, unless permitted to do so by the military judge for good cause. Failure to so move or object constitutes waiver of the motion or objection. Mil. R. Evid. 311(d)(2)(A).

3. Burden of proof. When a motion has been made by the defense, the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a

result of an unlawful search or seizure or that some other exception applies. Mil. R. Evid. 311(d)(5).

a) Exception: Consent. Government must show by clear and convincing evidence that the consent to search was voluntary. Mil. R. Evid. 314(e)(5).

b) Exception: "Subterfuge" Rule. If the rule is triggered, the prosecution must show by clear and convincing evidence that the primary purpose of the government's intrusion was administrative and not a criminal search for evidence. Mil. R. Evid. 313(b)(3)(B).

c) Exception: Eyewitness Identification. If military judge determines identification is result of lineup conducted w/o presence of counsel, or appropriate waiver, subsequent identification is unlawful unless Gov't can establish by clear and convincing evidence that eyewitness identification is not tainted. Mil. R. Evid. 321(d)(6).

4. Effect of guilty plea.

a) A plea of guilty waives all issues under the Fourth Amendment with respect to the offense, whether or not raised prior to the plea. Mil. R. Evid. 311(e).

b) Exception: conditional guilty plea approved by military judge with prior consent from the convening authority. RCM 910(a)(2).

5. Appellate Standard of Review. For Fourth Amendment issues, the standard of review for a military judge's evidentiary ruling is an abuse of discretion standard. *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999). Within this context, the abuse of discretion standard becomes a mixed question of fact and law. A military judge's "[f]indings of fact will not be overturned unless they are clearly erroneous or unsupported by the record." *Id.* A military judge's conclusions of law are reviewed under the *de novo* standard. The appellate courts will reverse for an abuse of discretion only if "the military judge's findings of fact are clearly erroneous or if his [or her] decision is influenced by an erroneous view of the law." *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

III. REASONABLE EXPECTATION OF PRIVACY

A. Government Action.

1. The Fourth Amendment does not apply unless there is a *governmental* invasion of privacy. *Rakas v. Illinois*, 439 U.S. 128, 140-49 (1978).

2. Private searches are not covered by the Fourth Amendment.

a) Searches by persons unrelated to the government are not covered by the Fourth Amendment.

(1) *United States v. Jacobsen*, 466 U.S. 109 (1984). No government search occurred where Federal Express employees opened damaged package.

(2) *United States v. Hodges*, 27 M.J. 754 (A.F.C.M.R. 1988). United Parcel Service employee opened package addressed to accused as part of random inspection. Held: this was not a government search.

b) Searches by government officials not acting in official capacity are not covered by the Fourth Amendment.

(1) *United States v. Portt*, 21 M.J. 333 (C.M.A. 1986). Search by military policeman acting in non-law enforcement role is not covered by the Fourth Amendment.

(2) *United States v. Daniels*, 60 M.J. 69 (C.A.A.F. 2004). Whether a private actor serves as an agent of the gov't hinges not on the motivation of the individual, but on the degree of govt's participation/involvement.

(3) *United States v. Buford*, 74 M.J. 98 (C.A.A.F. 2015). The protections provided by the Fourth Amendment do not apply to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the gov't or with the participation or knowledge of any gov't official.

c) Searches by informants are covered by the Fourth Amendment. *But see United States v. Aponte*, 11 M.J. 917 (A.C.M.R. 1981). Soldier "checked" accused's canvas bag and found drugs after commander asked soldier to keep his "eyes open." Held: this was not a government search because soldier was not acting as agent of the commander.

d) Searches by AAFES detectives are covered by Fourth Amendment. *United States v. Baker*, 30 M.J. 262 (C.M.A. 1990). Fourth Amendment extends to searches by AAFES store detectives; *Baker* overruled earlier case law that likened AAFES personnel to private security guards.

3. Foreign searches are not covered by Fourth Amendment.

a) Searches by U.S. agents abroad. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Fourth Amendment does not apply to search by U.S. agents of foreigner's property located in a foreign country.

b) Searches by foreign officials.

(1) The Fourth Amendment is inapplicable to searches by foreign officials unless U.S. agents "participated in" the search. Mil. R. Evid. 311(b)(3).

(a) "Participation" by U.S. agents does not include:

(i) Mere presence.

(ii) Acting as interpreter.

(b) *United States v. Morrison*, 12 M.J. 272 (C.M.A. 1982). Fourth Amendment did not apply to German search of off-post apartment, even though military police provided German police with information that led to search.

(c) *United States v. Porter*, 36 M.J. 812 (A.C.M.R. 1993). Military police officer participated in Panamanian search by driving accused to Army hospital, requesting blood alcohol test, signing required forms and assisting in administering test.

(2) A search by foreign officials is unlawful if the accused was subjected to "gross and brutal maltreatment." Mil. R. Evid. 311(b)(3).

B. Reasonable Expectation of Privacy (REP).

1. The Fourth Amendment only applies if there is a reasonable expectation of privacy. In *United States v. Jones*, 565 U.S. 400 (2012), the Court said there is not one "exclusive" test for reasonable expectation of privacy. The Court specifically acknowledged the historical trespass doctrine and the *Katz* expectation of privacy test.

a) Traditional trespass doctrine. "[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it in enumerates." *United States v. Jones*, 565 U.S. 400 (2012). In *Jones*, the Court found an unlawful search when police placed a GPS device on a car without a proper warrant. "The Government physically occupied private property for the

purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Jones* at 404.

b) The *Katz* test

(1) In Katz, the Court added to the trespass doctrine by finding an expectation of privacy in a conversation in a phone booth. Even though the warrantless eavesdropping of the phone call did involve a physical trespass, Justice Brennan's concurring opinion said the "Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). In *United States v. Jones*, the Court said "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Jones* at 409.

(2) Katz created a two-part test to determine if an expectation of privacy is reasonable:

(a) The person must have an actual subjective expectation of privacy; and,

(b) Society must recognize the expectation as objectively reasonable.

2. Deployed environment.

a) The Fourth Amendment applies in a combat zone. "[T]here is no general exception for locations or living quarters in a combat zone." *See US v. Huntzinger*, 69 M.J. 1, 5 (C.A.A.F. 2010).

3. Examples of areas with no REP

a) "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967).

(1) Open fields. The Fourth Amendment does not apply to open fields. Mil. R. Evid. 314(j).

(a) *Hester v. United States*, 265 U.S. 57 (1924). Open fields are not "persons, houses, papers, and effects" and thus are not protected by the Fourth Amendment.

(b) *United States v. Dunn*, 480 U.S. 294 (1987). Police intrusion into open barn on 198-acre ranch was not covered by the Fourth Amendment; barn was not within "curtilage." *Dunn* articulates a 4-part test to define "curtilage."

(i) The proximity of the area to be curtilage to the home;

(ii) Whether the area is included within an enclosure surrounding the home;

(iii) The nature of the uses to which the area is put; AND

(iv) The steps taken by the resident to protect the area from observation by people passing by.

(2) Abandoned property. Mil. R. Evid. 316(c)(2).

(a) Garbage. *California v. Greenwood*, 486 U.S. 35 (1988). There was no expectation of privacy in sealed trash bags left for collection at curbside.

(b) Clearing quarters. *United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988). There was no reasonable expectation of privacy in blood stains found in quarters accused was clearing when accused removed majority of belongings, lived elsewhere, surrendered keys to cleaning team, and took no action to protect remnants left behind.

(c) Voluntarily abandoned property. *United States v. Flores*, 64 M.J. 451 (C.A.A.F. 2007). An accused has no privacy interest in voluntarily abandoning his property prior to a search, and subsequently lacks standing to complain of the search or seizure of such property.

(d) Lost computer. *United States v. Michael*, 66 M.J. 78 (C.A.A.F. 2008). A government interest in safeguarding property outweighs reduced expectation of privacy in laptop computer left in restroom by a student at an entry-level school.

(3) Aerial observation.

(a) *California v. Ciraolo*, 476 U.S. 207 (1986). Observation of a fenced-in marijuana plot from an airplane was not a search.

(b) *Florida v. Riley*, 488 U.S. 445 (1989). Observation of a fenced-in marijuana greenhouse from a hovering helicopter was not a search.

(4) Peering into Automobiles. *United States v. Owens*, 51 M.J. 204 (C.A.A.F. 1999). Peering into an open door or through a window of an automobile is not a search. *See also United States v. Richter*, 51 M.J. 213 (C.A.A.F. 1999). If the car is stopped by a law enforcement official and then peered into, the investigative stop must be lawful.

(5) The "passerby."

(a) *United States v. Wisniewski*, 21 M.J. 370 (C.M.A. 1986). Peeking through a 1/8 inch by 3/8 inch crack in the venetian blinds from a walkway was not a search.

(b) *United States v. Kaliski*, 37 M.J. 105 (C.M.A. 1993). Security police's view through eight to ten inch gap in curtains in back patio door was unlawful search because patio was not open to public.

(6) Private dwellings. *Minnesota v. Carter*, 525 U.S. 83 (1998). Cocaine distributors were utilizing another person's apartment to bag cocaine. The distributors were in the apartment for two and a half hours and had no other purpose there than to bag the cocaine. Supreme Court held that even though the drug distributors were in private residence at consent of owner, they had no expectation of privacy in the apartment, and police discovery of their activity was not a Fourth Amendment search.

b) Plain view. Mil. R. Evid. 316(c)(5)(c).

(1) General rule. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. Fogg*, 52 M.J. 144 (C.A.A.F. 1999). Property may be seized when:

(a) The property is in plain view;

(b) The person observing the property is lawfully present; and,

(c) The person observing the property has probable cause to seize it.

(2) "Inadvertence" is not required for plain view seizure. *Horton v. California*, 496 U.S. 128 (1990).

(3) The contraband character of the property must be readily apparent. *Arizona v. Hicks*, 480 U.S. 321 (1987). Policeman lawfully in accused's home moved stereo turntable to check serial number to identify whether it was stolen; seizure was unlawful because the serial number was not in plain view and the lifting of the turntable was illegal search.

(4) Plain feel. Police may seize contraband detected through the sense of touch during a stop and frisk if its contraband nature is readily apparent. *Minnesota v. Dickerson*, 508 U.S. 366 (1993). Police officer felt lump of cocaine in accused's pocket during pat down

search and seized it. Seizure was held unconstitutional because the contraband nature of the lump was not "readily apparent." *See also United States v. Bond*, 529 U.S. 334 (2000) (finding border agent's squeeze of bus passenger's bag unreasonable absent individualized suspicion).

c) Plain view and electronic evidence. The Fourth Amendment's application to the digital world is not always as simple as applying existing "brick and mortar" precedent to the digital world. For all areas involving digital evidence (REP, plain view, child pornography probable cause, etc.) be sure to check recent case law and the Department of Justice's current electronic Search and Seizure Manual, located at https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf

(1) *United States v. Comprehensive Drug Testing (CDT), Inc.*, 621 F.3d 1162 (9th Cir. 2010). The court revised its previous CDT opinion that said the gov't had to waive plain view in all digital evidence cases, as well use a taint team to segregate all non-responsive data in digital searches. This revised opinion moved those two major new requirements into a five judge concurring opinion. The 9th Circuit's original restrictive position on plain view was not a majority view, but the concerns of the court about plain view turning digital searches into "general warrants" with no particularity requirement is shared by nearly all courts to address the issue.

(2) For the current majority, and less restrictive, position on applying the plain view doctrine in electronic evidence cases, *see U.S. v. Mann*, 592 F.3d 779 (7th Cir. 2010)(advocating an incremental, common law approach to adapting plain view to electronic evidence); *U.S. v. Williams*¸ 592 F.3d 511, 522 (4th Cir. 2010) (" Once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception are readily satisfied."). The only military case directly on point follows the *Mann* and *Williams* logic, but it is unpublished. *See U.S. v. Washington*, 2011 WL 498325 (A. Ct. Crim. App.).

d) No application of plain view doctrine if the contraband is discovered during a search that is held to be constitutionally unreasonable. *See U.S. v. Gurczynski*, 76 M.J. 381 (CAAF 2017).

e) Bank records.

(1) *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). No reasonable expectation of privacy exists in bank records. Even though records were obtained in violation of financial privacy statute, exclusion of evidence was inappropriate, because statute did not create Fourth Amendment protection.

(2) *United States v. Dowty*, 48 M.J. 102 (C.A.A.F. 1998). Servicemember may avail himself of the Right to Financial Privacy Act (RFPA), to include seeking federal district court judge to quash subpoena for bank records. However, Article 43, UCMJ, statute of limitations is tolled during such litigation.

f) Enhanced senses. Use of "low-tech" devices to enhance senses during otherwise lawful search is permissible.

(1) Dogs.

(a) *United States v. Place*, 462 U.S. 696 (1983). There is no expectation of privacy to odors emanating from luggage in a public place. "Low-tech" dog sniff is not a search (no Fourth Amendment violation).

(b) *United States v. Alexander*, 34 M.J. 121 (C.M.A. 1992). Dog sniff in common area does not trigger Fourth Amendment.

(c) *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981). Use of drug dogs at health and welfare inspection is permissible. Dog is merely an extension of human sense of smell.

(d) *But see Florida v. Jardines*, 133 S.Ct. 1409 (2013). Use of drug dog on curtilage of private residence is a search. Dog sniff is not a search, but there is no customary invitation to bring a drug dog to the front porch of private residence. Such action is a trespass, therefore 4th Amendment violation.

(e) *See* AR 190-12 (4 Jun. 2007), Military Working Dog Program. Drug detector dogs are not to be used to inspect people. *See* AR 190-12 at para 4-9.c.

(2) Flashlights. *Texas v. Brown*, 460 U.S. 730 (1983). Shining flashlight to illuminate interior of auto is not a search.

(3) Binoculars. *United States v. Lee*, 274 U.S. 559 (1927). Use of field glasses or binoculars is not a search.

(4) Cameras. *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). Aerial photography with "commercially available" camera was not a search, but use of satellite photos or parabolic microphones or other "high-tech devices" would be a search.

(5) Thermal Imaging Devices. *Kyllo v. United States*, 533 U.S. 27 (2001). Supreme Court ruled that police use of thermal imaging device without a warrant was unreasonable. The thermal imaging device detected higher than normal heat radiating from house. Heat source was lamps used for growing marijuana in private dwelling. The Court found use of thermal imaging device during surveillance was a "search" and, absent a warrant, presumptively unreasonable.

g) Interception of wire and oral communications. Communications are protected by the Fourth Amendment. *Katz v. United States*, 389 U.S. 347 (1967).

(1) One party may consent to monitoring a phone conversation.

(a) *United States v. Caceras*, 440 U.S. 741 (1979). A person has no reasonable expectation that a person with whom she is conversing will not later reveal that conversation to police.

(b) *United States v. Parrillo*, 34 M.J. 112 (C.M.A. 1992). There is no reasonable expectation of privacy as to contents of telephone conversation after it has reached other end of telephone line.

(c) *United States v. Guzman*, 52 M.J. 218 (C.A.A.F. 2000). There are still regulatory requirements for (one-party) consensual wiretapping but exclusion of evidence is not proper remedy except in cases where violation of regulation implicates constitutional or statutory rights.

(2) The "bugged" informant. *United States v. Samora*, 6 M.J. 360 (C.M.A. 1979). There is no reasonable expectation of privacy where a "wired" informant recorded conversations during drug transaction.

(3) Special rules exist for the use of wiretaps, electronic and video surveillance, and pen registers/trap & trace devices. Rules for video surveillance apply if "communications" are recorded.

(a) Federal statutes provide greater protections than the Fourth Amendment. *See* 18 U.S.C. §§ 2510-22, 2701-11, and 3121-27 (2000). The statutory scheme is referred to as the Electronic Communications Privacy Act (ECPA).

(i) The ECPA prohibits the unauthorized interception of wire and oral communications. 18 U.S.C. § 2511 (2000).

(ii) The ECPA contains its own exclusionary rule in the event of violation. 18 U.S.C. § 2515 (2000).

(iii) The ECPA applies to private searches, even though such searches are not covered by the Fourth Amendment. *People v. Otto*, 831 P.2d 1178 (Cal. 1992).

(b) Approval process requires coordination with HQ, USACIDC and final approval from DA Office of General Counsel. *See* Mil. R. Evid. 317; AR 190-53, Interception of Wire and Oral Communications for Law Enforcement Purposes (3 Nov. 1986).

(c) An overheard telephone conversation is not an "interception" under the statute. *United States v. Parillo*, 34 M.J. 112 (C.M.A. 1992).

(d) See Clark, Electronic Surveillance and Related Investigative Techniques, 128 Mil. L. Rev. 155 (1990).

(4) The USA PATRIOT ACT has enlarged the government's ability to access electronic communications and stored information by providing extraterritorial jurisdiction over certain offenses. For details on the Act, *see* https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf.

4. REP and government property

a) MRE baseline on government property generally

(1) Mil. R. Evid. 314(d) and Mil. R. Evid. 316(c)(4) – Probable cause and warrants are not required to search government property that has no expectation of privacy.

(2) Mil. R. Evid. 314(d) and analysis (MCM 2016 ed.) - There is a rebuttable presumption of no expectation of privacy in government property not issued for personal use. Wall and floor lockers are normally issued for personal use and have a rebuttable presumption of an expectation of privacy. Whether or not government property was issued for personal use "depends on the facts and circumstances at the time of the search."

(3) Normally a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. *United States v. Weshenfelder*, 43 C.M.R. 256 (1971).

b) Federal case law on expectation of privacy in government workplace

(1) *O'Connor v. Ortega*, 480 U.S. 709 (1987) (plurality opinion). Seminal case on balancing the role of government as employer and as law enforcement. A reasonable expectation of privacy in government workplace depends on the "operational realities" of the workplace. If there is an expectation of privacy, and the reason for the search is "for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, [the search] should be judged by the standard of reasonableness under all the circumstances." This standard of reasonableness does not require probable cause or a warrant, but the search must be reasonable in its inception and scope.

(2) *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). Court's first case on reasonable expectation of privacy (REP) and electronic evidence/digital devices. Issue was a civilian police department search of an officer's department issued pager transcripts. The 9th Circuit found a REP under the *Ortega* test because a supervisor's actions changed the "operational realities" of the department's policies. The Supreme Court cautioned "[a] broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds." The Court reviewed the 9th Circuit's REP analysis, but did not decide that issue, but assumed there was a REP. The Court then found the search reasonable under the *Ortega* "non-investigatory, work-related purpose" test).

(3) *United States v. Muniz*, 23 M.J. 201 (C.M.A. 1987). No expectation of privacy existed in locked government credenza when commander performed search for an administrative purpose.

(4) *United States v. Craig*, 32 M.J. 614 (A.C.M.R. 1991). No expectation of privacy existed in government desk at installation museum where search was conducted by sergeant major.

c) Barracks rooms.

(1) *United States v. Bowersox*, 72 M.J. 71 (CAAF 2013). Servicemembers have a reasonable expectation of privacy in a shared barracks room that protects them from unreasonable government intrusions, however a Servicemember has less of an expectation of privacy in his shared barracks room than a civilian does in his home.

(2) *United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993). Warrantless intrusion and apprehension in barracks upheld. Court rules there is no reasonable expectation of privacy in barracks. *But see United States v. Curry*, 46 M.J. 733 (N-M. Ct. Crim. App. 1997) *aff'd* 48 M.J. 115 (C.A.A.F. 1998) (per curiam). No need to read *McCarthy* so broadly: according to Navy Court, there is, instead, a *reduced* expectation of privacy in a barracks room.

(3) *United States v. Battles*, 25 M.J. 58 (C.M.A. 1987). Drugs discovered during 0300 hours "inspection" in ship's berthing area and box near a common maintenance locker were admissible because there was no reasonable expectation of privacy in these areas.

5. Electronic Evidence

a) The Fourth Amendment's application to the digital world is not always as simple as applying existing "brick and mortar" precedent to the digital world. For all areas involving digital evidence (REP, plain view, child pornography probable cause) be sure to check recent case and the Department of Justice's current electronic Search and Seizure Manual, located at https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf.

b) E-mail and servers

(1) *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996). Accused had reasonable expectation of privacy in electronic mail transmissions sent, received and stored on the AOL computer server. Like a letter or phone conversation, a person sending e-mail enjoys a reasonable expectation of privacy that police will not intercept the transmission without probable cause and a warrant.

(2) *United States v. Monroe*, 52 M.J. 326 (C.A.A.F. 2000). Accused did not have a reasonable expectation of privacy in e-mail mailbox on government server which was the

e-mail host for all "personal" mailboxes and where users were notified that system was subject to monitoring.

(3) *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006). Reasonable expectation of privacy found in e-mail communications regarding drug use on a government computer, over a government network, when investigation was conducted and ordered by law enforcement instead of originating with computer network administrator. (This is a narrow holding as USMC log-on banner described access to "monitor" the computer system –not to engage in law enforcement intrusions by examining the contents of particular e-mails in a manner unrelated to maintenance of the e-mail system).

(4) *United States v. Larson*, 66 M.J. 212 (C.A.A.F. 2008). Accused had no Fourth Amendment expectation of privacy in his government computer (distinguishing *Long* based on facts of case). Accused failed to rebut presumption that he had no reasonable expectation of privacy in the government computer provided to him for official use. *See* Mil. R. Evid. 314(d).

(5) *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). *See infra*, section on REP and government property.

c) Content of electronic communications

(1) 18 USC §2703 Stored Communications Act (SCA) and RCM 703A require a search warrant issued by a military judge (or state or federal magistrate judge) to obtain the content of an electronic communication from an electronic communication service provider (telephone, internet, email, social media, etc.).

(2) Contrary to the plain language of SCA and RCM 703A(a), a search warrant is required to obtain the content of an electronic communication, regardless of the how long the communication has been in storage, or the type of storage system (electronic communication service and remote computing service). *See U.S. v. Warshak*, 631 F.3d 266 (6th Cir. 2010).

d) Subscriber Information

(1) *United States v. Ohnesorge*, 60 M.J. 946 (N-M. Ct. Crim. App. 2005). There is no reasonable expectation of privacy in subscriber information provided to a commercial internet service provider.

(2) *United States v. Allen*, 53 M.J. 402 (C.A.A.F. 2000). No warrant/authorization required for stored transactional records (distinguished from private communications). Inevitable discovery exception also applied to information sought by government investigators.

(3) Generally, basic subscriber information is obtained by a court order issued by military judge (see RCM 703A(a)(4)) when gov't offers specific and articulable facts showing there are reasonable grounds to believe the contents sought are relevant and material to an on-going criminal investigation (RCM 703A(c)(1)(A)).

e) Historical Cell-Site Location Information.

(1) *Carpenter v. United States*, 138 S.Ct. 2206 (2018). Contrary to the plain language of the Stored Communications Act and RCM 703A(a)(4), an accused retains a reasonable expectation of privacy in the record of his physical movements as captured through historic cell-site location information (CSLI) from their cellular telephone. Seven days of historical CSLI obtained from Accused's wireless carrier constitutes a search for Fourth Amendment purposes and requires a search warrant.

f) Transactional Records from Electronic Communications (other than CSLI).

(1) Obtained via SCA and RCM 703A by court order of military judge. Standard is relevant and material to on-going criminal investigation.

g) Digital devices

(1) *United States v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006). While recognizing the limited expectation of privacy in a barracks room, CAAF acknowledges that a service member sharing a two-person dormitory room on a military base has a reasonable expectation of privacy in the files kept on a personally owned computer.

(2) *United States v. Tanksley*, 54 M.J. 169 (C.A.A.F. 2000). No (or at least reduced) reasonable expectation of privacy in office and computer routinely designated for official government use. Seizure was lawful based on plain view.

IV. AUTHORIZATION AND PROBABLE CAUSE

A. A search is valid if based upon probable cause and a proper search warrant. Probable cause is evaluated by looking at the "totality of the circumstances" to determine whether evidence is located at a particular place. In the military, the equivalent to a search warrant is called a search authorization, and may be issued by an appropriate neutral and detached commander, military judge, or military magistrate. Even if a search is based upon probable cause and is conducted pursuant to a proper search warrant/ authorization, it must be conducted in a reasonable manner.

B. General Rule. A search is proper if conducted pursuant to a search warrant or authorization based on probable cause. Mil. R. Evid. 315(a).

1. A search *warrant* is issued by a civilian judge; it must be in writing, under oath, and based on probable cause.

2. A search *authorization* is granted by a military commander, military judge or military magistrate; it may be oral or written, need not be under oath, but must be based on probable cause.

C. Probable Cause.

1. Probable cause is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. Mil. R. Evid. 315(f)(2). It is a "fluid concept---turning on the assessment of probabilities in particular factual contexts---not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1982).

2. Probable cause is evaluated under the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213 (1982). The Court rejected a lower court's attempt to "overlay a categorical scheme" on the *Gates* TOC analysis, see *United States v. Banks*, 540 U.S. 31 (2003). See also, *United States v. Leedy*, 65 M.J. 208 (C.A.A.F. 2007) where CAAF emphasizes TOC as the key in any probable cause analysis.

a) Probable cause will clearly be established if informant is reliable (*i.e.* believable) and has a factual basis for his or her information under the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).

b) Probable cause may also be established even if the *Aguilar-Spinelli* test is not satisfied. *Illinois v. Gates*, 462 U.S. 213 (1982). *But see United States v. Washington*, 39 M.J. 1014 (A.C.M.R. 1994). No probable cause existed to search accused's barracks room because commander who authorized search lacked information concerning informant's basis of knowledge and reliability. The Gates TOC test was re-articulated in *United States v. Bethea*,

61 M.J. 184 (C.A.A.F. 2005) in which the CAAF held that there was sufficient probable cause to authorize a seizure of a hair sample to establish wrongful use of cocaine based on a prior positive urinalysis despite fact that hair sample would not necessarily indicate a prior one-time use of cocaine. Hair sample revealed that the accused had used cocaine multiple occasions.

c) *United States v. Evans*, 35 M.J. 306 (C.M.A. 1992). Evidence that accused manufactured crack cocaine in his house gave probable cause to search accused's vehicle. *Devenpeck v. Alford*, 543 U.S. 146 (2004), the probable cause upon which investigation and arrest are based need not be the same or even closely related to the probable cause for the ultimate criminal conviction, so long as both are legitimate.

d) *United States v. Figueroa*, 35 M.J. 54 (C.M.A. 1992). Probable cause existed to search accused's quarters where commander was informed that contraband handguns had been delivered to the accused and the most logical place for him to store them was his quarters.

e) *Maryland v. Pringle*, 540 U.S. 366 (2003). A police officer suspected that one, or all three, of a group in a vehicle possessed drugs and arrested them. The Court found it reasonable for the officer to infer a common enterprise, and ruled the arrest constitutional as to Pringle, even though the officer had no individualized PC regarding Pringle.

f) *United States v. Rogers*, 67 M.J. 162 (C.A.A.F. 2009). Probable cause existed to test appellant's hair for cocaine, even though his urinalysis was negative.

g) Probable Cause and Child Pornography

(1) *United States v. Macomber*, 67 M.J. 214 (C.A.A.F. 2009). Probable cause existed to search airman's barracks room for child pornography under the totality of circumstances, even though there was no evidence the airman ever actually possessed child pornography, and the evidence that he registered with a child pornography website was fourteen months old.

(2) *United States v. Clayton*, 68 M.J. 419 (C.A.A.F. 2010). Probable cause existed to search for child porn on computer in appellant's quarters, based largely on appellant's membership in a Google user group known to contain child pornography, even though there was no evidence appellant actually possessed child pornography. Strong two-judge dissent worries about a "*de minimis*" approach to Fourth Amendment requirements in child pornography cases. *But see United States v. Hoffman*, 75 M.J. 120 (CAAF 2016) (finding accused's attempt to entice minors into sexual activity not sufficient to establish probable cause to search accused's computer.)

h) No intuitive link between electronic devices. *See United States v. Nieto*, 66 M.J. 146 (CAAF 2017). CID agent's training and experience revealed that soldiers commonly transfer videos/images from a cell phone to other electronic devices with larger storage capacities (e.g. laptop). Court held that assertion, by itself, was not enough to provide probable cause to search the accused's laptop.

i) Staleness. Probable cause will exist only if information establishes that evidence is currently located in area to be searched. PC may evaporate with passage of time.

j) *United States v. Henley*, 53 M.J. 488 (C.A.A.F. 2000). Magistrate's unknowing use of information over five years old was not dispositive. In addition, good faith exception applied to agents executing warrant.

k) *United States v. Queen*, 26 M.J. 136 (C.M.A. 1988). Probable cause existed despite delay of two to six weeks between informant's observation of evidence of crime (firearm) in

accused's car and commander's search authorization; accused was living on ship and had not turned in firearm to ship's armory.

l) *United States v. Agosto*, 43 M.J. 745 (A.F. Ct. Crim. App. 1995). Probable cause existed for search of accused's dormitory room even though 3 1/2 months elapsed between offense and search. Items sought (photos) were not consumable and were of a nature to be kept indefinitely.

3. *See* Appendix B for a guide to articulating probable cause.

D. Persons Who Can Authorize a Search. Mil. R. Evid. 315(d).

1. Any commander of the person or place to be searched ("king-of-the-turf" standard).

a) The unit commander can authorize searches of:

(1) Barracks under his control;

(2) Vehicles within the unit area; and

(3) Off-post quarters of soldiers in the unit if the unit is overseas. However, whether and under what condition a commander may lawfully authorize an off-post search of a private dwelling in that country is dependent upon any existing international agreements (e.g. SOFA). *United States v. Mitchell*, 21 U.S.C.M.A. 340 (1972).

b) The installation commander can authorize searches of:

(1) All of the above;

(2) Installation areas such as:

(a) On-post quarters;

(b) Post Exchange (PX); and,

(c) On-post recreation centers.

c) Delegation prohibited. Power to authorize searches is a function of command and may not be delegated to an executive officer. *United States v. Kalscheur*, 11 M.J. 378 (C.M.A. 1981)

d) Devolution authorized. *United States v. Law*, 17 M.J. 229 (C.M.A. 1983). An "acting commander" may authorize a search when commander is absent. *See also United States v. Hall*, 50 M.J. 247 (C.A.A.F. 1999). Commander may resume command at his discretion; no need not have written revocation of appointment of acting commander.

e) More than one commander may have control over the area to be searched. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). Three commanders whose battalions used common dining facility each had sufficient control over the parking lot surrounding facility to authorize search there.

2. A military magistrate or military judge may authorize searches of all areas where a commander may authorize searches. *See* chapter 8, AR 27-10, Military Justice (11 May 2016), for information on the military magistrate program.

3. In the United States a state civilian judge may issue search warrants for off-post areas.

4. In the United States a federal civilian magistrate or judge may issue search warrants for:

a) Off-post areas for evidence related to federal crimes; and,

b) On-post areas.

5. Electronic Communications from civilian service providers.

a) *See* RCM 703A. Military judge may issue search warrants based upon probable cause for content of electronic communications.

E. Neutral and Detached Requirement. The official issuing a search authorization must be neutral and detached. *See* Mil. R. Evid. 315(d). *See also United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (discusses four separate cases where commanders' neutrality was attacked).

1. A commander is not neutral and detached when he or she:

a) Initiates or orchestrates the investigation (has personal involvement with informants, dogs, and controlled buys); or,

b) Conducts the search.

2. A commander may be neutral and detached even though he or she:

a) Is present at the search;

b) Has personal knowledge of the suspect's reputation;

c) Makes public comments about crime in his or her command; or,

d) Is aware of an on-going investigation.

3. "The participation of a commander in investigative activities in furtherance of command responsibilities, without more, does not require a per se disqualification of a commander from authorizing a search under M.R.E. 315." *See U.S. v. Huntzinger*, 69 M.J. 1, 6 (C.A.A.F. 2010).

4. Alternatives: Avoid any potential "neutral and detached" problems by seeking search authorization from:

a) A military magistrate; or,

b) The next higher commander.

F. Reasonableness. Even if based upon a warrant or authorization and probable cause, *a search must be conducted in a reasonable manner*.

1. *Wilson v. Arkansas*, 514 U.S. 927 (1995). The common law requirement that police officers "knock and announce" their presence is part of the reasonableness clause of the Fourth Amendment.

2. *United States v. Banks*, 540 U.S. 31 (2003). In a case involving easily disposable illegal drugs, police were justified in breaking through an apartment door after waiting 15-20 seconds following knocking and announcing their presence. This time was sufficient for the situation to ripen into an exigency.

3. *Richards v. Wisconsin*, 520 U.S. 385 (1997). Every no-knock warrant request by police must be evaluated on a case-by-case basis. Test for no-knock warrant is whether there is reasonable suspicion that evidence will be destroyed or there is danger to police by knocking. *United States v. Ramirez*, 523 U.S. 65 (1998). Whether or not property is damaged during warrant execution, the same test applies -- reasonable suspicion.

4. *Hudson v. Michigan*, 547 U.S. 586 (2006). Violation of the Fourth Amendment "knock and announce" rule, without more, will not result in suppression of evidence at trial.

5. Depending on the circumstances, law enforcement officials may "seize" and handcuff occupants of a residence while they execute a search warrant of that residence. *Muehler v. Mena*, 544 U.S. 93, 125 S.Ct. 1465 (2005).

6. *L.A. County v. Rettele*, 127 S.Ct. 1989 (2007). When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.

7. *United States v. Gurczynski*, 76 M.J. 381 (CAAF 2017). The Constitutional principle of reasonableness necessarily bears some relation to the scope of the warrant, the execution of the search warrant, and the timing of the search; even in the absence of a time limit, the government nevertheless remains bound by the Fourth Amendment to the extent that all seizures must be reasonable in duration. A search conducted five months after the accused was convicted of the offenses specified in the warrant, and nine months after the issuance of the warrant, was held to be constitutionally unreasonable.

G. Reasonableness and Media "Ride-Alongs." Violation of Fourth Amendment rights of homeowners for police to bring members of media or other third parties into homes during execution of warrants. *Wilson v. Layne*, 526 U.S. 603 (1999).

H. Particularity. Warrants must… "particularly describe the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Fourth Amendment requires that a search warrant describe the items to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings; the proper metric of specificity is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation. *See U.S. v. Richards,* 76 M.J. 365 (CAAF 2017).

1. Digital Evidence.

a) *United States v. Osorio*, 66 M.J. 632 (A.F. Ct. Crim. App. 2008). Forensic examination of a computer based on a search warrant must not exceed the scope of the warrant. Examiners must carefully analyze the terms of the warrant and adjust their examination methodology accordingly. Inevitable discovery did not apply to facts of this case.

b) However, see *U.S. v. Richards*, 76 M.J. 365 (CAAF 2017). Despite the importance of preserving this particularity requirement, considerable support can be found in federal law for the notion of achieving a balance by not overly restricting the ability to search electronic devices.

I. Seizure of Property.

1. Probable cause to seize. Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape. Mil. R. Evid. 316(c)(1). *United States v. Mons*, 14 M.J. 575 (N.M.C.M.R. 1982). Probable cause existed to seize bloody clothing cut from accused's body during emergency room treatment.

2. Effects of unlawful seizure. If there is no probable cause the seizure is illegal and the evidence seized is suppressed under Mil. R. Evid. 311.

3. Meaningful interference with property. Moving electronic media to a central location in the accused's barracks room did not meaningfully interfere with his property interest in the media. Since the property was still in his barracks room when he withdrew his consent to search/seize, the subsequent seizure violated the Fourth Amendment. *See U.S. v. Hoffmann,* 75 M.J. 120 (CAAF 2016).

J. External Impoundment. Reasonable to secure a room ("freeze the scene") pending an authorized search to prevent the removal or destruction of evidence. *United States v. Hall*, 50 M.J. 247 (C.A.A.F. 1999). But freezing the scene does not mean that investigators have unrestricted authorization to search crime scene without a proper warrant/authorization. *See Flippo v. West Virginia*, 528 U.S. 11 (1999) (holding that no general crime scene exception exists).

K. Seizure (Apprehension) of Persons.

1. Probable cause to apprehend. Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it. RCM 302(c). *See also* Mil. R. Evid. 316(c).

2. Effects of unlawful apprehension. If there is no probable cause the apprehension is illegal and evidence obtained as a result of the apprehension is suppressed under Mil. R. Evid. 311. *See United States v. Dunaway*, 442 U.S. 200 (1979) (holding that fruits of illegal apprehension are inadmissible).

3. Situations amounting to apprehension.

a) There is a seizure or apprehension of a person when a reasonable person, in view of all the circumstances, would not believe he or she was free to leave.

b) In "cramped" settings (*e.g*. on a bus, in a room), there is an apprehension when a reasonable person, in view of all the circumstances, would not feel "free to decline to answer questions." *Florida v. Bostick*, 501 U.S. 429 (1991). *But see United States v. Drayton*, 536 U.S. 194 (2002) (finding that there was no requirement to inform bus passengers that they could refuse to cooperate with police).

c) Armed Texas police rousting a 17-year old murder suspect from his bed at 0300, transporting him handcuffed, barefoot and in his underwear to the police station was an apprehension, despite suspect's answer of "Okay", in response to police saying "We have to talk." *Kaupp v. Texas*, 536 U.S. 626 (2003).

d) Asking for identification is not an apprehension. *United States v. Mendenhall*, 446 U.S. 544 (1980).

(1) Asking for identification and consent to search on a bus is not apprehension. *Florida v. Bostick*, 501 U.S. 429 (1991). *See also United States v. Drayton*, 536 U.S. 194 (2002) (finding no requirement to inform bus passengers they could refuse to cooperate with police); *Muehler v. Mena*, 544 U.S. 93 (2005) (asking person who had been handcuffed about immigration status did not constitute seizure).

(2) State may prosecute for failure to answer if the 'stop and ID' statute is properly drawn. Thus, there was no Fourth Amendment violation in *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004).

e) A police chase is not an apprehension.

(1) *Michigan v. Chestnut*, 486 U.S. 567 (1988). Following a running accused in patrol car was not a seizure where police did not turn on lights or otherwise tell accused to stop. Consequently, drugs accused dropped were not illegally seized.

(2) *California v. Hodari D*., 499 U.S. 621 (1991). Police officer needs neither probable cause nor reasonable suspicion to chase a person who flees after seeing him. A suspect who fails to obey an order to stop is not seized within meaning of the Fourth Amendment.

f) Traffic Stops.

(1) *Brendlin v. California*, 551 U.S. 249 (U.S. 2007). When police conduct a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality.

g) An order to report to military police.

(1) An order to report for non-custodial questioning is not apprehension.

(2) An order to report for fingerprints is not apprehension. *United States v. Fagan*, 28 M.J. 64 (C.M.A. 1989). Accused, who was ordered to report to military police for fingerprinting was not apprehended. Fingerprinting is a much less serious intrusion than interrogation, and may comply with the Fourth Amendment even if there is less than probable cause.

(3) Transporting an accused to the military police station under guard is apprehension. *United States v. Schneider*, 14 M.J. 189 (C.M.A. 1982). When accused is ordered to go to military police station under guard, probable cause must exist or subsequent voluntary confession is inadmissible.

4. Apprehension at home or in quarters: a military magistrate, military judge, or the commander who controls that dwelling (usually the installation commander) must authorize apprehension in private dwelling. RCM 302(e)(2); *Payton v. New York*, 445 U.S. 573 (1980).

a) A private dwelling includes:

(1) BOQ/BEQ rooms;

(2) Guest quarters;

(3) On-post quarters; or,

(4) Off-post apartment or house.

b) A private dwelling does not include:

(1) Tents.

(2) Barracks rooms; *see United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993). Warrantless apprehension in barracks room was proper.

(3) Vehicles.

c) Exigent circumstances may justify entering dwelling without warrant or authorization. *See* Mil. R. Evid. 315(g). *United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988). Accused was properly apprehended, without authorization, in transient billets. Exigent circumstances justified apprehension. *See also Kirk v. Louisiana*, 536 U.S. 635 (2002) (absent exigent circumstances, police may not enter a private dwelling without a warrant supported by probable cause to search the premises or apprehend an individual); *United States v. Khamsouk*, 57 M.J. 282 (C.A.A.F. 2002) (finding that the DD Form 553 is not the equivalent of an arrest warrant issued by a civilian magistrate judge).

d) Consent may justify entering dwelling without proper warrant or authorization. *See* Mil. R. Evid. 314(e) and 316(c)(3). *United States v. Sager*, 30 M.J. 777 (A.C.M.R. 1990), *aff'd on other grounds*, 36 M.J. 137 (C.M.A. 1992). Accused, awakened by military police at on-post quarters, in his underwear, and escorted to police station was not illegally apprehended, despite lack of proper authorization, where his wife "consented" to police entry.

e) Probable cause may cure lack of proper authorization. *New York v. Harris*, 495 U.S. 14 (1990). Where police had sufficient probable cause but did not get a warrant before arresting accused at home, statement accused made at home was suppressed as violation of *Payton v. New York*, but statement made at police station was held to be admissible. The statement at the police station was not the "fruit" of the illegal arrest at home.

f) Exigent circumstances may also allow warrantless seizure of dwelling and/or occupants while waiting for search warrant to be issued. *Illinois v. McArthur*, 531 U.S. 326 (2001).

V. EXCEPTIONS TO AUTHORIZATION REQUIREMENT

A. Not all searches require warrants or search authorizations, if there is probable cause that evidence is at a certain location. If there is probable cause that evidence will be destroyed, a law enforcement official may dispense with the warrant/authorization requirement. Searches of automobiles generally do not require warrants/authorizations.

B. Exigent Circumstances.

1. General rule. A search warrant or authorization is not required when there is probable cause but insufficient time to obtain the authorization because the delay to obtain authorization would result in the removal, destruction, or concealment of evidence. Mil. R. Evid. 315(g).

a) Law enforcement created exigency – Warrantless search is lawful as long "police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment." *Kentucky v. King*, 131 S. Ct. 1849 (2011). In *King*, the search was lawful when after a controlled buy, police knocked on a door they suspected target was in and heard movement that made them think evidence was being destroyed. The Court did not rule on the actual "exigency," but assumed it existed, and held the police action of knocking on the door, which led to the suspicious movement and noises, did not invalidate the exigency.

2. Burning marijuana. *United States v. Lawless*, 13 M.J. 943 (A.F.C.M.R. 1982). Police smelled marijuana coming from house, looked into a window and spotted drug activity. Police then entered and apprehended everyone in the house, and later obtained authorization to search. *Held*: this was a valid exigency. *See also United States v. Dufour*, 43 M.J. 772 (N.M.Ct.Crim.App. 1995) (Observed use of drugs in home allowed search and seizure without obtaining warrant.)

3. Following a controlled buy.

a) *United States v. Murray*, 12 M.J. 139 (C.M.A. 1981). Commander and police entered accused's barracks room and searched it immediately after a controlled buy. *Held*: Search was valid based on exigent circumstances.

b) *But see United States v. Baker*, 14 M.J. 602 (A.F.C.M.R. 1982). OSI agents and civilian police entered accused's off-post apartment immediately after a controlled buy. Search was improper because there were no real exigencies, and there was time to seek authorization.

4. Traffic Stops (Pretextual):

a) *Whren v. United States*, 517 U.S. 806 (1996). A stop of a motorist, supported by probable cause to believe he committed a traffic violation, is reasonable under the Fourth Amendment regardless of the actual motivations of the officers making the stop. Officers who lack probable cause to stop a suspect for a serious crime may use the traffic offense as a pretext for making a stop, during which they may pursue their more serious suspicions by utilizing plain view or consent. *See also Arkansas v. Sullivan*, 532 U.S. 769 (2001) (holding state supreme court erred by considering subjective intent of arresting officer when there was a valid basis for a traffic stop and probable cause to subsequently arrest motorist for a speeding violation), and *United States v. Moore*, 128 U.S. (2008) (holding the police did not violate the Fourth Amendment when they made an arrest that was based on probable cause, but prohibited by state law, or when they performed a search incident to arrest).

b) *United States v. Rodriquez*, 44 M.J. 766 (N.M.Ct.Crim.App. 1996). State Trooper had probable cause to believe that accused had violated Maryland traffic law by following too closely. Even though the violation was a pretext to investigate more serious charges, applying *Whren*, the stop was lawful.

c) Seizure of drivers and passengers.

(1) *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The police may, as a matter of course, order the driver of a lawfully stopped car to exit. *See Maryland v. Wilson*, 519 U.S. 407 (1997) (holding that *Mimms* rule is extended to passengers). *But cf. Wilson v. Florida*, 734 So. 2d 1107, 1113 (Fla. Dist. Ct. App. 1999) applying *Mimms* and *Wilson* in holding that a police officer conducting a lawful traffic stop may not order a passenger back in the stopped vehicle.

(2) *Brendlin v. California*, 551 U.S. 249 (U.S. 2007). When police conduct a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality.

(3) *Arizona v. Johnson*, 129 US 781 (2009). Reads *Mimms*, *Wilson*, and *Brendlin* read together to hold that officers who conduct routine traffic stop[s] may perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous. They do not have to have a Terry-like reasonable suspicion that the driver or passengers have committed, or are committing, a crime.

5. Hot pursuit. *Warden v. Hayden*, 387 U.S. 294 (1967). Police, who chased armed robber into house, properly searched house.

6. Drugs or alcohol in the body.

a) *Schmerber v. California*, 384 U.S. 757 (1966). Warrantless blood alcohol test was justified by exigent circumstances.

b) *United States v. Porter*, 36 M.J. 812 (A.C.M.R. 1993). Warrantless blood alcohol test was not justified by exigent circumstances where there was no evidence that time was of the essence or that commander could not be contacted.

c) *United States v. Pond*, 36 M.J. 1050 (A.F.C.M.R. 1993). Warrantless seizure of urine to determine methamphetamine use was not justified by exigent circumstances because methamphetamine does not dissipate quickly from the body.

d) Nonconsensual extraction of body fluids without a warrant requires more than probable cause; there must be a "clear indication" that evidence of a crime will be found and that delay could lead to destruction of evidence. Mil. R. Evid. 312(d). See *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001).

C. Automobile Exception.

1. General rule. Movable vehicles may be searched based on probable cause alone; no warrant is required.

a) *Chambers v. Maroney*, 399 U.S. 42 (1970). The word "automobile" is not a talisman, in whose presence the Fourth Amendment warrant requirement fades away. *See also Pennsylvania v. Labron*, 518 U.S. 938 (1996). The auto exception is not concerned with whether police have time to obtain a warrant. It is concerned solely with whether the vehicle is "readily mobile."

b) Ability to Obtain a Warrant Irrelevant. *Maryland v. Dyson*, 527 U.S. 465 (1999) (per curiam). Police in Maryland waited for 13 hours for suspect to return to state and did not attempt to obtain a warrant. Supreme Court reaffirmed that automobile exception does not require a "separate finding of exigency precluding the police from obtaining a warrant."

c) Rationale:

(1) Automobiles are mobile; evidence could disappear by the time a warrant is obtained; and,

(2) There is a lesser expectation of privacy in a car than in a home.

d) See *United States v. Polanco*, 634 F.3d 39 (First Circuit 2011). *Arizona v. Gant* did not scrap the automobile exception (only altered the search incident to arrest exception for an automobile). If there is probable cause to believe a vehicle contains evidence of criminal activity, agents may search, without a warrant, any area of the vehicle in which the evidence may be found.

2. Scope of the search: any part of the car, including the trunk, and any containers in the car may be searched.

a) *United States v. Ross*, 456 U.S. 798 (1982). Police may search any part of the car and any containers in car if police have probable cause to believe they contain evidence of a crime.

b) *United States v. Evans*, 35 M.J. 306 (C.M.A. 1992). Military police who had probable cause to search auto for drugs properly searched accused's wallet found within vehicle.

3. Automobile is broadly defined. *California v. Carney*, 471 U.S. 386 (1985). Recreational vehicle falls within auto exception unless it is clearly used solely as a residence.

4. Timing of the search. *United States v. Johns*, 469 U.S. 478 (1985). Police had probable cause to seize truck but did not search it for three days. There is no requirement that search be contemporaneous with lawful seizure.

5. Closed containers in vehicles may also be searched. *California v. Acevedo*, 500 U.S. 565 (1991). Probable cause to believe closed container located in vehicle contains evidence of crime allows warrantless search of container. This case overruled *United States v. Chadwick*, 433 U.S. 1 (1977), which required police to have warrant where probable cause relates solely to container within vehicle. *Accord United States v. Schmitt*, 33 M.J. 24 (C.M.A. 1991).

6. No distinction between containers owned by suspect and passengers: both sorts of containers may be searched. *Wyoming v. Houghton*, 526 U.S. 295 (1999).

7. Applies to Seizure of Automobiles Themselves. *Florida v. White*, 526 U.S. 559 (1999). Automobile exception applies to seizure of vehicle for purposes of forfeiture and police do not need to get a warrant if they have probable cause to believe that car is subject to seizure. If seized, police are then allowed to conduct a warrantless inventory of the seized vehicle.

8. Exception does not apply to automobiles parked in curtilage of the home. *See Collins v. Virginia*, 138 S.Ct. 1663 (2018). Automobile exception to warrant requirement did not justify police officer's invasion of curtilage of home to investigate suspected stolen motorcycle located under a tarp in partially enclosed top portion of driveway of home.

VI. EXCEPTIONS TO PROBABLE CAUSE REQUIREMENT

A. Many searches require neither probable cause nor a search warrant/authorization. If a person voluntarily consents to a search, no probable cause or warrant is needed. Searches incident to apprehension/arrest need no other probable cause than the underlying PC for the arrest/apprehension. Certain brief detentions–called "stops" – require only "reasonable suspicion," and pat-down searches–called "frisks"– require only reasonable suspicion that the person is armed and dangerous. Inspections are technically not searches at all, but are rather administrative in nature, not criminal searches for evidence. A variety of inspections are not affected by Fourth Amendment requirements. Finally, emergency searches are also not affected by Fourth Amendment requirements.

B. Consent Searches.

1. General rule. If a person voluntarily consents to a search of his person or property under his control, no probable cause or warrant is required. MRE 314(e).

2. Persons Who Can Give Consent.

a) Anyone who exercises actual control over property may grant consent to search that property. Mil. R. Evid. 314(e)(2). *United States v. Reister*, 44 M.J. 409 (C.A.A.F. 1996). House sitter had actual authority to consent to search apartment, books and nightstand. *United States v. Clow*, 26 M.J. 176 (C.M.A. 1988). When police requested consent to search family dwelling, wife consented to search, but husband who was also present refused consent.

b) The Supreme Court held that consent is not constitutionally valid if one *physically* present co-tenant grants consent, but another *physically* present co-tenant refuses consent. *Georgia v. Randolph*, 547 U.S. 103 (2006). *See United States v. Weston*, 67 M.J. 390 (C.A.A.F. 2009), where CID removed husband and wife from their home by bringing them to the CID office. Because they were no longer "physically present" at the home, the wife's consent was valid over her husband's lack of consent.

(1) *But see United States v. King*, 604 F.3d 125 (3rd Cir. 2010) *cert. denied* (holding the *Georgia v. Randolph* rule applies only to realty but not personalty). In *King*, a physically present co-tenant's consent refusal was not valid against a consenting co-tenant permission to search laptop.

c) Anyone with apparent authority may grant consent.

(1) *Illinois v. Rodriguez*, 497 U.S. 177 (1990). Girlfriend with key let police into boyfriend's apartment where drugs were found in plain view. Police may enter private premises without a warrant if they are relying on the consent of a third party that they reasonably, but mistakenly, believe has a common authority over the premises.

(2) *United States v. White*, 40 M.J. 257 (C.M.A. 1994). Airman who shared off-base apartment with accused had apparent authority to consent to search of accused's bedroom. The Airman told police that the apartment occupants frequently borrowed personal property from each other and went into each other's rooms without asking permission.

(3) *See also, United States. v. Rader*, 65 M.J. 30 (C.A.A.F. 2007). Accused's roommate had sufficient access to and control over accused's computer to give valid consent to its search, where the computer was located in roommate's bedroom, it was not password protected, accused never told roommate not to access his computer or any of its files, accused's roommates used the computer to play computer games with accused's consent, and the consenting roommate accessed the computer approximately every two weeks to perform maintenance.

3. Voluntariness. Consent must be voluntary under the totality of the circumstances. Mil. R. Evid. 314(e)(4); *United States v. Frazier*, 34 M.J. 135 (C.M.A. 1992); s*ee United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008) (adopting the six-factor *Murphy* test from an Air Force court to determine voluntariness).

a) Traffic stop. *Ohio v. Robinette*, 519 U.S. 33 (1996). A request to search a detained motorist's car following a lawful traffic stop does not require a bright line "you are free to go" warning for subsequent consent to be voluntary. Consent depends on the totality of the circumstances.

b) Coerced consent is involuntary. *But see United States v. Goudy*, 32 M.J. 88 (C.M.A. 1991). Accused's consent was voluntary despite fact that he allegedly took commander's request to be an implied order.

c) It is OK to Trick. *United States v. Vassar*, 52 M.J. 9 (1999). Accused taken to hospital for head injury and told that a urinalysis was needed for treatment. CAAF held it is permissible to use trickery to obtain consent as long as it does not amount to coercion. Urinalysis was admissible, despite military judge applying wrong standard for resolving questions of fact.

d) Right to counsel. Reading Article 31 rights is recommended but not required. *United States v. Roa*, 24 M.J. 297 (C.M.A. 1987). Request for consent after accused asked for lawyer was permissible. *United States v. Burns*, 33 M.J. 316 (C.M.A. 1991). Commander's failure to give Article 31 warnings did not affect voluntariness of consent to urinalysis test.

(1) Request for cell phone passcode after accused asked for lawyer is permissible, so long as cell phone was seized pursuant to lawful consent of the accused. *United States v. Robinson*, 77 M.J. 303 (CAAF 2018).

(2) However, if a phone is seized pursuant to a search authorization, rather than via consent, after a lawyer is requested, Gov't may not request cell phone passcode. *United States v. Mitchell*, 76 M.J. 413 (CAAF 2017).

4. Scope. Consent may be limited to certain places, property and times. Mil. R. Evid. 314(e)(3). Consent to search computer necessarily implicated consent to seize and remove computer even though standard consent form did not explicitly state that computer could be seized and removed. *United States v. Rittenhouse*, 62 M.J. 504 (A.Ct.Crim.App. 2005). *See United States v. Gallagher*, 65 M.J. 601 (N-M. Ct. Crim. App. 2007) *affirmed, 66 M.J. 250 (C.A.A.F. 2008)* where the issue is whether the search of the accused's closed briefcase, located in the garage of accused's home, did not exceed the scope of his wife's consent to search the areas of the home over which she had actual or apparent authority.

5. Withdrawal. Consent may be withdrawn at any time. Mil. R. Evid. 314(e)(3). *But see United States v. Roberts*, 32 M.J. 681 (A.F.C.M.R. 1991). Search was lawful where accused initially consented, then withdrew consent, and then consented again. A search conducted after the accused withdrew consent is not lawful, unless independent authority for the search exists. *See United States v. Hoffman*, 75 M.J. 120 (C.A.A.F. 2016).

6. Burden of proof. The prosecution must show consent by clear and convincing evidence. Mil. R. Evid. 314(e)(5).

7. Consent and closed containers. *Florida v. Jimeno*, 500 U.S. 248 (1991). General consent to search allows police to open and closed containers.

C. Searches Incident to Apprehension.

1. General rule. A person who has been apprehended may be searched for weapons or evidence within his "immediate control." Mil. R. Evid. 314(g).

a) Scope of search. A person's immediate control includes his person, clothing, and the area within his wingspan (sometimes expansively defined to include "lunging distance"). MRE 314(g)(2).

b) Purpose of search: to protect police from nearby weapons and prevent destruction of evidence. *Chimel v. California*, 395 U.S. 752 (1969).

c) Substantial delay between apprehension and seizure will not invalidate the search "incident." *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996) (citing *United States v.*

Edwards, 415 U.S. 800 (1974) (10 hours)). *Curtis* was later reversed on other grounds and the sentence was subsequently reduced by the Navy-Marine Corps Court of Criminal Appeals; this reduction to life imprisonment was upheld by the CAAF. *United States v. Curtis*, 52 M.J. 166 (C.A.A.F. 1999).

2. Search of automobiles incident to arrest.

a) Search for weapons incident to lawful stop. Evidence seized in the course of a search for weapons in the areas of the passenger compartment (not the trunk) of a vehicle is admissible, so long as the person lawfully stopped is the driver or passenger, and the official who made the stop has a reasonable suspicion that the person stopped is dangerous and may gain immediate control of the weapon. Mil. R. Evid. 314(f)(3).

b) Search may be conducted after the occupant has been removed from the automobile, as long as the search is "contemporaneous" with the apprehension. *New York v. Belton*, 453 U.S. 454 (1981) (search of zipped jacket pocket in back seat of car following removal and arrest of occupants upheld; new bright line rule established).

c) *Belton* rule extended in *Thornton v. United States*, 541 U.S. 615 (2004), to include search of a vehicle if the arrestee was a "recent occupant" of the vehicle.

d) *Belton* rule distinguished and substantially limited in *Arizona v Gant*, 129 S. Ct. 1710, 1723 (2009). "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."

e) Arrest means arrest. A search incident to a traffic citation, as opposed to an arrest, is not constitutional. *Knowles v. Iowa*, 525 U.S. 113 (1999). *But cf. Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Petitioner was arrested for not wearing a seatbelt and then handcuffed, searched at the police station, and held in jail for an hour. The Court found that the arrest for this minor infraction was reasonable).

3. The search of a cell phone incident to arrest is not constitutional. *Riley v. California*, 134 S. Ct. 2473 (2014). The warrantless search incident to arrest of the digital contents of a cell phone, without exigent circumstances, violates the Fourth Amendment.

D. Stop and Frisk.

1. General rule. Fourth Amendment allows a limited government intrusion ("stop and frisk") based on less than probable cause ("reasonable suspicion") where important government interests outweigh the limited invasion of a suspect's privacy. *Terry v. Ohio*, 392 U.S. 1 (1968); Mil. R. Evid. 314(f)(2).

2. Reasonable suspicion.

a) Reasonable suspicion is specific and articulable facts, together with rational inferences drawn from those facts, which reasonably suggest criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991). *See United States v. Robinson*, 58 M.J. 429 (C.A.A.F. 2003), for an excellent framework for a reasonable suspicion analysis.

(1) Reasonable suspicion is measured under the totality of the circumstances; and,

(2) Reasonable suspicion is less than probable cause.

b) Reasonable suspicion may be based on police officer's own observations. *United States v. Peterson*, 30 M.J. 946 (A.C.M.R. 1990). Reasonable suspicion existed to stop soldier

seated with companion in car parked in dead end alley in area known for drug activity at night; car license plate was from out-of-state.

c) Reasonable suspicion may be based on collective knowledge of all police involved in investigation. *United States v. Hensley*, 469 U.S. 221, 229 (1985). Information in police department bulletin was sufficient reasonable suspicion to stop car driven by robbery suspect.

d) Reasonable suspicion may be based on an anonymous tip. *Alabama v. White*, 496 U.S. 325 (1990). Detailed anonymous tip was sufficient reasonable suspicion to stop automobile for investigative purposes. *But see Florida v. J.L.*, 529 U.S. 266 (2000) (stating that anonymous tip needs to be reliable in "its assertion of illegality").

e) Reasonable suspicion may be based on drug courier "profile." *United States v. Sokolow*, 490 U.S. 1 (1988). "Innocent" non-criminal conduct amounted to reasonable suspicion to stop air traveler who paid $2,100.00 cash for two tickets, had about $4,000.00 in cash; was traveling to a source city (Miami); was taking 20 hour flight to stay only 2 days; was checking no luggage (only carry-on luggage); was wearing same black jumpsuit and gold jewelry on both flights; appeared nervous; and, was traveling under alias. Cocaine found in carry-on bag after dog alerted was admissible.

f) Reasonable suspicion may be based on "headlong flight" coupled with other circumstances (like nervous and evasive behavior and high-crime area). *Illinois v. Wardlow*, 528 U.S. 119 (2000).

3. Nature of detention. A stop is a brief, warrantless investigatory detention based on reasonable suspicion accompanied by a limited search.

a) Frisk for weapons.

(1) The police may frisk the suspect for weapons when he or she is reasonably believed to be armed and dangerous. Mil. R. Evid. 314(f)(2).

(2) Plain feel. Police may seize contraband items felt during frisk if its contraband nature of items is readily apparent. *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (seizure of cocaine during frisk held unconstitutional because the contraband nature of cocaine was not readily apparent). But looking down the front of a suspect's pants to determine if "bulges" were weapons was reasonable. *United States v. Jackson*, No. ACM 33178, 2000 CCA LEXIS 57 (A.F. Ct. Crim. App. Feb. 28, 2000) (unpublished opinion).

b) Length of the detention.

(1) 15 minutes in small room is too long. *Florida v. Royer*, 460 U.S. 491 (1983). Suspect was questioned in a large storage closet by two DEA agents was unreasonable: "investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."

(2) 20 minutes may be sufficiently brief if police are hustling. *United States v. Sharpe*, 470 U.S. 675 (1985). 20-minute detention by highway patrolman waiting for DEA agent to arrive was not unreasonable.

c) Use of firearms.

(1) *United States v. Merritt*, 695 F.2d 1263 (10th Cir. 1982). Pointing shotgun at murder suspect did not turn legitimate investigative stop into arrest requiring probable cause.

(2) *United States v. Sharpe*, 470 U.S. 695 (1985); *United States v. Hensley*, 469 U.S. 221 (1985). Merely displaying handgun did not turn an investigative detention into a seizure requiring probable cause.

d) Use of dogs. *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding that otherwise lawful traffic stop was not expanded into an illegal search or seizure for contraband when officer walked a drug detection dog around vehicle during a routine traffic stop). *But see Rodriguez v. United States*, 135 S.Ct. 1609 (2015) (holding that extending a traffic stop "seven or eight minutes" so that a detection dog could respond to the scene violated the Fourth Amendment).

(1) *United States v. Alexander*, 901 F.2d 272 (2d Cir. 1990). Approaching car with drawn guns and ordering driver out of car to frisk for possible weapons did not convert *Terry* stop into full-blown arrest requiring probable cause.

4. Important government interests.

a) Police officer safety. *Terry v. Ohio*, 392 U.S. 1 (1968). Frisk was justified when officer reasonably believed suspect was about to commit robbery and likely to have weapon.

b) Illegal immigrants. *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). But Border Patrol Agent's squeezing of a canvas bag during a routine stop of bus at checkpoint violated Fourth Amendment. *Bond v. United States*, 529 U.S. 334 (2000).

c) Illegal drugs. *United States v. De Hernandez*, 473 U.S. 531 (1985). "[T]he veritable national crisis in law enforcement caused by smuggling of illicit narcotics . . . represents an important government interest." *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Place*, 462 U.S. 696 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980). *But see Indianapolis v. Edmond*, 531 U.S. 32 (2000) (finding that use of roadblock for general search of drugs violated the Fourth Amendment).

d) Solving crimes and seeking justice. *United States v. Hensley*, 469 U.S. 221 (1985). There is an important government interest "in solving crime and bringing offenders to justice."

5. House frisk ("Protective Sweep"). *Maryland v. Buie*, 494 U.S. 325 (1990). Police may make protective sweep of home during lawful arrest if they have "reasonable belief based on specific and articulable facts" that a dangerous person may be hiding in area to be swept; evidence discovered during protective sweep is admissible.

a) *United States v. Billings*, 58 M.J. 861 (A. Ct. Crim. App. 2003). Police may conduct a protective sweep of a house, even though the arrest takes place outside the house.

b) *United States v. Keefauver*, 74 M.J. 230 (CAAF 2015). Agents were not entitled to make a second, more extensive protective sweep of accused's home when they lacked facts to believe that 1) the areas to be swept harbored individuals, or 2) that those individual(s) posed a threat to law enforcement. The presence of drugs without more does not justify an extensive protective sweep under *Maryland v. Buie*.

E. Administrative Inspections.

1. The military's two-part test. Mil. R. Evid. 313(b).

a) Primary purpose test.

(1) Inspection. The primary purpose of an inspection must be to ensure the security, military fitness, or good order and discipline of the unit (administrative purpose).

(2) Criminal search. An examination made for the primary purpose of obtaining evidence for use in a court-martial or in other disciplinary proceedings (criminal purpose) is not an inspection. MRE 313(b)(2).

b) Subterfuge rule. MRE 313(b)(3). **If** a purpose of an examination is to locate weapons and contraband and if the examination:

(1) Was directed immediately following the report of a crime and not previously scheduled; or,

(2) Specific persons were selected or targeted for examination; or,

(3) Persons were subjected to substantially different intrusions; **then**, the prosecution must prove by clear and convincing evidence that the purpose of the examination was administrative, not a subterfuge for an illegal criminal search.

2. The Supreme Court's test. *New York v. Burger*, 482 U.S. 691 (1987) (warrantless "administrative" inspection of junkyard pursuant to state statute was proper).

a) There are three requirements for a lawful administrative inspection:

(1) There must be a substantial government interest in regulating the activity;

(2) The regulation must be necessary to achieve this interest; and,

(3) The statute must provide an adequate substitute for a warrant.

(a) The statute must give notice that inspections will be held;

(b) The statute must set out who has authority to inspect; and,

(c) The statute must limit the scope and discretion of the inspection.

b) A dual purpose is permissible. A state can address a major social problem both by way of an administrative scheme and through penal sanctions.

3. Health and welfare inspections. *United States v. Tena*, 15 M.J. 728 (A.C.M.R. 1983). Commander's unit inspection for substandard conditions is permissible. *United States v. Thatcher*, 28 M.J. 20 (C.M.A. 1989). Stolen toolbox was discovered in short-timer's room. Government failed to show by clear and convincing evidence that examination was an "inspection" and not an "illegal search."

4. Unit urinalysis.

a) Invalid inspection.

(1) *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994). Urinalysis inspection test results were improperly admitted where inspection was conducted because the first sergeant heard rumors of drug use in unit and prepared list of suspects, including accused, to be tested. The military judge erred in ruling the government proved by clear and convincing evidence that the inspection was not a subterfuge for an illegal criminal search.

(2) Commander must have jurisdiction and authority over accused to order urinalysis. *See United States v. DiMuccio*, 61 M.J. 588 (A.F. Ct. Crim. App. 2005) (Commander of 162nd FW, a national guard unit, had no authority to order accused to submit to urinalysis because accused was at the time in "Title 10" status vice "Title 32" status even though accused was still part of 162nd FW).

b) Valid inspection.

(1) Knowledge of "Reports." *United States v. Brown*, 52 M.J. 565 (A. Ct. Crim. App. 1999). Commander directed random urinalysis after report that several soldiers were using drugs in the command. The court found that the urinalysis was a valid inspection with the primary purpose to protect the morale, safety and welfare of the unit, despite the

recent report. In *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994), the accused's urinalysis results were properly admitted, despite the fact that the test followed report to commander's subordinate that accused had used drugs. Knowledge of a subordinate will not be imputed to the commander.

(2) Primary Purpose.

(a) *United States v. Shover*, 44 M.J. 119 (1996). The primary purpose for the inspection was to end "finger pointing, hard feelings," and "tension." The commander "wanted to get people either cleared or not cleared." The primary purpose was to "resolve the questions raised by the incident, not to prosecute someone." This was a proper administrative purpose.

(b) *United States v. Jackson*, 48 M.J. 292 (1998). Commander stated primary purpose of inspection of barracks rooms, less than 2 hours of receiving anonymous tip about drugs in a soldier's barracks room, was unit readiness. Court held inspection was proper.

(c) *United States v. Ayala*, 69 M.J. 63 (C.A.A.F. 2010). Based on reasons stating in implementation memorandum, which cited Mil. R. Evid. 313(b), an inspection program that required a second follow-up inspection for all positive urinalysis results was found lawful. The court found the primary purpose of the program was administrative, despite the SJA's proposal memorandum, which was clearly criminal in nature.

5. Gate inspections.

a) Procedures. *See* AR 210-10, Installations, Administration (12 Sep. 1977), para. 2-23c (summarizes the legal requirements for gate inspections) (the regulation has been rescinded but is being revised for future promulgation).

(1) A gate search should be authorized by written memorandum or regulation signed by the installation commander defining the purpose, scope and means (time, locations, methods) of the search.

(2) Notice. All persons must receive notice in advance that they are subject to inspection upon entry, while within the confines, and upon departure, either by a sign or a visitor's pass.

(3) Technological aids. Metal detectors and drug dogs may be used. *See* AR 190-12, Military Working Dog Program (4 Jun. 2007).

(4) Civilian employees. Check labor agreement for impact on overtime and late arrivals.

(5) Female pat-downs. Use female inspectors if possible.

(6) Entry inspections.

(a) Civilians: must consent to inspection or their entry is denied; may not be inspected over their objection.

(b) Military: may be ordered to comply with an inspection and may be inspected over their objection, using reasonable force, if necessary.

(7) Exit inspections.

(a) Civilians: may be inspected over objection, using reasonable force, if necessary.

(b) Military: may be ordered to comply with an inspection and may be inspected over their objection, using reasonable force, if necessary.

b) Discretion of inspectors. *United States v. Jones*, 24 M.J. 294 (C.M.A. 1987). Police may use some discretion, per written command guidance, to select which cars are stopped and searched.

c) Scope of search. *United States v. Burney*, 66 M.J. 701 (A.F. Ct. Crim. App. 2008), AFCCA found that it was reasonable for security forces personnel conducting a lawful inspection of vehicles entering an Air Force base to look inside the closed glasses pouch found in the accused's vehicle for contraband, considering that the intrusion was very minimal, the purpose of the inspection was to protect the base from contraband, and the search was conducted at a practical and completely logical location.

F. Border Searches.

1. Customs inspections.

a) Customs inspections are constitutional border searches. *United States v. Ramsey*, 431 U.S. 606 (1977) (finding a longstanding right of sovereign to protect itself).

b) Customs inspections in the military. Border searches for customs or immigration purposes may be conducted when authorized by Congress. Mil. R. Evid. 314(b); *United States v. Williamson*, 28 M.J. 511 (A.C.M.R. 1989). Military police customs inspector's warrantless search of household goods was reasonable since inspection was conducted pursuant to DOD Customs Regulations.

2. Gate searches overseas.

a) General rule. Installation commanders overseas may authorize searches of persons and property entering and exiting the installation to ensure security, military fitness, good order and discipline. Mil. R. Evid. 314(c).

(1) Primary purpose test is applicable.

(2) Subterfuge rule is inapplicable.

b) *United States v. Stringer*, 37 M.J. 310 (C.M.A. 1993). Gate searches overseas are border searches; they need not be based on written authorization and broad discretion can be given to officials conducting the search.

G. Inventories.

1. General rule. Inventories conducted for an administrative purpose are constitutional; contraband and evidence of a crime discovered during an inventory may be seized. Mil. R. Evid. 313(c).

a) Primary purpose test is applicable.

b) Subterfuge rule is inapplicable.

2. Purpose. *Illinois v. Lafayette*, 462 U.S. 640 (1983). Inventories of incarcerated persons or impounded property are justified for three main reasons:

a) To protect the owner from loss;

b) To protect the government from false claims; and,

c) To protect the police and public from dangerous contents.

3. Military inventories. Military inventories that are required by regulations serve lawful administrative purposes. Evidence obtained during an inventory is admissible. Inventories are required when soldiers are:

a) Absent without leave (AWOL), AR 700-84, Issue and Sale of Personal Clothing (18 Nov. 2004), para 12-14;

b) Admitted to the hospital, AR 700-84, Issue and Sale of Personal Clothing (18 Nov. 2004), para 12-15; and,

c) Placed in pretrial or post-trial confinement, AR 190-47, The Army Corrections System (15 Jun. 2006).

4. Discretion and Automobile Inventories. *Florida v. Wells*, 495 U.S. 1 (1990). When defendant was arrested for DWI and his car impounded and inventoried, the police improperly searched a locked suitcase in the trunk of car despite fact that there was no written inventory regulation. This search was insufficiently regulated to satisfy the Fourth Amendment.

5. *See* Anderson, *Inventory Searches*, 110 Mil. L. Rev. 95 (1985) (examples and analysis of military inventories).

6. Sobriety Checkpoints.

a) General rule. The Fourth Amendment does not prohibit the brief stop and detention of all motorists passing through a highway roadblock set up to detect drunk driving; neither probable cause nor reasonable suspicion are required as the stop is constitutionally reasonable. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

7. Crime Prevention Roadblocks. *Indianapolis v. Edmond*, 531 U.S. 32 (2000). Public checkpoints/roadblocks for the purpose of drug interdiction violate the Fourth Amendment. Stops for the purpose of general crime control are only justified when there is some quantum of individualized suspicion.

8. Information Gathering Roadblocks. *Lidster v. Illinois*, 540 U.S. 419 (2004). A roadblock conducted in order to gather information regarding a crime committed one week earlier did not violate the *Edmond* rule, and was not unconstitutional.

H. Emergency Searches.

1. General rule. In emergencies, a search may be conducted to render medical aid or prevent personal injury. Mil. R. Evid. 314(i). *See Brigham City, Utah v. Stuart et al*., 547 U.S. 398 (2006). Police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously threatened with such injury.

a) *Michigan v. Fisher*, 130 S. Ct. 546, 549 (2009). Officers "do not need ironclad proof of a 'likely serious, life-threatening' injury to invoke the emergency aid exception."

b) *Michigan v. Taylor*, 436 U.S. 499 (1978). Entry into burning or recently burnt building is permissible.

c) *United States v. Jacobs*, 31 M.J. 138 (C.M.A. 1990). Warrantless entry into accused's apartment by landlord was permissible because apartment was producing offensive odor because of spoiled food.

d) *United States v. Korda*, 36 M.J. 578 (A.F.C.M.R. 1992). Warrantless entry into accused's apartment was justified by emergency when supervisor thought accused had or was about to commit suicide.

I. Searches for Medical Purposes.

1. General rule. Evidence obtained from a search of an accused's body for a valid medical purpose may be seized. Mil. R. Evid. 312(f). *See United States v. Stevenson*, 53 M.J. 257

(C.A.A.F. 2000) (holding that the medical purpose exception applies to members of the Temporary Disability Retired List), *cert. denied*, 532 U.S. 919 (2001).

2. *United States v. Maxwell*, 38 M.J. 148 (C.M.A. 1993). Blood alcohol test of accused involved in fatal traffic accident was medically necessary, despite the fact that the test result did not actually affect accused's treatment. Test result was admissible. *But see United States v. Stevenson*, 66 M.J. 15 (CAAF 2008), additional blood drawn by Veteran Affairs at request of law enforcement to test accused's DNA was deemed to be not for valid medical purpose under MRE 312(f), and was therefore suppressed.

3. Drug Treatment Programs. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). The Court rejected "special needs" exception for warrantless (urinalysis) searches of pregnant women involved in a hospital drug treatment program. The ultimate purpose of the program was for law enforcement and not to get women in the program into substance abuse treatment.

J. School Searches. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). School officials may conduct searches of students based upon "reasonable grounds" as long as the search is not "excessively intrusive." *See also Board of Education v. Earls*, 536 U.S. 822 (2002) (holding that a policy adopted by the school district to require all students to consent to urinalysis testing in order to compete in extracurricular activities did not violate the Fourth Amendment, but was reasonable).

VII. EXCLUSIONARY RULE AND EXCEPTIONS.

A. The exclusionary rule is the remedy for illegal searches and/or illegally seized evidence: such evidence is excluded from trial. However, there are exceptions to this rule. If evidence was obtained in good faith by law enforcement officials; was discovered independent of a "tainted" source; or, would have been inevitably discovered, despite a "tainted" source, the evidence may be admitted. Illegally obtained evidence may also be introduced for impeachment purposes by the government.

B. The Exclusionary Rule.

1. Judicially created rule. Evidence obtained directly or indirectly through illegal government conduct is inadmissible. *Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 308 U.S. 338 (1939); *Mapp v. Ohio*, 376 U.S. 643 (1961) (the exclusionary rule is a procedural rule that has no bearing on guilt, only on respect for "dignity" or "fairness").

2. Mil. R. Evid. 311(a). Evidence obtained as a result of an unlawful search or seizure made by a person acting in a government capacity is inadmissible against the accused.

3. Violation of regulations does not mandate exclusion.

a) Urinalysis regulations.

(1) *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989). Deviation from Coast Guard urinalysis regulation did not make urine sample inadmissible.

(2) *But see United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990). Gross deviations from urinalysis regulation allow exclusion of positive test results.

b) Financial privacy regulations. *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). Failure to comply with federal statute and regulation requiring notice before obtaining bank records did not mandate exclusion of records.

C. Exception: Good Faith.

1. General rule. Evidence is admissible when obtained by police relying in good faith on facially valid warrant that later is found to be lacking probable cause or otherwise defective.

a) *United States v. Leon*, 468 U.S. 897 (1984). Exclusionary rule was inapplicable even though magistrate erred and issued warrant based on anonymous tipster's information which amounted to less than probable cause.

b) Rationale. Primary purpose of exclusionary rule is to deter police misconduct; rule should not apply where there has been no police misconduct. There is no need to deter a magistrate's conduct.

2. Limitations. *United States v. Leon*, 468 U.S. 897 (1984). Good faith exception does not apply, even if there is a search warrant, where:

a) Police or affiant provide deliberately or recklessly false information to the magistrate (bad faith by police);

b) Magistrate abandons his judicial role and is not neutral and detached (rubber-stamp magistrate);

c) Probable cause is so obviously lacking to make police belief in the warrant unreasonable (straight face test); or,

d) The place or things to be searched are so clearly misidentified that police cannot presume them to be valid (glaring technical deficiencies).

3. Mil. R. Evid. 311(c)(3): Evidence obtained from an unlawful search or seizure may be used if:

a) "competent individual" authorized search or seizure;

b) individual issuing authorization had "a substantial basis" to find probable cause; and

c) official executing authorization objectively relied in "good faith" on the authorization.

4. What is a "substantial basis" under Mil. R. Evid. 311(b)(3)? *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001). The rule is satisfied if the law enforcement officer has a reasonable belief that the magistrate had a "substantial basis" for determining probable cause.

5. Good faith exception applies to searches authorized by a commander. *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992). Good faith exception applied to allow admission of ration cards discovered during search authorized by accused's commander.

6. Good faith exception applies to searches authorized by military magistrate. *United States v. Carter*, 54 M.J. 414 (C.A.A.F. 2001). Regardless of whether the military magistrate had a substantial basis to issue an authorization for a blood sample, the CID SA acted in good faith in collecting the sample, and it was admissible.

7. The good faith exception applies to more than just "probable cause" determinations; it may also save a search authorization where the commander who authorized the search did not have control over the area searched.

a) On-post searches. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). The good faith exception applied where a commander had a good faith reasonable belief that he could authorize a search of an auto in a dining facility parking lot, even though the commander may not have had authority over the parking lot.

b) Off-post searches overseas. *United States v. Chapple*, 36 M.J. 410 (C.M.A. 1993). The good faith exception applied to search of accused's off-post apartment overseas even though commander did not have authority to authorize search because accused was not in his unit.

8. The good faith exception may apply even when a warrant has been quashed. *Arizona v. Evans*, 514 U.S. 1 (1995). The exclusionary rule does not require suppression of evidence seized

incident to an arrest based on an outstanding arrest warrant in a police computer, despite the fact the warrant was quashed 17 days earlier. Court personnel were responsible for the inaccurate computer record, because they failed to report that the warrant had been quashed.

a) *Arizona v. Evans* rule expanded in *Herring v. United States*, 129 S. Ct 695 (2009). Exclusionary rule does not apply when police officers rely on arrest warrant from a different county that had been recalled, but never removed from a shared computer database due to negligence by other county's police officers. Exclusionary rule has no deterrent value when police mistakes are the result of negligence, rather than deliberate violations or "systemic error or disregard of constitutional requirements."

9. *But cf. United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996). Anticipatory search of e-mail by online company, at behest of government and prior to service of warrant shows "no reliance on the language of the warrant for the scope of the search." Thus, good faith exception was not applicable. Evidence suppressed.

10. Reliance on Statute or Binding Precedent. Mil. R. Evid 314(c)(4). Evidence obtained as a result of an unlawful search or seizure may be admissible when the official seeking the evidence acted in objectively reasonable reliance on statute or on binding precedent later held violative of Fourth Amendment.

D. Exception: Independent Source.

1. General rule. Evidence discovered through a source independent of the illegality is admissible.

a) *Murray v. United States*, 487 U.S. 533 (1988). Police illegally entered warehouse without warrant and saw marijuana. Police left warehouse without disturbing evidence and obtained warrant without telling judge about earlier illegal entry. Evidence was admissible because it was obtained with warrant untainted by initial illegality.

b) Rationale. Police should not be put in worse position than they would have been in absent their improper conduct.

2. Evidence obtained through independent and voluntary acts of third parties will render evidence admissible under independent-source doctrine. See *United States v. Fogg*, 52 M.J. 144, 151 (C.A.A.F. 1999) (discussing independent-source doctrine as alternative basis for not invoking the exclusionary rule).

3. Search based on both legally and illegally obtained evidence. *United States v. Camanga*, 38 M.J. 249 (C.M.A. 1993). Independent source doctrine applied where affidavit supporting search authorization contained both legally and illegally obtained evidence. After excising illegal information, court found remaining information sufficient to establish probable cause.

E. Exception: Inevitable Discovery.

1. General rule. Illegally obtained evidence is admissible if it inevitably would have been discovered through independent, lawful means. *See* Mil. R. Evid. 311(c)(2).

a) *Nix v. Williams*, 467 U.S. 431 (1984). Accused directed police to murder victim's body after illegal interrogation. Body was admissible because it would have inevitably been discovered; a systematic search of the area where the body was found was being conducted by 200 volunteers.

b) Rationale. The police should not benefit from illegality, but should also not be put in worse position.

2. Examples:

a) *United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982). Illegal search of train station locker and seizure of hashish, which exceeded authority to wait for accused to open locker and then apprehend him, did not so taint apprehension of accused as to make subsequent seizure of drugs after accused opened locker inadmissible. Drugs would have been inevitably discovered.

b) *United States v. Carrubba*, 19 M.J. 896 (A.C.M.R. 1985). Evidence found in trunk of accused's car admissible despite invalid consent to search. Evidence inevitably would have been discovered as police had probable cause and were in process of getting search authorization.

c) *United States v. Kaliski*, 37 M.J. 105 (C.M.A. 1993). Inevitable discovery doctrine should be applied to witness testimony only if prosecution establishes witness is testifying of her own free will, independent of illegal search or seizure. Testimony of accused's partner in sodomy should have been suppressed where she testified against accused only after police witnessed sodomy during illegal search.

d) *Computers* – Inevitable discovery is a commonly argued exception in otherwise unlawful computer searches. *See United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008) (finding results of unlawful search admissible, but with only three judges finding inevitable discovery as the basis for admissibility); *United States v. Osorio*, 66 M.J. 632 (A.F. Ct. Crim. App. 2008) (finding forensic examiner's search of computer unlawful because it went beyond the scope of the warrant and refusing to allow inevitable discovery exception based on facts of the case); *United States v. Hoffman*, 75 M.J. 120 (C.A.A.F. 2016) (finding that record must demonstrate government was actively pursuing leads that would have led to the "inevitable discovery" at the time "when the illegality occurred.")

3. Distinguish between "independent source" and "inevitable discovery."

a) Independent source deals with *facts*. Did police in fact find the evidence independently of the illegality?

b) Inevitable discovery deals with hypotheticals. *Would* the police have found the evidence independently of the illegal means?

F. Exception: Attenuation of Taint.

1. General rule. Evidence that would not have been found *but for* official misconduct is admissible if the causal connection between the illegal act and the finding of the evidence is so attenuated as to purge that evidence of the primary taint. *See Wong Sun v. United States*, 371 U.S. 471, 484-87 (1963) (holding that the unlawful arrest did not taint subsequent confession where it was made after his arraignment, release on own recognizance, and voluntary return to the police station several days later). *See also U.S. v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006) which establishes three factors to determine whether an accused's consent was an independent act of free will, breaking the causal chain between the consent and a prior unconstitutional search: (1) the temporal proximity of the illegal search and the consent; (2) the presence of intervening circumstances; and (3) the purpose and the flagrancy of the initial search. *See also U.S. v. Jones*, 64 M.J. 596 (A. Ct. Crim. App., 2007).

2. *United States v. Rengel*, 15 M.J. 1077 (N.M.C.M.R. 1983). Even if accused was illegally apprehended, later seizure of LSD from him was attenuated because he had left the area and was trying to get rid of drugs at the time of the seizure.

3. *But see Taylor v. Alabama*, 457 U.S. 687, 691 (1982). Defendant was arrested without probable cause, repeatedly questioned by police who took fingerprints and put him in line-up without counsel present. Confession was obtained six hours after arrest was inadmissible.

G. Exception: Impeachment.

1. Illegally obtained evidence may be used to impeach accused's in-court testimony on direct examination or to impeach answers to questions on cross-examination. *United States v. Havens*, 44 U.S. 962 (1980). Defendant's testimony on direct that he did not know his luggage had a T-shirt that was being used for smuggling cocaine allowed admissibility of illegally obtained T-shirt on cross-examination to impeach defendant's credibility. *See also Walder v. United States*, 347 U.S. 62 (1954).

2. Mil. R. Evid. 311(c)(1). Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

APPENDIX A: SECTION III DISCLOSURE

UNITED STATES	)	
	)	Fort Blank, Missouri
v.	)	
	)	DISCLOSURE OF
William Green	)	SECTION III EVIDENCE
Private (E-1), U.S. Army	)	
A Co., 1st Bn, 13th Inf.	)	22 July 20XX
8th Inf. Div. (Mech)	)	

Pursuant to Section III of the Military Rules of Evidence, the defense is hereby notified:

1. Rule 304(d). There are (no) relevant statements, oral or written, by the accused in this case, presently known to the trial counsel (and they are appended hereto as enclosure ___).

2. Rule 311(d)(1). There is (no) evidence seized from the person or property of the accused or believed to be owned by the accused that the prosecution intends to offer into evidence against the accused at trial (and it is described with particularity in enclosure ____) (and it is described as follows: _____).

3. Rule 321(d)(1). There is (no) evidence of a prior identification of the accused at a lineup or other identification process which the prosecution intends to offer against the accused at trial (and it is described with particularity in enclosure ____) (and it is described as follows: _____ _____).

A copy of this disclosure has been provided to the military judge.

PETER MUSHMAN
CPT, JA
Trial Counsel

APPENDIX B: GUIDE TO ARTICULATING PROBABLE CAUSE

1. Probable cause to authorize a search exists if there is a *reasonable belief, based on facts*, that the person or evidence sought is at the place to be searched. Reasonable belief is more than mere suspicion. Witness or source should be asked three questions:

A. What is where and when? Get the facts!

1. Be specific: how much, size, color, etc.

2. Is it still there (or is information stale)?

a) If the witness saw a joint in barracks room two weeks ago, it is probably gone; the information is stale.

b) If the witness saw a large quantity of marijuana in barracks room one day ago, probably some is still there; the information is not stale.

B. How do you know? Which of these apply?

1. "I saw it there." Such personal observation is extremely reliable.

2. "He [the suspect] told me." Such an admission is reliable.

3. "His [the suspect's] roommate/wife/ friend told me." This is hearsay. Get details and call in source if possible.

4. "I heard it in the barracks." Such rumor is unreliable unless there are specific corroborating and verifying details.

C. Why should I believe you? Which of these apply?

1. Witness is a good, honest soldier; you know him from personal knowledge or by reputation or opinion of chain of command.

2. Witness has given reliable information before; he has a good track record (CID may have records).

3. Witness has no reason to lie.

4. Witness has truthful demeanor.

5. Witness made statement under oath. ("Do you swear or affirm that any information you give is true to the best of your knowledge, so help you God?")

6. Other information corroborates or verifies details.

7. Witness made admission against own interests.

2. The determination that probable cause exists must be based on facts, not only on the conclusion of others.

3. The determination should be a common sense appraisal of the totality of all the facts and circumstances presented.

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CHAPTER 27
SELF-INCRIMINATION

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Open confession is good for the soul.
- Old Scottish Proverb

I. BACKGROUND

A. Introduction. In the military, the law of self-incrimination embraces Article 31, UCMJ; the Fifth Amendment; the Sixth Amendment; and, the voluntariness doctrine. Each source of law provides unique protections, triggered by distinct events. When analyzing a self-incrimination issue, therefore, it is imperative to categorize the analysis. First, determine the relevant source or sources of law in issue. Next, evaluate the situation and decide if the protections afforded under each particular source of law have been triggered. If protections have been triggered, determine if there has been a violation of those protections. Typically, a challenge to a confession involves more than one source of self-incrimination law, and several steps of analysis. The confession or admission is admissible when the rights afforded under each source of applicable law have been observed.

B. Sources of law.

1. The Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

2. Article 31(a), UCMJ: "No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."

3. The Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

4. The Voluntariness Doctrine: Looking at the totality of the circumstances, was the confession the product of an essentially free and unconstrained choice by its maker, or was the accused's will overborne and his capacity for self-determination critically impaired. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

5. The collected law of *Privilege Against Self-Incrimination* (PASI) principles, statutes, and decisions is embodied in the MCM at Mil. R. Evid. 301, 304-305.

C. Definitions. Mil. R. Evid. 304(a)(1).

1. Confession: "A 'confession' is an acknowledgement of guilt."

2. Admission: "An 'admission' is a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory."

D. Scope of the protection.

1. Standard for protection: Mil. R. Evid. 301(a): ". . . evidence of a testimonial or communicative nature." "Article 31, like the Fifth Amendment, focuses on testimonial compulsion." *United States v. Williams*, 23 M.J. 362, 366 (C.M.A. 1987).

2. Applying the standard.

a. Oral or written statements are generally protected: *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). Drunk driving suspect's slurred speech and other evidence showing his lack of muscular coordination constituted nontestimonial and, therefore, admissible aspects of his unwarned responses to police questioning. In contrast, the suspect's answer to police questioning about the date of his sixth birthday was testimonial and should have been suppressed. "Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the 'trilemma' of truth, falsity, or silence and hence the response (whether based on truth or falsity) contains a testimonial component." *Id.* at 597.

b. Verbal acts (physical act which is the equivalent of speaking) are generally protected.

(1) *United States v. Whipple*, 4 M.J. 773 (C.G.C.M.R. 1978). The accused's verbal act of handing over drugs in response to officer's request was found to be a protected "statement."

(2) *Fisher v. United States*, 425 U.S. 391 (1976). Accounting documents used to prepare tax returns were not protected because they were prepared voluntarily, long before any prosecution was being considered. Additionally, the act of turning over the documents was not testimonial because it conveyed no factual information that the government did not already have.

(3) *United States v. Hubbell*, 530 U.S. 27 (2000). The Supreme Court held that the act of turning over documents in response to a subpoena *duces tecum* and a grant of immunity was a testimonial act because the prosecutor did not know of the location or even existence of the documents. The defendant had to use mental and physical steps to inventory the documents, and his production of the documents communicated their existence, possession, and authenticity.

(4) *United States v. Swift*, 53 M.J. 439 (C.A.A.F. 2000). A divorce decree turned over by the accused was not testimonial evidence because it was voluntarily prepared before he was ordered to produce it by his command. Additionally, the act of turning over the decree was not testimonial because the existence and location of the document was a "foregone conclusion" and added "little or nothing to the sum total of the Government's information." Finally, the Court stated that even if the act was testimonial, it fell under the "required records exception," since the decree was maintained for "legitimate administrative purposes."

c. Physical characteristics are not protected.

(1) Dental Impressions for bite mark comparisons not protected. *United States v. Martin*, 9 M.J. 731 (N.M.C.M.R. 1979), *aff'd on other grounds*, 13 M.J. 66 (C.M.A. 1982).

(2) Handwriting sample not protected; dicta on voice sample. *United States v. Harden*, 18 M.J. 81 (C.M.A. 1984).

(3) Voice samples not protected. *United States v. Akgun*, 24 M.J. 434 (C.M.A. 1987).

(4) Body fluids not protected.

(a) Blood sample is not testimonial. *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980).

(b) Urine specimen not protected. *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).

(c) Note however, that under Mil. R. Evid. 304(j), if an accused refuses a lawful order to submit for chemical analysis a sample of his or her blood, breath, urine, or other body substance, evidence of such refusal may be admitted into evidence on:

(i) A charge of violating an order to submit such a sample; or,

(ii) Any other charge on which the results of the chemical analysis would have been admissible.

d. Identification is generally not protected by PASI. *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177 (2004). A request for identification during a *Terry* stop did not fall within the scope of protection afforded by the Fifth Amendment and *Miranda*. The Court held that to qualify as incriminating, the individual must reasonably believe that his communication could be used in a criminal prosecution against him or could provide a link to other evidence that might be so used. Providing personal identification is normally insignificant, and would be incriminating in only the most unusual circumstances. In this case, the defendant failed to show that his refusal to comply with the officer's requests was based on a real fear that his identity would incriminate him or lead to evidence that could be used against him. However, the Court left open the possibility that there may be a circumstance where furnishing identification might lead to evidence needed to convict the witness of a separate offense, and therefore be protected by the Fifth Amendment. *See also Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *United States v. Tubbs*, 34 M.J. 654 (A.C.M.R. 1992) (questioning to identify a suspect during "booking" process does not require a testimonial response).

e. Duty to report — partially protected. PASI is violated if a regulatory duty to report misconduct will directly lead to, or is, evidence of one's own misconduct.

(1) *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986). Regulation requiring Airmen to report drug abuse of other Airmen is valid, but the PASI protects against conviction for dereliction of duty where "at the time the duty to report arises, the witness to drug abuse is already an accessory or principal to the illegal activity that he fails to report . . . ."

(2) *United States v. Sanchez*, 51 M.J. 165 (C.A.A.F. 1999). Conviction for misprision of a serious offense upheld where accused failed to report an aggravated assault. Court said if accused had immediately reported the offense, he would not have committed misprision.

(3) *United States v. Medley*, 33 M.J. 75 (C.M.A. 1991). Court declined to extend *Heyward* exception to cases where a social relationship between drug users is so interrelated that it would be impossible to reveal one incident without potentially incriminating the accused on a separate incident. *See also United States v. Bland*, 39 M.J. 921 (N.M.C.M.R. 1994).

(4) *United States v. Hammond*, 60 M.J. 512 (A. Ct. Crim. App. 2004). The Army court held that a conviction of fleeing the scene of an intentional collision does not violate the Fifth Amendment or Article 31, UCMJ. Balancing "the important governmental purpose in securing . . . information against the right of the servicemember to be protected from compulsory self-incrimination," the service court found that "although staying at the scene may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence."

(5) *United States v. Serianne*, 69 M.J. 8 (CAAF 2010). The Court held that exclusion from self-reporting provided in U.S. Navy Regulations was superior competent authority over Navy's service instruction requiring sailors to self-report any civilian arrest for an alcohol-related offense, and thus instruction did not provide a legal basis for finding accused derelict in performance of a required duty when he failed to report his own arrest for driving under the influence of alcohol.

(6) Contrast *Serianne* with *United States v. Castillo*, 74 M.J. 160 (C.A.A.F. 2015). (After the Dept. of Navy altered the Navy Regulation mentioned in *Serianne*, the Court held that the services could require Servicemembers to report arrests by civilian authorities because the regulations requiring it is not punitive. In order to qualify for PASI, a communication must be testimonial, incriminating, and compelled).

II. FIFTH AMENDMENT & MIRANDA

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. Const. amend. V.

In 1966, with the case *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that prior to any custodial interrogation, a subject must be warned that he has a right: (1) to remain silent, (2) to be informed that any statement made may be used as evidence against him, and (3) to the presence of an attorney. The goal of *Miranda* was to put in place a procedural safeguard that would counter the inherently coercive environment of a police-dominated, incommunicado interrogation. In 1967, the Court of Military Appeals applied *Miranda* to military interrogations in *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967). In *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court reaffirmed that *Miranda* is a constitutional decision that the Congress is not permitted to "overrule." The Supreme Court also implicitly reaffirmed all of the exceptions to *Miranda*.

The trigger for *Miranda* warnings is "custodial interrogation." The test for custody is an objective examination, from the perspective of the subject, into whether there was a formal arrest or restraint or other deprivation of freedom of action in any significant way. The test for an interrogation is also an objective test, but from the perspective of the person asking the questions, i.e., the police officer. The test is whether the comments made are those reasonably likely to elicit an incriminating response. For both, the subjective views harbored by either the interrogating officer or the person being questioned are irrelevant.

A. The *Miranda* Warnings: *Miranda v. Arizona*, 384 U.S. 436 (1966). Prior to any custodial interrogation, a subject must be warned:

1. That he/she has a right to remain silent;

2. That any statement made may be used as evidence against him/her; and,

3. That he/she has a right to the presence of an attorney, either retained or appointed.

Florida v. Powell, 130 S.Ct. 1195 (2010). *Miranda* did not require specific language to be used. As long as the warnings reasonably convey the three warnings above, then the warnings will be held to comply with *Miranda*.

B. Application to the Military.

1. General rule: Mil. R. Evid. 305(c)(1). "A statement obtained from the accused in violation of the accused's rights under Article 31 is involuntary and therefore inadmissible against the accused…"

2. *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967). *Miranda* applies to military interrogations.

C. The *Miranda* Trigger: The requirement for *Miranda* warnings is triggered by initiation of custodial interrogation.

1. What is the test for custody?

a. A person is in custody if he is taken into custody, could reasonably believe himself to be in custody, or otherwise deprived of his freedom of action in any significant way. *See* Mil. R. Evid. 305(b)(3).

b. Custody is evaluated based on an objective test from the perspective of a "reasonable" subject.

c. *Stansbury v. California*, 511 U.S. 318 (1994). In 1994, the Supreme Court reaffirmed that the test for custody under *Miranda* is an objective examination of whether there was formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The subjective views harbored by either the interrogating officer or the person being questioned are irrelevant.

Why? It was the coercive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time of the questioning, which led to imposition of the *Miranda* requirements.

d. *United States v. Miller*, 46 M.J. 80 (C.A.A.F. 1997). The CAAF applied the following "mixed question of law and fact" analysis in determining custody: 1) what were the circumstances surrounding the interrogation (question of fact); and, 2) given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave (question of law). Applying this objective standard, the court found no custody where the accused (1) was not under formal arrest; (2) voluntarily accepted an invitation to talk with an officer about the alleged misconduct; (3) voluntarily participated in the interview; (4) was treated cordially by the officer; and, (5) was left alone in the station house for a short period of time.

e. *United States v. Miller*, 48 M.J. 49 (C.A.A.F. 1998). After receiving a report about a gang robbery, an MP detained the accused to ascertain his identity and whereabouts during the evening. The CAAF determined that *Miranda* warnings were not required because the accused was not in custody. [Note: This is a different *Miller* than the case above, 46 M.J. 80.]

f. *United States v. Chatfield*, 67 M.J. 432 (C.A.A.F. 2009). The CAAF cited *Thompson v. Keohane*, 516 U.S. 99 (1995), for the proposition that two inquiries are necessary to determine custody: 1) what are the circumstances surrounding the

interrogation; and, 2) would a reasonable person in those circumstances have felt that he or she was not at liberty to terminate the interrogation. Despite the fact that questioning occurred in the station house, the CAAF held that appellant appeared there voluntarily, that the interrogation occurred in the detective's office instead of an interrogation room, and the duration of the interrogation all point to the fact that a reasonable person would not find that the appellant was in custody. No *Miranda* warnings were required.

2. Situation and location factors for determining custody.

a. Roadside stops: *Berkemer v. McCarty*, 468 U.S. 420 (1984). Highway patrol stopped a car that was weaving and, without giving *Miranda* warnings, asked the driver if he had used intoxicants. Court found no custody for *Miranda* purposes because: (1) motorist expects detention will be brief; and, (2) stop is in "public" and less "police dominated." "[T]he safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" The initially uncommunicated decision by the police to arrest the driver does not bear on whether the defendant is "in custody." *See also United States v. Rodriguez*, 44 M.J. 766 (N-M. Ct. Crim. App. 1996) (questioning of suspect about illegal gun sales during roadside stop was noncustodial), *aff'd*, 60 M.J. 239 (C.A.A.F. 2004).

b. In the bedroom: *Orozco v. Texas*, 394 U.S. 324 (1969). Suspect was "in custody" for *Miranda* purposes where he was questioned in his bedroom and an officer testified the suspect was not free to go, but was "under arrest."

c. Age is not a factor: *Yarborough v. Alvarado*, 541 U.S. 652 (2004). The Supreme Court overruled the 9th Circuit's determination that *Miranda* required courts to consider a defendant's age and his lack of a prior criminal history in determining custody. The Court noted that *Miranda* established an objective test for custody. Age and prior criminal experience are individual characteristics of a suspect, which if required for a custody determination, would create a subjective test.

d. Military status as a factor in custody evaluation: *United States v. Jordan*, 44 C.M.R. 44 (C.M.A. 1971). Questioning by a superior is not *per se* custodial, but "questioning by a commanding officer or military police or investigators at which the accused is given an Article 31 warning, strongly suggests that an accused is also entitled to a right to counsel warning under *Miranda* and *Tempia*."

e. Coercive environment forbidden, but deception not forbidden: *Illinois v. Perkins*, 496 U.S. 292 (1990). "[A]n undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response" about an uncharged offense. "*Miranda* forbids coercion, not strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner."

3. Interrogation: Mil. R. Evid. 305(b)(2). "'Interrogation' includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." Note: the term "interrogation" has the same meaning under the Fifth Amendment as it does for Article 31(b) (*see infra* Sec. IV. G. 3. [When must warnings be given?] of this outline).

a. Once a suspect has expressed his desire to deal with police only through counsel, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication. *United States v. Mitchell*, 76 M.J. 413 (CAAF 2017).

D. The "Public Safety" Exception: *New York v. Quarles*, 467 U.S. 649 (1984). After apprehending a suspect with an empty shoulder holster in a grocery store, officer did not read rights warnings, but asked where the gun was. The Court held that "overriding considerations of public safety justify the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon."

E. Who can invoke the Fifth Amendment Privilege?

1. *Ohio v. Reiner*, 532 U.S. 17 (2001). The Supreme Court held that an individual could invoke his Fifth Amendment rights even if he believed he was innocent. All that is necessary for a valid invocation of the privilege against self-incrimination is that it be "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." The Court further recognized "that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth."

2. *Hoffman v. United States*, 341 U.S. 479 (1951). Privilege not only extends to answers that would in themselves support a conviction, but also apply to those responses which "would furnish a link in the chain of evidence needed to prosecute the claimant."

3. *McKune v. Lile*, 536 U.S. 24 (2002). As part of a sexual abuse treatment program, qualifying inmates can be required to complete and sign an "Admission of Responsibility" form, in which they accept responsibility for the crimes for which they have been sentenced, and complete a sexual history form detailing all prior sexual activities, or face a reduction of their prison privileges for noncompliance. The Supreme Court held that the state had a legitimate penological interest in rehabilitating inmates, and the *de minimus* adjustment of prison restrictions served this proper prison goal. *See also United States v. McDowell*, 59 M.J. 662 (A.F. Ct. Crim. App. 2003) (holding that a naval brig's policy of encouraging participation in its sex offender treatment program and conditioning relatively minor privileges on such participation does not violate a prisoner's Fifth Amendment privilege against self-incrimination).

III. SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The *Miranda* counsel warning requirement must be distinguished from the Sixth Amendment counsel warning.[1] Whereas *Miranda* concerns assistance of counsel in determining whether to exercise the PASI, under the Sixth Amendment an individual has the right to assistance of counsel for his defense in all criminal prosecutions. Although an individual's exercise of his Sixth Amendment right may have the ancillary effect of invoking the PASI, the trigger and scope of the rights are different. Under the Sixth Amendment, a right to counsel is triggered by initiation of the adversarial criminal justice process. In the civilian sector, the trigger point is reached upon indictment. In the military, it is triggered by the preferral of charges.

A. Under Mil. R. Evid. 305(c)(3), the Sixth Amendment right to counsel warning is required for interrogations by a person subject to the code acting in a law enforcement capacity, conducted

[1] Issuing *Miranda* warnings has been found sufficient to satisfy the Sixth Amendment right to counsel warning requirement. *Patterson v. Illinois*, 487 U.S. 285 (1988). *See also Montejo v. Louisiana*, 556 U.S. 778 (2009).

subsequent to preferral of charges (not the imposition of pretrial restraint under RCM 304), where the interrogation concerns the offenses or matters that were the subject of the preferral.

B. Sixth Amendment provisions are limited to law enforcement activity: There was no violation of the Sixth Amendment where, following preferral, a state social services worker who had an independent duty under state law to investigate child abuse interviewed the accused. The social worker never contacted the government before or after the interview until subpoenaed. If a non-law enforcement official is not serving the "prosecution team," he is not a member of the "prosecutorial forces of organized society," and thus is not barred from contacting an accused based on a prior Sixth Amendment invocation. *United States v. Moreno*, 36 M.J. 107 (C.M.A. 1992).

C. Neither custody nor "coercive influences" are required to trigger Sixth Amendment protections.

1. If an accused interrogated after preferral of charges requests counsel, any subsequent waiver of the right to counsel obtained during an interrogation concerning the same offenses is invalid unless the prosecution can demonstrate by a preponderance of evidence that the accused initiated the communication leading to the waiver. Mil. R. Evid. 305(e)(3)(B). This is true whether the questioning is in a custodial setting by persons known by the accused to be police, *Brewer v. Williams*, 430 U.S. 387 (1977); surreptitiously by a co-accused, *Maine v. Moulton*, 474 U.S. 159 (1985); through police monitored radio transmissions, *Massiah v. United States*, 377 U.S. 201 (1964); or, when police ask questions of an indictee about his drug use and affiliations, *Fellers v. United States*, 540 U.S. 519 (2004).

2. Mere presence as a listening post does not violate Sixth Amendment rights. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (defendant's cellmate instructed only to listen and report). However, if an informant initiates contact and conversation after indictment for express purpose of gathering information about charged activities, statements made by defendant are obtained in violation of accused's Sixth Amendment right to counsel and may not be used in government's case-in-chief. *United States v. Henry*, 447 U.S. 264 (1980); *Kansas v. Ventris*, 556 U.S. 586 (2009); *United States v. Langer*, 41 M.J. 780 (A.F. Ct. Crim. App. 1995).

D. Questioning must relate to the charged offense: *Texas v. Cobb*, 532 U.S. 162 (2001). Appellant's Sixth Amendment right to counsel was not violated when police questioned him, without his counsel being present, about a murder that occurred during a burglary, after he had previously been arraigned for the underlying burglary offense. The Supreme Court stated that the Sixth Amendment right to counsel attaches only to charged offenses and to those offenses that would be "considered the same offense under the *Blockburger*[2] test," even if not formally charged.

IV. ARTICLE 31, UCMJ

While the plain meaning of the statute would appear to answer these questions, 25 years of litigation and judicial interpretation have made it clear that virtually nothing involving Article 31 has a "plain meaning."[3]

-Fredric Lederer, 1976

A. Introduction: In 1950, Congress enacted Article 31(b) to dispel a service member's inherent compulsion to respond to questioning from a superior in either rank or position. As a result, the protections under Article 31(b) are triggered when a suspect or an accused is questioned (for law

[2] *Blockburger v. United States*, 284 U.S. 299 (1932). "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."
[3] Captain Fredric I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1, 11 (1976).

enforcement or disciplinary purposes) by a person subject to the UCMJ who is acting in an official capacity, and perceived as such by the suspect or accused. Questioning refers to any words or actions by the questioner that he should know are reasonably likely to elicit an incriminating response. A suspect is a person who the questioner believes, or reasonably should believe, committed an offense. An accused is a person against whom a charge has been preferred.

B. Content of the warning. *See also* Mil. R. Evid. 305(c)(1). A person subject to the code who is required to give warnings under Article 31(b) may not interrogate or request any statement from an accused or suspect without first informing him/her:

1. of the nature of the accusation;

2. that he/she has the right to remain silent; and,

3. that any statement he/she does make may be used as evidence against him/her.

(Note: Unlike *Miranda* warnings, there is no right to counsel.)

C. General notice requirement: Article 31(b) may be satisfied by a general recitation of the three elements described above. For example, Article 31(b) was satisfied when state child protective services social worker advised the accused: he was suspected of sexually abusing his daughter; he did not have to speak with her or answer any questions; and, anything he said could be repeated by her in court if subpoenaed. *United States v. Kline*, 35 M.J. 329 (C.M.A. 1992).

D. Nature of the accusation.

1. An individual must be provided a frame of reference for the impending interrogation by being told generally about all known offenses. "It is not necessary to spell out the details . . . with technical nicety." Informing the accused that he was suspected of larceny of ship's store funds was held sufficient to cover wrongful appropriation of store funds during an earlier period. *United States v. Quintana*, 5 M.J. 484 (C.M.A. 1978). *See also United States v. Rogers*, 47 M.J. 135 (C.A.A.F. 1997) (informing of "sexual assault" of one victim held sufficient to orient the accused to the offense of rape of a separate victim that occurred 4 years earlier).

2. *United States v. Kelley*, 48 M.J. 677 (A. Ct. Crim. App. 1998). Advising the accused that he was going to be questioned about rape implicitly included the offense of burglary. The ACCA determined that the burglary was a part of the accused's plan to commit the rape. Therefore, by informing the accused that he was suspected of rape, he was sufficiently oriented to the particular incident, even though it involved several offenses.

3. Whether the stated warning sufficiently provided notice of the accusation is tested on the basis of the totality of the circumstances. For example, in *United States v. Erie*, 29 M.J. 1008 (A.C.M.R. 1990), a rights warning for suspected use of hashish was judged sufficient to cover distribution of hashish and cocaine. The court found that the rights warning oriented accused to that fact that the investigation was focused on controlled substances. *See also United States v. Pipkin*, 58 M.J. 358 (C.A.A.F. 2003) (warning covering distribution of a controlled substance was sufficient to cover conspiracy to distribute).

4. The requirement to advise a suspect/accused concerning the nature of the accusation is a continuing responsibility. If, during the course of an interrogation, the questions will address offenses not described in the initial warning, an additional warning must be provided. For example, in *United States v. Huelsman*, 27 M.J. 511 (A.C.M.R. 1988), an initial warning that the accused was suspected of "larceny by uttering worthless checks" was not sufficient to cover offenses involving possession and distribution of marijuana. When the agent learned that the reason for writing the checks related to drugs, the accused became a suspect for drug offenses and was entitled to an additional Article 31(b) warning. *But see United States v. Kelley*, 48 M.J. 677 (A. Ct. Crim. App. 1998) (investigators did not have to halt the interrogation and renew rights

warnings when the accused stated that he had provided false information. The questioning centered on the rape and the burglary, and not the false statements).

5. *United States v. Simpson*, 54 M.J. 281 (C.A.A.F. 2000). Advising the appellant that he was suspected of indecent acts or liberties with a child was held sufficient to focus him toward the circumstances surrounding the event and to inform him of the general nature of the allegations, to include rape, indecent assault, and sodomy of the same child. When determining whether the nature of the accusation requirement has been met, the court will examine: whether the conduct is part of a continuous sequence of events; whether the conduct was within the frame of reference supplied by the warnings; and, whether the interrogator had previous knowledge of an unwarned offense.

E. Right to remain silent.

1. The main PASI aspect of the Article 31(b) warning is practically the same as its *Miranda* warning counterpart.

2. The most significant area of concern regarding this prong of the warning is the occasional improper qualification of the PASI when the investigator recites the warning. In *United States v. Allen*, 48 C.M.R. 474 (A.C.M.R. 1974), the accused was advised he could remain silent only if he was in fact involved in the suspected misconduct. He was also told that if he knew who was involved in the robbery under investigation and remained silent, he could be found guilty. Both of these statements were held improper. A suspect has an "absolute right to silence."

F. Statements may be used as evidence.

1. The "use" aspect of the Article 31 warning is identical to its *Miranda* warning counterpart.

2. As with the right to silence provision described above, problems with the "use" provision generally arise when interrogators accompany the warning with provisos or disclaimers concerning the prospective use of the subject's statements. It is well settled that such comments may negate the validity of the entire warning. *United States v. Hanna*, 2 M.J. 69 (C.M.A. 1976) (subsequent assurance of confidentiality negates the effectiveness of otherwise proper Article 31 warning; "[B]etween you and me, did you do it?").

G. Triggering the warning requirement.

1. Statutory requirement.

a. "No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing . . . ." Article 31(b).

b. The phrasing of Article 31(b) supplies a framework for analyzing situations which may trigger the Article 31 warning requirement.[4] Beyond consideration of the content of the warning, the following questions must be considered:

(1) Who must warn?

(2) When must the warning be provided?

(3) Who must be warned?

[4] This type of analysis was first suggested by Professor Maguire in 1958. Major Robert F. Maguire, *The Warning Requirement of Article 31(b): Who Must do What to Whom and When?*, 2 MIL. L. REV. 1 (1958). The analysis was examined and explained in light of *Miranda* and ten years of its progeny by Professor (then Captain) Lederer in 1976. Captain Fredric I. Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1 (1976).

2. Who must warn?

a. The literal language of Article 31(b) seems to require warnings during any criminal interrogation of a suspect/accused by a person subject to the UCMJ. However, judicial interpretations have both expanded and contracted the scope of the statute's literal language to conform to the practicalities of the military as well as the courts' various views of the drafter's intent.

b. In the years following the enactment of the UCMJ, military courts applied both an "official questioning" test and a "position of authority" test to narrow the broad "[p]erson subject to this chapter" language of Article 31. Key elements of these tests were merged by the CMA in *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981).[5]

c. Failure to provide warnings when required could result in a violation of Article 98, Noncompliance with Procedural Rules.

d. In *Duga*, the CMA held Article 31(b) applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. Accordingly, the court set forth a two-pronged test to determine whether a person is "a person subject to this chapter" for the purposes of Article 31. The points of analysis are:

(1) Was the questioner subject to the Code acting in an official capacity in the inquiry or was the questioning based on personal motivation?; and,

(2) Did the person questioned perceive the inquiry as involving more than a casual conversation? (subjective test)

The *Duga* version of the official questioning standard was further defined by the court in *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990). The *Loukas* court held that Article 31(b) warnings were not required prior to an aircraft crew chief's questioning of a crew member about drug use, where the questions were limited to those needed to "fulfill operational responsibilities, and there was no evidence suggesting his inquiries were designed to evade constitutional or codal rights." Now Article 31 "requires warnings only when questioning is done during an official law-enforcement investigation or disciplinary inquiry."[6] The current standard:

e. New two part test, *see United States v. Jones*, 73 M.J. 357 (CAAF 2014): 1) was questioner acting in official capacity or through personal motivation, and 2) would reasonable person consider the questioner to be acting in official law enforcement or disciplinary capacity (objective test)?

(1) Article 31 warnings required for members of the IRR. *See United States v. Gilbreath*, 74 M.J. 11 (CAAF 2014).

f. Law enforcement or disciplinary inquiry: the Primary Purpose Test.

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[5] The foundation for what we now know as "the *Duga* test" was laid twenty-seven years earlier in *United States v. Gibson*, 14 C.M.R. 164 (C.M.A. 1954). In *Gibson*, the court also provided a review of Article 31's purpose and the legislative history.

[6] Analysis of whether questioning is part of an official law enforcement investigation or disciplinary inquiry is governed by an objective test. An investigation is law enforcement or disciplinary when, based on all the facts and circumstances at the time of the interview, "the military questioner was acting or could reasonably be considered as acting in an official law enforcement or disciplinary capacity." *United States v. Good*, 32 M.J. 105 (C.M.A. 1991).

(1) *United States v. Cohen*, 63 M.J. 45 (C.A.A.F. 2006). Air Force IG's conversations with a Servicemember filing a complaint extended beyond the boundaries necessary to fulfill his administrative duties and should have been proceeded by an Article 31 rights warning. While the IG's responsibilities were primarily administrative, they were not exclusively so under the applicable Air Force Instructions. Under the circumstances of the case the IG had disciplinary responsibilities and should have suspected the complainant of an offense and advised him of his Article 31 rights prior eliciting incriminating statements from him.

(2) *United States v. Pittman*, 36 M.J. 404 (C.M.A. 1993). Accused's section leader, and friend, was required to escort him off-post. Unaware of the child abuse allegations, the escort asked the accused what was going on. Accused admitted hitting his stepson. Trial court held this questioning was motivated out of personal curiosity and not interrogation or a request for a statement within the meaning of Article 31(b). The CMA affirmed, citing *Duga*. *See also United States v. Jones*, 24 M.J. 367 (C.M.A. 1987); *United States v. Williams*, 39 M.J. 758 (A.C.M.R. 1994).

(3) *United States v. Guron*, 37 M.J. 942 (A.F.C.M.R. 1993). Interviews by accounting and finance personnel to determine eligibility for pay and allowances, but not for purposes of disciplinary action or criminal prosecution, do not require Article 31 warnings be given.

(4) *United States v. Bowerman*, 39 M.J. 219 (C.M.A. 1994). Army doctor was not required to inform accused of Article 31 rights when questioning him about child's injuries even though doctor thought child abuse was a distinct possibility.[7]

(5) *United States v. Dudley*, 42 M.J. 528 (N-M. Ct. Crim. App. 1995). Statement by accused to psychiatrist was admissible, even though psychiatrist had not given accused Article 31 warnings and knew of charges against accused. Accused was brought to psychiatrist by investigator who feared that accused might be suicidal and the psychiatrist asked questions for diagnostic purposes in order to determine whether accused was a suicide risk.

(6) *United States v. Bell*, 44 M.J. 403 (C.A.A.F. 1996). Article 31 requirement for warnings does not apply at trial or Article 32 investigations because they are "judicial proceeding[s]; not disciplinary or law enforcement tools within the context of Article 31." However, RCM 405(f)(4) requires that warnings be given to the accused at an Article 32 hearing. *See also* Mil. R. Evid. 301(b), the privilege of a witness to refuse to respond to a question that may tend to incriminate the witness is a personal one that the witness may exercise or waive at his/her discretion.

(7) *United States v. Moses*, 45 M.J. 132 (C.A.A.F. 1996). Naval Criminal Investigative Service (NCIS) agents engaged in an armed standoff with the accused were not engaged in a law enforcement or disciplinary inquiry when they asked the accused what weapons he had inside the house. Rather, the questioning was considered negotiations designed to bring criminal conduct to an end peacefully.

(8) *United States v. Payne*, 47 M.J. 37 (C.A.A.F. 1997). Defense Investigative Service (DIS) agents conducting background investigation were not engaged in law enforcement activities, therefore, they did not have to warn the accused of his rights

[7] *See also United States v. Brown*, 38 M.J. 696 (A.F.C.M.R. 1993); *United States v. Baker*, 29 C.M.R. 129 (C.M.A. 1960) (doctor not required to read rights before questioning appellant during a physical about needle marks on his arms).

under Article 31. *See also United States v. Tanksley*, 50 M.J. 609 (N-M. Ct. Crim. App. 1999) (NCIS agents conducting background investigation).

(9) *United States v. Bradley*, 51 M.J. 437 (C.A.A.F. 1999). A commander, questioning his Soldier about whether the Soldier had been charged with criminal conduct in order to determine whether the accused's security clearance should be terminated, was not required to give Article 31(b) warnings, since the purpose of the questioning was not for law enforcement of disciplinary purposes. The CAAF recognized an "administrative and operational exception" that may overcome the presumption that "a superior in the immediate chain of command is acting in an investigatory or disciplinary role" when questioning a subordinate about misconduct.

(10) *United States v. Norris*, 55 M.J. 209 (C.A.A.F. 2001). The appellant was friends with the family of the victim. When the father (E-7) of the victim asked the appellant (E-4) about the relationship, he admitted that he had kissed and performed oral sex on her. The conversation lasted two hours, during which neither man referred to each other by rank. The court concluded that the victim's father was not asking questions for a disciplinary or law enforcement purpose, but rather sought out the appellant to clarify the matter.

(11) *United States v. Guyton-Bhatt*, 56 M.J. 484 (C.A.A.F. 2002). A legal assistance attorney was required to give Article 31 warnings to a debtor of his client, where the attorney suspected the debtor of committing forgery, planned to pursue criminal action against the debtor as a way to help his client, and used the authority of his position when he called the debtor to gather information. The CAAF concluded that the legal assistance attorney was "acting as an investigator in pursuing this criminal action."

(12) *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002). A chaplain was required to give warnings when he abandoned his clerical role and was acting solely as an Army officer. He did this when he breached the "communications to clergy" privilege by informing the appellant that he would have to report the appellant's child sexual abuse incident to authorities if the appellant did not.

(13) *United States v. Smith*, 56 M.J. 653 (A. Ct. Crim. App. 2001). President of prison's Unscheduled Reclassification Board was not required to read Article 31 rights to an inmate prior to asking him if he would like to make a statement about his recent escape, since the purpose of the board was to determine if the inmate's custody classification should be tightened.

(14) Defense counsel are not required to read Article 31 rights when conducting interviews of a witness on behalf of their clients, even if he suspects the witness committed a criminal offense. TJAG's PRC Opinion 90-2; *United States v. Howard*, 17 C.M.R. 186 (C.M.A. 1954); *United States v. Marshall*, 45 C.M.R. 802 (N.M.C.M.R. 1972); *but see United States v. Milburn*, 8 M.J. 110 (C.M.R 1979).

g. Civilian interrogations.

(1) General Rule. The plain language of the statute seems to limit the class of people who must provide Article 31(b) warnings to those who are subject to the UCMJ themselves. Mil. R. Evid. 305(b)(1) provides, however, that a "[p]erson subject to the code . . . includes a person acting as a knowing agent . . . ." Additionally, the courts have rejected literal application of the statute and provide instead that in those cases where military and civilian agents are working in close cooperation with each other for law enforcement or disciplinary purposes, civilian interrogators are "persons subject to the chapter" for the purposes of Article 31.

(2) Tests. Civilian agents may have to provide Article 31 warnings when, under the "totality of the circumstances" they are either acting as "instruments" of military investigators, or where the military and civilian investigations have "merged." *See* RCM 305(f)(1).

(a) The merger test: (1) Are there different purposes or objectives to the investigations?; and (2) Are the investigations conducted separately? Additionally, the test to determine the second prong is: (a) Was the activity coordinated between military and civilian authorities?; (b) Did the military give guidance or advice?; and, (c) Did the military influence the civilian investigation?

(b) The instrumentality test: (1) Is the civilian agent employed by, or otherwise subordinate to, military authority?; (2) Is the civilian under the control, direction, or supervision of military authority?; and, (3) Did the civilian acted at the behest of military authority or, instead, had an independent duty to investigate?[8]

(3) *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). Civilian intelligence agents were not required to read Article 31 warnings to Marine suspected of espionage because (1) their investigation had not merged into an "indivisible entity" with the military investigation, and (2) the civilian investigators were not acting in furtherance of any military investigation or as an instrument of the military.[9]

(4) *United States v. Quillen*, 27 M.J. 312 (C.M.A. 1988). A civilian PX detective was required to advise a Soldier suspected of shoplifting of his Article 31 rights before questioning him. The detective was an "instrument of the military" whose conduct in questioning the suspect was "at the behest of military authorities and in furtherance of their duty to investigate crime." Furthermore, the suspect perceived the detective's questioning to be more than casual conversation. *See also United States v. Ruiz*, 54 M.J. 138 (C.A.A.F. 2000).

(5) *United States v. Moreno*, 36 M.J. 107 (C.M.A. 1992). State social services worker who had an independent duty under state law to investigate child abuse was not required to provide Article 31 or *Miranda* warnings prior to interviewing the accused. The court found no investigative merger or agency relationship. "[O]ne of the prime elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent."

(6) *United States v. Raymond*, 38 M.J. 136 (C.M.A. 1993). Social worker, subject to AR 608-18's reporting requirements, was not acting as an investigative agent of law enforcement when he counseled the accused with full knowledge that the accused was pending charges for child sexual abuse. The CMA also ruled that health professionals engaged in treatment do not have a duty to provide Article 31(b) warnings.[10]

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[8] *United States v. Grisham*, 16 C.M.R. 268 (C.M.A. 1954).

[9] *United States v. Oakley, Jr.*, 33 M.J. 27 (C.M.A. 1991). A military policeman was present when civilian police questioned appellant regarding civilian fraud charges. The military policeman, acting as a military liaison, advised the appellant that he should cooperate with the civilian police and even asked a few questions of appellant during the interrogation. The CMA denied appellant's motion to suppress, holding that the civilian police investigation had not merged with a military investigation.

[10] Diagnostic questioning had been previously placed outside the scope of Article 31 in *United States v. Fisher*, 44 C.M.R. 277 (C.M.A. 1972). *Raymond* is significant in that it upheld the concept of diagnostic questioning in spite of the regulatory reporting requirement.

(7) *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006). Family Advocacy representative was acting as an "investigative agent of law enforcement" and should have provided the accused an Article 31 warning when she questioned him after a Family Advocacy committee meeting which included a legal officer and a military investigator. The CAAF found that the Family Advocacy representative worked in close coordination with law enforcement before and after her questioning of the accused, that she suspected the accused of an offense at their first meeting, and that evidence of her investigatory purpose could be seen in her first question ("Did you do it?").[11]

(8) *United States v. Payne*, 47 M.J. 37 (C.A.A.F. 1997). The CAAF held that Defense Investigative Service (DIS) agents conducting a background investigation per the request of the accused were not acting under the direction of military authorities and were not, therefore, subject to the UCMJ. Accordingly, the DIS agents did not have to warn the accused of his rights under Article 31.

(9) *United States v. Redd*, 67 M.J. 581 (A. Ct. Crim. App. 2008). The ACCA held that where a CID agent actively participates in civilian law enforcement interview, Article 31 rights must be read to the accused. However, *Miranda* warnings given in this case, combined with notification that accused was under investigation for child sex offenses was sufficient to meet Article 31 requirements.

(10) *United States v. Garcia*, 69 M.J. 658 (C.G. Ct. Crim. App. 2010). The CGCCA held that where CGIS and civilian investigations did not coordinate their activities and that the civilian investigators did not seek military guidance, Article 31, UCMJ rights were not required by the civilian investigators when questioning the appellant. The court did note that there were several coordinated joint witness interviews, but there was "no significant basis for questioning the independence of the two investigations."

h. Foreign police interrogations.

(1) The rule for interrogations by foreign police agents is similar to that set forth for U.S. civilian police agents. Mil. R. Evid. 305(f)(2) provides that no warnings are required unless the foreign police interrogation is "conducted, instigated, or participated in by military personnel or their agents . . . ." An interrogation is not "participated in" merely because U.S. agents were "present," "acted as interpreter," or took steps to mitigate harm.[12]

(2) *United States v. Coleman*, 25 M.J. 679 (A.C.M.R. 1987), *aff'd*, 26 M.J. 451 (C.M.A. 1988). "Cooperative assistance" between CID and German police investigating a murder did not turn the German interrogation into a U.S. interrogation, since the German interrogation "was, in no way 'conducted, instigated, or participated in' by the CID" nor was there "subterfuge" or any violation of due process voluntariness.

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[11] The CAAF noted that the "cooperative effort" between law enforcement and other members of the military community required by Air Force Regulations "does not render every member of the military community a criminal investigator or investigative agent," but that this particular Family Advocacy representative's actions were more akin to an investigative agent than a social worker. *Brisbane*, 63 M.J. at 112.

[12] *See United States v. Plante*, 32 C.M.R. 266 (C.M.A. 1962) (holding that no Article 31(b) warnings required where MP accompanied service member to French police headquarters, but where MP did not take part in the interrogation); *United States v. Jones*, 6 M.J. 226 (C.M.A. 1979) (holding no Article 31(b) warnings required when German police interrogated accused in U.S. CID headquarters building solely for the benefit of the German authorities where no U.S. personnel were present).

(3) *United States v. French*, 38 M.J. 420 (C.M.A. 1993). Accused was questioned by British police in presence of his First Sergeant and an OSI agent. Despite OSI's knowledge of the investigation, their presence during the interview, an agent's comment during interview that it would be better for accused to remain silent than to continue lying, and brief use of OSI agent's handcuffs during arrest, "participation" of military agents did not reach level which would require Article 31 and *Miranda* rights.

(4) *United States v. Pinson III*, 56 M.J. 489 (C.A.A.F. 2002). Icelandic police were not required to give appellant Article 31 warnings prior to questioning him as part of an investigation, where the Icelandic police did not ask NCIS agents for information or leads, NCIS did not ask Icelandic police to ask certain questions, and the two governments conducted separate investigations. The CAAF found that the interrogation was "purely for the benefit of the Icelandic" authorities.

3. When must warnings be given?

a. Under Mil. R. Evid. 305(b)(2), action that triggers the requirement for Article 31 (or *Miranda*) warnings includes "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." This includes direct questioning or action that amounts to the functional equivalent of questioning, and is evaluated based on an objective test from the perspective of a reasonable police officer/investigator.

b. Words or actions reasonably likely to elicit an incriminating response.

(1) *Brewer v. Williams*, 430 U.S. 387 (1977). "Christian burial speech" was intended to elicit incriminating information and was tantamount to interrogation where police knew accused was "deeply religious," and the speech was directed to him.

(2) *Rhode Island v. Innis*, 446 U.S. 291 (1980). "'Interrogation' under *Miranda* refers . . . to express questioning, . . . [and] also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response . . . ." Conversation between police while transporting suspect to station that children from nearby school for handicapped might find the shotgun and hurt themselves was held *not* an interrogation, since it was not directed to suspect and no reason to believe he was susceptible to such remarks.

(3) *United States v. Byers*, 26 M.J. 132 (C.M.A. 1988). "Interrogate" for purposes of Article 31(b) corresponds with Supreme Court interpretation of "interrogation" in applying *Miranda* warning requirement. An OSI agent's 20-40 minute pre-warning commentary was interrogation. The agent could tell the suspect that "the suspicion results from a positive drug test. To go further violates Article 31(b)." Taint attenuated, however, and statement admitted.

(4) *United States v. Guron*, 37 M.J. 942 (A.F.C.M.R. 1993). A 9-minute pre-warning conversation about a variety of subjects having nothing to do with the BAQ fraud investigation, the purpose of which was to relax the subject and get acquainted, was not the functional equivalent of interrogation.

(5) *United States v. Young*, 49 M.J. 265 (C.A.A.F. 1998). Investigator's comment: "I want you to remember me, and I want you to remember my face, and I want you to remember that I gave you a chance," directed to the accused after the accused invoked his right to counsel may have been an interrogation. Judge Sullivan, in a concurring

opinion, firmly believes that it was. The court affirmed the admissibility of the subsequent confession on other grounds.

(6) *United States v. Muldoon*, 10 M.J. 254 (C.M.A 1981). The "time-honored technique to elicit a statement -- namely, informing the suspect that he has been implicated by someone else," is interrogation.

c. Not "interrogation."

(1) Subjects who begin a statement in a spontaneous fashion do not need to be stopped and warned. The appropriate rights warning, however, must precede any follow-up interrogation.

(2) *United States v. Warren*, 47 M.J. 649 (A. Ct. Crim. App. 1997). Asking the accused to put his spontaneous statement in writing was not an interrogation. An interrogation began, however, when the investigator asked the accused to elaborate and explain portions of the statement.

(3) *United States v. Turner*, 48 M.J. 513 (A. Ct. Crim. App. 1998). Telling the accused that he was AWOL and would be turned over to a particular military law enforcement authority did not constitute an interrogation. The ACCA viewed these comments as statements regarding the nature of evidence against the accused and not an interrogation.

(4) *United States v. Vitale*, 34 M.J. 210 (C.M.A. 1992). First Sergeant warned accused not to discuss the matter and to let OSI handle it because she did not want to get involved. Accused was previously interviewed by another NCO following an improper rights advice. Held: First Sergeant's conduct was not the "functional equivalent of interrogation," and accused's subsequent unsolicited statements were uttered spontaneously, voluntarily, and without coercion.

(5) *United States v. Lichtenhan*, 40 M.J. 466 (C.M.A. 1994). An investigator (Inv.) considered the accused a suspect in a series of thefts, and intended to question him regarding a related matter. The investigator approached the accused and initiated the following interchange:

Inv.: "[Y]ou got a minute to talk?"

Accused: "Sure, chief, but there's something I need to talk to you about first."

Inv.: "Go ahead."

The accused proceeded to make a series of incriminating remarks. The CMA ruled the investigator's approach and comments did not amount to questioning such that Article 31 requirements were triggered.

(6) *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992). Suspect invoked right to silence. Several hours later, suspect was re-approached by same CID agent and asked for a re-interview, whereupon the suspect made some incriminating statements. Held: Simply asking for a re-interview of an individual not in custody was not questioning designed "to elicit an incriminating" statement.

(7) *United States v. Ruiz*, 54 M.J. 138 (C.A.A.F. 2000). A civilian store detective employed by AAFES, upon suspecting that the appellant had stolen store merchandise, stated to him, "[t]here seems to be some AAFES merchandise that hasn't [sic] been paid for." The appellant replied, "yes," produced the merchandise from under his coat,

and said "you got me." The CAAF ruled that Article 31(b) warnings were not required because the detective did not "interrogate" the accused, but rather informed him of why he was stopped and why he was asked to accompany the detective back to the store's office.

(8) *United States v. Allen*, 54 M.J. 854 (A.F. Ct. Crim. App. 2001). During the reading of his charges by his commander, the appellant appeared pale and shocked, and near the end of the reading stated, "the fourth one is true, or partially true." The court concluded that the reading of the charges in this case was not the functional equivalent of an interrogation. The court placed special emphasis on the circumstances surrounding the reading of the charges. Specifically, that the appellant was not asked any questions before being read his charges, the accused was not in confinement, and he was a lieutenant colonel.

(9) Consent to search.

(a) *United States v. Burns*, 33 M.J. 316 (C.M.A. 1991). Requesting consent to search and also conducting a urine test did not violate the Fifth Amendment even though the accused previously requested counsel. Asking the accused questions during the search of his residence did violate the Fifth Amendment, but were non-prejudicial errors.

(b) *United States v. Vassar*, 52 M.J. 9 (C.A.A.F. 1999). While in the hospital, the accused signed a written consent form and gave a urine sample, which tested positive for drugs. The CAAF held that the consent was voluntary and that there is no requirement to give Article 31(b) warnings before asking for consent to search.

(c) *United States v. Frazier*, 34 M.J. 135 (CMA 1992). No Fourth Amendment violation for police to ask for consent to search accused's wallet after he was advised of his Article 31 rights and agreed to answer questions.

(d) *United States v. Hutchins*, 72 M.J. 294 (C.A.A.F. 2013). A request to consent to search does not infringe upon Article 31 or PASI because such requests are not interrogations and the consent given is ordinarily not a statement. However, the Court ruled that the NCIS agent's request for consent to search was an attempt to reinitiate communication with the accused, therefore violated *Edwards*.

(e) *United States v. Robinson*, 77 M.J. 303 (CAAF 2018), Even after accused invokes his right to counsel, OSI agents may lawfully request accused's cell phone passcode, so long as accused consented to the search of their cell phone. Contrast with *United States v. Mitchell*, 76 M.J. 413 (CAAF 2017). (Court held investigators may not request cellphone passcode after accused invokes right to counsel and declines to provide consent to search their cellphone. Such questioning constitutions interrogation in violation of *Edwards*.)

V. RIGHTS WARNINGS CHART

	Article 31(b)	*Miranda* (Fifth Amendment)	Sixth Amendment
Purpose	To dispel a service member's inherent compulsion to respond to questioning from a superior in rank or position	To provide protection against an inherently intimidating and coercive interrogation environment	To provide accused the assistance of counsel during critical stages of the criminal process.
Who must warn?	1) Person subject to the code 2) Acting in official capacity 3) For law enforcement or disciplinary purposes	Law enforcement officer	Government agent acting in law enforcement capacity
Test:	1) Was the military questioner acting, or could reasonably be considered as acting, in an official law enforcement or disciplinary capacity, and 2) Did the person questioned perceive it as official questioning?		
Who must be warned?	Accused or suspect	Person subject to custodial interrogation	Accused
Test:	Did the questioner believe, or reasonably should have believed, that the person committed an offense?		
When are warnings required?	Questioning where an incriminating response is either sought or is a reasonable consequence	Custodial interrogation	Questioning after the preferral of charges on matters related to the charged offense(s)
Test:	Would a reasonable interrogator see the questions as ones likely to elicit an incriminating response?	<u>Custodial</u> – Would a reasonable person in the subject's position feel that they were under arrest or significant restraint? <u>Interrogation</u> – Would a reasonable interrogator see the questions as ones likely to elicit an incriminating response?	Right to counsel attaches only to charged offenses and to those offenses that would be "considered the same offense under the *Blockburger* test," even if not formally charged
Content of warnings	1) Nature of offense 2) Right to silence 3) Use of statement	1) Right to silence 2) Use of statement 3) Right to counsel	Right to counsel Note: *Miranda* warnings satisfy the Sixth Amendment

Effect of invocation:			
Right to silence	Temporary respite from interrogation	Temporary respite from interrogation	Not applicable
Right to counsel	Not applicable	Questioning ceases until: 1) Counsel made available (for continuous custody, counsel must be present; if break in custody, real opportunity to seek legal advice required), or 2) Subject re-initiates and valid waiver obtained	Questioning about charged offense ceases until: 1) Counsel present, or 2) Subject re-initiates and valid waiver obtained

VI. EFFECT OF IMPLEMENTING THE RIGHTS

Whenever a subject invokes a right in response to an Article 31(b) or Fifth or Sixth Amendment warning, the first thing that must happen is the same: the interrogation must stop immediately. What may happen next is dependent on what source of self-incrimination law applies and what right has been invoked.

If the subject invokes the right to remain silent under Article 31(b) or *Miranda*, he or she is entitled to a temporary respite from questioning that the government must scrupulously honor. Once honored, the government may re-approach the subject for further questioning.

If the subject invokes the right to counsel under the Fifth Amendment, the subject cannot be questioned further unless: (1) counsel is made available; or (2) the subject re-initiates questioning. In a continuous custody setting, counsel is made available when counsel is present. When there is a break in custody, counsel is made available when the subject has had a real opportunity to seek legal advice. If the subject has not had a real opportunity to seek legal advice, then counsel must be present. If the subject re-initiates the questioning, the investigator must obtain a valid waiver of rights before continuing the interrogation.

If the subject invokes the right to counsel under the Sixth Amendment, the subject cannot be questioned further unless: (1) counsel is present; or (2) the subject re-initiates questioning. For purposes of the Sixth Amendment, continuous custody or a break in custody is irrelevant.

The questioner must clarify any ambiguous invocation of rights before questioning may begin. However, if the subject initially waives his rights and begins making a statement, any subsequent invocation of his rights must be unambiguous. Ambiguous requests do not have to be clarified by the questioner and the interrogation may proceed.

The fact that the accused (during official questioning and in exercise of rights under the Constitution) requested counsel is inadmissible against the accused. *United States v. Moran*, 65 M.J. 178 (CAAF 2017), and *United States v. Condon*, 77 M.J. 244 (CAAF 2017). The exercise of the right to counsel is proof of neither guilt nor innocence. MRE 301(f).

A. The right to remain silent (*Miranda* or Article 31(b)).

1. A subject may invoke any or all of his/her rights either prior to or during an interrogation. Whether invoked in response to an Article 31(b) or *Miranda* warnings, the right to remain silent

entitles a subject to a temporary respite from interrogation. There is no *per se* prohibition against re-approaching a suspect following invocation of the right to remain silent.

2. Factors to consider in determining if the PASI has been violated include: which right was invoked, who initiated communication, subject matter of the communication, when the communication took place, where the communication took place, and the time between invocation of the right and the second interview. *See generally Michigan v. Mosley*, 423 U.S. 96 (1975) (suspect's "right to cut off questioning" and remain silent was "scrupulously honored" when first officer stopped questioning on robbery after suspect invoked *Miranda* right to silence and second officer, after a lapse of over two hours, re-advised the suspect of his rights and questioned him on unrelated murder).

3. *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992). CID "scrupulously honored" the accused's Fifth Amendment "right to cut off questioning," (*i.e.*, right to silence) when the agent immediately ended the interview, permitted the accused to leave the CID office, and waited more than two hours before attempting to re-interview him.

4. *United States v. Doucet*, 43 M.J. 656 (N-M. Ct. Crim. App. 1995). Under the circumstances of the case, appellant's request to go home and refusal to sign a prepared written statement constituted an invocation of his right to remain silent, even though he had made prior oral admissions and had agreed to work on a written statement.

5. *United States v. Rittenhouse*, 62 M.J. 509 (A. Ct. Crim. App. 2005). Once a suspect waives the right to silence, interrogators may continue questioning unless and until the suspect unequivocally invokes the right to silence. If a suspect makes an ambiguous or equivocal invocation of his right to remain silent, law enforcement agents have no duty to clarify the suspect's intent and may continue with questioning. *See also Davis v. United States*, 512 U.S. 452 (1994).

B. The Fifth Amendment (*Miranda*) Right to Counsel.

1. Mil. R. Evid. 305(c)(2); 305(d)

2. The *per se* rule of *Edwards.*

a. When a subject has invoked his right to counsel in response to a *Miranda* warning, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. "Having expressed his desire to deal with the police only through counsel, the subject is not subject to further interrogation . . . until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477 (1981); *see also United States v. Harris*, 19 M.J. 331 (C.M.A. 1985) (*Edwards* applies to military interrogations).

b. There is no exception to *Edwards* for police-initiated, custodial interrogations relating to a separate investigation once a suspect has invoked his right to counsel under the Fifth Amendment. "As a matter of law, the presumption raised by a suspect's request for counsel - that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance - does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." Additionally, the fact that the officer conducting the second interrogation does not know of the request for counsel is of "no significance." Knowledge of the suspect's invocation is imputed to other officers. *Arizona v. Roberson*, 486 U.S. 675 (1988).

c. The *Edwards* requirement that counsel be "made available" means more than an opportunity to consult with an attorney outside the interrogation room. In *Minnick v.*

Mississippi, 498 U.S. 146 (1990), the Supreme Court held "that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."[13] *But see McNeil v. Wisconsin*, 501 U.S. 171 (1991) (limiting *Minnick* holding regarding *Edwards* rule to periods of continuous custody).

d. *United States v. Mitchell*, 51 M.J. 234 (C.A.A.F. 1999). After a clear invocation of his Fifth Amendment right to counsel, the accused was asked by his work supervisor during a brig visit if it was worth committing the alleged misconduct. Even though the accused's supervisor was not a law enforcement official, the CAAF held that the questioning of the accused in custody, after invocation of his Fifth Amendment right to counsel, violated the protections of *Edwards v. Arizona*, 451 U.S. 477 (1981).

e. *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999). At trial, the prosecutor introduced the accused's statements that were made as part of a separate state plea agreement. Prior to making the statements, the accused unambiguously invoked his right to counsel, however, since counsel was present during the interview, the CAAF held that there was no violation of the Fifth Amendment.

f. *United States v. Thompson*, 67 M.J. 106 (C.A.A.F. 2009). After accused was placed in pretrial confinement and given defense counsel, a CID agent questioned accused without defense counsel notified or present, but after a rights waiver was signed. The CAAF presumed that the confession was obtained in violation of his Fifth Amendment right to counsel, but found the error harmless beyond a reasonable doubt. The confession was not ultimately admitted, except in redacted form by the defense. The confession only contained statements regarding the offenses for which he was acquitted or pled guilty.

3. Limits of the *Edwards* rule.

a. Counsel "made available."

(1) *United States v. Faisca*, 46 M.J. 276 (C.A.A.F. 1997). During a CID custodial interrogation concerning the theft of government property, the accused invoked his right to counsel. The CID agents conducting the interrogation immediately ceased their questioning. Six months later, a CID agent initiated contact with the accused and arranged for another interrogation. During the later interrogation, the accused affirmatively waived his self-incrimination rights and made a statement. The court found no *Edwards* violation.

(2) *Maryland v. Shatzer*, 130 S.Ct. 1213 (2010). The Supreme Court held that a fourteen-day period of time is sufficient to overcome the *Edwards* barrier, regardless of the availability of counsel. The Court also held that post-trial incarceration for an unrelated offense does not trigger "custody" for *Miranda*/*Edwards* purposes.

(3) Prior to SCOTUS' *Shatzner* ruling, CAAF upheld breaks in custody of two days (*United States v. Schake*, 30 M.J. 314 (C.M.A. 1990) and *United States v. Young*, 49 M.J. 265 (C.A.A.F. 1998)), and 19 days (*United States v. Vaughters*, 44 M.J. 377 (C.A.A.F. 1996)), as sufficient to provide accused a meaningful opportunity to consult with counsel, and thus not violate *Edwards*. ACCA had ruled that a 24 hour release from custody after invocation of right to counsel was a sufficient break from custody to overcome the *Edwards* barrier.

[13] *See* Mil. R. Evid. 305(c)(2). In 1994, this subdivision was amended to conform military practice with the Supreme Court's decision in *Minnick*.

(4) *United States v. Mitchell*, 76 M.J. 413 (CAAF 2017) at 417, footnote 4. Two hour break from custody after invocation of right to counsel was less than the fourteen days required to overcome *Edwards* barrier (citing *Maryland v. Shatzner).*

(5) *United States v. Kerns*, 75 M.J. 783 (AFCCA 2016). Interrogation ten days after invocation of right to counsel violated *Shatzner* 14-day waiting period and thus violated the accused's Fifth Amendment protections.

b. Re-initiation by the accused.

(1) *Edwards* does not foreclose finding a waiver of Fifth Amendment protection after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities. *Minnick v. Mississippi*, 498 U.S. 146 (1990).

(2) *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). Accused reinitiated communication with police "relating generally to the investigation" by asking, "What is going to happen to me now?" But routine requests for a drink of water or to use a telephone "cannot be fairly said to represent a desire [for] a more generalized discussion relating directly or indirectly to the investigation."

(3) *United States v. Bonilla*, 66 M.J. 654 (C.G. Ct. Crim. App. 2008) (en banc). While in custody the accused invoked his Fifth Amendment right to counsel and to remain silent. Coast Guard Investigative Service (CGIS) agents later entered the interview room and discussed the case between themselves hoping that the accused would re-initiate conversations about the case. This tactic was successful. The CGCCA ruled this was not an interrogation or functional equivalent of an interrogation. No threats were made, there were no compelling pressure put on the appellant beyond custody, pleas to conscience, or other ploys the agents knew or were reasonably likely to elicit an incriminating response. [Note: Opinion was a 3-1-2 decision with the three dissenting judges finding that the accused did not re-initiate further communications. The majority opinion plus one dissenting judge agree that the agents' actions were not an interrogation.]

(4) *United States v. Watkins*, 32 M.J. 1054 (A.C.M.R. 1991), *aff'd*, 34 M.J. 344 (C.M.A. 1992). Accused reinitiated conversation by asking CID if he should get a civilian attorney and how much time the agent thought the accused might get.

(5) *United States v. McDavid*, 37 M.J. 861 (A.F.C.M.R. 1993). Despite previous invocation of his right to counsel, accused initiated the conversation with OSI agents by asking if he could explain something.

c. Waiver after re-initiation by the accused.

(1) *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). If initiation by the accused is found, then a separate inquiry must be made whether, on the totality of the circumstances, the accused voluntarily waived his rights.

(2) *United States v. McLaren*, 38 M.J. 112 (C.M.A. 1993). In reinitiating conversation with interrogators by answering a question asked before his rights invocation, accused impliedly waived previously invoked Fifth Amendment right to counsel.

d. Foreign Police Exception.

(1) *Edwards* protections are not triggered by request for counsel to a foreign official because there is an overseas exception to *Edwards* rule. In review of cases in this area, the CAAF has focused on the suspect's state of mind, just as the Supreme

Court did in *Roberson*. A suspect may be willing to cooperate without counsel during a U.S. interview, while added intimidation in a foreign interview may make him unwilling to do so.

(2) *United States v. Coleman*, 26 M.J. 451 (C.M.A. 1988). U.S. investigators had actual knowledge that Coleman had requested counsel during questioning by the German police, but *Edwards* bar did not apply to initial interrogation by U.S. authorities. However, there must be a complete rights advisement and waiver before the U.S. interrogation.[14]

4. When are requests for counsel effective?

a. Premature invocations.

(1) The right to counsel arises upon initiation of custodial interrogation.

(2) But, where a suspect is in custody and requests counsel from a person in apparent authority shortly before initiation of the interrogation, "it is artificial to draw a distinction between the formal interview . . . and these events which led up to it."[15]

(3) *McNeil v. Wisconsin*, 501 U.S. 171 (1991). In dicta, Justice Scalia opines that peremptory counsel elections are invalid. "We have never held that a person can invoke his *Miranda* rights 'anticipatorily' in a context other than custodial interrogation."

(4) *United States v. Schroeder*, 39 M.J. 471 (C.M.A. 1994). Even though under arrest (civilian law enforcement agents), accused's request to speak to an attorney before non-consensual urinalysis was "too little and too early" to qualify as invocation of his *Miranda* right to counsel. Accused had not been read his *Miranda* warnings or subjected to custodial interrogation.

(5) *United States v. Kendig*, 36 M.J. 291 (C.M.A. 1993). Electing to consult counsel during Article 15 proceeding: 1) does not constitute invoking Fifth Amendment right to counsel; 2) does not invoke a Sixth Amendment right to counsel; and, 3) does not require notice to counsel under Mil. R. Evid. 305(e), since subsequent interview concerned unrelated offenses. *See also United States v. Thomas*, 39 M.J. 1094 (A.C.M.R. 1994) (advising interrogator of representation by civilian attorney on unrelated matter does not trigger *Edwards* requirements).

(6) *Montejo v. Louisiana*, 556 U.S. 778 (2009). The majority, written by Justice Scalia, again asserts that "[w]e have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *McNeil*, 501 U.S. at 182, n.3.

b. Ambiguous request = equivocal request = no *Edwards* protection.

(1) Once a suspect initially waives his *Miranda* rights and agrees to submit to custodial interrogation without the assistance of counsel, only an unambiguous request for counsel will trigger the *Edwards* requirements.

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[14] *See also United States v. Dock*, 40 M.J. 112 (C.M.A. 1994) (accused's pretrial statements to U.S. military investigators were admissible after he requested U.S. counsel while under German custody even though U.S. investigators were present when accused requested counsel during German interrogations); *United States v. Hinojosa*, 33 M.J. 353 (C.M.A. 1991).

[15] *United States v. Goodson*, 18 M.J. 243 (C.M.A. 1984), *vacated*, 471 U.S. 1063 (1985) (remanded "for further consideration in light of *Smith v. Illinois*, 469 U.S. 91 (1984)"), *rev'd per curiam*, 22 M.J. 22 (C.M.A. 1986), *modified*, 22 M.J. 247 (C.M.A. 1986), *on remand*, 22 M.J. 947 (A.C.M.R. 1986).

(2) *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993), *aff'd*, 512 U.S. 452 (1994). Following an initial waiver, Davis stated to Naval Investigative Service (NIS) agents: "Maybe I should talk to a lawyer." The CMA ruled this ambiguous comment failed to invoke Fifth Amendment right to counsel, and NIS agent properly clarified ambiguous comment before continuing. The Supreme Court ruled that clarification of ambiguous counsel requests is not legally required. The invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed as an expression of a desire for the assistance of an attorney. If a suspect makes a reference to an attorney that is ambiguous or equivocal, questioning need not be terminated. A request is ambiguous if a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel.[16]

(3) *United States v. Morgan*, 40 M.J. 389 (C.M.A. 1994). Following initial waiver of Article 31 and counsel rights, accused made statement, but then asked "[c]an I still have a lawyer or is it too late for that?" The CMA rules that the accused's statement was an equivocal or ambiguous request for counsel.

(4) *United States v. Vandewoestyne*, 41 M.J. 587 (A.F. Ct. Crim. App. 1994). Evidence established under a totality of the circumstances, that accused made a knowing and intelligent waiver of his right to counsel and the right to remain silent at the initiation of the interview. Accused asking investigators if they thought he needed a lawyer was not a sufficiently clear statement that could have been understood as a request for counsel. Investigators nevertheless clarified the request, and accused then waived his right to counsel.

(5) *United States v. Nadel*, 46 M.J. 682 (N-M. Ct. Crim. App. 1997). CID interrogated the accused about indecent acts he allegedly committed. After an initial valid waiver of Article 31(b) and *Miranda* counsel rights, the accused told CID agents that he would not like to discuss oral sodomy without first receiving advice from a lawyer, but would be willing to answer questions concerning anything else without assistance of counsel. CID did not question Nadel about sodomy but did question him about indecent assault. Thereafter, Nadel made a written confession of the indecent assault. The NMCCA found that the request for a lawyer was "not a clear assertion of the right to have counsel present during the interview." The court, *citing Davis v. United States*, 512 U.S. 452 (1994), held that because it was an ambiguous request for counsel, the CID agent had no duty to stop the interrogation or clarify Nadel's equivocal request.

(6) *United States v. Henderson*, 52 M.J. 14 (C.A.A.F. 1999). German police apprehended the accused as a suspect in a stabbing incident. While in custody, the German police advised the accused of his rights (under both German law and Article 31(b)), obtained a waiver, and interrogated the accused. The accused denied involvement in the stabbing and eventually asked to continue the interview in the

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[16] A statement either is an assertion of the right to counsel, or it is not. In *Smith v. Illinois*, 469 U.S. 91 (1984), the Court found that the following interchange contained a request for counsel, stating that "[a]n accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself."

Q: You have a right to a lawyer.

A: Uh, yeah, I'd like to do that.

Q: If unable to pay, one will be appointed. Do you want a lawyer?

A: Yeah and no, uh, I don't know what's, really.

morning. The German police immediately stopped the questioning. Shortly thereafter, while the accused remained in custody, the CID observer, who was present during the initial interview, spoke to the accused in private. He emphasized the importance of telling the truth and that the accused had "nothing to worry about." The accused indicated he wanted to "tell the truth," but wanted to talk to a lawyer. Eventually, the accused agreed to make a statement and talk to a lawyer the morning. During the interview, the accused admitted to stabbing one of the victims. Citing *Davis*, the CAAF held that the accused's request to talk to a lawyer in the morning was an ambiguous request for counsel and did not invoke the protections of *Miranda* and *Edwards*.

(7) *United States v. Ford*, 51 M.J. 445 (C.A.A.F. 1999). An explosive device was found in the accused's barracks room during an inspection. Without giving warnings, an investigator questioned the accused at the barracks. When the accused "asked to have a lawyer present, or to talk to a lawyer," the investigator stopped the questioning. The investigator transported the accused to the CID office and, after obtaining a waiver of rights, questioned the accused again. The accused eventually gave a written confession. During the interview, however, the accused said that he didn't want to talk and thought he should get a lawyer. The investigator sought clarification and the accused responded that he wanted a lawyer if the investigator continued accusing him of lying. After further clarification, the accused agreed to continue with the questioning. The CAAF found that the accused did not invoke his Fifth Amendment right to counsel during the barracks' questioning. Further, the court held that accused's comment about a lawyer during the CID office interrogation was an ambiguous request for a lawyer and did not invoke the *Miranda* or *Edwards* protections.

(8) *United States v. Delarosa*, 67 M.J. 318 (C.A.A.F. 2009). Accused was questioned by civilian law enforcement for homicide charges related to the death of his infant son. After repeatedly telling investigators that he wanted to talk to them, he signed "no" on the form next to the block that read, "I further state that I waive these rights and desire to make a statement." After investigators attempted to clarify, accused asked for a command representative. Investigators denied this request and left accused alone. Several hours later, accused asked to talk. He was re-advised of his rights and waived them. The CAAF found the first invocation to be ambiguous, but held that officers could continue to attempt clarify his initial ambiguous invocation and resume questioning at any time.

(9) Practice tip: Clarification of ambiguous requests is probably still a good idea. Clarification will preclude later disputes over whether request was ambiguous as a matter of law.

C. Sixth Amendment Counsel Rights. *Montejo v. Louisiana*, 556 U.S. 778 (2009). The Court ruled that *Edwards* applies to the Sixth Amendment right to counsel.

1. Mil. R. Evid. 305(c)(3); 305(d).

2. *McNeil v. Wisconsin*, 501 U.S. 171 (1991). Sixth Amendment right to counsel is offense specific. Therefore, police may approach a suspect, who has counsel for a charged offense, about a different uncharged offense. Invocation of the Fifth Amendment right to counsel cannot be inferred from the invocation of the Sixth Amendment right in light of the differing purposes and effects of the two rights.

3. *United States v. Sager*, 36 M.J. 137 (C.M.A. 1992). Representation by civilian counsel on child sex abuse charges pending in civilian court did not constitute invocation of right to

counsel with respect to later questioning by CID concerning unrelated child sex abuse offenses on a military installation.

4. *United States v. Kendig*, 36 M.J. 291 (C.M.A. 1993). Court held that exercising option to consult counsel during Article 15 proceeding: 1) did not constitute invoking Fifth Amendment right to counsel; 2) did not create a Sixth Amendment right to counsel; and, 3) did not require notice to counsel under Mil. R. Evid. 305(e) since subsequent interview concerned unrelated offenses.

5. *United States v. Hanes*, 34 M.J. 1168 (N.M.C.M.R. 1992). "[A] request for counsel at an RCM 305(i) hearing before charges have been preferred neither invokes a Sixth Amendment right to counsel because the hearing is not an adversarial proceeding nor invokes a Fifth Amendment right to counsel because the hearing is not the functional equivalent of a custodial interrogation."

VII. WAIVER OF RIGHTS

Before the government can introduce statements of the accused in its case in chief, it must prove a knowing, intelligent, and voluntary waiver of the accused's applicable rights.

A. Mil. R. Evid. 305(e).

B. Implied Waiver.

1. Although an express waiver is not required, courts generally will not presume a waiver from a subject's silence or subsequent confession alone. Implied waiver scenarios are rare and limited to the facts of the case.

2. If the right to counsel is not declined affirmatively, the "prosecution must demonstrate by a preponderance . . . that the individual waived the right to counsel." Mil. R. Evid. 305(e)(2).

3. *North Carolina v. Butler*, 441 U.S. 369 (1979). An express statement of waiver of the *Miranda* right to counsel is not invariably necessary. Waiver was established where accused was advised of rights, said he understood them, refused to sign waiver, but agreed to talk.[17]

4. *United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990). "Mil. R. Evid. 305(g)(2) does not create an exception to the requirement that an accused must intentionally relinquish his right to counsel, rather it permits proof of the waiver by evidence other than the accused's own expression that he knows of his right to counsel, understands his right, and intentionally elects to relinquish that right." *Id.* at 241 (Cox. J., concurring).

5. *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010). The Supreme Court held that "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police."

C. "Intelligent" and "knowing" waiver.

1. *Moran v. Burbine*, 475 U.S. 412 (1986). Neither the police failure to inform a suspect of an attorney's efforts to reach him, nor the police misinforming the attorney of their plans to interrogate the suspect undercuts an otherwise valid waiver by the suspect of his *Miranda* rights.

2. *Colorado v. Spring*, 479 U.S. 564 (1987). Accused was arrested for selling stolen firearms, was advised of his rights, which he waived, and questioned on the sales and also about a prior murder the police had not previously mentioned. "We hold that a suspect's awareness of all

[17] In *Butler*, the Court made a distinction between an express written or oral statement of waiver and a waiver clearly inferred from the actions and words of the person interrogated. However, both types of waiver were deemed sufficient for purposes of waiver of the right to counsel after appropriate advice.

the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." "Spring's decision to waive his . . . privilege was voluntary. He alleges no 'coercion . . . by physical violence or other deliberate means calculated to break [his] will.'" His waiver was "knowingly and intelligently made: that is, that Spring understood that he had the right to remain silent and that anything he said could be used as evidence against him."

3. *Connecticut v. Barrett*, 479 U.S. 523 (1987). In response to rights warnings, accused stated he would not give a written statement unless his attorney was present, but he would give an oral statement. Held: waiver was effective; "[t]he fact that some might find Barrett's decision illogical is irrelevant, for we have never 'embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness.'"

4. *United States v. Thornton*, 22 M.J. 574 (A.C.M.R. 1986). Accused's consumption of 6 to 18 beers prior to interrogation did not invalidate otherwise proper rights waiver.

D. Voluntariness of waiver.

1. The government must prove by a preponderance of the evidence that a suspect waived his applicable rights. In order to prove a valid waiver, the government must show:

a. that the relinquishment of the defendant's rights was voluntary; and

b. that the defendant had a full awareness of the right being waived and of the consequences of waiving that right. *See Moran v. Burbine*, 475 U.S. 412 (1986).

E. Presence of Counsel as a Predicate to Waiver.

1. Custodial Interrogation [Mil. R. Evid. 305(b)(3)].[18] Absent a valid waiver of counsel under Mil. R. Evid. 305(e),19 when an accused or person suspected of an offense is subjected to custodial interrogation, and the accused or suspect requests counsel, counsel must be present before any subsequent custodial interrogation may proceed. Mil. R. Evid 305(d).

United States v. Finch, 64 M.J. 118 (C.A.A.F. 2006). The *McOmber* rule requiring notification of counsel prior to questioning a suspect who has previously asserted his right to counsel under the Fifth Amendment is overruled. Mil. R. Evid. 305(c) provides for only two situations where counsel must be present, absent waiver: (1) custodial interrogations (e.g., *Edwards* rule); and (2) post-preferral interrogation (where the suspect's Sixth Amendment right to counsel has been invoked and the questions concern the offense(s) charged).

2. Post-preferral interrogation. Mil. R. Evid. 305(e)(3)(B) provides that if a person makes a valid request for counsel subsequent to the preferral of charges (e.g., Sixth Amendment request for counsel), any subsequent waiver of that right is invalid unless the prosecution can show that the accused initiated the communication leading to the waiver. *But see Montejo v. Louisiana*, 556 U.S. 778 (2009).

[18] If an accused or suspect is interrogated by a person required to give Article 31 warnings and the accused or suspect is in custody, or reasonably believes himself to be in custody, or is otherwise deprived of his freedom of action in any way, and requests counsel, any subsequent waiver of the right to counsel obtained during custodial interrogation concerning the same or different offense is invalid unless the prosecution can demonstrate by a preponderance of the evidence that: (1) the accused or suspect initiated the communication leading to waiver; or (2) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver.

a. The rules concerning invocation of the Sixth Amendment right to counsel set limits on subsequent interrogation concerning the charged offense or offenses.

b. However, the Sixth Amendment right to counsel is "offense specific." Law enforcement may question a suspect on an offense that has not been preferred/indicted. The test to determine whether there are two different offenses is whether each provision requires proof of a fact that the other does not (i.e., the *Blockburger* test). *Texas v. Cobb*, 532 U.S. 162 (2001).

F. Waiver of PASI at trial.

1. "A witness who answers a self-incriminating question without having asserted the privilege against self-incrimination may be required to answer the questions relevant to disclosure, unless the questions are likely to elicit additional self-incriminating information." Mil. R. Evid. 301(e).

2. By testifying on direct examination about an offense for which he is being tried, an accused does not, however, waive his privilege against self-incrimination with respect to uncharged misconduct at an entirely different time and place. *United States v. Castillo*, 29 M.J. 145 (C.M.A. 1989).

3. Claiming the privilege during cross-examination.

a. Mil. R. Evid. 301(e)(1): "If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct . . . , in whole or in part, unless the matters to which the witness refuses to testify are purely collateral."[20]

b. If matters to which the witness refuses to testify during cross-examination are purely collateral, there is no right to have the witness's direct testimony stricken. *United States v. Evans*, 33 M.J. 309 (C.M.A. 1991).

c. *United States v. Moore*, 36 M.J. 329 (C.M.A. 1993). Military judge was within his discretion to strike the entire direct testimony of a defense witness following assertion of right against self-incrimination on cross-examination.

d. *United States v. Lawless*, 13 M.J. 943 (A.F.C.M.R. 1982). A government witness testified he had assisted accused in weighing and packing marijuana but refused to testify about who had supplied the baggies and other packaging equipment. The military judge properly refused to strike the direct testimony since the information about the source of the equipment was collateral to the core of the direct.

4. Confessional stipulations. *United States v. Craig*, 48 M.J. 77 (C.A.A.F. 1998). Entering into a confessional stipulation does not waive the accused's constitutional rights against self-incrimination, to a trial of the facts, and to confront and cross-examine the witnesses against her.

5. The impact of a guilty plea on PASI.

a. Trial counsel are permitted to use a guilty plea to a lesser-included offense to establish elements common to both the greater and lesser crimes of a single specification. *United States v. Rivera*, 23 M.J. 89 (C.M.A. 1986); *see also* RCM 920(e). They may not, however, reach back to the providency inquiry to find evidence to condemn the accused from his own mouth on a separate offense. *United States v. Craig*, 63 M.J. 611 (A.F. Ct. Crim. App. 2006).

[20] The Analysis to the rule describes collateral matters as "evidence of minimal importance" ("usually dealing with a rather distant fact solicited for impeachment").

b. *Mitchell v. United States*, 526 U.S. 314 (1999). The Supreme Court held that in the federal criminal system, a guilty plea does not waive the self-incrimination privilege at sentencing. The Court found that the protection of the Fifth Amendment privilege applies equally to the sentencing phase of trial as it does to the guilt phase, and that negative inferences cannot be drawn by the accused's election to remain silent during the sentencing phase.

VIII. VOLUNTARINESS

The concept of voluntariness entails elements of the voluntariness doctrine, due process, and compliance with Article 31(d).[21] Whether or not *Miranda* is implicated, a confession must be voluntary to be valid. Thus, a confession deemed coerced must be suppressed despite a validly obtained waiver in the first instance. In determining whether a confession is voluntary, it is necessary to look at the totality of the circumstances concerning whether the accused's will was overborne and whether the confession was the product of an essentially free and unconstrained choice by its maker. Some factors to consider in assessing the totality of the circumstances include the age, education, and intelligence of the accused, whether the accused has been informed of his constitutional rights, the repeated and prolonged nature of the questioning, and the use of physical punishment, such as the deprivation of food or sleep.

A. The Test.

1. "The principles for determining whether a pretrial statement was [involuntary] is essentially the same whether the challenge is based on the Constitution, Article 31(d), or Mil. R. Evid. 304." *United States v. Bubonics*, 45 M.J. 93 (C.A.A.F. 1996).

2. "The necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker. If, instead, the maker's will was overborne and his capacity for self-determination critically impaired, use of the confession would offend due process."[22]

3. In applying a totality of the circumstances test to determine if the government has shown by a preponderance of the evidence that the accused will was not overborne in the making of a

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[21] *See generally* Captain Fredric I. Lederer, *The Law of Confessions — the Voluntariness Doctrine*, 74 Mil. L. Rev. 67 (1976).

Article 31(d) provides:

> No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

The Analysis to Mil. R. Evid. 304(c)(2) (MCM 2016 ed.) lists examples of involuntary statements as those resulting from: coercion, unlawful influence, and unlawful inducement, to include infliction of bodily harm, deprivation of food, sleep, or adequate clothing; threats of bodily harm; confinement or deprivation of privileges because a statement was not made, or threats thereof; promises of immunity or clemency; promises of reward or benefit, or threats of disadvantage.

[22] *Bubonics*, 45 M.J. at 95. In *Bubonics*, the court found that while "Mutt and Jeff" techniques and threat of civilian prosecution interrogation techniques do not amount to *per se* coercion, based on the facts of the case, the interrogators improperly coerced Bubonics' statement. *See also Ledbetter v. Edwards*, 35 F.3d 1062 (6th Cir. 1994) (finding that the accused's confession was voluntary, the court considered the following factors: 1) no physical punishment or threats had been used; 2) no deprivation of physical necessities, such as food and drink or bathroom privileges; 3) short interrogation (3 hours); 4) informed of his *Miranda* warnings three different times; 5) clear indication Ledbetter understood his rights and did not appear under the influence of drugs or alcohol or otherwise unable to comprehend those rights; 6) did not express a reluctance to talk; and, 7) no request for the presence of an attorney).

confession, the court will consider: (1) the characteristics of the accused, (2) conditions of the interrogation, and (3) conduct of the law enforcement officials.[23]

4. *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008). Despite AFOSI agent conduct that included a ten-hour interview, two polygraphs, lies about the existence of the suspect's fingerprints at the crime scene and threats to turn the suspect over to civilian law enforcement if he did not confess, the subsequent confession was not involuntary under the totality of the circumstances.

5. *United States v. Lichtenhan*, 40 M.J. 466 (C.M.A. 1994). While a cleansing warning is not a requirement for admissibility, an earlier unwarned statement coupled with the lack of a cleansing warning before a subsequent statement are all part of the "totality of the circumstances" in determining if the subsequent statement was made voluntarily.

6. *United States v. Griffin*, 50 M.J. 278 (C.A.A.F. 1999). At trial, the prosecutor introduced a confession the accused made to Defense Investigative Service (DIS) agents during a security clearance update interview. The CAAF upheld the military judge's decision to admit the confession. In doing so, the court stated that "the voluntariness of a confession is determined by examining the totality of the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." The court also determined that the military judge's decision to exclude defense expert testimony about false confessions was proper.

7. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In determining whether a confession has been elicited by means that are unconstitutional, it is necessary to look at the totality of the circumstances concerning "whether the defendant's will was overborne in a particular case." Factors to consider in assessing the totality of the circumstances include the age, education, and intelligence of the accused; whether the accused has been informed of his constitutional rights; the length of the questioning; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food or sleep.

8. *United States v. Henderson*, 52 M.J. 14 (C.A.A.F. 1999). In deciding that the confession was voluntary, the court gave significant weight to the fact that the accused couched his admissions in an exculpatory manner in the hopes of avoiding trouble.

9. *United States v. Ford*, 51 M.J. 445 (C.A.A.F. 1999). Based on the totality of the circumstances, the CAAF held that the accused's written confession was voluntary, and was not tainted by an earlier unwarned, yet not coerced, interrogation.

B. Use of Deception.

1. *Miranda v. Arizona*, 384 U.S. 436 (1966). Any evidence that the accused was threatened, tricked, or cajoled into a waiver will show that the defendant did not voluntarily waive his privilege.

2. *United States v. Davis*, 6 M.J. 874 (A.C.M.R. 1979). After a proper waiver, deception is permissible in the interrogation process as long as the artifice is not likely to produce an untrue confession.

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[23] *United States v. Vandewoestyne*, 41 M.J. 587 (A.F. Ct. Crim. App. 1994) (totality of the circumstances established accused's confession was knowing and voluntary, even though he was ultimately persuaded to confess because of fear that a failure to cooperate might lead to deportation of his wife if her complicity in offenses was ever known to the INS); *see also United States v. Wheeler*, 22 M.J. 76 (C.M.A. 1986); *United States v. Norfleet*, 36 M.J. 129 (C.M.A. 1992); *United States v. Doucet*, 43 M.J. 656 (N-M. Ct. Crim. App. 1995); *United States v. Briggs*, 39 M.J. 600 (A.C.M.R. 1994); *United States v. Gill*, 37 M.J. 501 (A.F.C.M.R. 1993).

3. *United States v. Jones*, 34 M.J. 899 (N.M.C.M.R. 1992). NIS agent falsely stated that co-accused had "fingered" the accused as the sole perpetrator. This misrepresentation, though relevant to a determination of voluntariness, does not render an otherwise voluntary statement involuntary.

4. *United States v. Thrower*, 36 M.J. 613 (A.F.C.M.R. 1992). When accused continued to deny involvement in ATM card theft, another OSI agent was introduced as "Dr. Paul," a psychologist/psychic with a special power to know when he was being told a lie by looking into his crystal ball. Accused eventually made admissions to "Dr. Paul." The court considered the "cornball ruse" as nothing more than an adjuration to the accused to tell the truth and did not render confession involuntary.

5. *United States v. Sojfer*, 47 M.J. 425 (C.A.A.F. 1998). During an interrogation, the NCIS agent stated a proposition that he knew was false. In response, the accused corrected the agent with incriminating information. Applying a totality of the circumstance analysis, the CAAF denied the accused's claim that the statement was involuntary, i.e., the product of "fraud and trickery."

C. Due process/unlawful inducements.

1. *Colorado v. Connelly*, 479 U.S. 157 (1986). Official coercion is a necessary element in showing a violation of due process. In *Connelly*, the defendant, who was later diagnosed as mentally ill, approached a police officer and confessed to a murder. Despite testimony that his mental illness interfered with his free will, the Court found the confession was voluntary because there was no evidence of coercion by the police. The Court noted that the defendant's mental condition would be an important consideration when police use subtle psychological methods of coercion, but rejected the idea "that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness.'"

2. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). To render an inducement unlawful under Article 31(d), "[the] inducement must be made by someone acting in a law enforcement capacity or in a position superior to the person making the confession." A promise of confidentiality from U.S. Intelligence agent (non-police agent) did not constitute unlawful inducement; therefore, the accused's confession was voluntary.

3. *United States v. Campos*, 48 M.J. 203 (C.A.A.F. 1998). Five weeks after a serious car accident, while the accused was medicated and in the hospital recovering from injuries, NCIS agents questioned him about wrongful use and distribution of methamphetamine. Prior to the questioning, the accused was advised of his rights under Article 31(b) and *Miranda*. The court held that the actions of the NCIS agents did not rise to "government overreaching," and that the accused's mental state was not such as to render the confessions involuntary. The court stated that the accused's mental state is just a factor in determining the voluntariness of a confession and is only considered if there is a governmental due process violation due to overreaching.

4. *United States v. Morris*, 49 M.J. 227 (C.A.A.F. 1998). An investigator telling the accused during an interrogation that "[i]f you help us, we will help you," did not amount to unlawful inducement.

5. *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991). Senior law enforcement noncommissioned officer's admonishments to cooperate did not overbear the suspect's freely drawn conclusion that it was in his own best interest to cooperate.

6. *United States v. Murphy*, 18 M.J. 220 (C.M.A. 1984). Trial counsel's advice that cooperation with Japanese police could result in a more lenient sentence merely provided the

accused information with which to make an informed, tactical judgment as to his making a statement.

D. Coercion/Threats.

1. Mil. R. Evid. 304(a)(1)(A) defines inadmissible involuntary statements as those obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment or Article 31 or through use of coercion, unlawful influence, or unlawful inducement. The drafters' analysis for this provision states:

> The language governing statements obtained through the use of "coercion, unlawful influence, and unlawful inducement," found in Article 31(d) makes it clear that a statement obtained by any person, regardless of status, that is the product of such conduct is involuntary. Although it is unlikely that a private citizen may run afoul of the prohibition of unlawful influence or inducement, such a person clearly may coerce a statement and such coercion will yield an involuntary statement.[24]

2. *United States v. Ellis*, 57 M.J. 375 (C.A.A.F. 2002). The appellant was subjected to several hours of interrogation during which he was accused of killing his two-year-old child. During the interrogation, the appellant was told that there was enough evidence to arrest him and his wife (who was also being subjected to interrogation). He was also told that his children would be taken away and put in foster care if he and his wife were arrested. The appellant and his wife met for fifteen minutes; after the meeting the appellant confessed to slamming his son's head on the ground on two different occasions. The court concluded that although the detective's statement regarding the possible removal of appellant's children may have contributed to his confession, the statement was still the product of an essentially free and unconstrained choice by the appellant, and thus was voluntary. *See also United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005).

3. *Arizona v. Fulminante*, 499 U.S. 279 (1991). The accused was befriended by another inmate, an FBI informant, who promised to protect the accused from other inmates if he would tell what happened concerning the murder of the accused's 11-year-old daughter. Under "totality of the circumstances" the subsequent confession was involuntary. The Court found that a credible threat of physical violence existed unless the accused confessed. "Coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." Other factors that may have been relevant in determining whether the accused's will has been overborne include: accused's intelligence, physical stature, prior prison experiences, and relationship with the informant.

4. *United States v. Martinez*, 38 M.J. 82 (C.M.A. 1993). Confession during polygraph examination could be found involuntary as result of psychological coercion, even though accused had waived his rights and was free to leave motel room. Accused testified that his will was overborne. Coercive factors considered included duration of interrogation, the nature of the

[24] Although written well before Connelly, the drafters' analysis is probably still a correct interpretation of the law. From the perspective of a due process analysis, statements are excluded as the result of governmental misconduct. The Supreme Court observed in Connelly, however, that even if a confession is constitutionally voluntary, due to the absence of government misconduct, it might still be proved unreliable as a matter of law. In this regard, the admissibility of a statement is governed by the evidentiary laws of the forum, and not by the Due Process Clause. As implemented by Mil. R. Evid. 304, the statutory protection of Servicemembers under Article 31 clearly contemplates not only an analysis of due process voluntariness, but also consideration of voluntariness as a matter of fundamental reliability. Accordingly, statements coerced by private citizens may still be held inadmissible under Mil. R. Evid. 304.

interrogation techniques, and the accused's frustrated attempts to obtain assistance of counsel during the investigation.

5. *United States v. Benner*, 57 M.J. 210 (C.A.A.F. 2002). Appellant's confession to CID was involuntary, since the appellant was faced with the "Hobson's choice" of either confessing on his own, or having the chaplain inform CID of his earlier admissions to child sexual abuse while seeking counseling from the chaplain.

6. *Haynes v. Washington*, 373 U.S. 503 (1963). Petitioner's written confession violated due process because it was obtained through the use of threats and isolation techniques by police. Failure to inform petitioner of his rights was another relevant factor in determining whether the confession was voluntary. The court further observed that the refusal to allow petitioner to communicate with his attorney or his wife was a misdemeanor under state law.

7. *United States v. O'Such*, 37 C.M.R. 157 (C.M.A. 1967). The fact that appellant was deprived of sleep, had threats made against his family during the interrogation, and was threatened with being charged with misprision of a felony if he continued to remain silent led to his coerced oral admissions.

8. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). A thirty-six hour interrogation was determined to be so "inherently coercive" as to render a resulting confession automatically involuntary. The Court seems to further indicate that the longer the interrogation, the less important the other factors become when evaluating the totality of the circumstances.

E. Military Self-Reporting Requirements

1. *United States v. Castillo*, 74 M.J. 160 (C.A.A.F. 2015). The Navy changed their Navy's Standard Organization and Regulation Manual to include a self-reporting requirement that "Any person arrested or criminally charged by civil authorities shall immediately advise their immediate commander of the fact that they were arrested or charged." Appellant was arrested for DUI off-base, but failed to report the arrest to her command. Her command learned of the arrest during an unrelated visit to the local courthouse. Appellant was charged with violating a lawful order under Article 92 of the UCMJ.

IX. ADMITTING CONFESSIONS MADE AFTER IMPROPER POLICE CONDUCT

Generally, a confession obtained after an illegal search, arrest, or prior confession is inadmissible, unless the government can show sufficient attenuation of the taint. If the prior illegality is a result of procedural defects, it will be easier for the government to show attenuation of the taint. If, however, the prior illegality resulted from a constitutional violation (i.e., coercion) then it is unlikely the government will prevail.

A. After an illegal arrest or search.

1. *Brown v. Illinois*, 422 U.S. 590 (1975). *Miranda* warnings alone are insufficient to cure taint of arrest made without probable cause or warrant. Factors to consider on attenuation of the taint: (1) *Miranda* warnings; (2) "temporal proximity" of the illegal arrest and the confession; (3) "intervening circumstances"; and, (4) "purpose and flagrancy of the official misconduct".

2. *Wong Sun v. United States*, 371 U.S. 471 (1963). Statements made by appellant in his bedroom at the time of his unlawful arrest were the fruits of the agents' unlawful action, and they should have been excluded from evidence. However, since the appellant was later lawfully arraigned and released on his own recognizance and had returned voluntarily several days later when he made his unsigned statement, the connection between his unlawful arrest and the making

of this later statement was so attenuated that the unsigned statement was not the fruit of the unlawful arrest and, therefore, it was properly admitted in evidence.

3. *United States v. Washington*, 39 M.J. 1014 (A.C.M.R. 1994). Unlawful search tainted statements made by accused where first statement was taken immediately after search and discussed items found during search. While a rights warning is a relevant factor in attenuating a statement from prior official misconduct, a warning alone cannot always break the casual connection. *See also New York v. Harris*, 495 U.S. 14 (1990) (where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the use of a statement made by the defendant outside of his home, even though the statement is taken after an illegal warrantless arrest made in the home); *United States v. Khamsouk*, 57 M.J. 282 (C.A.A.F. 2002) (although appellant was seized during an illegal search, his continued custody at the police station was based on probable cause, therefore, his subsequent warned statement to police was properly admitted).

4. *United States v. Mitchell*, 31 M.J. 914 (A.F.C.M.R. 1990). *Harris* applied. Statement made to police who entered accused's motel room based on probable cause, but without a warrant or his consent should have been suppressed, but written statement given three days later was admissible.

5. *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994). Illegality of urinalysis precluded admission of accused's statements, where urinalysis results were delivered to accused on day he made his initial confession, accused was directed to bring form notifying him of positive results to the criminal investigative division office, and positive results of the challenged urinalysis were the sole basis for the accused's questioning by the military police. However, no cleansing warning was given.

B. After an inadmissible confession.

1. Question first tactic. *Missouri v. Seibert*, 542 U.S. 600 (2004). Police engaged in a common interrogation tactic of questioning the suspect. Once they obtained the confession, they would read the suspect her rights, get a waiver, and then obtain a second confession. The Supreme Court held that the warned confession was inadmissible, since the police's deliberate tactic of withholding *Miranda* warnings elicited an initial confession that was used to undermine the "comprehensibility and efficacy" of the subsequent *Miranda* warnings. Under the circumstances of the case, the Court concluded that it would have been reasonable for the suspect to regard the two phases of the interrogation as a continuum, especially since the officer referred back to the earlier admissions. The mere recital of *Miranda* warnings in the middle of this continuous interrogation was not sufficient to separate the two phases in suspect's mind. Therefore, she would have concluded that it would be unnatural for her not to repeat the same information she had just given. She would not have understood that she had a choice about continuing to talk.

2. *Oregon v. Elstad*, 470 U.S. 298 (1985). "A suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." "Administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible." However, no cleansing warning required. *See also United States v. Lichtenhan*, 40 M.J. 466 (C.M.A. 1994).

3. *United States v. Phillips*, 32 M.J. 76 (C.M.A. 1991). An unwarned statement obtained without actual coercion does not presumptively taint a subsequent, warned statement. Government must prove by a preponderance of the evidence, however, that the warned statement was voluntary and was not obtained by using the earlier statement. If the initial statement is the product of actual coercion, duress, or inducement, it presumptively taints subsequent warned

statements. Cleansing warnings, although not legally required, will help show voluntariness. *Cf. United States v. Torres*, 60 M.J. 559 (A.F. Ct. Crim. App. 2004).

4. *United States v. Steward*, 31 M.J. 259 (C.M.A. 1990). Mere "technical violations of Article 31(b)" do not presumptively taint subsequent warned statements. The appropriate legal inquiry in these types of cases is whether his subsequent confession was voluntary considering all the facts and circumstances of the case, including the earlier technical violation of Article 31(b).

5. *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006). Where an earlier statement is "involuntary" only because the accused has not been properly warned of his Article 31(b) rights, the voluntariness of the second statement is determined by the totality of the circumstances. The earlier unwarned statement is a factor in this total picture, but it does not presumptively taint the subsequent statement. If a "cleansing warning" has been given — where the accused is advised that a previous statement cannot be used against him — that statement should be taken into consideration. If a cleansing statement is not given, however, its absence is not fatal to a finding of voluntariness.

6. *United States v. Gardinier*, 65 M.J. 60 (C.A.A.F. 2007), *rev'd on other grounds*, 67 M.J. 304 (C.A.A.F. 2009). Suspect provided two incriminating statements to civilian investigators following a proper *Miranda* rights warning. Immediately after making these statements, a CID agent entered the interview room, identified himself, and obtain a third incriminating statement without advising the suspect of his Article 31 rights. Four days later, the suspect was called to the CID office and advised that his prior statement was given with what "may not have been a proper rights advisement." The suspect was then asked whether he would be willing to make another statement. He did. While the court suppressed the first (unwarned) statement to CID, the second statement was found to be voluntary under the totality of the circumstances despite the fact the accused had not been specifically informed that his first statement to CID might be inadmissible.

7. *United States v. Young*, 49 M.J. 265 (C.A.A.F. 1998). A two-day period was enough to purge the taint from the previous inadmissible confession. *See also United States v. Ford*, 51 M.J. 445 (C.A.A.F. 1999); *United States v. Allen*, 59 M.J. 478 (C.A.A.F. 2004); *United States v. Cuento*, 60 M.J. 106 (C.A.A.F. 2004).

8. *Michigan v. Tucker*, 417 U.S. 433 (1974). Police failure to advise appellant of his right to appointed counsel did not require that the testimony of a witness identified in appellant's statement be suppressed.

X. THE EXCLUSIONARY RULE

No statement obtained in violation of Article 31, *Miranda*[25] Sixth Amendment,[26] or due process may be received in evidence in the case in chief in a trial by court-martial against the subject of the

[25] *Harris v. New York*, 401 U.S. 222 (1971); *accord Oregon v. Hass*, 420 U.S. 714 (1975).

[26] *Kansas v. Ventris*, 556 U.S. 586 (2009) (statement to informant, admittedly elicited in violation of the Sixth Amendment, was admissible to impeach defendant's inconsistent testimony at trial); *Michigan v. Harvey*, 494 U.S. 344 (1990) (statement given in response to police-initiated interrogation following attachment of accused's Sixth Amendment right to counsel, although not admissible in the prosecution's case-in-chief, may be used to impeach the defendant's testimony, at least when the defendant gives a knowing and voluntary waiver of his right to counsel); *United States v. Langer*, 41 M.J. 780 (A.F. Ct. Crim. App. 1995) (statements made by accused after preferral of drug charges against him to person recruited as drug informant by government agents were obtained in violation of accused's Sixth Amendment right to counsel and could not be used in government's case-on-chief. Although informant may have been intended to act as a passive listening post, person in fact initiated contact and conversations with accused for the express purpose of gathering information about illegal drug activity. Statements could be used in rebuttal if such information became relevant to impeach accused's testimony).

violation. Evidence resulting from "mere" procedural violations may be allowed to impeach the testimony of the accused. Rationale for allowing impeachment use is that in an impeachment situation, the search for the truth in a criminal case outweighs the deterrence value of the exclusionary rule. Coerced statements are inadmissible for all purposes, to include impeachment of the accused. Otherwise inadmissible statements may also be admissible in a later prosecution against the accused for perjury, false swearing, or making of a false official statement.

A. The general rule: Mil. R. Evid. 304(a). "[A]n involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule."

B. The inevitable discovery exception.

1. Mil. R. Evid. 304(b) provides that:

a. Evidence challenged as derivative evidence may be admitted against the accused only if the military judge finds by a preponderance of the evidence that:

(1) the statement was made voluntarily,

(2) the evidence was not obtained by use of the statement, or

(3) the evidence would have been obtained even if the statement had not been made.

2. *United States v. Kline*, 35 M.J. 329 (C.M.A. 1992). Accused, on his own initiative, contacted his commander and stated, "I have just turned myself in for sexually molesting my daughter." The court found admission was not inadmissible involuntary derivative evidence, despite suppression of a similar admission made to a military social worker hours earlier.

C. Statements incriminating others.

1. Exclusionary rule does not apply to coerced or unadvised witness statements that incriminate someone else. Instead, evidence of coercive or illegal investigatory tactics employed by the government to secure such evidence or subsequent testimony based thereon may be presented to the fact-finder for purposes of determining the weight to be afforded this evidence.

2. *United States v. McCoy*, 31 M.J. 323 (C.M.A. 1990). No due process violation where trial counsel deliberately advised CID agents not to advise suspects of their Article 31 rights, suspects later gave immunized testimony against accused, and accused had a full opportunity to present this improper conduct to the members through cross-examination, witnesses, and argument.

D. False Official Statement charge. *United States v. Swift*, 53 M.J. 439 (C.A.A.F. 2000). The government may only use a statement taken in violation of Article 31 in a later prosecution for false official statement, where the accused has taken the stand in an earlier prosecution, thereby "open[ing] the door to consideration of the unwarned statement by his or her in-court testimony." *See also* Mil. R. Evid. 304(e)(2).

E. Derivative physical evidence

1. General rule: Mil. R. Evid. 304(b).

2. *United States v. Patane*, 542 U.S. 630 (2004). After arresting the defendant at his house and before completely giving him *Miranda* warnings, the police asked him where his pistol was. The defendant told the officers the location of the pistol, and then, per their request, gave the officers permission to enter and seize it. The Supreme Court held that the pistol was admissible. A plurality of the Court concluded that the Self-Incrimination Clause of the Fifth Amendment protects individuals from being compelled to testify against themselves in a criminal proceeding.

Thus, the Clause cannot be violated by admitting nontestimonial evidence obtained through the use of unwarned, yet voluntary statements. Creating a blanket suppression rule for such evidence does not serve the Fifth Amendment's goals of "assuring trustworthy evidence" or deterring police misconduct. Additionally, the protections of *Miranda* are not violated when officers fail to give warnings, regardless of whether the failure is negligent or intentional. Instead, *Miranda's* protections are violated when unwarned statements are admitted against the declarant at trial. Suppression of unwarned statements is a complete remedy to protect this fundamental "trial right." Therefore, the "fruit of the poisonous tree" doctrine does not apply to evidence derived from *Miranda* violations.

XI. MENTION OF INVOCATION AT TRIAL

A. Silence at trial.[27]

1. *Griffin v. California*, 380 U.S. 609 (1965). Comment by the prosecutor on the accused not testifying violates the Fifth Amendment and due process.

2. *Portuondo v. Agard*, 529 U.S. 61 (2000). A prosecutor's comments about the defendant's opportunity to watch other witnesses testify before he took the stand and to tailor his testimony accordingly, did not amount to a constitutional violation, but were instead a fair comment on factors effecting the defendant's credibility. The Supreme Court held that "when [a defendant] assumes the role of a witness, the rules that generally apply to other witness — rules that serve the truth-seeking function of the trial — are generally applicable to him as well."

3. *United States v. Robinson*, 485 U.S. 25 (1988). Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin*, holds that the privilege against compulsory self-incrimination is violated. But where the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, there is no violation of the privilege.

4. *United States v. Cook*, 48 M.J. 64 (C.A.A.F. 1998). During closing argument, trial counsel asked the members to consider the accused's yawning during trial as being indicative of his guilt. The CAAF held that it was improper for the trial counsel to comment about the courtroom demeanor of the accused, but found the error to be harmless. The Court determined that the accused's acts were non-testimonial and therefore not protected by the Fifth Amendment. Regardless, the acts were not relevant to the issue of guilt or innocence. *See also United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999).

5. *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991), *aff'd*, 36 M.J. 34 (C.M.A. 1992) (summary disposition). Trial counsel asked rhetorical questions directed to accused during argument on findings, and then answered them himself in manner calculated to bring the accused's silence to the members' attention. "[A] trial counsel may not comment directly,

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[27] Mil. R. Evid. 301(f) sets forth the general rule:

(1) "fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the government."

* * *

(2) "fact that the accused during official questioning and in exercise of rights . . . remained silent, refused to answer . . . , requested counsel, or requested that the questioning be terminated is inadmissible against the accused."

indirectly, or by innuendo, on the fact that an accused did not testify in his defense." Harmless error despite legally inappropriate comments.

6. *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Trial counsel improperly described non-testifying accused's demeanor as "[t]he iceman." Comments on a non-testifying accused's demeanor are objectionable on three grounds: 1) argues facts not in evidence; 2) violates Mil. R. Evid. 404(a) by using character evidence solely to prove guilt; and, 3) violates the Fifth Amendment. Defense counsel only objected on third ground, which was cured by an instruction. Other grounds were waived and not plain error. *See also United States v. Jackson*, 40 M.J. 820 (N.M.C.M.R. 1994) (trial counsel's argument on findings that accused's tears in court were tears of remorse and guilt was harmless error even though the accused's courtroom behavior off of the witness stand was legally irrelevant to the question of guilt).

7. *United States v. Carter*, 61 M.J. 30 (C.A.A.F. 2005). The CAAF held that the trial counsel's repeated comments about the "uncontroverted" and "uncontradicted" evidence during findings argument constituted an impermissible reference to the accused's exercise of his Fifth Amendment right not to testify. The trial counsel's comments on the defense's failure to present contradicting evidence were not tailored to address any weaknesses in the defense's cross-examination of the victim or the defense's efforts to impeach her; rather, since only the accused could controvert the victim, the trial counsel's comments in effect repeatedly drew the members' attention to the accused's failure to testify.

8. *United States v. Paige*, 67 M.J. 442 (C.A.A.F. 2009). The trial counsel, during closing arguments, argued that the evidence of the victim's condition was "uncontradicted." The trial counsel also incorrectly argued that Paige had to assert that his mistake was honest in order to qualify for the mistake of fact as to consent defense. The CAAF held that as to the uncontradicted comment, this was neither plain nor obvious error. Paige was not the only one with the information that could contradict the victim's condition because other witnesses saw her immediately before and during the rape. As to the mistake of fact defense comment, the error was plain and obvious, but it was harmless beyond a reasonable doubt.

9. *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). During opening statements, the trial counsel told the members that Ashby never told anyone about the videotape of the incident. The trial counsel also told the members that when Ashby met with the Italian prosecutor, he was told that he had a right to remain silent, similar to American law, and that he invoked that right. The defense moved for a mistrial, which was denied. The trial counsel was required to redact her statement to the members. The defense was allowed to voir dire the members, which was declined. A curative instruction was given by the military judge. The CAAF found the comments made by the trial counsel were error, but that they were harmless beyond a reasonable doubt due to the curative efforts made by the military judge.

B. Silence after warnings.

1. *Doyle v. Ohio*, 426 U.S. 610 (1976). Use of accused's silence after *Miranda* warning to impeach later trial testimony as a fabrication violates due process.

2. *United States v. Riley*, 47 M.J. 276 (C.A.A.F. 1997). Under the circumstances of the case (no defense objection, no instruction to members regarding improper introduction of evidence, and weak evidence), admission of testimony by an investigator regarding the accused's invocation of the privilege against self-incrimination during questioning constituted plain error.

3. *United States v. Sidwell*, 51 M.J. 262 (C.A.A.F. 1999). When asked by the trial counsel what statements the accused made, the witness testified that the accused invoked "his rights." Defense counsel immediately objected and moved for a mistrial. Although the military judge denied the defense motion, he did strike the witnesses testimony, gave several curative

instructions, and questioned the members to ensure they understood the instructions. The CAAF determined that error occurred, but considering the corrective action taken by the military judge and the facts of the case, the error was harmless. *Cf. United States v. Riley*, 47 M.J. 276 (C.A.A.F. 1997).

4. *United States v. Miller*, 48 M.J. 811 (N-M. Ct. Crim. App. 1998). Relying on *Riley*, the NMCCA held that the admission of the investigator's testimony that the accused terminated the interrogation materially prejudiced the substantial rights of the accused. The court also noted that the military judge failed to take the necessary steps to remedy the prejudice.

C. Silence before warnings.

1. Mil. R. Evid. 304(a)(2).

"Failure to deny an accusation of wrongdoing is not an admission of the truth of the accusation if, at the time of the alleged failure, the person was under investigation or was in confinement, arrest, or custody for the alleged wrongdoing. "

2. *United States v. Cook*, 48 M.J. 236 (C.A.A.F. 1998). After being arrested and questioned by OSI investigators about a rape allegation, the accused went to a friend's house. The friend asked the accused if he committed the rape. The accused did not respond. At trial, the prosecution introduced this evidence and argued that the accused's failure to deny the allegation indicated guilt. The CAAF held that this evidence was irrelevant under Mil. R. Evid. 304, even when the one asking the questions was a friend who was inquiring out of personal curiosity. The CAAF also held that the start of the OSI investigation was the triggering event for the Mil. R. Evid. 304 protections.

3. *United States v. Alameda*, 57 M.J. 190 (C.A.A.F. 2002). Appellant's silence upon being informed that he was being apprehended for an "alleged assault" was not relevant since appellant had a history of domestic violence, including an incident two weeks prior to the attempted murder incident, therefore his failure to deny one or more of the "alleged assaults" to the arresting officer does not support an inference of guilt and is therefore not relevant. Since the military judge's admission into evidence of the appellant's silence was error, trial counsel's use of it in his closing argument was also error. Additionally, the military judge's instructions to the panel were "off the mark," since they only dealt with the appellant's silence at trial, and may have actually exacerbated the problem by indicating to panel members, by omission, that they could draw an adverse inference from appellant's silence during his apprehension.

4. *United States v. Ruiz*, 50 M.J. 518 (A.F. Ct. Crim. App. 1999), *aff'd*, 54 M.J. 138 (C.A.A.F. 2000). During cross-examination of the accused, the trial counsel questioned him about his failure to proclaim his innocence when confronted by investigators. The AFCCA held that under the circumstances, the questioning by trial counsel did not violate Mil. R. Evid. 304(h), because it was designed to highlight the differences between the testimonies of the prosecution witnesses and of the accused.

5. Use of accused's pre-arrest, pre-*Miranda* warning silence to impeach later trial testimony on self-defense is permissible.[28]

[28] *Jenkins v. Anderson*, 447 U.S. 231 (1980) (accused failed to inform police about his self-defense claim for at least two weeks after murder. Prosecutor used this silence in his cross-examination of the defendant and in his closing argument); *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (defendant failed to tell anyone that the victim's shooting was an accident prior to receipt of the warnings). *See also State v. Easter*, 922 P.2d 1285 (Wash. 1996) (finding that the accused's pre-arrest silence cannot be used against him). In *Easter*, the accused was questioned at the accident scene, but he refused to answer any questions (not a custodial interrogation). During trial, the prosecutor argued that the accused's silence indicated he was being evasive to avoid alcohol detection. The Washington Supreme Court

6. Use of accused's post-arrest, pre-*Miranda* warning silence to impeach trial testimony on self-defense is permissible; rules of evidence may address. *See Fletcher v. Weir*, 455 U.S. 603 (1982).

D. Invoking the right to counsel. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). The standard for determining whether mentioning an accused's invocation of his right to counsel is improper is the same standard used for mentioning an accused's invocation of his right to remain silent. Here, no reversible error where: 1) defense counsel first elicited evidence of his client's invocation on cross-examination and did not object to the witness's response; 2) defense's theory "invited response" from trial counsel about accused's invocation; and, 3) invocation was not used as substantive evidence against accused.

E. Remedy for impermissible comments at trial.

1. *United States v. Garrett*, 24 M.J. 413 (C.M.A. 1987). Trial counsel erred by eliciting testimony from CID agent that accused had terminated their interview and asked for an attorney, but a mistrial was properly denied and the error cured by the judge's instructions.[29]

2. *United States v. Palumbo*, 27 M.J. 565 (A.C.M.R. 1988). CID agent revealed to the court that accused asserted rights and declined to be interviewed. The military judge properly denied a mistrial and corrected the error by (1) immediately instructing members to disregard evidence and that accused had properly invoked rights; (2) obtaining affirmative response from court members that they understood and could follow instructions; (3) having defense counsel participate in drafting curative instruction; and, (4) finding trial counsel inadvertently introduced evidence.[30]

F. The right extends through sentencing.

1. *Estelle v. Smith*, 451 U.S. 454 (1981). "We can discern no basis to distinguish between the guilt and penalty phases . . . so far as the protection of the Fifth Amendment privilege is concerned."

2. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992). "We must emphasize that trial counsel can only argue that an accused lacks remorse when that inference can be fairly derived from evidence before the court-martial. It cannot arise solely from an accused's exercise of his or her rights."

XII. PROCEDURE

A. Discovery: Mil. R. Evid. 304(d): "*Disclosure of Statements by the Accused and Derivative Evidence*. Before arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces, and all evidence derived from such statements, that the prosecution intends to offer against the accused."

1. Mil. R. Evid. 304(f)(2): If not disclosed, judge may make such orders as required in the "interests of justice."

B. Litigating the issues.

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held that an accused's pre-arrest silence cannot be used against him/her. The court found that the right to silence is derived from the Fifth Amendment and not *Miranda*, and applies before an accused is in custody or is the subject of an investigation.

[29] A good example of a curative instruction is contained in *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991).

[30] When defense does not request it, there is no need to reiterate instruction during final instructions. *See also United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990).

1. General Procedure.

a. Motions and objections. Defense must raise the motion prior to the plea or the motion is waived; good cause must be shown for an exception. Mil. R. Evid. 304(f)(1).

b. Specificity. Judge may require defense to specify the grounds. Mil. R. Evid. 304(f)(4).

c. Evidence. The defense may present evidence to support its motion, including the testimony of the accused for the limited purpose of the motion. The accused may be cross-examined only on the matter to which he testified. Nothing said by the accused, either in direct or cross-examination, may be used against him for any purpose other than in a prosecution for perjury, false swearing, or false official statement. Mil. R. Evid. 304(f)(3).

d. Burden. Once a motion or objection is raised by the defense, the prosecution has the burden of proving that the statement was voluntary by a preponderance of the evidence. Mil. R. Evid. 304(f)(6).

e. If a statement is admitted into evidence, the defense shall be allowed to present evidence as to the voluntariness of the statement in an attempt to reduce the weight that the fact finder will give to it. Mil. R. Evid. 304(f)(3).

f. Rulings. Shall be ruled on prior to plea, unless good cause. Judge shall state essential findings of fact.

g. Guilty plea waives all objections to the admission of the statements. Mil. R. Evid. 304(f)(8).

2. Standing to challenge self-incrimination issues. Mil. R. Evid. 301(b). The privilege of a witness to refuse to respond to a question that may tend to incriminate the witness is a personal one that the witness may exercise or waive at his or her discretion.

a. *United States v. Jones*, 52 M.J. 60 (C.A.A.F. 1999). To perfect its case against the accused, the government negotiated with three "minor offenders" to testify against the accused. These witnesses did not have a formal grant of immunity. The unwritten agreement was that the government would not prosecute them if they accepted Article 15 punishment, paid restitution, and testified against the accused. On appeal, the accused argued that the government violated the witness's self-incrimination rights, and therefore, their testimony should not have been admissible. The CAAF held that the accused did not have standing to challenge procedural violations of the self-incrimination rights of the witnesses, but may challenge statements that are involuntary due to "coercion and unlawful influence." The court further determined that the even though the government's actions "smelled bad" and resulted in *de facto* immunity, they did not constitute the requisite showing of prejudice.

3. Warnings and waivers at trial.

a. General rule. Mil. R. Evid. 301(a): An individual may claim the most favorable privilege provided by the Fifth Amendment, Article 31 or these rules. The privileges against self-incrimination are applicable only to evidence of a testimonial or communicative nature. Right against self-incrimination is a "fundamental constitutionally-mandated procedural

right that can be waived only by an accused on the record." Waiver will not be presumed by a silent or inadequate record.[31]

b. MRE 301(a) discussion. A military judge is not required to provide Article 31 warnings. If a witness appears likely to provide incriminating testimony, the military judge MAY advise the witness of their rights. Counsel may request that the military judge to advise a witness of their rights. Such an advisory should be made outside the presence of the members. Failure to so advise a witness does not make the witness's testimony inadmissible.

4. Burden of proof. Mil. R. Evid. 304(f)(6): The burden of proof is on the prosecution by a preponderance of the evidence. It extends only to grounds raised.

5. Defense evidence on motions. Mil. R. Evid. 304(f)(3): Accused may testify for limited purpose.

6. Corroboration.

a. Mil. R. Evid. 304(c): "An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession."

b. Procedure. The military judge alone is to determine when adequate evidence of corroboration has been received. Corroborating evidence must be introduced before the admission or confession is introduced unless the military judge allows submission of such evidence to later corroboration. *See* Mil. R. Evid. 304(c)(5).

c. *United States v. Rounds*, 30 M.J. 76 (C.M.A. 1990). Independent evidence of each and every element of the confessed offense is not required as a matter of military law. Generally speaking, it must "establish the trustworthiness of the" confession. Confession was sufficiently corroborated without independent evidence of ingestion of drugs when independent evidence showed accused had access and opportunity to ingest drugs at time and place where he confessed to using drugs.[32]

d. *United States v. Duvall*, 47 M.J 189 (C.A.A.F. 1997). A conviction cannot be based solely on a confession. Rather, some corroborative evidence must be introduced to the trier of fact pursuant to Mil. R. Evid. 304(g).

e. *United States v. Hall*, 50 M.J. 247 (C.A.A.F. 1999). In a military judge alone trial, the trial counsel did not offer the same corroborating evidence on the merits that he did during proceedings on a defense motion to suppress the accused's confession. In affirming its holding in *Duvall* (corroborating evidence must be submitted to the trier-of-fact), the CAAF found that the government satisfied Mil. R. Evid. 304 and the confession was sufficiently corroborated, since the judge acknowledged that he considered the corroborating evidence for both the motion and the merits.

f. *United States v. Swenson*, 51 M.J. 522 (A.F. Ct. Crim. App. 1999). Members convicted the accused of attempting to use LSD. The conviction was based upon a confession that was corroborated by a previous admission of LSD use. The AFCCA held

[31] *United States v. Adams*, 28 M.J. 576 (A.C.M.R. 1989) (judge's failure to advise accused of his constitutional rights rendered guilty plea improvident).
[32] *See also United States v. Lawrence*, 43 M.J. 677 (A.F. Ct. Crim. App. 1995) (confession to cocaine use of four occasions sufficiently corroborated by recent urinalysis); *United States v. Maio*, 34 M.J. 215 (C.M.A. 1992); *United States v. Williams*, 36 M.J. 785 (A.C.M.R. 1993).

that corroborating the accused's confession with a prior admission was proper so long as the prior admission was a statement of anticipated future conduct and not an admission of past criminal conduct. A statement of future criminal misconduct does not need to be corroborated; it can be used to corroborate a confession.

g. *United States v. Cottrill*, 45 M.J. 485 (C.A.A.F. 1997). The corroborating evidence must raise only an inference of truth as to the essential facts admitted, which must be shown by a preponderance of the evidence. In *Cottrill*, there was sufficient independent physical evidence to corroborate the accused's pretrial admissions that he sexually assaulted his daughter. *See also United States v. O'Rourke*, 57 M.J. 636 (A. Ct. Crim. App. 2002)

h. *United States v. Howe*, 37 M.J. 1062 (N.M.C.M.R. 1993), *overruled on other grounds*, *United States v. Driver*, 57 M.J. 760 (N-M. Ct. Crim. App. 2002). Trial counsel has a duty to withdraw charge based on uncorroborated admission or else inform military judge there is insufficient evidence to support it.

i. *United States v. McCastle*, 40 M.J. 763 (A.F.C.M.R. 1994), *aff'd*, 43 M.J. 438 (C.A.A.F. 1996), *as modified on reconsideration*, 44 M.J. 77 (C.A.A.F. 1996). Corroboration was enough where the place the accused admitted to purchasing drugs was a well-known trafficking location, accused's description of the dealer matched the description of a known dealer at that location, and the dealer was frequently observed by authorities using the described vehicle to conduct drug sales.

j. *United States v. Baldwin*, 54 M.J. 464 (C.A.A.F. 2001). In the confession, the appellant stated that his wife had walked in on him while he was assaulting his daughter (although she did not see anything) and that he immediately sought professional help through the chaplain and a therapist. In finding adequate corroboration, the court relied on the following facts: the appellant's wife saw the appellant in their daughter's room on the night he confessed to sexually assaulting her; the appellant gave his wife "a strange look that she had never seen before;" the appellant left the bedroom and went in the living room where he began crying and talking about his own history of being sexually abused; and, two days after being caught, the appellant went to the chaplain and then to a therapist. It was not necessary to provide independent evidence of all the elements of the offense. The court also emphasized that the government only had to establish an inference of truth as to the essential facts by a preponderance of the evidence.

k. *United States v. Adams*, 74 M.J. 137 (C.A.AF. 2015). CAAF reversed the appellant's conviction after determining that the government offered no evidence to corroborate the appellant's opportunity or motive to commit the crime, his access, his intent, ant the accomplices involved, the subject of the larceny (cocaine), the time of the crime, or the act of larceny itself. CAAF held that there is no "tipping point" of corroboration which would allow admission of the entire confession if a certain percentage of essential facts are found to be corroborated. For instance, if four of five essential facts were corroborated, the entire confession is not admissible. Only the four corroborated facts are admissible and the military judge is required to excise the uncorroborated essential fact, Mil. R. Evid. 304(c).

l. *Unites States v. Swift*, 76 M.J. 210 (CAAF 2016). As a rule, admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence has been admitted into evidence that corroborates the essential facts admitted to justify sufficiently an inference of their truth.

7. Defense Evidence on Voluntariness.

a. *Crane v. Kentucky*, 476 U.S. 683 (1986). Due process and Sixth Amendment concerns require that the accused be permitted to challenge the reliability of a statement before the fact-finder, even though the judge may have found the statement "voluntary."

b. *United States v. Miller*, 31 M.J. 247 (C.M.A. 1990). Mil. R. Evid. 304(e) adopts the orthodox rule for determining the voluntariness of confessions. The judge alone determines the admissibility of confessions and that ruling is final. Although the members must consider the confession in determining guilt or innocence, the accused is free to argue the confession was involuntary in order to reduce the weight the members give it. Judge must hold a hearing and make findings as to voluntariness only if the defense raises the issue by a motion to suppress or a timely objection at trial. The Constitution does not require a voluntariness hearing unless use of the confession is challenged.

8. Joint trials: redaction of confessions. *Gray v. Maryland*, 523 U.S. 185 (1998). A co-defendant's confession that substituted either a blank space or the word "deleted" in place of the accused's name was inadmissible in a joint trial. As redacted, the Court held that the jury would clearly infer the confession refers to the accused. The Court opined that there were other acceptable ways to redact the accused's name from the confession. *See also Bruton v. United States*, 391 U.S. 123 (1968); Mil. R. Evid. 306.

XIII. IMMUNITY

A grant of immunity overcomes the privilege against self-incrimination by removing the consequences of a criminal penalty. If a Servicemember is given immunity, the government can compel him to make a statement, but cannot use that compelled statement against him in trial. The statement can, however, be used if the Servicemember commits perjury, false statement, or false swearing. Only the General Court-Martial Convening Authority (GCMCA) can grant immunity. There are circumstances in which immunity may be implied (*de facto* immunity), even though the GCMCA did not grant immunity.

A. Types of immunity.

1. Transactional. Immunity from trial by court-martial for one or more offenses under the code.

2. Testimonial. "Use immunity" for testimony and any derivative evidence. Mil. R. Evid. 301(d)(1) and *Kastigar v. United States*, 406 U.S. 441 (1972).

3. RCM 704 & Mil. R. Evid. 301.

B. Authority to grant immunity.

1. General rule: only the GCMCA can grant immunity, or their subordinate SPCMCA, if so designated.

2. To whom:

a. Persons subject to the UCMJ.

(1) Must relate to court-martial, not federal district court prosecution. RCM 704(c)(1).

(2) Insure DOJ has no interest in the case. AR 27-10, para. 2-4 (11 May 2016).

b. Persons not subject to the UCMJ.

(1) GCMCA, or designee, can grant only with approval of U.S. Attorney General. RCM 704(c)(2).

(2) Procedures. AR 27-10, para. 2-4 (11 May 2016).

c. Delegation of authority to subordinate special court-martial convening authority is authorized, if permitted by Service regulations. RCM 704(c)(3).

C. Procedure.

1. Decision to grant immunity.

a. Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the GCMCA, or designee.

b. If a defense request to grant immunity has been improperly denied, the military judge may, upon motion by the defense, grant appropriate relief by directing that the proceedings against the accused be abated.

c. RCM 704(e): The military judge may grant such a motion upon findings that:

(1) The witness intends to invoke the right against self-incrimination . . . if called to testify; and

(2) The government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the government through its own overreaching, has forced the witness to invoke the privilege . . .; and,

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source, and does more than merely affect the credibility of other witnesses.

d. *United States v. Richter*, 51 M.J. 213 (C.A.A.F. 1999). The accused was one of many actors in a larceny scheme. Prior to trial, the defense asked the convening authority to grant immunity to a defense witness. The convening authority denied the defense request, but granted immunity to five prosecution witnesses. The CAAF held that the military judge did not abuse his discretion when he denied the defense motion to abate the court-martial. The court relied on the three-prong test under RCM 704(e) in reaching its decision. Specifically, the court stated that the three prongs must be read in the conjunctive. Since the defense witness was a prosecution target, the second prong of the rule was not met.

2. Order to testify/grant of immunity.

a. RCM 704(d).

b. AR 27-10, Military Justice, Chapter 2 (Investigation and Prosecution of Crimes With Concurrent Jurisdiction).

D. Notice to the accused.

1. Mil. R. Evid. 301(d)(2). Written grant shall be served on accused prior to arraignment or within a reasonable time before witness testifies.

2. Remedy: continuance, prohibit or strike testimony, or other order as required.

3. *United States v. Tuscan*, 67 M.J. 592 (C.G. Ct. Crim. App. 2009). Trial counsel notified defense of government witness immunized testimony the morning of trial. Witness did not testify until after lunch on the second day of trial. Defense did not ask for a continuance. The CGCCA held that this was a reasonable time before the witness testified and therefore the testimony was properly allowed. However, the CGCCA expresses concern that the government was potentially "hiding the ball." *Id*. at 595.

E. Scope of the immunity.

1. Prosecution after testimonial immunity.

a. Independent evidence.

(1) Government must show that evidence used to prosecute accused is completely independent of immunized testimony. Tips to avoid problems: (1) screen all immunized data from the trial team; (2) catalogue or seal all data to provide a paper trail; and, (3) personnel who had access to the immunized testimony should have no contact with the prosecution team. *See United States v. England*, 30 M.J. 1030 (A.F.C.M.R. 1990), *aff'd*, 33 M.J. 37 (C.M.A. 1991).

(2) Government can use neither the immunized testimony nor its fruits, to include any investigatory leads. It is a question of fact whether the government has a legitimate, independent source for its evidence. In *United States v. Boyd*, 27 M.J. 82 (C.M.A. 1988), the findings and sentence were set aside and charges dismissed because testimony of a witness (Wills) against the accused was derived from the prior immunized testimony of the accused against Wills. Government did not meet its burden of showing that the accused's testimony did not contribute to Wills' decision to make a statement against the accused. *See also United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003); *but see United States v. McGeeney*, 44 M.J. 418 (C.A.A.F. 1996).

b. Non-evidentiary use of immunized statements.

(1) *United States v. Kastigar*, 406 U.S. 441 (1972). The Supreme Court held that prosecutorial authorities are prohibited from using testimony that is compelled by grants of immunity. In *United States v. Kimble*, 33 M.J. 284 (C.M.A. 1991), the CMA held that immunity protection described in *Kastigar* also extend to "non-evidentiary uses" of immunized statements, such as the decision to prosecute. *See also United States v. Mapes*, 59 M.J. 60 (C.A.A.F. 2003).

(2) Accordingly, the impact of testimonial immunity goes beyond the admissibility of certain statements. The government must show by preponderance of the evidence that the decision to prosecute was untainted by evidence received as a result of immunity grant. *See United States v. McGeeney*, 41 M.J. 544 (N-M. Ct. Crim. App. 1994); *see also Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992).

(3) If the government cannot show that the decision to prosecute the accused was made before immunized statements were provided by accused, the government may not prosecute unless it can show, by a preponderance of the evidence, that the prosecutorial decision was untainted by the immunized testimony. *See United States v. Olivero*, 39 M.J. 264 (C.M.A. 1994).

(4) *United States v. Olivero*, 39 M.J. 246 (C.M.A. 1994). The convening authority gave appellant testimonial immunity regarding his knowledge of other airman's (TSgt S) drug use. Government did not certify, seal, or memorialize any evidence of appellant's own drug use prior to this grant. Contrary to his oral, unsworn statement initially provided after immunity grant, the appellant testified at TSgt S's Article 32 hearing that he had never used drugs with TSgt S. Four days later, Olivero was charged with drug use and perjury. At trial, Olivero moved to dismiss claiming the decision to prosecute was wrongly based on his immunized statements. The CMA agreed. Conviction set aside.

Two practice points should be taken from *Olivero*:

(a) If possible, prior to providing a grant of immunity, any evidence that will be used in a subsequent prosecution of the grantee should be segregated and

sealed to foreclose later issues regarding improper non-evidentiary use of immunized statements; and,

(b) Trial and defense counsel and military judges should make distinctions in their arguments, motions, and rulings between evidentiary and non-evidentiary uses of disputed immunized statements.

(5) *Olivero* is consistent with *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992), where the CMA ruled that prosecutions may not "result from" statements taken in violation of Article 31(d).

(6) *United States v. Youngman*, 48 M.J. 123 (C.A.A.F. 1998). In response to a defense motion, the military judge dismissed only those charges derived directly from the accused's immunized statement. The CAAF held that the military judge abused his discretion by not determining if the accused's immunized statement and evidence derived therefrom played "any role" in the decision to prosecute all of the offenses.

2. Immunity does not supplant the attorney-client privilege. A witness, testifying under a grant of immunity can still assert an attorney-client privilege. Further, disclosure of attorney-client confidences while testifying under a grant of immunity does not constitute a voluntary waiver of the attorney-client privilege. *See United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997).

F. Use of immunized testimony "against" the witness.

1. Impeachment. Immunized testimony from prior court-martial cannot be used to impeach an accused in later court-martial. *United States v. Daley*, 3 M.J. 541 (A.C.M.R. 1977).

2. Post-Trial Matters. Immunized testimony can be used by an SJA to refute claims in a clemency petition that the terms of the immunity agreement were breached. The CMA termed these "matters . . . collateral to a criminal trial." *United States v. Vith*, 34 M.J. 277 (C.M.A. 1992) (Judge Gierke, concurring in the result, disagreed, finding this limited use violated the Fifth Amendment).

3. Subsequent Prosecutions. Neither type of immunity bars prosecution for perjury, false swearing, false official statement, or failure to comply with an order to testify. RCM 704(b); Mil. R. Evid. 301(d)(1).

G. Standing to object to immunity grants: *United States v. Martinez*, 19 M.J. 744 (A.C.M.R. 1984). Unless the accused is denied due process or a fair trial, he is without standing to challenge a grant of immunity to those who testify against him.

H. Inadvertent immunity.

1. *De facto* immunity.

a. A person other than GCMCA, or designee, may create a situation of *de facto* immunity when he or she:

(1) manifests apparent authority to grant immunity;

(2) makes a representation that causes the accused to honestly and reasonably believe that he will not be prosecuted if he fulfills a certain condition;

(3) has at least the tacit approval of the GCMCA, or designee; and,

(4) the accused relies to his or her detriment on the representations. An accused may complete the creation of a *de facto* grant of immunity when he relies on the

representation to his detriment by actually fulfilling the condition suggested by the government.

b. Analysis.

(1) Where an accused honestly and reasonably believes that an official has promised him transactional immunity and that official has the lawful authority to do so, then the promise is the functional equivalent of a grant of immunity.[33]

(2) However, statements by an official will not provide a foundation for a claim of *de facto* immunity absent some measure of detrimental reliance by the accused.[34]

(3) Despite a showing of detrimental reliance, remedial measures by the military judge at trial may still permit prosecution.[35]

2. Unlawful inducement - Article 31(d).

a. A situation akin to equitable testimonial immunity arises following violations of Article 31(d).

b. To be an unlawful inducement under Article 31(d), the improper action must be undertaken by someone acting in a law enforcement capacity or in a position superior to the person making the confession.[36]

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[33] *Samples v. Vest*, 38 M.J. 482, 487 (C.M.A. 1994); *see also Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982) (SJA oral promise of immunity to officer suspected of espionage enforced on grounds of due process); *United States v. Wagner*, 35 M.J. 721 (A.F.C.M.R. 1992) (unit commander's agreement not to prosecute accused if he refrained from further child sex abuse and got treatment created *de facto* immunity that was not breached even though accused discontinued counseling after 15 months); *United States v. Jones*, 52 M.J. 60 (C.A.A.F. 1999) (*de facto* transactional immunity resulted when the Chief of Military Justice and DSJA entered into an unwritten agreement with three co-accused that the government would not court-martial them if they accepted Article 15 punishment, paid restitution, and testified against the accused.)

[34] *United States v. Conklan*, 41 M.J. 800 (A. Ct. Crim. App. 1995). Representations by a battalion commander, indicating that the Army would not prosecute accused for carnal knowledge offense, did not constitute offer of *de facto* transactional immunity, in light of commander's failure to call upon accused to fulfill any condition in exchange for whatever benefit was conferred. Representation was merely gratuitous statement of present intent subject to change in sole discretion of the convening authority. The accused's reenlistment after commander's statement was not sufficient detrimental reliance to give rise to *de facto* immunity; reenlistment was not bargained for or otherwise contemplated as a condition of government's initial decision not to prosecute.

[35] *United States v. McKeel*, 63 M.J. 81 (C.A.A.F. 2006). Accused admitted to a military investigator that he engaged in sexual intercourse with a female shipmate when she was too intoxicated to consent. When the investigative report was forwarded to the chief petty officer who served as the ship's senior enlisted person responsible for military justice matters he promised the accused that if he accepted nonjudicial punishment and waived his right to an administrative discharge board there would no court-martial and the accused would be administratively separated from the military. The accused agreed and pled guilty to various charges, including rape, during a nonjudicial punishment proceeding. He was then processed for administrative separation and he waived his right to a separation board. When the administrative separation packet was received by the GCMCA, who had no prior knowledge of the charges against the accused, the GCMCA declined to approve the separation, and initiated proceedings that resulted in the accused's GCM.

[36] *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992) (civilian U.S. government intelligence agents interviewed the accused. Their interviews were not subject to an unlawful inducement analysis under Article 31(d)).

On the other hand, a USMC Commander's (O-6) assurances to two accused that "they had done nothing wrong and should provide testimony before an investigative board" did amount to unlawful inducement in *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992). The accused's subsequent waivers were found to be without effect. The action by the Colonel rendered the accused's statements, and all evidence derived therefrom, inadmissible.

3. Regulatory Immunity. DoD and DA Family advocacy regulations generally do not create a bar to prosecution against self-referred child abusers. Further, consideration and adherence to regulatory policies and criteria set out in these regulations are not conditions precedent to disposition by courts-martial. Although DoD and DA policy may be internally inconsistent in that they both encourage and deter self-referral, they do not infringe on any rights recognized by the Constitution, the UCMJ, or the CAAF decision.[37]

[37] *United States v. Corcoran*, 40 M.J. 478 (C.M.A. 1994); s*ee also United States v. Martindale*, 40 M.J. 348 (C.M.A. 1994) (evidence of accused incriminating statements not barred by SecNavInst 1752.3, The Family Advocacy Program); *but see United States v. Bell*, 30 M.J. 168 (C.M.A. 1990) (directive language of USMC policy regarding rehabilitation and retention of sexual offenders necessitated documented pretrial diversion consideration).

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CHAPTER 28
POST-TRIAL PROCESSES

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I. REFERENCES

A. UCMJ, Articles 55-76a.

B. Manual for Courts-Martial (2016 Edition).

C. Military Justice Act of 2016.

D. Military Justice Review Group (MJRG), Report of the MJRG, Part I: UCMJ Recommendations (Part II was never completed) (http://ogc.osd.mil/images/report_part1.pdf)

E. 2014 & 2015 National Defense Authorization Act (NDAA).

F. Executive Order (EO) 13696, dated 17 June 2015.

G. EO 13825, dated 1 March 2018 (there is at least one additional EO pending a/o 1 December 2018)

H. U.S. Dep't of Army, Reg. 27-10, Military Justice ch. 5 (11 May 2016) [hereinafter AR 27-10] (pending revisions to incorporate MJA 2016 changes).

I. Francis Gilligan & Frederic I. Lederer, *Court-Martial Procedure*, 2015 (vol. 2), Chapter 24.

J. United States Army Court of Criminal Appeals, Office of the Clerk of Court, Post Trial Handbook (3 Jan. 2012).

II. SUMMARY OF THE PROCESS

The MJA 2016 will make substantial and important changes to post trial processing. This portion of the deskbook will retain the information related to the legacy system for two reasons. One, until we begin implementing the new system, it is difficult to know whether and what portions of the old system concerns and caselaw will remain relevant. Two, in the short term, we will continue processing cases using the legacy system. According to the EO signed in March 2018, all cases referred prior to 1 January

2019 will use legacy post-trial processing procedures regardless of when the case is tried and ready for post-trial action.

"It is at the level of the convening authority that an accused has his best opportunity for relief." *United States v. Boatner*, 43 C.M.R. 216, 217 (C.M.A. 1971).

"The essence of post-trial practice is basic fair play – notice and an opportunity to respond." *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996).

"[T]he following is [the] process for resolving claims of error connected with a convening authority's post-trial review. First, an appellant must allege the error. . . . Second, an appellant must allege prejudice. . . . Third, an appellant must show what he would do to resolve the error if given such an opportunity." *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998).

"All this court can do to ensure that the law is being followed and that military members are not being prejudiced is to send these cases back for someone TO GET THEM RIGHT." *United States v. Johnston*, 51 M.J. 227, 230 (C.A.A.F. 1999).

Below is a summary of the legacy system:

A. Sentence is announced and the court is adjourned.

B. Trial counsel prepares report of result of trial, confinement order.

C. Post-trial sessions, if any.

D. Exhibits accounted for and reproduced.

E. Request for deferment of confinement, if any.

F. Request for deferment of reduction, if any.

G. Request for deferment and/or waiver of forfeitures, if any.

H. Record of trial (ROT) created, reproduced.

I. Trial counsel / defense counsel (DC) review ROT for errata.

J. Military judge (MJ) authenticates ROT (or substitute authentication if required).

K. Staff Judge Advocate (SJA) signs the Staff Judge Advocate's Recommendation (SJAR).

L. SJAR and authenticated ROT served on accused / DC and, if required, the victim.

M. Victim submits matters through SJA to CA.

N. Accused / DC submits clemency petition (R.C.M. 1105 matters) and response to SJAR (R.C.M. 1106 matters) – often done simultaneously.

O. SJA signs addendum.

P. Addendum served on DC and accused if contains "new matter."

Q. CA considers DC / accused submissions, takes initial action.

R. Promulgating order signed.

S. Record reproduced and mailed.

T. Appellate review.

U. Final action.

Below is a summary of the new system (some items reflect the draft version of AR 27-10):

A. Sentence is announced and the court is adjourned.

B. Trial counsel prepares statement of trial results.

C. Assembly of the court-martial record for clemency purposes; verbatim transcript preparation begins (if required).

D. Post-trial sessions, if any, at any point prior to Entry of Judgment (EOJ).

E. DC requests for deferment and/or waiver.

F. Accused and qualifying victims submit post-trial matters (within 10 days of announcement of sentence; may be extended for an additional 20 days).

G. CA consults with the SJA, considers the accused and victim submissions, and takes action.

H. Military Judge signs the EOJ.

I. Court reporter certifies the Record of Trial; it is served on the accused and qualifying victims.

J. Appellate review.

The above is a simplified version of the new system. However, the intent of the MJRG (report referenced above) was to streamline the process. In an era where CA discretion on findings and sentence has been vastly circumscribed, it seems sensible to expedite the post-trial process prior to appellate review. Although Congress did not wholesale adopt the MJRG's recommendations, the report is still useful for an understanding of the why and how for many of the changes.

For many of these changes, the updated version of AR 27-10 will fill in the gaps on how to proceed under the new rules. Also, new forms are pending for the new processes.

III. DUTIES OF COUNSEL. ARTICLE 38, UCMJ; R.C.M. 502(D)(5)-(6); R.C.M. 1103(B)(1)

A. **[Legacy]** R.C.M. 502(d)(5), discussion, para. (F), addresses the trial counsel's (TC's) post-trial duties.

1. Prepare Report of Result of Trial. "[P]romptly provide written notice of the findings and sentence adjudged to the convening authority or a designee, the accused's immediate commander, and (if applicable) the officer in charge of the confinement facility."

2. Supervise preparation, authentication and distribution of the ROT. R.C.M. 1103(b)(1).

3. Review ROT for errata. *United States v. Ayers*, 54 M.J. 85 (C.A.A.F. 2000). On appeal, appellant alleged that the ROT was not truly authenticated since the assistant trial counsel (ATC) executed the authentication. The ATC signed the authentication document that stated, "I have examined the record of trial in the forgoing case." The ATC also made several corrections to the ROT. The defense claimed that for the authentication to be proper, the authenticating individual must state the ROT accurately reports the proceedings. Also, defense claimed that an ATC cannot authenticate a ROT unless he is under the supervision of the TC (as required by R.C.M. 502(d)(2)). The court disagreed, holding that by signing the authentication document, the ATC was stating that the ROT was correct. Also, since the defense did not allege any error in the ROT, or prejudice from having the ATC authenticate the ROT, no relief was appropriate.

4. Ensure the record of trial is served on the accused and counsel, as appropriate. R.C.M. 1104(b)(1), 1106(f)(3). *See generally* R.C.M. 502(d)(5), discussion, para. (F).

B. **[Legacy]** R.C.M. 502(d)(6), discussion, para. (E) addresses the defense counsel's (DC's) post-trial duties.

1. Advise the accused of post-trial and appellate rights (not technically post-trial – R.C.M. 1010).

2. Deferment of confinement / reduction / forfeitures. R.C.M. 1101(c).

3. Examination of the record of trial. R.C.M. 1103(i)(1)(B).

4. Submission of matters: R.C.M. 1105; 1106(f)(4), (7); and, 1112(d)(2). *See also* UCMJ, Article 38(c).

5. Right to appellate review and waiver thereof, in writing, within specified time period. R.C.M. 1110.

6. Examine Staff Judge Advocate's Recommendation (SJAR). R.C.M. 1106(f).

7. *See also United States v. Palenius*, 2 M.J. 86, 93 (C.M.A. 1977). "The trial defense attorney . . . should maintain the attorney-client relationship with his client subsequent to the [trial] . . . until substitute trial [defense] counsel or appellate counsel have been properly designated and have commenced the performance of their duties . . . ."

a) Raising appellate issues. *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

b) Act in accused's interest. *See United States v. Martinez*, 31 M.J. 524 (A.C.M.R. 1990).

c) Maintain an attorney-client relationship. R.C.M. 1106(f)(2) (for substitute counsel); *United States v. Schreck*, 10 M.J. 226 (C.M.A. 1981), *supplemented by*, 10 M.J. 374 (C.M.A. 1981); *United States v. Titsworth*, 13 M.J. 147 (C.M.A. 1982); *United States v. Jackson*, 34 M.J. 783 (A.C.M.R. 1992) (some responsibility placed on the SJA).

C. Effectiveness of counsel in the post-trial area is governed by *Strickland v. Washington*, 466 U.S. 668 (1984), and *United States v. Lewis*, 42 M.J. 1 (C.A.A.F. 1995). *See also United States v. MacCulloch*, 40 M.J. 236 (C.M.A. 1994); *United States v. Brownfield*, 52 M.J. 40 (C.A.A.F. 1999); and, *United States v. Lee*, 52 M.J. 51 (C.A.A.F. 1999). *See also* Section XXVIII *infra*.

1. *United States v. Banks*, 75 M.J. 746 (C.A.A.F. 2016). Citing to *United States v. Palmer*, 2007 CCA LEXIS 592 (Army Ct. Crim. App. Aug. 7, 2007), the court implied that defense counsel who fail to timely submit R.C.M. 1105 matters could be considered ineffective. This could become even more problematic with the changes to the timeline for post-trial submissions under the MJA 2016.

2. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). Defense counsel ineffective by submitting, as part of the accused's clemency matters, a letter from the accused's mother that "undercut [his] plea for clemency," a separate letter from the father that was "acerbic" and a "scathing diatribe directed toward trial counsel, trial defense counsel, the members, the judge, and the convening authority," and an e-mail from the accused's brother that "echoed the theme of appellant's father." *Id*. at 124. Returned for a new clemency submission, PTR, and action.

3. *United States v. Key*, 57 M.J. 246 (C.A.A.F. 2002). The CAAF, without ruling, hints that defense counsel might be ineffective if counsel fails to advise the client on waiver of forfeitures and the right to request waiver. The CAAF avoids the issue in *Key* because appellant could not recall if his counsel advised him. Appellant's equivocal statement re: his recollection was insufficient to overcome the presumption that counsel's performance was competent.

4. *United States v. Gunderman*, 67 M.J. 683 (A.C.C.A. 2009). The appellant claimed that his defense counsel did not inform him that he could request disapproval of the adjudged forfeitures,

deferral under Article 57, and waiver of automatic forfeitures under Article 58b. Based upon the facts, the court finds that there was sufficient advice given about forfeitures and the ability to request waiver and deferral after trial. Three factors weighed in favor of the decision: 1) the appellant signed a post-trial advice form that informed him of his ability to request waiver and deferral; 2) the appellant agreed on the record that he had been properly informed of his post-trial rights; and, 3) the appellant submitted a letter to the convening authority pursuant to R.C.M. 1105 void of any indication that he wanted deferral or waiver.

5. *United States v. Fordyce*, 69 M.J. 501 (A.C.C.A. 2010) (en banc). The ACCA did not reach the issue of whether defense counsel was ineffective for submitting clemency matters to the convening authority without the input from appellant and for failing to submit a request to defer and waive forfeitures for the benefit of the accused's wife and five children. However, the ACCA held that appellant made the requisite showing of prejudice because defense counsel admitted she did not cover waiver since the standardized post-trial and appellate rights form she had used did not include that provision. Case remanded for new SJAR and action. The ACCA also recommends two things:

a) Defense counsel should have an accused co-sign R.C.M. 1105/1106 submissions, or sign an acknowledgement that the matters submitted are all that the accused wishes to submit; and,

b) A practice that would demonstrate on the record that the appellant received both proper written advice on post-trial rights and the opportunity to submit post-trial matters to the convening authority. The ACCA notes with approval the amendments to the Military Judges' Benchbook, DA Pam 27-9, paras. 2-4-2 and 2-6-14 (1 Jan. 2010), which includes in inquiry into the accused's knowledge of what he can submit to the convening authority.

IV. NOTICE CONCERNING POST-TRIAL AND APPELLATE RIGHTS. R.C.M. 1010

A. Before adjournment of any general and special court-martial, the MJ shall ensure that the DC has informed the accused orally and in writing of:

1. The right to submit post-trial matters to the CA;

2. The right to appellate review, as applicable, and the effect of waiver or withdrawal of such rights;

3. The right to apply for relief from TJAG if the case is neither reviewed by a Court of Criminal Appeals; and,

4. The right to the advice and assistance of counsel in the exercise or waiver of the foregoing rights.

V. REPORT OF RESULT OF TRIAL; DEFERMENT AND WAIVER. ARTICLES 57, 57A, 58, 58A, 58B, AND 60, UCMJ; R.C.M. 1101

A. **[Legacy]** Result of Trial and Post-Trial Restraint.

1. TC notifies accused's immediate commander, CA or designee, and confinement facility of results (DA Form 4430, Department of the Army Report of Result of Trial). *See* R.C.M. 502(d)(5). *See also* AR 27-10, para. 5-30 (11 May 2016).

2. The accused's commander may order the accused into post-trial confinement. The accused's commander may delegate to TC authority to order accused into post-trial confinement. R.C.M.

1101(b)(2). Note: Summary Court Martial Officer (SCMO) may NOT order a Servicemember into post-trial confinement.

B. Deferment of confinement. This will not change under the MJA 2016. The Rule citations are to the MJA 2016. One would expect the caselaw in this area to remain applicable.

1. Accused may request, in writing, deferment of confinement.

2. Accused burden to show "the interests of the accused and the community in deferral outweigh the community's interest in imposition of the punishment on its effective date."

3. Factors CA may consider include, "where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; [and] the accused's character, mental condition, family situation, and service record." R.C.M. 1101(d)(2).

4. CA's action on deferment request MUST be in writing and a copy provided to the accused.

5. CA's written action on deferment request is subject to judicial review for abuse of discretion. The request and action thereon MUST be attached to the record of trial. R.C.M. 1103(d)(2).

6. CA must specify why confinement is not deferred.

a) *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993). The CA refused to defer confinement "based on seriousness of the offenses of which accused stands convicted, amount of confinement imposed by the court-martial and the attendant risk of flight, and the adverse effect which such deferment would have on good order and discipline in the command." Accused alleged abuse of discretion in refusing to defer confinement. Held – even though explanation was conclusory, it was sufficient. The court noted other matters of record supporting decision to deny deferment.

b) *United States v. Dunlap*, 39 M.J. 1120 (A.C.M.R. 1994). Remedy for failure to state reasons for denying deferment request is petition for extraordinary relief. The court reviewed facts and determined that deferment was not appropriate.

c) *United States v. Edwards*, 39 M.J. 528 (A.F.C.M.R. 1994). Accused not entitled to relief where deferment would have expired before appellate review. The court recommended that the DC ask for "statement of reasons" or petition for redress under Article 138.

d) *United States v. Sebastian*, 55 M.J. 661 (A.C.C.A. 2001). One week prior to his trial, accused submitted a deferment request requesting that any confinement be deferred until after the upcoming Easter holiday. He also asked for deferral and waiver of forfeitures. The CA never acted on first request. One week after trial (which included confinement as part of the adjudged sentence), the accused submitted a second request regarding forfeitures. Approximately six weeks later (five weeks after the forfeitures went into effect), the SJA responded recommending disapproval. Contrary to the SJA's advice, the CA granted the forfeitures request. "While there is no requirement for a convening authority to act 'instantaneously' on a deferment request, there is also no authority for a convening authority to fail to act at all when a deferment request is submitted in a timely manner." *Id*. at 663. The court found prejudice both in the failure to respond to the first deferment request and in the untimely response to the second request. The court reduced the accused's confinement from nine months to five months and set aside the adjudged forfeitures.

e) *United States v. McClary*, 68 M.J. 606 (C.G.C.C.A. 2010). At the end of trial, the appellant submitted a request to the convening authority requesting deferment of confinement "until at least" four days after trial. The convening authority responded the same day by writing, "Considered and denied." Forty days later, the convening authority signed a memorandum to the appellant providing his reasons for the denial. The appellant alleged error for failure to provide the rationale at the time of denial. The CGCCA agreed, and held that "[c]ertainly there was error at the time of denial." However, even though the court found error, the court was not able to provide relief since the rationale had eventually been provided. The court denied relief.

C. Deferment of forfeitures. This is another thing that will not change under the MJA 2016. The Rule citations are to the MJA 2016. One would expect the caselaw in this area to remain applicable.

1. Accused may request, in writing, deferment of forfeitures. R.C.M. 1101(a)(2).

2. Accused burden to show "the interests of the accused and the community in deferral outweigh the community's interest in imposition of the punishment on its effective date [e.g., forfeitures]." R.C.M. 1101(d)(2).

3. Applies to adjudged forfeitures (Article 57(a)(2), UCMJ; R.C.M. 1101(c)) AND automatic forfeitures(Article 58b(a)(1), UCMJ)). *United States v. Lundy*, 60 M.J. 52 (C.A.A.F. 2004); *United States v. Adney*, 61 M.J. 554 (A.C.C.A. 2005).

4. Factors CA may consider include, "where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; [and] the accused's character, mental condition, family situation, and service record." R.C.M. 1101(d)(2).

5. CA's action on deferment request MUST be in writing and a copy provided to the accused. R.C.M. 1101(d)(2).

6. CA's written action on deferment request is subject to judicial review for abuse of discretion. The request and action thereon MUST be attached to the record of trial. R.C.M. 1103(d)(2).

7. CA must specify why forfeitures are not deferred. *United States v. Zimmer*, 56 M.J. 869 (A.C.C.A. 2002). Error for the CA to deny the defense deferment request in a one-sentence action without providing reasons for the denial. Four months of confinement and the adjudged forfeitures were set aside. *See also United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

8. *United States v. Brown*, 54 M.J. 289 (C.A.A.F. 2000). CA denied accused's deferment request. The SJA memorandum to CA recommending denial was never served on the accused who argued prejudice because he was not afforded the opportunity to rebut the memorandum. The CAAF found no prejudice; however, they strongly suggested that new rules be created regarding deferment and waiver requests – rules could require an SJA recommendation with deferment and waiver requests with a corresponding notice and opportunity to respond provision.

9. *United States v. Key*, 55 M.J. 537 (A.F.C.C.A. 2001), *aff'd*, 57 M.J. 246 (C.A.A.F. 2002). Nine days after being sentenced, the accused submitted a request asking for deferment of forfeitures and reduction. The SJA's written response recommended disapproval, advice the CA followed. The SJA's advice was never served on the accused. He argued prejudice claiming deferment requests should be processed like a clemency request. Although the Air Force requires that waiver requests be treated like clemency requests (*United States v. Spears*, 48 M.J. 768

(A.F.C.C.A. 1998) (overruled in part on other grounds)) subject to the requirements of Article 60, deferment of forfeitures and reductions in rank do not have to be treated similarly. No requirement that an SJA recommendation regarding deferment be served on defense. Note: the CAAF affirmed without reaching the issue of whether service of the SJA's memo is a *per se* requirement. The court noted the absence of "new matter" and the non-inflammatory nature of the SJA's memo in affirming.

10. *United States v. Moralez*, 65 M.J. 665 (A.C.C.A. 2007). Forfeitures were adjudged at trial. After trial, the accused submitted request to the CA to (1) defer adjudged and automatic forfeitures until action, and (2) disapprove adjudged forfeitures and waive automatic forfeitures at action. The SJA advised the CA to grant the deferrals, but postpone any decision on disapproval or waiver until action. The SJAR, the defense clemency submission, and the addendum were silent to the requested disapproval/waiver request. At action, the CA approved the adjudged sentence (including forfeitures). The ACCA held that SJA should have further advised the CA on his options regarding the disapproval of adjudged and waiver of automatic forfeitures at action.

11. *United States v. Dean* 74 M.J. 608 (A.C.C.A. 2015) Accused sentenced to BCD and 7 months confinement on 15 Jan 2014; ETS date was 11 Feb 2014. Request for deferral submitted on 5 Mar 2014. Addendum was silent on deferral advice, no other advice submitted. ACCA says this is error, requires rationale from CA for both adjudged and automatic sentences.

D. Waiver of forfeitures. This is another thing that will not change under the MJA 2016. The Rule citations are to the MJA 2016. One would expect the caselaw in this area to remain applicable.

1. Accused may request waiver of automatic forfeitures (Article 58b, UCMJ) or the CA may waive *sua sponte*. The accused's request should be in writing.

2. Waiver is allowed for a period not to exceed six months and is for the purpose of providing support to the accused's dependents, as defined in 37 U.S.C. § 401.

3. Factors CA may consider include: "the length of the accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. 1059." R.C.M. 1101(d)(2).

4. Unlike the CA's action on a deferral of forfeitures, there is no requirement that a similar decision on waiver of forfeitures be in writing or that it be served on the accused. *United States v. Zimmer*, 56 M.J. 869, 872 n.4 (A.C.C.A. 2002). According to *Zimmer*, such a decision is also not subject to judicial review. *Id*.

5. Waiver of forfeitures is authorized as soon as they become effective; need not wait until action.

6. *United States v. Nicholson*, 55 M.J. 551 (A.C.C.A. 2001). SJA advice stating that waiver request prior to action is premature and must be submitted as part of the R.C.M. 1105 submissions was incorrect. The convening authority may waive and direct payment of any automatic forfeitures when they become effective by operation of Article 57(a) – the earlier of fourteen days after sentence is adjudged or date the sentence is approved by the CA. *See also United States v. Kolodjay*, 53 M.J. 732 (A.C.C.A. 1999) (noting that the CA's action apparently would not achieve his objective of a six month waiver because the waiver dated back to the date the sentence was adjudged rather than fourteen days thereafter; a waiver is valid only when there are forfeitures to waive).

E. Deferment of reduction in rank. This is one area that remains unsettled at the moment under the MJA 2016. The original revised version of Art. 58a would have made reduction to E-1 automatic with a sentence that included ANY confinement (as opposed to the former requirement for 6 months where there was no punitive discharge and/or hard labor without confinement). The newer version of Art. 58a will allow the services to promulgate regulations governing automatic reductions. The pending EO will also resolve the inconsistency between effective dates in the Article versus the current R.C.M. Any automatic reductions will be effective at EOJ.

VI. POST-TRIAL SESSIONS. ARTICLE 39, UCMJ; R.C.M. 905, 1102/R.C.M. 1104

A. The most important change on post-trial sessions under the MJA 2016 will be to take authority away from the CA to order post-trial Art. 39(a) sessions. Only the MJ will have that authority. He or she will be able to do so any time prior to EOJ. There is no substantial change to the standards and or matters subject to a post-trial Art. 39(a) session. Proceedings in revision no longer appear in any of the R.C.M.s.

B. **[Legacy]** Types of post-trial sessions.

1. Proceedings in revision. "[T]o correct an apparent error, omission, or improper or inconsistent action by the court-martial which can be rectified by reopening the proceeding without material prejudice to the accused." R.C.M. 1102(b)(1).

2. Article 39(a) sessions. "[To inquire] into, and, when appropriate, [resolve] any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence. The military judge may also call an Article 39(a) session, upon motion of either party or *sua sponte*, to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence." R.C.M. 1102(b)(2). "The military judge shall take such action as may be appropriate**,** including appropriate instructions when members are present. The members may deliberate in closed session, if necessary, to determine what corrective action, if any, to take." R.C.M. 1102(e)(2); *United States v. Jackson*, 34 M.J. 1145 (A.C.M.R. 1992).

C. **[Legacy]** Timing.

1. The MJ may call a post-trial session before the record is authenticated. The CA may direct a post-trial session any time before taking initial action or at such later time as the convening authority is authorized to do so by a reviewing authority, except that no proceeding in revision may be held when any part of the sentence has been ordered executed. R.C.M. 1102(d).

2. *United States v. Scaff*, 29 M.J. 60, 65 (C.M.A. 1989). Until MJ authenticates the ROT, MJ may conduct a post-trial session to consider newly discovered evidence, and in proper cases, may set aside findings of guilty and the sentence.

3. MJ need not wait for guidance or directive from reviewing authority or CA. "The military judge may also call an Article 39(a) session, upon motion of either party or *sua sponte*, to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence." R.C.M. 1102(b)(2).

D. **[Legacy]** Format. Rule essentially adopts the *DuBay* "hearing" concept but it expands the jurisdiction of the MJ into post-trial proceedings. Article 39(a) requires that "these proceedings shall be conducted in the presence of the accused." *See also United States v. Caruth*, 6 M.J. 184 (C.M.A. 1979) (holding that a post-action hearing held in accused's absence found "improper and . . . not a part of the record of trial").

E. **[Legacy]** Limitations. R.C.M. 1102(c). *See United States v. Boland*, 22 M.J. 886 (A.C.M.R. 1986). Post-trial sessions cannot:

1. Reconsider a finding of not guilty as to a specification, or a ruling which amounts to a finding of not guilty.

2. Reconsider a finding of not guilty as to a charge unless a finding of guilty to some other Article is supported by a finding as to a specification.

3. Increase the severity of a sentence unless the sentence is mandatory.

F. Cases.

1. *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008). Prior to authentication of the record of trial the defense moved for a new trial based upon the government's failure to disclose impeachment evidence of one of the government's key witness. The judge granted a new trial and on appeal, the government argued that Article 73 and R.C.M. 1210 only allowed new trial petitions after the CA's action. The CAAF agreed that Article 73 does not allow a military judge to order a new trial – but Article 39(a) does. The CAAF declared unequivocally that military judges have authority under Article 39(a) to convene post-trial sessions to consider newly discovered evidence and to take whatever remedial action the military judge finds appropriate (to include a new trial).

2. *United States v. Meghdadi*, 60 M.J. 438 (C.A.A.F. 2005). After trial, appellant requested an Article 39(a) session seeking to inquiry into alleged witness misconduct, or, alternatively, a mistrial or a new trial. A different military judge than who presided over the trial heard evidence at the post-trial session and denied the motion. The defense based its motion on allegations that the primary CID investigator lied at trial when he testified that: he had not promised the informant who testified against the appellant that the informant would not go to jail if he helped CID; that he had not told the informant that CID would assist him with his case if the informant went to work for CID; and, that he had not met with the informant after CID terminated the informant as a registered source. An audio tape surreptitiously recorded by the informant in a conversation with the agent shed light on each of these allegations. The CAAF noted that the MJ failed to recognize the purpose of the requested inquiry, which was to examine the request for a mistrial or a new trial, rather than to establish a basis for correction or discipline of the witnesses themselves. The CAAF also criticized the findings made by the MJ. With respect to the evidentiary value of the tape, which the MJ discounted, the CAAF held that the appellant "firmly established" the potential impeachment value of the tape. The CAAF noted that the MJ denied himself the opportunity for meaningful assessment of whether the investigator's trial testimony was perjured, and if so, whether the effect of the perjury substantially contributed to the sentence.

3. *United States v. Humpherys*, 57 M.J. 83 (C.A.A.F. 2002). Post-trial 39(a) session held by MJ to question two panel members about a rater-ratee relationship that they failed to disclose during *voir dire*. After making extensive findings of facts and conclusions of law, the MJ indicated he would not have granted a challenge for cause based on the relationship had it been disclosed. Petition for a new trial denied. The CAAF noted the following regarding the MJ's post-trial responsibilities:

> The post-trial process empowers the military judge to investigate and resolve allegations, such as those in this case, by interviewing the challenged panel members. It allows the judge to accomplish this task while the details of trial are still fresh in the minds of all participants. The judge is able to assess firsthand the demeanor of the panel members as they respond to questioning from the bench and counsel.

Id. at 96.

4. *United States v. Jones*, 46 M.J. 815 (N-M.C.C.A. 1997). In mixed-plea case, MJ failed to announce findings of guilty of offenses to which accused had pled guilty, and as to which MJ had conducted providence inquiry. Upon realizing failure to enter findings, MJ convened post-trial Article 39(a) hearing and entered findings consistent with pleas of accused. Though technically a violation of R.C.M. 922(a), MJ commended for using post-trial session to remedy oversight.

5. *United States v. Perkins*, 56 M.J. 825 (A.C.C.A. 2001). MJ's failure to properly announce guilty finding as to Spec 3 of Charge II (MJ announced Guilty to Spec 3 of Charge III) did not require court to set aside appellant's conviction of Specification 3 of Charge II when it was apparent from the record that the MJ merely misspoke and appellant had actually plead guilty to Specification 3 of Charge II. The court notes that a proceeding in revision UP of R.C.M. 1102 would have been an appropriate course of action had the MJ or SJA caught the mistake.

6. *United States v. Kulathungam*, 54 M.J. 386 (C.A.A.F. 2001). Proceeding in revision to correct erroneous omission of findings from the record and to formally announce findings was appropriate. Omission was the only procedural deviation by the MJ during the court-martial. Note: upon discovery of the omission, the TC and court reporter "inserted" the findings in the record. DC was aware of the omission during trial but for tactical reasons chose to remain silent. On appeal, the CAAF advised counsel, in the future, to seek the advice of the MJ or a more senior counsel to avoid the "train wreck" that occurred in that case.

7. *United States v. Mayfield*, 45 M.J. 176 (C.A.A.F. 1996). Accused's written judge alone (JA) request never signed by parties and made part of the record. Additionally, no timely oral request for judge alone was made on the record. Before authentication, MJ realized omission and called a post-trial Article 39(a), during which accused acknowledged he had made request in writing and that JA trial had been his intent all along. The CAAF reversed the NMCCA, which had found the failure to formally request JA to be a jurisdictional error.

8. *United States v. Avery*, No. 9500062 (A.C.C.A. May 17, 1996) (unpublished). Post-trial 39(a) session held to inquire into allegations that a sergeant major (SGM) slept through part of the trial. Testimony of MAJ H, panel president, about "SGM A's participation during deliberations . . . was relevant and admissible." MJ "properly stopped appellant's trial defense counsel from asking MAJ H about any opinions expressed by SGM A during deliberations."

9. *United States v. Gleason*, 43 M.J. 69 (C.A.A.F. 1995). Proceeding in revision is inappropriate to correct erroneous sentencing instruction. Proper procedure is a rehearing. Article 63 prohibits members who sat in original proceeding from sitting on a rehearing. No such prohibition exists for a proceeding in revision. There is no problem in having the same members for a proceeding in revision. *See also United States v. Roman*, 46 C.M.R 78, 81 (C.M.A. 1972).

10. *United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985). Post-trial 39(a) appropriate procedure to repeat proceedings to reconstruct portions of a record of trial resulting from loss of recordings.

11. *United States v. Jordan*, 32 M.J. 672 (A.F.C.M.R. 1991). MJ erred in entering findings of guilty on two specifications. After authentication he noticed error and notified SJA, who advised CA to only approve proper findings, but to approve sentence as adjudged. "If the error were detected before authentication, the better method of handling this type of error would have been for the military judge to direct a post-trial session under R.C.M. 1102(d)." Such a post-trial session could have been used to reconsider the erroneous findings of guilty and re-determine the sentence. *See* R.C.M. 1102(b), (c), and (e). As requested by the trial defense counsel, the CA

could have also ordered a rehearing on sentence and avoided this issue. *See* R.C.M. 1107(e)(1)." *Id*. at 673-4 n.1.

12. *United States v. Wallace*, 28 M.J. 640 (A.F.C.M.R. 1989). MJ became aware of possible extraneous information received by the panel on the "ease of converting a BCD to a general discharge." MJ had an obligation to *sua sponte* convene a post-trial Article 39(a) session to assess facts and determine any possible prejudice. Findings affirmed; sentence set aside and rehearing authorized.

13. *United States v. Wilson*, 27 M.J. 555 (C.M.A. 1988). TC failed to administer oath to two enlisted panel members. MJ held a proceeding in revision to correct the "substantial omission, to wit: a sentence and a sentencing proceeding." Ministerial act of swearing court members is essential to legal efficacy of proceedings but not a matter affecting jurisdiction.

14. *United States v. Baker*, 32 M.J. 290 (C.M.A. 1991). MJ held a post-trial Article 39(a) session to correct the omission in sentence announcement (the president of the panel failed to announce the adjudged DD). Held – Error; presents the appearance of UCI. *See also United States v. Dodd*, 46 M.J. 864 (A.C.C.A. 1997) (holding that it was error for court to re-convene two minutes after adjourned to state they had also adjudged a bad-conduct discharge).

15. *United States v. Jones*, 34 M.J. 270 (C.M.A. 1992). MJ held proceeding in revision two months after adjournment to correct "erroneous announcement of sentence" (failure to announce confinement). Held – Error. "Article 69(e)(2)(c) disallows such corrective action, to assure the integrity of the military justice system." *Id.* at 271.

16. *United States v. Jackson*, 34 M.J. 1145 (A.C.M.R. 1992). MJ held post-trial Article 39(a) session one month after adjournment, declared mistrial as to sentence based on procedural error (court members used improper voting procedures), and ordered new session with same members. Held – post-trial session was actually a proceeding in revision, and since the error was substantive, was inappropriate; even if not error, inappropriate to use same sentencing authority. *See also United States v. Roman*, 46 C.M.R 78, 81 (C.M.A. 1972).

17. *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997). MJ abused his discretion when he denied the accused's request for delay of a post-trial Article 39(a) session in order to obtain civilian defense counsel. MJ was more concerned with expediency and convenience to government than protecting rights of the accused.

18. *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984). Unlawful command control for president to order a re-vote after a finding of not guilty had been reached. MJ should build a factual record at a post-trial Article 39(a) session.

19. *United States v. Steck*, 10 M.J. 412 (C.M.A. 1981). Proceeding in revision, directed by CA, appropriate to conduct a more thorough inquiry into the terms of the pretrial agreement and accused's understanding thereof.

20. *United States v. LePage*, 59 M.J. 659 (N-M.C.C.A. 2003). MJ erroneously admitted NJP record and considered evidence in arriving at a punitive discharge. At a post-trial Article 39(a) session, the MJ held that he erred and that the error prejudiced appellant. He further held, erroneously, that he lacked authority to correct the defect, citing to R.C.M. 1009, which addresses reconsideration of sentences. Held – MJ could have corrected the error under R.C.M. 1102 at a post-trial Article 39(a) session since the erroneous admission of the evidence "substantially affect[ed] the sufficiency of the sentence."

21. *United States v. Lofton*, 69 M.J. 386 (C.A.A.F. 2011). A convening authority abused his discretion in denying a request for a post-trial Article 39(a) session after an email surfaced from

an Air Force victim advocate claiming witnesses were texting each other the contents of testimony from the courtroom. However, the court addressed the testimony of the witnesses and found that there was no "basis for concluding that shaping of testimony or collusion occurred," and that the appellant was not prejudiced as a result.

22. MJ may, any time until authentication, "reconsider any ruling other than one amounting to a finding of not guilty." R.C.M. 905(f).

VII. PREPARATION OF RECORD OF TRIAL. ARTICLE 54, UCMJ; R.C.M. 1103; MCM, APPENDIX 13 AND 14/ R.C.M. 1112 AND R.C.M. 1114

A. Under the MJA 2016, the number of cases which require verbatim transcripts will increase. However, the ROT will no longer one of the potential triggers for the timeline to submit post trial matters. For that reason, the importance of the record of trial will be much less than it was under the legacy system.

B. **[Legacy]** R.C.M. 1103(b)(2)(B). In a GCM, TC shall, under the direction of the MJ, cause the ROT to be prepared and the reporters' notes, however compiled, to be retained. The ROT must be verbatim if:

1. Any part of the sentence exceeds six months confinement, forfeiture of pay greater than two-thirds pay per month, any forfeiture of pay for more than six months, or other punishments which may be adjudged by a SPCM; or a punitive discharge was adjudged.

2. *United States v. Embry*, 60 M.J. 976 (A.C.C.A. 2005). Appellant spoke with social work assistant prior to trial. The intake notes of that assistant were litigated before trial. The intake notes were not marked or attached to the record as an appellate exhibit. The notes could not be located when asked for by the ACCA. The court determined that the MJ erred in not marking and attaching the intake notes to the record. Because the MJ considered them, the notes must be included in the ROT to effect appellate review of a ruling affecting the rights of the accused at trial. The court found that the government failed to rebut the presumption of prejudice arising from the incomplete ROT.

3. *United States v. Madigan*, 54 M.J. 518 (N-M.C.C.A. 2000). Appellant asserted (among other allegations of error) that the ROT was incomplete because the Article 32 investigation was not included and the Article 34 SJA advice was also missing. Both allegations were without merit. The appellant waived his allegation of error regarding the Article 34 advice because no objection had been made, before, during or after trial. Also, the appellant alleged no prejudice from this error. The Article 32 was missing because the appellant had pled guilty and waived the Article 32 investigation.

4. *United States v. Gaskins*, 69 M.J. 569 (A.C.C.A. 2010) (en banc). During sentencing, the appellant admitted into evidence his "Good Soldier Book," which allegedly contained "a compilation of . . . awards, certificates, letters of commendation and character letters from family and friends, as well as a number of photographs." The exhibit was not included in the record of trial. The trial defense counsel noted this omission in the post-trial submissions. The SJAR addendum responded to this by stating that the exhibit "could not be located." The SJA provided a memorandum describing the exhibit, written by the senior court reporter (not the court reporter that sat in on appellant's trial). The SJA also provided the appellant's Official Military Personnel File (OMPF) for the convening authority to review. The post-trial submissions from the defense included twenty-one letters of support. The adjudged sentence was approved. In this case, the ACCA held that, despite the efforts to include a substitute memorandum, there is still an omission from the record of trial. However, the court was unable to determine whether or not this omission

is substantial or not. The description provided by the government did not include "adequate detail" for the court to analyze whether or not it was a substantial omission. The court then turned to the three options available and found that approving a sentence below the threshold for a verbatim record (like the dissent encourages), would be a particularly harsh remedy "[i]n light of the seriousness of appellant's offenses, the substantial sentence he received, and the fact that the omission in this case relates only to sentencing" rather than guilt. Over a rigorous dissent, the court sent the case back for a *DuBay* hearing to determine the contents of the exhibit, and any prejudice. The CAAF granted an extraordinary writ of prohibition to prevent this *DuBay* hearing and sent the case back to the ACCA. *See Gaskins v. Hoffman, Conn, Johnson, Cook, Baime, and United States Army*, Misc. No. 11-8004, 69 M.J. 452 (C.A.A.F. Dec. 9, 2010).

a) *United States v. Gaskins*, No. 20080132, 2011 WL 498371 (A.C.C.A. Feb. 10, 2011) (unpublished) (en banc). On remand, the majority opinion at the ACCA affirmed the findings and remanded the case for a sentencing rehearing. The opinion is terse, less than a page of text. Six judges were in the majority opinion (J. Hoffman, S.J. Conn, S.J. Johnson, J. Gallagher, J. Baime, and J. Burton). Four of the judges from the original opinion are still in the majority, while Judge Cook has since left the court. Two new judges, J. Gallagher and J. Burton, joined the majority for this opinion. There were two separate opinions that concurred in part and dissented in part. Both of these opinions agreed with the majority that the findings were unaffected by the missing sentencing exhibit. However, both would approve a nonverbatim record of trial punishment. J. Gifford also wrote to state that a rehearing is inappropriate because it "unfairly places the onus on appellant to present a sentencing case."

b) The CAAF granted a petition to stay this rehearing. *See Gaskins v. Hoffman, Conn, Johnson, Gallagher, Baime, and Burton*, Misc. No. 11-8017, 70 M.J. 37 (C.A.A.F. Mar. 31, 2011).

c) Two months later, the CAAF reversed their decision and denied the petition, paving the way for the sentencing rehearing to take place. *See Gaskins v. Colonel John B. Hoffman, USA, et al.*, Misc. No. 11-8017, 70 M.J. 207 (C.A.A.F. June 1, 2011).

d) ACCA then affirmed the sentence adjudged at the rehearing of 9 years confinement which the CA had approved. 2012 CCA LEXIS 255 (July 12, 2012).

e) CAAF granted relief on a separate issue in 2013 and returned the case to ACCA which approved a sentence of 8.5 years. 2013 CCA LEXIS 564 (July 22, 2013).

C. **[Legacy]** R.C.M. 1103 and the discussion list what must be included in or attached to the ROT. The rule is supplemented by AR 27-10.

D. **[Legacy]** Acquittals still need a ROT (summarized).

E. **[Legacy]** If an Article 39(a) session is called to order by the court a ROT is required. *See* R.C.M. 1103(e). For example, accused is arraigned and subsequent to arraignment, the charges are withdrawn and dismissed – prepare a summarized ROT.

F. **[Legacy]** What if a verbatim ROT cannot be prepared? *See* R.C.M. 1103(f). *But see United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985) (can reconstruct the record of trial to make it "verbatim").

G. **[Legacy]** How verbatim is verbatim? No substantial omissions.

1. Verbatim does not mean word-for-word. *See United States v. Gray*, 7 M.J. 296 (C.M.A. 1979); *United States v. Behling*, 37 M.J. 637 (A.C.M.R. 1993). Insubstantial omissions do not make a record non-verbatim, but substantial omissions create a rebuttable presumption of

prejudice that the government must rebut. *United States v. McCullah*, 11 M.J. 234 (C.M.A. 1981).

2. The government can reconstruct the record of trial to rebut the presumption of prejudice. *United States v. Lashley*, 14 M.J. 7 (C.M.A. 1982); *United States v. Eichenlaub*, 11 M.J. 239 (C.M.A. 1981); *United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985).

3. *United States v. Cudini*, 36 M.J. 572 (A.C.M.R. 1992). Failure to attach copy of charges and specifications as appellate exhibit not substantial omission; where omission is insubstantial, accused must show specific prejudice.

4. *United States v. Washington*, 35 M.J. 774 (A.C.M.R. 1992). Pretrial conferences under R.C.M. 802 need not be recorded; matters agreed upon, however, must be made a part of the record.

5. *United States v. Marsh*, 35 M.J. 505 (A.F.C.M.R. 1992). Off-the-record discussion of administrative discharge not a substantial omission where issue had been raised on the record and military judge ruled on the record that trial would proceed.

6. *United States v. Clemons*, 35 M.J. 767 (A.C.M.R. 1992). ROT qualified as verbatim record although it included three off-the-record pauses; sessions involved purely administrative matters, what took place was not essential substance of trial, and sessions were not recorded for legitimate purposes.

7. *United States v. Kyle*, 32 M.J. 724 (A.F.C.M.R. 1991). After reviewing documents *in camera*, MJ must seal the documents and attach them to the ROT. *See* R.C.M. 702(g)(2) and Article 54(c)(1). "A military judge must make a record of every significant *in camera* activity (other than his legal research) adequate to assure that his decisions are reviewable on appeal." *Id*. at 726.

8. *United States v. Harmon*, 29 M.J. 732 (A.F.C.M.R. 1989). Tape recorder failed. MJ attempted to reconstruct. Because of substantial omission, burden on government to rebut presumption of prejudice. In this case, an almost impossible task.

9. *United States v. Sneed*, 32 M.J. 537 (A.F.C.M.R. 1990). DC argued *ex parte* motion telephonically to MJ. Defense complained that record was not verbatim because the *ex parte* telephone conversation was not recorded and was not made a part of the required verbatim ROT. Held: "Although the omission may have sufficient 'quantitative' substance to raise the presumption of prejudice . . . we have no hesitancy in finding that presumption effectively rebutted, not so much by affirmative government action (*e.g*., reconstruction of the record) as by the totality of circumstances." *Id*. at 540.

10. *United States v. Alston*, 30 M.J. 969 (N.M.C.M.R. 1990). Omission of testimony relating to offenses of which accused was acquitted was a substantial omission.

11. *United States v. Chollet*, 30 M.J. 1079 (C.G.C.M.R. 1990). Several bench conferences had "inaudible" sections. "We believe that these inaudible portions were substantial omissions which, along with other non-transcriptions, render the record non-verbatim." BCD disapproved.

12. *United States v. Seal*, 38 M.J. 659 (A.C.M.R. 1993). Omission of videotape viewed by MJ before imposing sentence renders ROT "incomplete," resulting in reversal.

13. *United States v. Maxwell*, 2 M.J. 1155 (N.M.C.M.R. 1975). Two audiotapes were inadvertently destroyed, resulting in loss of counsel's arguments, a brief Article 39(a) session on instructions, and announcement of findings. All but DC argument reconstructed. "We do not

view the absence of defense counsel's argument as a substantial omission to raise the presumption of prejudice . . . [and] no prejudice has been asserted." *Id*. at 1156.

14. *United States v. Sylvester*, 47 M.J. 390 (C.A.A.F. 1998). ROT did not contain R.C.M. 1105/1106 submissions from CDC and request for deferment or the CA's action thereon. Held: No error for failing to include the R.C.M. 1105/1106 submissions (CDC did not submit written matters, but made an oral presentation to the CA). The CAAF refused to create a requirement that all such discussions be recorded or memorialized in the ROT, but made it clear they prefer written post-trial submissions. The CAAF did find error, although harmless, for not including the deferment request and action in the ROT (the accused was released six days after the request).

15. *United States v. Simmons*, 54 M.J. 883 (N-M.C.C.A. 2001). During appellant's trial, there were two gaps in which the government had technical difficulty with its recording devices. An Article 39(a) session had to be reconstructed due to a tape malfunction and approximately fifty minutes of testimony were lost due to the volume being too low. Article 54(a) requires the preparation of a complete ROT in a general court-martial where the accused receives a discharge. A complete ROT should include a verbatim transcript. If the government cannot provide a verbatim ROT, it can either establish the accused suffered no prejudice or only approve the sentence that could be adjudged if the accused had been tried by a straight special court-martial. The court did a line-by-line analysis of the portions of the ROT that were missing and concluded that no prejudice occurred. The court agreed that the ROT was not verbatim, but the government had overcome the presumption of prejudice applied by the court.

16. *United States v. Henthorn, Jr.*, 58 M.J. 556 (N-M.C.C.A. 2003). ROT omitted approximately twenty-four pornographic images considered by the MJ on sentencing. Held: "such presumed prejudice [was] adequately rebutted" and any error stemming from the omission was harmless beyond a reasonable doubt. *Id*. at 559. Factors considered by the court: the case was a guilty plea; the omitted evidence did not go to guilt or innocence; the appellant did not question the validity of his plea; the images were adequately described in the ROT; the DC was aware of the MJ's proposed handling of the images (i.e., ordered sealed in NCIS case file); and neither DC or appellate DC questioned the nature of the omitted documents.

17. *United States v. Usry*, 68 M.J. 501 (C.G.C.C.A. 2009). There was a fifty-second gap during the inquiry into the appellant's competence. The CGCCA holds that this was not a substantial omission. Even though that fifty-second gap occurred when the military judge was inquiring into the appellant's competence to stand trial, which is an important issue, the court holds that a decision on competence is "unlikely to turn on the precise words being spoken during a fifty-second period." The military judge had an opportunity to observe the appellant's behavior during trial, which was more probative of the appellant's competence than his answers to a few questions.

18. *United States v. Miller*, No. 20090826, 2010 WL 3620471 (A.C.C.A. May 20, 2010) (unpublished). The ROT did not include a DVD showing the accused at work that was played at trial during sentencing. The ACCA, finding prejudice, approved non-verbatim ROT punishment (six months confinement and a reduction to E-1).

19. *United States v. Davenport*, 73 M.J. 373 (C.A.A.F. 2014) Notwithstanding the military judge's and trial counsel's review, the record was authenticated on June 2, 2009; missing from the record was the entire testimony on the merits of SGT MS, a Government witness. The record indicates only that the Government called SGT MS as a witness. "The omission of the testimony of an entire merits witness is almost necessarily substantial where, as here, the content of the testimony is equivocal even after attempts to reconstruct it at a DuBay hearing. . . . On balance, the omission of SGT MS's testimony was substantial and, therefore, the transcript here was

nonverbatim." Since it was nonverbatim and cannot be reconstructed, R.C.M. 1103(f) limits the approved sentence to six months confinement and no discharge.

H. **[Legacy]** Trial counsel shall review 150 pages per day and unless unreasonable delay will result, DC will be given the same opportunity to examine the ROT before authentication. R.C.M. 1103(i)(1)(B). See also, U.S. Army Judiciary Rules of Court, R. 28.5 (dated Nov. 1, 2013); *United States v. Bryant*, 37 M.J. 668 (A.C.M.R. 1993). Review by DC before authentication is preferred, but will not result in return of record for new authentication absent showing of prejudice. *See also United States v. Smith*, 56 M.J. 711 (A.F.C.C.A. 2001).

I. **[Legacy]** Military Judges Duties / Responsibilities. *United States v. Chisholm*, 58 M.J. 733 (A.C.C.A. 2003), *aff'd*, 59 M.J. 151 (C.A.A.F. 2003) (holding that lower court's decision was not "advisory" in nature; issue of whether a Trial Judge has the authority noted by the lower court not reached by the court). Both Article 38(a), UCMJ, and R.C.M. 1103(b)(1)(A) make the military judge responsible for overseeing and ensuring that the record of trial is prepared. The court, after noting that preparation of the record of trial is a "shared responsibility" between the SJA and military judge, found that military judges "have both a duty and responsibility to take active roles in 'directing' the timely and accurate completion of court-martial proceedings." 58 M.J. at 737. The court highlighted a military judge's "inherent authority to issue such reasonable orders as may be necessary to enforce that legal duty," noting that the manner in which he or she directs completion of the record is a matter within his or her "broad discretion." Having said that, the court suggested several "remedial actions" available to a military judge:

> The exact nature of the remedial action is within the sound judgment and broad discretion of the military judge, but could include, among other things: (1) directing a date certain for completion of the record with confinement credit or other progressive sentence relief for each day the record completion is late; (2) ordering the accused's release from confinement until the record of trial is completed and authenticated; or, (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing.

Id. at 737-38. Jurisdictions that choose to ignore a military judge's order regarding preparation of the record of trial "do so at their peril." *Id*. Note: although the CAAF found that the lower court decision was NOT advisory, the CAAF also noted that "the parties in a subsequent case are free to argue that specific aspects of an opinion . . . should be treated as non-binding dicta." 59 M.J. at 152.

VIII. AUTHENTICATING AND SERVING RECORDS OF TRIAL. ARTICLE 54, UCMJ; R.C.M. 1104/R.C.M. 1112

A. As noted, authentication by the MJ will no longer be required. Rather the court reporter will certify under R.C.M. 1112. That same rule will govern distribution of the ROT. Under the revised Art. 54(e), a larger class of victims will be eligible to receive copies of the record of trial.

B. **[Legacy]** Authentication by MJ or judges in GCM or SPCM with adjudged BCD. Authentication IAW service regulations for SPCM (same as GCM in AR 27-10). Substitute authentication rules provided (*Cruz-Rijos* standard).

1. Dead, disabled or absent: only exceptions to MJ authentication requirement. Article 54(a). *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976).

2. TC may authenticate the ROT only if the military judge is genuinely unavailable for a lengthy period of time.

a) PCS to distant place may qualify as absence. *United States v. Lott*, 9 M.J. 70 (C.M.A. 1980). Reduced precedential value in light of spread of technology (facsimiles, overnight delivery, etc.). Also justification for substitute authentication is less given the demise of the 90-day post-trial/confinement *Dunlap* rule. *See United States v. Banks*, 7 M.J. 92 (C.M.A. 1979).

b) An extended leave may be sufficient. *United States v. Walker*, 20 M.J. 971 (N.M.C.M.R. 1985) (leave of thirty days is prolonged absence). *But see United States v. Batiste*, 35 M.J. 742 (A.C.M.R. 1992) (fifteen day leave does not equal prolonged absence); R.C.M. 1104(a)(2)(B), discussion (substitute authentication only for emergencies; the brief, temporary absence of the MJ is not enough).

c) Military judge's release from active duty authorizes substitute authentication UP of R.C.M. 1104(a)(2)(B). *See United States v. Garman*, 59 M.J. 677 (A.C.C.A. 2003); *United States v. Gibson*, 50 M.J. 575, 576 (N-M.C.C.A. 1999).

d) A statement of the reasons for substitute authentication should be included in the ROT. *United States v. Lott*, 9 M.J. 70 (C.M.A. 1980).

e) *United States v. Allende*, 66 M.J. 142 (C.A.A.F. 2008). Trial counsel made corrections to the record of trial, authenticated the record of trial "because of absence of the military judge," and served it on the defense counsel. Absent objection from the defense counsel, the CAAF held that this was insubstantial or non-prejudicial.

C. **[Legacy]** If more than one MJ, each must authenticate his portion. *United States v. Martinez*, 27 M.J. 730 (A.C.M.R. 1988).

1. *United States v. Ruh*, 2014 CCA LEXIS 710 (A. Ct. Crim. App. 22 Sept 2014) ROT sent to MJ in Aug 2012; MJ failed to authenticate because he was on terminal leave. TC finally authenticated on 14 Nov. 2012.

D. **[Legacy]** TC shall cause a copy of ROT to be served on the accused after authentication. Substitute service rules provided. R.C.M. 1104(b).

1. UCMJ, Article 54(c) requires such service as soon as the ROT is authenticated.

2. In *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976), the CMA added the requirement that this be done well before CA takes action.

3. Substitute service on the DC is a permissible alternative. *See United States v. Derksen*, 24 M.J. 818 (A.C.M.R. 1987).

E. **[Legacy]** Service on the victim. IAW R.C.M. 1103(g)(3), a victim is entitled to a free copy of the ROT. A victim is defined here as one who has suffered direct physical, emotional or pecuniary harm as a result of a specification or charge and is named in a specification of 120, 120b, 120c or 125 or any attempt to commit the same.

F. **[Legacy]** What to do if the authenticated ROT is lost? Produce a new ROT for authentication.

1. *United States v. Garcia*, 37 M.J. 621 (A.C.M.R. 1993). Holding that SJA-prepared certification that all allied documents were true copies of originals was sufficient substitute for original documents.

2. *United States v. Godbee*, 67 M.J. 532 (N-M.C.C.A. 2008). The original ROT was lost. The copy of the ROT submitted for appellate review was internally consistent and contained all numbered pages and exhibits. The ROT also contained a copy of the authentication page signed

by the military judge. As a result, the NMCCA applies a presumption of regularity to its creation, authentication, and distribution. Harmless error.

G. **[Legacy]** Rules for correcting an authenticated ROT. Certificate of correction process. Correction to make the ROT conform to the actual proceedings. R.C.M. 1104(d).

H. **[Legacy]** The authenticated ROT will be forwarded to the CA for action or referred to the SJA for a recommendation before such action. SJA recommendation required prior to taking action in a GCM or SPCM in which a punitive discharge or confinement for one year was adjudged. R.C.M. 1106(a).

I. **[Legacy]** If defense time for errata is unreasonable, MJ can authenticate without errata. R.C.M. 1103(i)(1)(B).

IX. MATTERS SUBMITTED BY THE ACCUSED. ARTICLE 60, UCMJ; R.C.M. 1105/R.C.M. 1106

A. After being sentenced, the accused has the right to submit matters for the CA's consideration. This is another area of change under the MJA 2016. The R.C.M. number will change and the timeline will also change dramatically, and be triggered by the announcement of sentence. Because the substance of the rule will not change much, it is likely the caselaw in this area will remain largely applicable.

1. *See United States v. Davis*, 20 M.J. 1015 (A.C.M.R. 1985) (holding that DC's failure to submit matters under R.C.M. 1105 and failure to mention under R.C.M. 1106(f) that MJ strongly recommended suspension of the BCD was ineffective assistance). *See* R.C.M. 1106(d)(3)(B) that now requires the SJA to bring to the CA's attention recommendations for clemency made on the record by the sentencing authority. *See also United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001) (holding that DC's submission of three enclosures which reduced the accused's chances for clemency was ineffective).

2. *United States v. Harris*, 30 M.J. 580 (A.C.M.R. 1990). DC is responsible for determining and gathering appropriate post-trial defense submissions.

3. *United States v. Martinez*, 31 M.J. 524 (A.C.M.R. 1990). DC sent the accused one proposed R.C.M. 1105 submission. When the defense counsel received no response (accused alleged he never received it), DC submitted nothing; ineffective assistance found.

4. *United States v. Tyson*, 44 M.J. 588 (N-M.C.C.A. 1996). Substitute counsel, appointed during 15-month lapse between end of the SPCM and service of the PTR, failed to generate any post-trial matters (in part because accused failed to keep defense informed of his address). No government error, but action set aside because of possible IAC.

5. *United States v. Sylvester*, 47 M.J. 390 (C.A.A.F. 1998). Written submissions are preferred, even if only to document an oral presentation.

B. Accused can submit anything, but the CA need only consider written submissions. *See* R.C.M. 1105/R.C.M. 1106.

1. The material may be anything that may reasonably tend to affect the CA's action, including legal issues, excluded evidence, previously unavailable mitigation evidence, and clemency recommendations. *See United States v. Davis*, 33 M.J. 13 (C.M.A. 1991).

C. Time periods.

1. Under the MJA 2016, the accused will have 10 days from the announcement of sentence. R.C.M. 1106(d)(1). That may be extended by the CA for up to 20 days for "good cause." Good cause does not ordinarily "include the need to obtain matters that reasonably could have presented at the court-martial." R.C.M. 1106(d)(4)(B).

2. **[Legacy]** GCM or SPCM – due on later of ten days after service of SJAR on BOTH DC and the accused and service of authenticated ROT on the accused.

3. **[Legacy]** SCM – within seven days of sentencing.

4. The failure to provide these time periods is error; however, the accused must make some showing that he would have submitted matters. *United States v. DeGrocco*, 23 M.J. 146 (C.M.A. 1987). *See also United States v. Sosebee*, 35 M.J. 892 (A.C.M.R. 1992). "A staff judge advocate who discourages submissions to the convening authority after the thirty-day time limit but prior to action creates needless litigation and risks a remand from this Court." *Id*. at 894.

5. *United States v. Borden*, 74 M.J. 754 (A.C.C.A. 2015). The accused's 10-day deadline to submit matters now begins to run the day the ROT arrives at his address. This policy shift (under the old rule the clock did not run until receipt by the accused) ends the practice of an accused rejecting service and brings military case law into line with federal court practice and its rules on service. The gov't must insure the ROT and SJAR are shipped to the correct address (either confinement or the address given by the accused).

D. Waiver rules. These will not change under the MJA 2016. The accused may waive the right to make a submission under R.C.M. 1105 by:

1. Failing to make a timely submission.

a) *United States v. Maners*, 37 M.J. 966 (A.C.M.R. 1993). CA not required to consider late submission, but may do so with view toward recalling and modifying earlier action.

b) *But see United States v. Carmack*, 37 M.J. 765 (A.C.M.R. 1993). Government "stuck and left holding the bag" when defense makes weak or tardy submission, even though no error or haste on part of the government.

c) *United States v. Doughman*, 57 M.J. 653 (N-M.C.C.A. 2002). Failure to submit matters in a timely manner constitutes a waiver of the right to submit matters.

> Article 60, UCMJ, 10 U.S.C. § 860, affords an accused the right to submit matters for the convening authority's consideration, prior to the convening authority taking action on the case . . . . With this statutory right . . . also comes a responsibility: to submit matters in a timely fashion. Both Article 60, UCMJ, and R.C.M. 1105 clearly require that matters in clemency be submitted within 10 days of the service of the record of trial or the staff judge advocate's recommendation (SJAR), whichever is later, unless an extension is sought or granted. *Id*. at 654. Held: absent evidence of an approved extension, the appellant waived the right to submit matters. Despite finding waiver, a review of the record revealed no prejudice since the appellant's submissions were in the proper place in the record and the action post-dated the appellant's submission. Citing *United States v. Stephens*, 56 M.J. 391 (C.A.A.F. 2002), the court noted that nothing requires the CA to list everything considered prior to taking action; in the absence of evidence to the contrary, the presumption is that the CA considered clemency matters submitted by the appellant prior to taking action.

2. By making a partial submission without expressly reserving in writing the right to submit additional matters. *United States v. Scott*, 39 M.J. 769 (A.C.M.R. 1994).

3. Filing an express, written waiver.

4. *United States v. Travis*, 66 M.J. 301 (C.A.A.F. 2008). Defense requested two short delays after the initial ten day response period to gather a letter from LtGen Mattis (now Gen Mattis, Commander, USCENTCOM). Addendum served and three days later, CA took action. Defense submitted letter from LtGen Mattis; filed writ to NMCCA claiming prejudice because no clemency matters were considered by CA. Denied. The CAAF held that there was no material prejudice to the appellant because CA purported to withdraw his action later, and approve the sentence as adjudged after considering the letter from LtGen Mattis. Note: CA had no authority to withdraw his first action because case had been forwarded to NMCCA. Also, because SJA was in Iraq and defense counsel was at Camp Pendleton, much of this was communication related. Take affirmative action to ensure matters are received before action taken.

5. *United States v. Rosenthal*, 62 M.J. 261 (C.A.A.F. 2005). Waiver of submission of matters in first post-trial process does not automatically mean appellant waives submission of matters in second or subsequent post-trial process. Appellant must be afforded the opportunity to submit matters.

E. Submission of matters contrary to client's directive. *United States v. Williams*, 57 M.J. 581 (N-M.C.C.A. 2002). Error for the defense counsel to submit a Memorandum for Record that documented his advice to his client and his client's decision not to submit clemency matters; however, the appellant suffered no harm as a result of the error. *See also United States v. Blunk*, 37 C.M.R. 422 (C.M.A. 1967).

F. Claims of post-trial cruel and unusual punishment.

1. *United States v. Roth*, 57 M.J. 740 (A.C.C.A. 2002), *aff'd*, 58 M.J. 239 (C.A.A.F. 2003) (summary disposition). Claims of post-trial cruel and unusual punishment in violation of the Eighth Amendment or Article 55, UCMJ, are within a CCA's Article 66, UCMJ, review authority. In order to succeed on his claim of injury to his testicle while at the DB, injury resulting from improper frisks without "penological justification," the appellant must satisfy both an objective and subjective test regarding the alleged injury. Objectively, the appellant must show that the "alleged deprivation or injury was 'sufficiently serious' to warrant relief." *Id*. at 742. Second, the appellant must show that the person causing the injury had a "culpable state of mind and subjectively intended to maliciously or sadistically harm [him] through the use of wanton or unnecessary force, and that the injury was not caused by a good faith effort to maintain or restore discipline." *Id*. Held: although appellant satisfied the objective test, he failed to present any subjective evidence of culpability or use of wanton or unnecessary force.

2. *United States v. Brennan*, 58 M.J. 351 (C.A.A.F. 2003), *aff'd after remand*, 60 M.J. 119 (C.A.A.F. 2004) (summary disposition). The test for post-trial claims of cruel and unusual punishment is two pronged with an objective component and subjective component: "whether there is a sufficiently serious act or omission that has produced a denial of necessities . . . [and] whether the state of mind of the prison official demonstrates deliberate indifference to inmate health or safety," respectively. *Id*. at 353. Additionally, "to sustain an Eighth Amendment violation, there must be a showing that the misconduct by prison officials produced injury accompanied by physical or psychological pain." *Id*. at 354. During the post-trial processing of the appellant's case, the appellant's counsel requested clemency based on seven separate grounds, one of which was an allegation that while confined at the USACFE, Mannheim, Germany, she was subjected to cruel and unusual punishment in violation of the Eighth Amendment and Article 55, UCMJ (i.e., sexual harassment and assaults by an E-6 cadre member over a two-month period). In responding to the allegations, the government argued that the appellant failed to establish harm and additionally, relief was not warranted because the CA already granted

clemency. The CAAF disagreed with both assertions. First, the court found that it was clear that the appellant suffered harm at the hands of the cadre member. Next, although the CA granted some clemency (reducing confinement by three months), the CA's action was unclear as to why he granted the clemency. The appellant's counsel raised seven separate bases for relief and the SJAR was silent regarding the allegation of cruel and unusual punishment. Held: the decision of the service court was affirmed as to findings and set aside as to sentence. The case was remanded to the service court with the option of either granting relief at their level for the Article 55, UCMJ, violation (i.e., Eighth Amendment) or to remand back to the CA for remedial action.

3. *United States v. Ney*, 68 M.J. 613 (A.C.C.A. 2010). The appellant asserted that the command failed to follow AR 190-47 by not transferring him to a military confinement facility within seven working days after trial (it took thirty-four days). This Eighth Amendment and Article 55, UCMJ, claim was denied because: 1) administrative remedies, such as an Article 138 complaint, must be exhausted first; and, 2) regulatory violations alone are normally not enough for an Eighth Amendment or Article 55 violation.

G. Appellate counsel access to defense files. *United States v. Dorman*, 58 M.J. 295 (C.A.A.F. 2003). Error for military defense counsel and the CCA to deny civilian defense counsel access to the appellant's case file after civilian defense counsel obtained a signed release from the client. "[T]rial defense counsel must, upon request, supply appellate defense counsel with the case file, but only after receiving the client's written release." *Id*. at 298.

X. MATTERS SUBMITTED BY A VICTIM. R.C.M. 1105A/R.C.M. 1106A

A. A crime victim has the right to submit matters for consideration by the CA after the sentence is adjudged. This is another area of change under the MJA 2016. The R.C.M. number will change and the timeline will also change dramatically, and be triggered by the announcement of sentence. Because the substance of the rule will not change much, it is likely the caselaw in this area will remain largely applicable.

B. A victim is defined as one who has suffered direct physical, emotional or pecuniary harm as a result of an offense on which the accused was convicted and on which the CA is now acting. This definition will not change.

C. **[Legacy]** The statement shall be submitted within ten days of receiving the later of the SJA's recommendation or (if entitled to receive a copy) the record of trial.

XI. RECOMMENDATION OF THE SJA OR LEGAL OFFICER. ARTICLE 60, UCMJ; R.C.M. 1106/R.C.M. 1109 AND 1110

A. This will be a dramatic change under the MJA 2016. The new rules will only require that the CA "consult" with the SJA or legal advisor prior to taking action. That is all. There is no requirement for it to be in writing, to be served on opposing counsel, or provide them an opportunity to respond. Although AR 27-10 will likely impose additional requirements, the days of determining "new matter," drafting addendums, and ensuring the opportunity to respond are likely over once we begin operating under the new system. This also raises the question of whether defense counsel will continue to allege legal error in some fashion to the CA and how defense counsel will look to preserve, in writing, those issues they believe merit potential appellate review.

B. **[Legacy]** R.C.M. 1106 requires a written SJA recommendation (SJAR) before the CA takes action on a GCM with any findings of guilty or a SPCM with an adjudged BCD or confinement for a year.

C. **[Legacy]** Disqualification of persons who have previously participated in the case.

1. Who is disqualified? The accuser, investigating officer, court members, MJ, any TC, DC, or anyone who "has otherwise acted on behalf of the prosecution or defense." Article 46, UCMJ.

a) *United States v. Taylor*, 60 M.J. 190 (C.A.A.F. 2004). SJA of TC who authored article in base newspaper stating that the interests of justice were not met in a recent court-martial because of administrative errors resulting in the inadmissibility of counseling documents was disqualified from participating in the post-trial process. The SJA could have disclaimed the article, but instead said that the article could be imputed to him. His failure to disqualify himself was error.

b) *United States v. Gutierrez*, 57 M.J. 148 (C.A.A.F. 2002). Chief of Justice who testified on the merits in opposition to a defense motion to dismiss for lack of speedy trial and who later became the SJA, is disqualified from participating in the post-trial process. Therefore, it was error for that officer to prepare the SJAR and the subsequent addendum. The court noted, "Having actively participated in the preparation of the case against appellant, [that officer] was not in a position objectively to evaluate the fruits of her efforts." *Id*. at 149.

c) *United States v. Johnson-Saunders*, 48 M.J. 74 (C.A.A.F. 1998). The Assistant TC, as the Acting Chief of Military Justice, prepared the SJAR. The SJA added only one line, indicating he had reviewed and concurred with the SJAR. The DC did not object when served with the SJAR. The court held that the ATC was disqualified to prepare the SJAR. The court went on to hold that there was no waiver and there was plain error. The court returned the case for a new SJAR and action. The court created the test for non-statutory disqualification: whether the trial participation of the person preparing the SJAR "would cause a disinterested observer to doubt the fairness of the post-trial proceedings."

d) *United States v. Sorrell*, 47 M.J. 432 (C.A.A.F. 1998). CoJ wrote the SJAR. Dispute developed between the accused and the CoJ over whether the CoJ promised the accused he would recommend clemency if the accused testified against other soldiers (which he did). The court avoided the issue; if there was error, it was harmless because the PTR recommended six months clemency, which the CA approved.

e) *United States v. Stefan*, No. 20081097 (A.C.C.A. Jan. 29, 2010) (unpublished), *review granted*, 69 M.J. 171 (C.A.A.F. 2010). This case was submitted on its merits. The majority affirmed the findings and the sentence without comment. The dissent found that a disqualified officer advised the convening authority. The officer at issue first appeared in the record of trial as "Chief, Military Justice," by signing the referral of both the charges and additional charges. Next, she appeared as trial counsel and served the referred charges and additional charges on appellant. Third, she acted again as "Chief, Military Justice" by granting the defense request for extension of time to submit post-trial matters. Next, she signed the promulgating order and the chronology sheet as "Acting Staff Judge Advocate." Then, on the same day, she signed the court-martial data sheet as three separate persons: "Trial Counsel," "Convening Authority or His/Her Representative," and "Staff Judge Advocate of General Court-Martial Convening Authority or Reviewing Staff Judge Advocate." Finally, on that same day, she signed the addendum to the SJAR as "Acting SJA." The dissent spent time discussing the roles of the chief of military justice and the fact that the "modern chief of military justice in the Army is in no way, shape, or form—not in concept or execution—'neutral,' and has no business advising the convening authority in the post-trial process." As a result, the dissent would have found prejudice by the numerous roles played by the chief of military justice in this case, and granted relief.

f) *United States v. Stefan*, 69 M.J. 256 (C.A.A.F. 2010). The CAAF agreed with the dissent from the court below and found that the Chief of Justice was statutorily disqualified under Article 6(c), UCMJ, primarily because she served the referred charges and the additional charges on the accused, a "task traditionally reserved for detailed trial counsel, see R.C.M. 602." However, the CAAF held that the appellant was not prejudiced and granted no relief. Of particular note to the CAAF was the fact that anyone who acts as a trial counsel is disqualified under the plain reading of Article 6(c), UCMJ, and not just those who are specifically detailed as trial counsel under Article 27, UCMJ.

g) *United States v. Ramos*, No. 20090099, 2010 WL 3946329 (A.C.C.A. July 19, 2010) (unpublished), *aff'd*, 69 M.J. 475 (C.A.A.F. Jan. 11, 2011) (summary disposition). This case was submitted on its merits. The majority affirmed the findings and the sentence without comment. The dissent found that a disqualified officer advised the convening authority. The facts here are very similar to the *Stefan* case above, because the same office of the staff judge advocate and the same officer were involved. The dissent held that this case is very similar to the *Stefan* case above, except for the fact that the main document at issue in this case was the SJAR. In *Stefan*, the main document at issue was the addendum. As a result, the defense counsel had an opportunity to object to the disqualified officer acting in this case, whereas in *Stefan*, the defense counsel had no opportunity to object to the disqualified officer acting on the addendum. As a result, the dissent would have remanded the case for at least "a new review and action."

2. Also disqualified is the SJA who must review his own prior work (*United States v. Engle*, 1 M.J. 387 (C.M.A. 1976)); or his own testimony in some cases (*United States v. Rice*, 33 M.J. 451 (C.M.A. 1991)); *United States v. Choice*, 49 C.M.R. 663 (C.M.A. 1975). *United States v. McCormick*, 34 M.J. 752 (N.M.C.M.R. 1992) (holding that PTR insufficient if prepared by a disqualified person, even if filtered through and adopted by the SJA). *See* R.C.M. 1106(b) discussion.

3. "Material factual dispute" or "legitimate factual controversy" required. *United States v. Lynch*, 39 M.J. 223, 228 (C.M.A. 1994). *See United States v. Bygrave*, 40 M.J. 839 (N.M.C.M.R. 1994) (holding that PTR must come from one free from *any* connection with a controversy); *United States v. Edwards*, 45 M.J. 114 (C.A.A.F. 1996). Legal officer (non-judge advocate) disqualified from preparing PTR because he preferred the charges, interrogated the accused, and acted as evidence custodian in case. Mere prior participation does not disqualify, but involvement "far beyond that of a nominal accuser" did so here.

4. Who is not disqualified?

a) The SJA who has participated in obtaining immunity or clemency for a witness in the case. *United States v. Decker*, 15 M.J. 416 (C.M.A. 1983).

b) Preparation of pretrial advice challenged at trial not automatically disqualifying; factual determination. *United States v. Caritativo*, 37 M.J. 175 (C.M.A. 1993).

c) *United States v. McDowell*, 59 M.J. 662 (A.F.C.C.A. 2003). SJA whose initial SJAR was deemed defective on appeal is not *per se* disqualified when the error is a result of a change in the law as opposed to bad or erroneous advice. Changes in the law affecting the validity of an SJAR do not create a "personal interest" in the case; however, erroneous or bad advice in an SJAR, returned to the same SJA for a second review and action may disqualify that SJA if it is shown he or she has an other than official interest in the case.

5. How do you test for disqualification outside the scope of the rules? Do the officer's actions before or during trial create, or appear to create, a risk that the officer will be unable to evaluate

the evidence objectively and impartially? *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). *See United States v. Kamyal*, 19 M.J. 802 (A.C.M.R. 1984) ("a substantial risk of prejudgment"). *United States v. Johnson-Saunders*, 48 M.J. 74 (C.A.A.F. 1998) (whether the involvement by a disqualified person in the PTR preparation "would cause a disinterested observer to doubt the fairness of the post-trial proceedings")

6. R.C.M. 1106(c). When the CA has no SJA or SJA is disqualified (unable to evaluate objectively and impartially), CA must request assignment of another SJA, or forward record to another GCMCA. Make sure documentation is included in the record.

a) Informal agreement between SJAs is not sufficient. *United States v. Gavitt*, 37 M.J. 761 (A.C.M.R. 1993).

b) *United States v. Hall*, 39 M.J. 593 (A.C.M.R. 1994). SJA used incorrect procedure to obtain another SJA to perform post-trial functions. Court holds that failure to follow procedures can be waived.

c) Deputies cannot sign SJARs. *United States v. Crenshaw*, No. 9501222 (A.C.C.A. 1996) (unpublished). Fact that Deputy Staff Judge Advocate (DSJA) improperly signed PTR as "Deputy SJA" rather than "Acting SJA" did not require corrective action where PTR "contained nothing controversial" and where SJA signed addendum that adhered to DSJA's recommendation.

d) Who should author the SJAR? The SJA. *United States v. Finster*, 51 M.J. 185 (C.A.A.F. 1999), where a non-qualified individual signed the SJAR, the court concluded there was manifest prejudice. *United States v. Gatlin*, 60 M.J. 804 (N-M.C.C.A. 2004) (refusing to apply a presumption of regularity to a PTR signed by a LT Stampher (not the SJA) when there was no explanation in the record as to why he prepared and signed the PTR; holding, however, that appellant did not make a showing of any prejudice).

D. **[Legacy]** Form and content: "The staff judge advocate or legal advisor shall provide the [CA] with a copy of the report of results of trial, setting forth the findings, sentence, and confinement credit to be applied, a copy or summary of the pretrial agreement, if any, any recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence, and the staff judge advocate's recommendation." R.C.M. 1106(d)(3).

1. Findings and sentence. *United States v. Russett*, 40 M.J. 184 (C.M.A. 1994). Requirement for the SJA to comment on multiplicity question arises when DC first raises the issue as part of the defense submission to the CA.

a) Accuracy most critical on charges and specs. *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994) (the CMA disapproved findings on two specs omitted from PTR). *See also United States v. Sanchez*, 54 M.J. 874 (A.C.C.A. 2001) (error in PTR alleging a finding of guilty to larceny as opposed to wrongful appropriation, however, no prejudice – finding of guilty to larceny set aside and replaced with a finding of guilty to wrongful appropriation and sentence affirmed after reassessment). *United States v. Lindsey*, 56 M.J. 850 (A.C.C.A. 2002). Finding of not guilty to specification reported in PTR as guilty. DC failed to comment on the error. Applying a waiver and plain error analysis, court held plain error; therefore, waiver did not apply. Unsure on the issue of prejudice, the court reduced the sentence by two months. "We are unsure of the impact of the error on appellant's request for clemency. To moot any possible claim of prejudice . . . and for the sake of judicial economy, we will take appropriate remedial action." *Id*. at 851. *But see United States v. Ross*, 44 M.J. 534, 536 (A.F.C.C.A. 1996) (improper dates for offense in PTR – July vs.

Sept. – not fatal when CA action reflected original, correct date of charge sheet; "we are reluctant to elevate 'typos' in dates to 'plain error'" *especially* when waived).

b) Some errors indulged, especially when defense does not notice or point them out. *See, e.g.*, *United States v. Royster*, No. 9400201 (A.C.C.A. 1995) (unpublished); *United States v. Bernier*, 42 M.J. 521 (C.G.C.C.A. 1995); *United States v. Zaptin*, 41 M.J. 877 (N-M.C.C.A. 1995). *United States v. Gunkle*, 55 M.J. 26 (C.A.A.F. 2001). The PTR failed to reflect that the judge granted motions for a finding of not guilty and/or modification of charges. Defense failed to mention these errors in their R.C.M. 1105/6 submissions, but did mention the judge's favorable rulings. The court found no error.

c) Maximum punishment. Not a required element; if done, ensure accuracy. *See United States v. Hammond*, 60 M.J. 512 (A.C.C.A. 2004) (reducing confinement by thirty days when the PTR misstated the maximum punishment (life w/o possibility for parole when maximum was only six years)).

2. Any clemency recommendations by the MJ or panel. R.C.M. 1106(d)(3) [2008 change].

a) *United States v. Paz-Medina*, 56 M.J. 501 (A.C.C.A. 2001). Plain error for the SJA to *omit* member's clemency recommendation regarding waiver of forfeitures from the PTR. CA action set aside; returned for new PTR and action. Court also commented on the slow post-trial processing stating, "[b]ecause we are already returning the case for a new SJAR and action, the new SJA and convening authority will also be provided a discretionary opportunity to fashion an appropriate remedy for the untimely processing." *Id*. at 505.

b) *United States v. Williams*, 57 M.J. 1 (C.A.A.F. 2002). Error found where government failed to serve DC with PTR prior to action when PTR omitted clemency recommendation from sentencing authority.

3. Summary of accused's service record. Required by the old, pre-23 August 2008, R.C.M. 1106(d)(3)(C), <u>but not</u> the new R.C.M. 1106. Under the new R.C.M. 1106(d)(1), the SJA "<u>*shall*</u> use the record of trial in preparation of the recommendation, and <u>*may*</u> also use the personnel records of the accused or other matters in advising the [CA] whether clemency is warranted." (emphasis added).

a) *United States v. Parker*, 73 M.J. 914 (A.F.C.C.A. 2014) The USAF version of an ORB/ERB submitted at trial was incorrect in that it did not list the accused's combat and overseas time. Air Force Instruction 51-201, states the personal data sheet should list an accused's overseas service and combat time. Court notes while not required under the current R.C.M., if a service summary is given it must be accurate. No prejudice here though because the specification and other materials stated offense occurred in Qatar.

b) *United States v. Sanchez*, 69 M.J. 679 (C.G.C.C.A. 2010). The SJAR contained the fact that the appellant had no previous convictions, information about a prior nonjudicial punishment, and a list of four negative administrative remarks. There was no mention of the appellant's awards and decorations or positive marks. The court found this to be prejudicial error and remanded the case for a new SJAR and action. Even though there is no requirement to summarize the accused's service records under the amendment to R.C.M. 1106(d), any summary must be "balanced" and "a fair portrayal."

4. Nature and duration of any pretrial restraint.

a) "The accused was under no restraint;" or

b) "The accused served 67 days of pretrial confinement, which should be credited against his sentence to 8 years confinement."

5. *United States v. Scalo*, 60 M.J. 435 (C.A.A.F. 2005). SJAR erroneously advised the CA that there had been no pretrial restraint in appellant's case. In fact, the appellant had been restricted to the limits of Fort Stewart, Georgia for forty-four days until his court-martial. The court determined that the SJA's failure to advise the CA regarding appellant's pretrial restraint was not inherently prejudicial and that appellant failed to make a colorable showing of possible prejudice. The appellant failed to make a reference, direct or indirect, in his clemency petition. Further, the length alone of the restraint, was not of an unusual length to attract the convening authority's attention for clemency purposes.

a) *United States v. Weber*, 56 M.J. 736 (C.G.C.C.A. 2002). Error for SJA to omit from PTR that accused was subject to over three months of pretrial restriction; however, applying *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), accused failed to "make some colorable showing of possible prejudice" that would warrant relief.

b) *United States v. Miller*, 56 M.J. 764 (A.F.C.C.A. 2002). SJAR failed to mention three days of pretrial confinement. Held: attachments to SJAR (e.g., Report of Result of Trial and Personal Data Sheet) both stated three days of PTC; therefore, no error. Even if error, applying *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), accused failed to make a "colorable showing of prejudice" that would warrant relief. Finally, court noted that accused waived the issue by failing to raise a timely objection in the absence of plain error.

6. CA's obligation under any pretrial agreement. *See United States v. Green*, 58 M.J. 855 (A.C.C.A. 2003); *United States v. Sheffield*, 60 M.J. 591 (A.F.C.C.A. 2004) (failure of the SJAR to notify the CA of his obligations regarding waiving automatic forfeitures was error). The 2008 amendment to R.C.M. 1106(d)(3) requires a "copy or summary of the pretrial agreement."

7. Additional appropriate matters may be included in the recommendation even if taken from outside the record. R.C.M. 1106(d)(5). *See United States v. Due*, 21 M.J. 431 (C.M.A. 1986). *See also United States v. Drayton*, 40 M.J. 447 (C.M.A. 1994). Key – service on accused and counsel and opportunity to comment!

E. **[Legacy]** Two additional tips.

1. Use a certificate of service when providing the defense with the SJAR. *United States v. McClelland*, 25 M.J. 903 (A.C.M.R. 1988). This logic should be extended to service of the accused's copy of the SJAR. *See* R.C.M. 1106(f).

2. List each enclosure (petitions for clemency, etc.) that goes to the CA on the SJAR/addendum and/or have the convening authority initial and date all documents. *United States v. Hallums*, 26 M.J. 838 (A.C.M.R. 1988); *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989).

a) Query: What if the CA forgets to initial one written submission, but initials all the others? Have you just given the DC evidence to argue that the CA "failed to consider" a written defense submission?

b) *United States v. Blanch*, 29 M.J. 672 (A.F.C.M.R. 1989) (government entitled to enhance "paper trail" and establish that accused's R.C.M. 1105 matters were forwarded to and considered by the CA); *United States v. Joseph*, 36 M.J. 846 (A.C.M.R. 1993) (SJA's affidavit established that matters submitted were considered by CA before action).

c) *United States v. Briscoe*, 56 M.J. 903 (A.F.C.C.A. 2002). Failure of SJA to prepare addendum to PTR advising CA to consider all matters (i.e., written maters) submitted by accused cured through post-trial affidavit from CA and SJA swearing that all clemency matters were considered by CA prior to action.

d) *United States v. Stephens*, 56 M.J. 391 (C.A.A.F. 2002). CA's action stated that he "'specifically considered the results of trial, the record of trial, and the recommendation of the [SJA]'." *Id*. at 392. The CA's action did not list the accused's clemency matters. Held: no error since the evidence revealed the CA considered the addendum which included the accused's clemency materials. "We decline to hold that a document embodying the [CA's] final action is defective simply because it refers to the SJA's recommendation without also referring to the attachments, such as an addendum or clemency materials." *Id*.

e) *United States v. Gaddy*, 54 M.J. 769 (A.F.C.C.A. 2001). The appellant submitted a single letter from his pastor in his R.C.M. 1105 matters. The SJA did not do an addendum accounting for the letter nor did the PTR advise the CA he had to consider all written submissions made by the appellant. According to the court, it can assume the CA considered all defense submissions when the SJA prepares an addendum which includes mention of the defense submissions, advises the CA that he must consider the matters submitted, and the addendum actually lists the matters submitted. If no addendum is prepared, the record must reflect that the CA was advised of his obligation to consider all written submissions from defense and there must be some evidence that the defense matters were actually considered. The AFCCA found prejudice and reduced the appellant's sentence by two months.

f) *United States v. Baker*, 54 M.J. 774 (A.F.C.C.A. 2001). There was no evidence in the record that the CA had considered the defense R.C.M. 1105 matters. SJA did not do an addendum to his PTR despite lengthy letter from accused requesting clemency. Affidavits obtained to establish that the CA considered the appellant's letter. Although the court found no prejudicial error, they decry the waste of appellate assets caused by the SJA failing to follow standard Air Force post-trial process. The court stated that they will be sending information to their TJAG about SJAs who commit egregious post-trial errors.

F. **[Legacy]** Errors in the recommendation.

1. Corrected on appeal without return to CA for action.

2. Returned for new recommendation and new action. *See United States v. Craig*, 28 M.J. 321 (C.M.A. 1989). "Since it is very difficult to determine how a convening authority would have exercised his broad discretion if the staff judge advocate had complied with R.C.M. 1106, a remand will usually be in order." *Id*. at 325 (quoting *United States v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988)). *See also United States v. Reed*, 33 M.J. 98 (C.M.A. 1991); *United States v. Hamilton*, 47 M.J. 32 (C.A.A.F. 1997). "This court has often observed that the convening authority is an accused's last best hope for clemency [citation omitted]. Clemency is the heart of the convening authority's responsibility at that stage of a case. If an SJA gives faulty advice in this regard, the impact is particularly serious because no subsequent authority can adequately fix that mistake." *Id*. at 35. *See also United States v. Ord*, 63 M.J. 279 (C.A.A.F. 2006). When the CA did not act expressly on the findings and the SJAR omitted a finding of guilty adjudged by the court-martial, the ACCA could not presume that the CA approved the omitted findings, but could return the record for a new SJAR and action.

a) *United States v. Pate*, 54 M.J. 501 (A.C.C.A. 2000). Accused was convicted at trial of several charges which were the basis of a prior Article 15. The SJA advised the CA of the Article 15 in his PTR and erroneously stated the Article 15 was set aside. Defense noted the error in the R.C.M. 1105/6 submissions and the SJA agreed with the defense in an addendum, which advised the CA he could not consider the Article 15 for any purpose other than granting *Pierce* credit to the appellant. Defense claimed that under *Pierce*, an Article 15 of this nature cannot be used for any purpose, administrative or otherwise, and thus it was error for the SJA to mention it in the PTR. The court disagreed, stating that *Pierce* does not

require withholding this information from the CA. The court went on to state that even if it did, the defense had failed to make a colorable showing of possible prejudice.

b) *United States v. Williams*, 54 M.J. 626 (A.F.C.C.A. 2000). SJA signed the PTR three days before the military judge authenticated the ROT. Defense claimed PTR was invalid because it was based on an unauthenticated record of trial (ROT) thus invalidating the CA's action. The court disagreed – ROT had only received minor, non-substantive errata from the military judge and defense failed to raise any objection in the R.C.M. 1105/6 submissions. Court found no prejudice to the accused and noted that the issue was waived. *See also United States v. Smith*, 54 M.J. 783 (A.F.C.C.A. 2001) (cautioning that when PTR dated nine days before authentication of the ROT, "this sort of inattention to detail far too often creates unnecessary issues on appeal."). *Id*. at 788.

c) *United States v. Farence*, 57 M.J. 674 (C.G.C.C.A. 2002). Despite erroneous SJAR that advised the CA that the appellant was convicted of two offenses dismissed for sentencing purposes by the MJ, no corrective action was required when the appellant failed to make "some colorable showing of possible prejudice."

3. Waived absent plain error. R.C.M. 1106(f)(6) provides that "[f]ailure of counsel for the accused to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error."

a) In cases where neither the appellant nor his counsel raises any error in the SJAR either as an R.C.M. 1106(f)(4) matter or on appeal, the reviewing court will apply a *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998), plain error analysis: (1) was there an error; (2) was the error plain and obvious; and, (3) did the error materially prejudice a substantial right. *United States v. Scalo*, 59 M.J. 646 (A.C.C.A. 2003) (en banc), *aff'd*, 60 M.J. 435 (C.A.A.F. 2005). The reviewing court will not apply the lesser *Wheelus* standard of "some colorable showing of possible prejudice" to establish plain error in cases where the issues is not raised by the appellant either at or before action or on appeal. *Id*. at 650.

b) In cases where neither the appellant nor his counsel raises an allegation of error in the SJAR as an R.C.M. 1106(f)(4) matter, but raises the error on appeal, the reviewing court will apply a *Powell-Wheelus* analysis (appellant need only show a "colorable showing of possible prejudice"). *United States v. Hartfield*, 53 M.J. 719, 720 (A.C.C.A. 2000).

G. **[Legacy]** No recommendation is needed for total acquittals or other final terminations without findings. This now includes findings of not guilty only by reason of lack of mental responsibility. *See* R.C.M. 1106(e).

H. **[Legacy]** Service of SJAR on DC and the accused. R.C.M. 1106(f)(1).

1. Before forwarding the recommendation and the ROT to the CA for action, the SJA or legal officer shall cause a copy of the SJAR to be served on counsel for the accused. A separate copy will be served on the accused.

a) *United States v. Hickok*, 45 M.J. 142 (C.A.A.F. 1996). Failure to serve PTR on counsel is prejudicial error, even though counsel submitted matters before authentication of record and service of PTR. Original counsel PCS'd, new counsel never appointed, and OSJA never tried to serve PTR. The CAAF found accused "was unrepresented in law and in fact" during this stage. Fact that R.C.M. 1105 clemency package was submitted at an early stage (and, all conceded, considered by CA at action) cannot compensate for the separate post-trial right to *respond* to the PTR under R.C.M. 1106. *United States v. Williams*, 57 M.J. 1 (C.A.A.F. 2002)

(finding error for failing to serve DC with PTR prior to action when PTR omitted clemency recommendation from sentencing authority).

b) *United States v. Siler*, 60 M.J. 772 (N-M.C.C.A. 2004). When the SJA served the PTR on appellant, the substitute DC put the SJA on notice that the DC did not have an attorney-client relationship with the appellant. The CA took action without any comment by appellant or his substitute DC. Once on notice of a potential problem concerning post-trial representation, the government has the responsibility to ensure adequate representation.

c) *United States v. Cornelious*, 41 M.J. 397 (C.A.A.F. 1995). The SJA should have realized that service of the PTR was inadequate because it was not served "on counsel for the accused" as required by R.C.M. 1106(f)(1). In this case the court held that service was tantamount to no service at all and ordered a new PTR and CA action. The court took pains to explain that because the SJA affirmatively inquired into the existence of the attorney-client relationship, he could not ignore the results of his inquiry.

d) *United States v. Klein*, 55 M.J. 752 (N-M.C.C.A. 2001). Failure to serve PTR on DC until five days after CA's action constituted error, but accused failed to make "some colorable showing of possible prejudice." However, relief was granted on another basis.

e) *United States v. Williams*, 57 M.J. 1 (C.A.A.F. 2002). Action set aside because PTR which omitted required clemency recommendation from the MJ at sentencing served on DC day after action in the case.

f) *United States v. Smith*, 59 M.J. 604 (N-M.C.C.A. 2003). Failure to produce evidence of service of the SJAR on the appellant prior to action does not preclude approval of a punitive discharge despite language to the contrary in R.C.M. 1107(d)(4) and 1103(c)(1). The court, after noting that R.C.M. 1107(d)(4) was "inartfully drafted," applied a "'whole statute' principle of statutory interpretation . . . considering the drafter's intent . . . and [considering] case law," rejected a literal reading of R.C.M. 1107(d)(4) and 1103(c)(1) that would require disapproval of a punitive discharge. Finally, the court noted that the appellant failed to make a colorable showing of possible prejudice from the alleged error.

2. Although normally submitted simultaneously, R.C.M. 1105 and R.C.M. 1106 submissions serve different purposes. R.C.M. 1105 submissions are the accused's submissions where R.C.M. 1106 focuses on submission by the accused's counsel.

3. R.C.M. 1106(f)(1). "If it is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at court or in writing, the accused's copy shall be forwarded to the accused's defense counsel. A statement shall be attached to the record explaining why the accused was not served personally."

a) *United States v. Ayala*, 38 M.J. 633 (A.C.M.R. 1993). Substitute service of ROT and PTR on DC authorized where accused is confined some distance away.

b) *United States v. Smith*, 37 M.J. 583 (N.M.C.M.R. 1993). Mailing of recommendation is not impracticable where all parties are located in CONUS and the accused has provided a current mailing address.

c) *United States v. Lowery*, 37 M.J. 1038 (A.C.M.R. 1993). Real issue in this area is whether accused and defense counsel have had an opportunity to submit post-trial matters.

d) *United States v. Ray*, 37 M.J. 1052 (N.M.C.M.R. 1993). Mere failure to serve does not warrant relief; accused did not offer evidence to rebut presumption that SJA had properly

executed duties, did not submit matters that would have been submitted to CA, and did not assert any inaccuracies in the recommendation.

e) *United States v. Ybarra*, 57 M.J. 807 (N-M.C.C.A. 2002). Failure to serve ROT and SJAR on appellant as specifically requested by appellant does not warrant relief (i.e., no prejudice) when the appellant submitted a waiver of clemency and he failed, under *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), to cite to any errors or omissions in the SJAR that he would have brought to the CA's attention had he been given the opportunity to do so.

4. R.C.M. 1106(f)(2). The accused may designate at trial which counsel shall be served with the SJAR or may designate such counsel in writing to the SJA before the SJAR is served. Absent such a designation, the priority for service is: civilian counsel, individual military counsel, and then detailed counsel. *But see United States v. Johnson*, 26 M.J. 509 (A.C.M.R. 1988) (holding that service on detailed defense counsel, even when accused was represented by civilian counsel, was sufficient. Accused "must have acquiesced" in the response filed by detailed defense counsel because his letter to the CA was included in the detailed defense counsel's response to the SJAR).

5. R.C.M. 1106(f)(2). If no civilian counsel exists and all military counsel have been relieved or are not reasonably available, substitute counsel shall be detailed by an appropriate authority. AR 27-10, para. 6-9 (11 May 2016), says the Chief, USATDS, or his delegee will detail defense counsel.

a) Substitution of counsel problems. R.C.M. 1106(f)(2).

(1) *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978). Substituted counsel must form attorney-client relationship with the accused; absent extraordinary circumstances, only the accused may terminate an existing relationship. *See also United States v. Miller*, 45 M.J. 149 (C.A.A.F. 1996). Substitute defense counsel's failure to formally establish attorney-client relationship with accused found harmless, despite substitute counsel's failure to consult accused or submit clemency package. Detailed counsel (who later ETS'd) had submitted clemency materials before service of PTR, and government was not on any reasonable notice that substitute counsel and accused failed to enter attorney-client relationship. In such circumstances, the test is for prejudice.

(2) *United States v. Howard*, 47 M.J. 104 (C.A.A.F. 1997). Rejecting an invitation to overrule *Miller*, the CAAF restated that failure of the substitute DC to contact the client post-trial will be tested for prejudice. "Prejudice" does not require the accused to show that such contact and the resulting submission would have resulted in clemency; it only requires a showing that the accused would have been able to submit something to counter the SJA's PTR.

(3) *United States v. Antonio*, 20 M.J. 828 (A.C.M.R. 1985). Accused may waive the right to his former counsel by his acceptance of substitute counsel and his assent to representation.

(4) *United States v. Hood*, 47 M.J. 95 (C.A.A.F. 1997). Even if the substitute counsel does form the required attorney-client relationship, failure to discuss the accused's clemency packet with him prior to submission is deficient performance under the first prong of the *Strickland* analysis.

(5) *United States v. Johnston*, 51 M.J. 227 (C.A.A.F. 1999). The convening authority must ensure that the accused is represented during post-trial. Submission of R.C.M. 1105 and 1106 matters is considered to be a critical point in the criminal proceedings against an accused.

b) If the accused alleges ineffective assistance of counsel (IAC) after trial, that counsel cannot be the one who is served with the SJAR.

(1) *United States v. Cornelious*, 41 M.J. 397 (C.A.A.F. 1995). Government on notice of likely IAC. Court remanded to determine whether accused substantially prejudiced.

(2) *United States v. Carter*, 40 M.J. 102 (C.M.A. 1994). No conflict exists where DC is unaware of allegations.

(3) *United States v. Alomarestrada*, 39 M.J. 1068 (A.C.M.R. 1994). Dissatisfaction with outcome of trial does not always equal attack on competence of counsel requiring appointment of substitute counsel.

(4) *United States v. Sombolay*, 37 M.J. 647 (A.C.M.R. 1993). Substitute counsel not required where allegations of ineffective assistance are made after submission of response to PTR.

6. R.C.M. 1106(f)(3). Upon request, a copy of the ROT shall be provided for use by DC. DC should include this boilerplate language in the Post-Trial and Appellate Rights Forms.

I. **[Legacy]** Defense Counsel Submissions. R.C.M. 1106(f)(4). "Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter."

1. *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975). Service of PTR on the DC is required before the CA can take action. DC's failure to object to errors in PTR response normally waives such errors. *See also United States v. Narine*, 14 M.J. 55 (C.M.A. 1982).

2. Response due within 10 days of SJAR arriving to both DC and accused and service of authenticated ROT on accused, whichever is later. *U.S. v. Borden* 74 M.J. 754.

3. SJA may approve delay for R.C.M. 1105 (not R.C.M. 1106) matters for up to 20 days; only CA may disapprove. Note the distinction between the timelines and approval and/or disapproval authority when dealing with R.C.M. 1105 vs. R.C.M. 1106 matters. *See* R.C.M. 1105(c)(1) and R.C.M. 1106(f)(3). Key: serve accused and counsel the authenticated ROT and SJAR at the same time.

J. **[Legacy]** Staff Judge Advocate's Addendum. R.C.M. 1106(f)(7). "The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to respond."

1. Must address allegations of legal error. Rationale not required; "I have considered the defense allegation of legal error regarding _____. I disagree that this was legal error. In my opinion, no corrective action is necessary." *See also United States v. McKinley*, 48 M.J. 280, 281 (C.A.A.F. 1998) (Judge Cox's interpretation of R.C.M. 1106(d)(4) and how to respond to an allegation of legal error).

a) *See United States v. Keck*, 22 M.J. 755 (N.M.C.M.R. 1986). *See also United States v. Broussard*, 35 M.J. 665 (A.C.M.R. 1992) (addendum stating "I have carefully considered the enclosed matters and, in my opinion, corrective action with respect to the findings and sentence is not warranted" was an adequate statement of disagreement with the assertions of accused). Need not give rationale or analysis – mere disagreement and comment on the need for corrective action sufficient.

b) *United States v. Welker*, 44 M.J. 85 (C.A.A.F. 1996). Although error for SJA not to respond to defense assertions of legal errors made in post-trial submissions, the CAAF looked to record and determined there was no merit to the allegation of error raised by the defense in the R.C.M.

1105/6 submissions. Consequently, the court held that there was no prejudice to the accused by the SJA's failure to comment on the allegation of error raised by the defense. The court also reaffirmed the principle that a statement of agreement or disagreement, without statement of rationale, is OK. Court will test for prejudice. When (as here) the court finds no trial error, it will find no prejudice. *See also United States v. Jones*, 44 M.J. 242 (C.A.A.F. 1996) (comments on preparation of ROT were "trivial"); *United States v. Hutchison*, 56 M.J. 756 (A.C.C.A. 2002).

c) *United States v. Sojfer*, 44 M.J. 603 (N-M.C.C.A. 1996). Seven page addendum recited alleged errors and said, "'*My recommendation remains unchanged: I recommend that you take action to approve the sentence as adjudged*' . . . He [SJA] made no other comment regarding the merit of the assigned errors." *Id.* at 611. Government argued that "only inference . . . is that the [SJA] disagreed with all of the errors that were raised. We agree." *Id*.

d) *United States v. Zimmer*, 56 M.J. 869 (A.C.C.A. 2002). It was error for SJA not to respond to allegation of error regarding improper deferment denial.

2. Ambiguous, unclear defense submission. If the submission arguably alleges a legal error in the trial, the SJA must respond under R.C.M. 1106 and state whether corrective action is needed.

a) *United States v. Williams-Oatman*, 38 M.J. 602 (A.C.M.R. 1993). "Consideration of inadmissible evidence" is sufficient allegation of legal error.

b) *United States v. Hutchison*, 56 M.J. 756 (A.C.C.A. 2002). Unsupported claim of onerous and illegal pretrial punishment which was not raised at trial after specific Article 13 inquiry by MJ and raised for the first time in clemency submission does NOT allege legal error requiring comment by the SJA. Likewise, alleged undue, non-prejudicial post-trial delay does not raise an allegation of legal error requiring comment by the SJA.

3. R.C.M. 1106(f)(7). Addenda containing "new matter" must be served on the defense.

a) *United States v. Valencia*, ___ M.J. ___ (A.Ct. Crim. App. Oct. 23, 2015) Victim initially declined to submit matters to the convening authority, IAW R.C.M. 1105A; however once she was served the ROT she wrote a statement on a form returned to the OSJA and sent to the CA. The statement was a view on what action the CA should take on the sentence and was never served on defense counsel. ACCA ruled it was new matter that should have been served, but no prejudice because CA had already approved adjudged sentence without knowing of the victim submission. CA signed a supplemental action after seeing the submission and ratified his earlier decision.

b) *United States v. Leal*, 44 M.J. 235 (C.A.A.F. 1996). If the additional information is not part of the record, *i.e.*, transcript, consider it to be new matter. Not enough that the information is contained "between the blue covers," because that would permit government to highlight and smuggle to CA evidence offered but not admitted. Here, the addendum referred to a letter of reprimand; the failure to serve the addendum required a new PTR and action by a new CA. *But see United States v. Brown*, 54 M.J. 289 (C.A.A.F. 2000). New action not required where defense, on appeal, fails to proffer a possible response to the un-served addendum that "could have produced a different result." *Id*. at 293.

c) *United States v. Cook*, 43 M.J. 829 (A.F.C.C.A. 1996), *aff'd*, 46 M.J. 37 (C.A.A.F. 1997). In two post-trial memos, the SJA advised the CA about the MJ's qualifications and experience, the likelihood of the accused waiving an administrative separation board, and minimizing effects of BCD. The AFCCA disapproved the BCD because all of this was

obviously outside the record and should have been served on accused with opportunity to comment.

d) *United States v. Harris*, 43 M.J. 652 (A.C.C.A. 1995). Addendum mentioned for the first time that the accused had received three prior Article 15s; new review and action required.

e) *United States v. Sliney*, No. 9400011 (A.C.C.A. 1995) (unpublished). The inclusion of letters from victim and victim-witness liaison required re-service; new action required. *Accord United States v. Haire*, 40 M.J. 530 (C.G.C.M.R. 1994).

f) *United States v. McCrimmons*, 39 M.J. 867 (N.M.C.M.R. 1994). Reference in addendum to three thefts that formed basis for court-martial ("demonstrated by his past behavior that he is not trustworthy"), not "new matter."

g) *United States v. Heirs*, 29 M.J. 68 (C.M.A. 1989). The SJA erred by erroneously advising the CA in the addendum that Heirs' admissions during the rejected providence inquiry could be used to support the findings of guilty once the accused challenged the sufficiency of the evidence post-trial.

h) *United States v. Jones*, 44 M.J. 242 (C.A.A.F. 1996). Addendum explained post-trial delays and an Air Force Regulation on the Return to Duty Program (RDP). The CAAF held this information to be new matter under R.C.M. 1106(f)(7). However, error was harmless since many of the reasons for the delay were in the Record of Trial, and the contents of the regulation were clearly known to the defense since the defense asked for entry into the RDP.

i) *United States v. Catalani*, 46 M.J. 325 (C.A.A.F. 1997). The addendum stated, "All of the matters submitted for your consideration in extenuation and mitigation were offered by the defense at trial; and the senior most military judge in the Pacific imposed a sentence that, in my opinion, was both fair and proportionate to the offense committed." This was held to be new matter under R.C.M. 1106(f)(7). The case was returned for submission to a different convening authority for action.

j) *United States v. Trosper*, 47 M.J. 728 (N-M.C.C.A. 1997). The Division Sergeant Major attached a memorandum to the addendum that stated that "taking responsibility means he accepts the punishment awarded. . . . He has earned his brig time and his BCD." The court found this to be unremarkable because commanders "seek the counsel of his or her trusted advisors in such a weighty matter." Even if this was new matter, the appellant did not state how he would respond to the memorandum, so there was no prejudice.

k) *United States v. Cornwell*, 49 M.J. 491 (C.A.A.F. 1998). CG asked the SJA whether the command supports the accused's request for clemency. The SJA called the accused's commanders, then verbally relayed their recommendations against clemency for the accused to the CG. The SJA then signed an MFR to that effect, and attached it to the ROT. The CAAF held the SJA's advice to the CG is not new matter in the addendum under R.C.M 1106(f)(7), but may be new matter under R.C.M. 1107(b)(3)(B)(iii) of which the accused's is not charged with the knowledge thereof. However, even if such, the CAAF says the defense did not indicate what they would have done in response, so no relief.

l) *United States v. Anderson*, 53 M.J. 374 (C.A.A.F. 2000). A paper-clipped, small (3 x 3 ½), hand-written note attached to the last page of the SJAR from the chief of staff to the convening authority that stated, "Lucky he didn't kill the SSgt. He's a thug, Sir." was new matter requiring service on the accused and an opportunity to respond.

m) *United States v. Gilbreath*, 57 M.J. 57 (C.A.A.F. 2002). Error for SJA, after a Judge Alone trial, not to serve addendum on defense which stated in part, "After hearing all

matters, the jury determined a bad conduct discharge was appropriate and as such, I recommend you approve the sentence as adjudged." *Id*. at 59. Defense could have pointed out that: (1) the trial was judge alone, and (2) the sentencing authority did NOT consider the clemency submissions. Note – the court also questioned whether the statement by the SJA was improper. "She [DC] also could have made a persuasive argument that the SJA's recommendation that the CA defer to the judgment of the members was also legally improper." *Id*. at 62.

n) *United States v. Gilbreath*, 58 M.J. 661 (A.F.C.C.A. 2003), *aff'd*, 59 M.J. 400 (C.A.A.F. 2004) (summary disposition). After remand from the case above, the insertion in the SJA's addendum of a statement of inability to locate appellant to serve her with post-trial documents constituted "new matter" requiring service on the appellant's defense counsel and an opportunity to respond. The government could have avoided this issue by complying with the substitute service provisions of R.C.M. 1106(f)(1), which simply require a statement in the record of trial explaining "why the accused was not served personally." Applying the standard for relief enunciated in *United States v. Chatman*, 46 M.J. 321 (C.A.A.F. 1997) (appellant must "demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter."), the AFCCA noted that the inability to locate appellant could be perceived by the CA as evidence of appellant's disobedience of orders because she failed to provide a valid leave address while on appellate leave. Additionally, the CA could view the comment as an indication of how little she cared about her case because she failed to provide a proper mailing address for issues associated with her case. In light of the potential adverse impact of the SJA's comments, the AFCCA found prejudice and determined that its charter to "do justice" mandated a new SJAR and action in the case. *Id*. at 665.

o) *United States v. Scott*, 66 M.J. 1 (C.A.A.F. 2008). SJA's lengthy rebuttal to defense assertions that the accused's sentence was overly harsh was not a new matter. Unlike *Catalani* and *Gilbreath*, the SJA's comments did not misinform the CA as to the matters contained in the accused's clemency submissions or misstate the sentencing authority in the accused's case.

p) *United States v. Frederickson*, 63 M.J. 55 (C.A.A.F. 2006). The DSJA prepared the addendum, which was endorsed by the SJA. It was not served on the defense, despite all of the DSJA's observations about the defense submissions. The CAAF held that the addendum constituted new matter, and should have been served on the defense. However, in this case, they held that the defense counsel could not demonstrate prejudice since the proffered defense response was the same.

q) *United States v. Tuscan*, 67 M.J. 592 (C.G.C.C.A. 2008). Addendum contained the following: "I also disagree with the defense counsel's statement that the accused is 'remorseful for the events that transpired.' . . . As you may recall, the pretrial offers, taken as a whole were unreasonable and on their face did not reflect a willingness on the part of the accused to fully accept responsibility." The CGCCA finds that this comment, while not a complete picture of the pretrial negotiations, was not error. The CGCCA warns against doing this in the future, since the SJAR Addendum is not intended to be a "document of advocacy for the government. An SJA should not only be objective, as noted above, but also should maintain the appearance of objectivity."

4. Addendum should remind CA of the requirement to review the accused's post-trial submissions. *United States v. Pelletier*, 31 M.J. 501 (A.F.C.M.R. 1990); *United States v. Ericson*, 37 M.J. 1011 (A.C.M.R. 1993).

a) *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990). Appellate courts will presume post-trial regularity if the SJA prepares an addendum that:

(1) Informs the CA that the accused submitted matters and that they are attached;

(2) Informs the CA that he *must consider* the accused's submissions; and,

(3) Lists the attachments.

b) *United States v. Taylor*, 67 M.J. 578 (A.F.C.C.A. 2008). In her clemency submissions to the convening authority, the appellant asked to enter the Return-To-Duty Program (RTDP). The addendum made no mention of this request, nor did it advise the convening authority of his options regarding the RTDP. The addendum did specifically list the appellant's submissions and advised the convening authority that he had to consider them prior to taking action. No error.

5. Who should sign the addendum? The SJA.

a) *United States v. Hudgins*, 69 M.J. 630 (A.C.C.A. 2010). If the Deputy Staff Judge Advocate signs the addendum, then he or she should sign it as the Acting SJA. Signing it as the Deputy Staff Judge Advocate or "for" the SJA is improper under Article 60(d), UCMJ, and R.C.M. 1106(a). No prejudice in this case because "the Deputy Staff Judge Advocate was an officer and experienced judge advocate who was statutorily qualified to sign the addendum as the Acting SJA in the SJA's absence."

K. **[Legacy]** What if the accused submitted matters but there is no addendum?

1. *United States v. Godreau*, 31 M.J. 809 (A.F.C.M.R. 1990). Two conditions for a presumption of post-trial regularity:

a) There must be a statement in the SJAR informing the CA that he must consider the accused's submissions.

b) There must be some means of determining that the CA in fact considered all post-trial materials submitted by the accused. Ideal: (1) list all attachments; (2) have the CA initials and dates all submissions in a "clearly indicated location."

2. If *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990), requirements are not met, or if no addendum and the two *Godreau* conditions are not met, the government must submit an affidavit from the CA. *See United States v. Joseph*, 36 M.J. 846 (A.C.M.R. 1993).

3. "The best way to avoid a *Craig* [28 M.J. 321 (C.M.A. 1989)] problem is to prepare an addendum using the guidance in *Foy* and *Pelletier* to ensure compliance with *Craig* and UCMJ, Article 60(c). If this method is used, there will be no need to have the convening authority initial submissions or prepare an affidavit." *Godreau*, 31 M.J. at 812.

4. *United States v. Buller*, 46 M.J. 467 (C.A.A.F. 1997). "[L]itigation can be avoided through the relatively simple process of serving the addendum on the accused in all cases, regardless whether it contains 'new matter'." *Id*. at 469 n.4.

5. *United States v. Briscoe*, 56 M.J. 903 (A.F.C.C.A. 2002). Failure of SJA to prepare addendum to PTR advising CA to consider all matters (i.e., written matters) submitted by accused cured through post-trial affidavit from CA and SJA swearing that all clemency matters were considered by CA prior to action.

L. **[Legacy]** Common SJAR and addendum errors:

1. Inaccurately reflect charges and specifications (especially dismissals, consolidations).

2. Inaccurately reflect the maximum punishment.

3. Omit, misapply pretrial confinement (*Allen*, R.C.M. 305(k) credit).

4. Omit, misapply Article 15 (*Pierce*) credit.

5. Recommend approval of greater than 2/3 forfeitures for periods of no confinement.

6. Recommend approval (in special courts-martial) forfeitures and fines (cumulatively) in excess of the court-martial's jurisdictional limit.

7. Add extraneous (and often erroneous) information.

XII. ACTION BY CONVENING AUTHORITY AND ENTRY OF JUDGMENT. ARTICLE 60, UCMJ; R.C.M. 1107/R.C.M. 1109, 1110 AND 1111

A. The MJA 2016 will break R.C.M. 1107 into two separate rules – R.C.M. 1109 will cover cases where Congress has severely limited the CA's ability to grant clemency. R.C.M. 1110 will govern all other cases where the CA retains unfettered discretion. Otherwise, the only notable change to Art. 60 will be to provide a provision for the MJ to recommend suspension of a punitive discharge to the CA in cases where there is no mandatory minimum punitive discharge. This was something specifically contemplated by the MJRG as a way to potentially rehabilitate Soldiers and given them an opportunity to return to the unit. For those cases that involve all pre-1 January 2019 offenses, but are referred and tried after 1 January 2019, the EO states that the suspension authority in Art. 60 will be also be available to the accused. Finally, the MJA 2016 will add an entirely new step in the process – Entry of Judgment – done by the MJ, following CA action, which terminates the trial proceedings and initiates appellate review.

B. Who may act: the CA. *See United States v. Delp*, 31 M.J. 645 (A.F.C.M.R. 1990) (the person who convened the court).

1. *United States v. Fernandez*, 24 M.J. 77 (C.M.A. 1987). CA wrote a drug-abuse policy memorandum that characterized illegal drugs as a "threat to combat readiness," among other things. This strongly worded memo did not suggest an inelastic attitude that would prohibit the convening authority from taking action under Article 60, UCMJ.

2. *United States v. Solnick*, 39 M.J. 930 (N.M.C.M.R. 1994). Rule requiring CA to take action unless impractical requires that there be practical reason for transferring case from control of officer who convened court to superior after trial, and precludes superior from plucking case out of hand of CA for improper reason.

3. *United States v. Rivera-Cintron*, 29 M.J. 757 (A.C.M.R. 1989). Acting Commander not disqualified from taking action in case even though he had been initially detailed to sit on accused's panel.

4. *United States v. Cortes*, 29 M.J. 946 (A.C.M.R. 1990). After considering the Assistant Division Commander's affidavit, the court determined that the acting CA, who approved accused's sentence as adjudged, was not affected by the editorial written by the CA about the "slime that lives among us."

5. *United States v. Vith*, 34 M.J. 277 (C.M.A. 1992). Commander did not lose impartiality by being exposed to three pages of accused's immunized testimony in companion case; commander had no personal interest in the case and there was no appearance of vindictiveness.

6. *United States v. Mack*, 56 M.J. 786 (A.C.C.A. 2002). Installation Chaplain and staff officer to the CA stole over $73,000 from the Consolidated Chaplains' Fund (CCF). Although CA had a personal and professional relationship with accused, he was not disqualified from acting as CA absent evidence that he had a "personal interest in the outcome of the [accused's] case." *Id*. at 794. The ACCA found that the CA was not an "accuser" as alleged by the accused and there was no error, plain or otherwise, by the CA taking action. Additionally, the ACCA found accused waived the issue of CA as accuser absent plain (clear and obvious) error.

7. *United States v. Walker*, 56 M.J. 617 (A.F.C.C.A. 2001). CA's comments during visit to confinement facility established an "arbitrary and inflexible refusal to consider clemency," thus disqualifying him from acting in accused's case. According to accused, CA, during a confinement visit, stated the following: "I have no sympathy for you guys, you made your own decisions and you put yourself in this situation. I'm not sympathetic, and I show no mercy for you. I hope you guys learn from this, but half of you will go on and try to cheat civilian laws and end up in a worst [sic] place than this." *Id*. at 618. Allegation by appellant went uncontested by the CA. Relief – action of CA set aside and returned to another SJA and CA for a new PTR and action. Court noted that its opinion did not mean that the CA in question was forever disqualified from taking action in other cases. *See also United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); *United States v. Voorhees*, 50 M.J. 494 (C.A.A.F. 1999).

8. *United States v. Barry*, 57 M.J. 799 (A.C.C.A. 2002). Absent a proper transfer of authority from one GCMCA to another, a transfer based on impracticability, a commander who did not convene the court lacks authority to act on the case. The appellant, assigned to the 10th Mountain Division (Light Infantry) at all times relevant, was convicted at a GCM convened by the Commander, 10th Mountain Division (Light Infantry); however, action in his case was taken by the Commander, 10th Mountain Division (Light Infantry) (Rear), who signed as Commander, 10th Mountain Division (Light Infantry). Because of the action by an improper convening authority, as well as concerns whether the SJA in the case was disqualified from providing legal advice, the case was returned for a new SJAR and action. *See also United States v. Newlove*, 59 M.J. 540 (A.C.C.A. 2003).

9. *United States v. Gudmundson*, 57 M.J. 493 (C.A.A.F. 2002). CA who testified on a controverted matter in a case was NOT *per se* disqualified from acting on the case. BG Fletcher, the CA, authorized "Operation Nighthawk," the "inspection" that resulted in appellant's positive urinalysis result, and testified on the motion to suppress. Testimony by a CA indicating a "personal connection with the case" may result in disqualification whereas testimony of "an official or disinterested *nature* only" is not disqualifying. Where an appellant is aware of potential grounds for disqualification and fails to raise them, the issue is waived on appeal. *Id* at 495. In the case at bar, the appellant's clemency submissions, while reminding the CA of the fact that he previously testified in the appellant's court-martial, did not ask the CA to disqualify himself.

10. *United States v. Davis*, 58 M.J. 100 (C.A.A.F. 2003). CA disqualification falls into two categories: (1) involves cases where the CA is an accuser, has a personal interest in the outcome of the case, or has a personal bias toward the accused; and (2) involves instances where the CA exhibits or displays an inelastic attitude toward the performance of his or her post-trial duties or responsibilities. Comments by the CA in the appellant's drug case that "people caught using illegal drugs would be prosecuted to the fullest extent, and if they were convicted, they should not come crying to him about their situations or their families['], or words to that effect" fall into category 2. Although CAs "need not appear indifferent to crime," they must maintain a "flexible mind" and a "balanced approach" when dealing with it. *Id*. at 103. The CA's comments reflected an inelastic or "inflexible" attitude toward his post-trial duties when dealing with drug cases and

as such, he was disqualified from acting on the appellant's case. The decision of the lower court was reversed, the action set aside and the case remanded for a new review and action by a different CA. *United States v. Taylor*, 60 M.J. 190 (C.A.A.F. 2004) involved an allegation in category 1. The DC requested the CA's disqualification because an article authored by a TC and imputed to SJA amounted to a prejudgment as to clemency. The CA signed an affidavit stating that he was not aware of the article until the DC pointed it out and that he had no role in the article's preparation or publication. He also stated that the article did not influence his decision to not grant clemency. The CAAF held that the record established that the article could not be imputed to the CA, so disqualification was not appropriate.

11. *United States v. Brown*, 57 M.J. 623 (N-M.C.C.A. 2002). Error for one SPCMCA to act on a case convened by another SPCMCA. Held – although Article 60, UCMJ, and R.C.M. 1107(a) allow for a different CA than that who convened a case to act on a case, this is the exception rather than the rule, and is allowed in situations where it is impracticable for the convening authority to act. Furthermore, in situations of impracticability, the transfer of the case should be to an officer exercising general court-martial jurisdiction (OEGCMJ), not to another special court-martial convening authority. In the case at bar, there was no showing of impracticability, the record of trial failed to contain any statement of impracticability as required by R.C.M. 1107, and the transfer of the case was not to an OEGCMJ; therefore, the action was set aside and the case remanded for a new action by a proper convening authority.

C. CA not automatically disqualified simply because prior action set aside. *United States v. Ralbovsky*, 32 M.J. 921 (A.F.C.M.R. 1991). Test: Does CA have other than an official interest or was he a member of the court-martial?

D. **[Legacy]** When to Act?

1. Cannot act before R.C.M. 1105(c) time periods have expired or submissions have been waived.

2. *United States v. Lowe*, 58 M.J. 261 (C.A.A.F. 2003). Prejudicial error for the CA to act on the case prior to service of the SJAR on the appellant's defense counsel as required by R.C.M. 1106(f)(1). The plain language of R.C.M. 1106(f)(1) as well as Article 60, UCMJ establish, as a matter of right, the requirement for service of the SJAR prior to action. The court noted:

> The opportunity to be heard before or after the convening authority considers his action on the case is simply not qualitatively the same as being heard at the time a convening authority takes action, any more than the right to seek reconsideration of an appellate opinion is qualitatively the same as being heard on the initial appeal. "The essence of post-trial practice is basic fair play – notice and an opportunity to respond." *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996).

Id. at 263. The appellant established some "colorable showing of possible prejudice" by showing that he was denied the opportunity to advise the CA of his gunshot wound and his future prognosis. Finally, the court provided some common sense guidance to military practitioners:

> Where there is a failure to comply with R.C.M. 1106(f), a more expeditious course would be to recall and modify the action rather than resort to three years of appellate litigation. The former would appear to be more in keeping with principles of judicial economy and military economy of force.

Id. at 264.

E. **[Legacy]** General considerations.

1. Not required to review for legal correctness or factual sufficiency. Action is within sole discretion of CA as a command prerogative.

2. R.C.M. 1107(b)(3)(A). *Must consider*:

a) Result of trial;

b) SJA recommendation;

c) Accused's written submissions;

d) Victim's written submission

e) *United States v. Davis*, 33 M.J. 13 (C.M.A. 1991). How "detailed" must the consideration be? "Congress intended to rely on the good faith of the convening authority in deciding how detailed his 'consideration' must be."

f) *United States v. Dvonch*, 44 M.J. 531 (A.F.C.C.A. 1996). Failure to consider two letters submitted by DC requires new review and action.

g) *United States v. Osuna*, 56 M.J. 620 (C.G.C.C.A. 2001). Record of trial returned to CA where there was no evidence that the CA considered clemency letter by DC.

h) *United States v. Mooney*, No. 9500238 (A.C.C.A. June 10, 1996) (unpublished). Court determined that fax received "in sufficient time to forward it . . . through the Staff Judge Advocate to the convening authority." "[A]ppellant's articulate and well-reasoned R.C.M. 1105 clemency letter *through no fault of his own* was not submitted to the convening authority on time. We do not have sufficient information to determine [whose fault it was] . . . as our function is . . . not to allocate blame. The quality of the clemency letter . . . gives rise to the reasonable possibility that a [CA] would grant clemency based upon it. Thus . . . the appellant has been prejudiced . . ." (emphasis in original). Action set aside and returned to CA for new PTR and action.

Practice Pointer: Even if the government is not at fault, accused may get new SJAR and action. Send back to CA if record not yet forwarded for appeal.

i) *United States v. Roemhildt*, 37 M.J. 608 (A.C.M.R. 1993). CA and SJA not required to affirmatively state they considered recommendation of Family Advocacy Case Management Team (FACMT). *Accord United States v. Corcoran*, 40 M.J. 478 (C.M.A. 1994).

j) *United States v. Ericson*, 37 M.J. 1011 (A.C.M.R. 1993). There must be some tangible proof that CA saw and considered clemency materials before taking action. *United States v. Briscoe*, 56 M.J. 903 (A.F.C.C.A. 2002) (post-trial affidavits from SJA and CA suffice, although not the preferred method – use an addendum).

3. R.C.M. 1107(b)(3)(B). *May consider*:

a) Record of trial, personnel records of accused, and anything deemed appropriate, but if adverse to accused and from outside the record, then accused must be given an opportunity to rebut. *See United States v. Mann*, 22 M.J. 279 (C.M.A. 1986); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984).

b) *United States v. Harris*, 56 M.J. 480 (C.A.A.F. 2002). CA properly considered accused's pre-enlistment criminal history, some of which occurred while the accused was a juvenile, history documented in the accused's enlistment waiver document contained within his Service Record Book (SRB), a personnel record of the accused which he had access to and

could review during the clemency process. No requirement to provide the accused with prior notice that the CA would consider the document since the SRB was part of the accused's personnel records and not "other matters."

4. CA need not meet with accused – or anyone else. *United States v. Haire*, 44 M.J. 520 (C.G.C.C.A. 1996). CA not required to give a personal appearance appointment to the accused. Even truer now, as this case relied on *Davis*, in which court had held that CA must consider videotape (no longer good law in light of 1998 statutory change). Requirement to "consider" only pertains to "'inanimate' matter that can be appended to a clemency request. We specifically reject the contention that a petitioner for clemency has a non-discretionary right to personally appear before the convening authority." *Id.* at 526.

5. R.C.M. 1107(b)(4). No action on not guilty findings.

6. R.C.M. 1107(b)(5). No action approving a sentence of an accused that lacks the capacity to understand or cooperate in post-trial proceedings.

F. **[Legacy]** **SPECIAL NOTE**: If all the offenses on which the convening authority is acting occurred on or after 24 June 2014, R.C.M. 1107 applies as it currently exists. However, if at least one of the offenses the CA is acting on occurred before 24 June 2014, the prior version of R.C.M. 1107 applies, except that mandatory minimum sentencing under Article 56(b) still applies to appropriate offenses. See, R.C.M. 1107 preamble. (June 2015 ed.) Under R.C.M. 1107 for the older offenses, the CA may give generally unfettered clemency for both findings and sentence.

G. **[Legacy]** Action on findings not required is not required for any offenses regardless of the date of the offense, but is permissible. R.C.M. 1107(c).

1. **For offenses pre-24 June 2014**: The CA may continue to set aside convictions or approve lesser-included offenses without any further legal discussion, rational or reasoning.

2. **For offenses occurring on or after 24 June 2014** : The CA may not dismiss a finding or approve an LIO unless the offense is a qualifying offense. A "qualifying offense" is one where (i) the maximum punishment under the MCM does not exceed two years confinement; and (ii) the sentence adjudged at trial does not include a punitive discharge or confinement for more than six months. Additionally, offenses under Article 120, 120b, and 125 are never qualifying offenses and those convictions may never be set aside. A rehearing may be ordered under R.C.M. 1107(e). Finally, if the CA does in fact act to dismiss or change any finding of guilty, the CA must provide a written explanation for their reasons for such action. See, R.C.M. 1107(c).

3. *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994). "In the absence of contrary evidence, a convening authority who does not expressly address findings in the action impliedly acts in reliance on the statutorily required recommendation of the SJA, *see* Article 60(d) (1983), and thus effectively purports to approve implicitly the findings as reported to the convening authority by the SJA." *Id*. at 337. *See also United States v. Henderson*, 56 M.J. 911 (A.C.C.A. 2002) (when faced with ambiguous or erroneous findings not expressly addressed by CA in his action, the court can either return the case to the CA for clarification (i.e., new PTR and action) or affirm only those findings of guilty that are correct and unambiguous in the PTR).

4. *United States v. Lindsey*, 56 M.J. 850 (A.C.C.A. 2002). SJAR erroneously stated findings and CA implicitly approved the findings as reported by the SJA. SJAR reported a guilty finding to Specification 4 of the Charge when in fact the accused was found not guilty of this offense. The court only affirmed the proper findings and reduced the accused's period of confinement from twelve months to ten months. The court commented on the lack of attention to detail in the post-trial processing:

> This case presents the court with yet another incident in which an SJA has failed to provide complete and accurate information to the convening authority, as required by R.C.M. 1106. The regularity of these post-trial processing errors is alarming and occurs in many jurisdictions. Most SJAR errors are the direct result of sloppiness and a lack of attention to detail exhibited by the SJA, Deputy SJA, and the Chief of Criminal Law. Likewise, diligent trial defense counsel should identify and correct such errors whenever possible. See R.C.M. 1106(f)(4), (f)(6). These errors reflect poorly on our military justice system and on those individuals who implement that system. They should not occur!

Id. at 851. In a footnote in the above-quoted language, the court referred to thirty-five cases out of nineteen jurisdictions, covering a 15-month period, with erroneous SJARs.

5. *United States v. Saunders*, 56 M.J. 930 (A.C.C.A. 2002). The SJAR erroneously advised the CA that the appellant was convicted of six specifications of violating a no-contact order, as opposed to five, and adultery (i.e., Specification 1 of Charge I and Specification 2 of Additional Charge I respectively). Applying *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), the court found that despite the erroneous SJAR, the appellant failed to make a "colorable showing of possible prejudice to his substantial rights concerning the approved sentence." *Id*. at 936. The erroneous findings of guilty were set aside and the affected specifications dismissed; the sentence was affirmed.

6. *United States v. Ord*, 63 M.J. 279 (C.A.A.F. 2006). Appellant was convicted of seven different offenses. However, the SJAR omitted one of the seven. The CA approved the SJA's recommendation on the sentence. The ROT was then forwarded to ACCA for appellate review. Subsequently, the command issued a "corrected" promulgating order that included the missing findings. The ACCA set aside the CA's action and returned the record for a new SJAR and CA's action. The ACCA then affirmed the findings and sentence as approved in the new CA's action, including the forgery offense. The CAAF held that, when the CA did not act expressly on the findings, and the SJAR omitted a finding of guilty adjudged by the court-martial, the ACCA could not presume that the CA approved the omitted findings, but could return the record for a new SJAR and action.

7. *United States v. Alexander; United States v. Vanderschaaf*, 63 M.J. 269 (C.A.A.F. 2006) (joint case). The ACCA found that action taken by the CA in separate, unrelated cases did not approve findings reached by a GCM, and in both cases it ordered that language which appeared in the CMO be deleted. The Judge Advocate General of the Army sought review. The CAAF found that the ACCA erred. Although the UCMJ and the MCM require the CA to take express action when he disapproved a finding, neither the UCMJ nor the MCM required a CA to take express action to approve findings. The record in both cases was consistent with the presumption that the CA approved the findings adjudged at trial.

H. **[Legacy]** Action on sentence must:

1. Explicitly state approval or disapproval.

a) *United States v. Wilson*, 65 M.J. 140 (C.A.A.F. 2007). The Court will not look for ambiguity where there is none. Action said:

> "In the case of . . . that part of the sentence extending to confinement in excess of 3 years and 3 months is disapproved. The remainder of the sentence, with the exception of the Dishonorable Discharge, is approved and will be executed."

SJAR and addendum recommended approval of the adjudged DD and that is what the CA intended to do, but CAAF found the language of the action unambiguous in its disapproval

of the DD. The court refused to look at surrounding documents to find an ambiguity where the action appeared clear on its face.

b) *United States v. Schiaffo*, 43 M.J. 835 (A.C.C.A. 1996). Action did not expressly approve the BCD, though it referred to it in "except for" executing language. Sent back to CA for new action. Action said:

> "In the case of . . . only so much of the sentence as provides for reduction to Private E1, forfeiture of $569.00 pay per month for six months, and confinement for four months is approved and, except for the part of the sentencing extending to bad-conduct discharge, will be executed."

See also United States v. Reilly, No. 9701756 (A.C.C.A. June 12, 1998) (unpublished); *United States v. Scott*, No. 9601465 (A.C.C.A. June 12, 1998) (unpublished); *United States v. Politte*, 63 M.J. 24 (C.A.A.F. 2006); and, *United States v. Gosser*, 64 M.J. 93 (C.A.A.F. 2006).

c) *United States v. Klein*, 55 M.J. 752 (N-M.C.C.A. 2001). Action by CA stated: "In the case of . . . the sentence is approved, but the execution of that part of the sentence extending to confinement in excess of 28 days was suspended for a period of 4 months from the date of trial . . . The part of the sentence extending to the bad conduct (sic) discharge will be suspended for a period of 12 months from the date of trial, at which time, unless the suspension is sooner vacated, it will be remitted without further action." After the appellate court acquired jurisdiction, CA attempted to withdraw the first action and replace a second wherein the punitive discharge was not suspended, stating he never intended to suspend the discharge. Held: "administrative oversight" as opposed to "clerical error" in CA's action does not warrant return to the CA for a corrected action. Additionally, any purported action by the CA after an appellate court acquires jurisdiction is a nullity. The NMCCA distinguishes this case from *United States v. Smith*, 44 M.J. 788 (N-M.C.C.A. 1996), stating "[u]nlike *Smith*, there is nothing 'illegal, erroneous, incomplete or ambiguous' in the original action." *Id*. at 756.

d) *United States v. Mendoza*, 67 M.J. 53 (C.A.A.F. 2008). Lower court (NMCCA) had sent the case back for a new Action because the language was ambiguous and not susceptible to interpretation. First Action stated: "only such part of the sentence as provides for a reduction to the grade of pay E-1, confinement for 90 days, is approved and except for the part of the sentence extending to a bad conduct [sic] will be executed." CA who signed original action had moved on. His successor in command took a new action that approved the BCD. No new SJAR was prepared, and there was no evidence the CA consulted with the original CA before action. The CAAF holds that a "new, as opposed to a corrected" action requires a new SJAR and the opportunity for the accused to submit additional matters under R.C.M. 1105.

2. **<u>For offenses pre-24 June 2014</u>**: The CA may continue to give clemency in any amount without any further legal discussion, rational or reasoning.

3. **<u>For offenses occurring on or after 24 June 2014</u>** : The CA may not disapprove, commute, or suspend in whole or in part any portion of an adjudged sentence of (A) confinement for more than six months or (B) a punitive discharge. If the CA does act to disapprove, suspend, or commute any part of a sentence, the CA must provide a written explanation for their reasons for such action. See, R.C.M. 1107(d)(1)(F). The CA may still give clemency on other parts of the sentence (i.e. reprimands, forfeitures, rank reduction), although the reasoning for such action must be in writing and attached to the record. R.C.M. 1107(d)(1)(C).

4. CA action cannot increase adjudged sentence.

a) *United States v. Jennings*, 44 M.J. 658 (C.G.C.C.A. 1996). MJ announced five month sentence, but did not expressly include pretrial confinement (PTC) credit. After issue raised, MJ said on record that he had "considered" the eight days PTC before announcing the sentence, and the SJA recommended that the CA approve the sentence as adjudged (he did).

> "Further clarification by the judge was needed to dispel the ambiguity . . . created by his remarks." SJA "should have returned the record to the judge for clarification pursuant to R.C.M. 1009(d), rather than attempt to dispel the ambiguity of intent himself." "In any event, there is no authority whatsoever for a staff judge advocate to make an upward interpretation of the sentence, as was done in this case."

Id. at 662.

b) *United States v. Kolbjornsen*, 56 M.J. 805 (C.G.C.C.A. 2002). Appellant was sentenced to a DD, twelve months confinement, and reduction to E-1. The pretrial agreement required the CA to suspend any confinement in excess of ten months. At action, the CA approved "only so much of the sentence as provides for a BCD, confinement for 3 months, and reduction to E-1." On appeal, the court noted the ambiguity of the action and stated it had two options: (1) return the case to the CA for a new SJAR and action to clarify the ambiguity, or (2) to construe the ambiguity itself and resolve any inconsistencies in favor of the appellant. The court chose the latter and affirmed only so much of the sentence as provided for a BCD, confinement for three months, and reduction to E-1.

c) *United States v. Shoemaker*, 58 M.J. 789 (A.F.C.C.A. 2003). At action the first time, the CA approved only thirty days confinement of a three month sentence. On appeal, the action was set aside and the case returned for a new SJAR and action. In the subsequent action, the CA approved a sentence of one month. Unfortunately, seven months out of the year contain thirty-one days resulting in a potential sentence greater than that originally approved, in violation of R.C.M. 810(d). Rather than return the case for a third SJAR and action, the court only approved thirty days confinement.

d) *United States v. Mitchell*, 58 M.J. 446 (C.A.A.F. 2003). Appellant was sentenced to a BCD, ten years confinement, total forfeitures, and reduction to E-1. On appeal, the ACCA ordered a rehearing on sentence. On rehearing, the appellant was sentenced to a DD, six years confinement, and reduction to E-1. The ACCA affirmed the rehearing sentence finding that under an objective standard, a reasonable person would not view the rehearing sentence as "in excess of or more severe than" the original sentence; therefore, Article 63, UCMJ, and R.C.M. 810(d)(1) were not violated. The CAAF reversed as to sentence, finding that a DD is more severe than a BCD and no objective equivalence is available when comparing a punitive discharge with confinement. The CAAF reduced the sentence to a bad-conduct discharge, six years confinement, and reduction to E-1.

e) *United States v. Burch*, 67 M.J. 32 (C.A.A.F. 2008). Appellant was sentenced to confinement for one year, reduction to E-1, and a bad-conduct discharge. The CA suspended all confinement in excess of 45 days. Subsequent to his release, but before the suspension period was over, or the CA took action, appellant committed additional misconduct. His suspension was properly vacated and he was returned to confinement. The CA took action, which stated: "execution of that part of the sentence adjudging confinement in excess of 45 days is suspended for a period of 12 months." Appellant served approximately 223 days of confinement before being released. The CAAF held that this was illegal confinement. "If the CA's action is to be given effect, as required by R.C.M. 1107,

attendant circumstances preceding the action may not be utilized to undermine it." The vacation of the suspension should have been noted in the action.

5. **Pre-24 June 2014** May disapprove all or any part of a sentence for any or no reason.

a) *United States v. Bono*, 26 M.J. 240 (C.M.A. 1988). Reduction in sentence saved the case when DC found to be ineffective during sentencing.

b) *United States v. Smith*, 47 M.J. 630 (A.C.C.A. 1997). At a GCM, the accused was sentenced to total forfeitures (TF), but no confinement. Neither the DC nor the accused submitted a request for waiver or deferment, nor complained about the sentence. Accused did not go on voluntary excess leave. Fourteen days after sentence, TF went into effect. At action, the CA tried to suspend all forfeitures beyond 2/3 until the accused was placed on involuntary excess leave. Held: CA's attempt to suspend was invalid, because the TF was executed (at 14 days) prior to the attempted suspension. The ACCA found the time the accused spent in the unit (5 Jul to 19 Aug) without pay was cruel and unusual punishment and directed the accused be restored 1/3 of her pay. *See also United States v. Warner*, 25 M.J. 64 (C.M.A. 1987).

6. **Pre-24 June 2014** IAW R.C.M. 1107(d)(2). May reduce a mandatory sentence adjudged. Now, CA may not reduce a mandatory minimum. R.C.M. 1107(d)(1)(D).

7. May change a punishment to one of a different nature if less severe. *United States v. Carter*, 45 M.J. 168 (C.A.A.F. 1996). CA lawfully converted panel's BCD and twelve month sentence to twenty-four *additional* months' confinement and no BCD, acting in response to request that accused be permitted to retire. Commutation must be clemency, "not 'merely a substitution'" of sentences, but clearly was proper here; BCD was disapproved and accused got his wish to retire, and where, importantly, he neither set any conditions on the commutation (*e.g.*, setting a cap on confinement he was willing to endure), nor protested the commutation in his submission to the CA. But consider the discussion to R.C.M. 1107(d)(1) that a BCD could be converted to confinement for up to one year at a special court-martial.

8. May suspend a punishment. *United States v. Barraza*, 44 M.J. 622 (N-M.C.C.A. 1996). Court approved CA's reduction of confinement time from PTA-required forty-six months (suspended for twelve months) to fourteen months, six days (suspended for thirty-six months). Sentence was for ten years. Court emphasized the "sole discretionary power" of CA to approve or change punishments "as long as the severity of the punishment is not increased" (*citing* R.C.M. 1107(d)(1)). Also significant that approved confinement was twenty-two months less than accused sought in his clemency petition.

9. *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). Error for SJAR to advise CA that in order to waive automatic forfeitures at action he would have to disapprove the adjudged forfeitures. CA could have modified the monetary amount of adjudged forfeitures and/or suspended the forfeitures for the period of waiver. Case returned to the CA for a new SJAR and action.

10. **Pre-24 June 2014 offenses**: May reassess sentence. If a CA reassesses sentence after, for example, dismissing guilty findings, the CA must do so in conformity with the requirements of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). *United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000). The CA may purge any prejudicial effect if it can determine that the sentence would have been of a certain magnitude. Further, the SJAR must provide guidance to the CA as the standard to apply in reassessing the sentence. *United States v. Reed*, 33 M.J. 98 (C.M.A. 1991).

a) *United States v. Bonner*, 64 M.J. 638 (A.C.C.A. 2007). The SJAR recommended that the CA disapprove one specification without giving a reason. The CA did so and approved the

adjudged sentence. Appellate defense alleged error and pointed to the lack of any *Sales* guidance on sentence reassessment in the SJAR or addendum. The ACCA found no reason to believe the specification was disapproved because of legal error (no such allegation in R.C.M. 1105/1106 submissions) and concluded that the disapproval was an act of clemency not requiring sentence reassessment. *See United States v. Kerwin*, 46 M.J. 588 (A.F.C.C.A. 1996) (holding that a pure act of clemency does not require sentence reassessment). In a footnote, the ACCA conceded that there may be "middle ground" between pure sentence clemency and clemency recommended as a form of relief from "possible legal error" and recommended that SJAs advise CAs of the standard for sentence reassessment.

b) *United States v. Taylor*, 47 M.J. 322 (C.A.A.F. 1997), *aff'd after remand*, 51 M.J. 390 (C.A.A.F. 1999). Discusses how to reassess a sentence if some charges are dismissed by the CA. Disregarding the findings is not enough; must disregard the evidence too. Remanded to the AFCCA to correctly reassess or order a re-hearing.

c) *United States v. Griffaw*, 46 M.J. 791 (A.F.C.C.A. 1997). SJA incorrectly stated that the sentence reduction based on the terms of the pre-trial agreement was equal to a form of clemency.

d) *United States v. Bridges*, 58 M.J. 540 (C.G.C.C.A. 2003). Appellant was sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement for twenty-two years, and a DD. At action, the CA disapproved two specifications and approved only so much of the sentence as provided for reduction to E-1, forfeiture of all pay and allowances, confinement for twenty years, and a DD. The CGCCA held that the CA erred in attempting to reassess the sentence after dismissing two very serious specifications (indecent acts and forcible sodomy). Although the maximum punishment for the offenses both before and after action remained the same (i.e., reduction to E-1, forfeiture of all pay and allowances, confinement for life, and a DD), the issue was whether the CA or the court could "accurately determine the sentence which the members would have adjudged for only those charges and specifications approved by the convening authority." *Id*. at 545. The court determined that neither the CA nor the court could properly reassess the sentence in light of the modified findings, set aside the sentence and authorized a rehearing.

e) *United States v. Meek*, 58 M.J. 579 (C.G.C.C.A. 2003). Appellant was sentenced to reduction to E-1, seventy-five days confinement, and a BCD. At action, the SJA recommended disapproval of one charge based upon the PTA. The SJA further recommended "I do not recommend that you adjust the accused's sentence as a result of setting aside the military judge's findings as to Charge I and its specification. The two remaining charges to which the accused pled guilty adequately support the sentence awarded." *Id*. at 580. The CGCCA held that the SJA erred by giving the above guidance and by failing to advise the CA that he must reassess the sentence, approving only so much of the sentence as would have been adjudged without the dismissed specification. The CGCCA approved only so much of the sentence as provided for reduction to E-1, sixty days confinement, and a BCD.

f) *United States v. Perez*, 66 M.J. 164 (C.A.A.F. 2008). Shortly after trial, rape victim recants. During post-trial Article 39(a) session, military judge finds that he would not have found appellant guilty of rape, nor would he have sentenced him to anything more than six months confinement, reduction and forfeitures. CA modified findings and sentence by approving the BCD, reduction to E-1, and confinement for 206 days. The CAAF held that CA did not properly reassess sentence. Under no circumstances can the CA approve a sentence greater than the sentencing authority would have adjudged absent the error.

11. *United States v. Rollins*, 61 M.J. 338 (C.A.A.F. 2005). Appellant was sentenced to a BCD, confinement for eight years, and reduction to E-5. The convening authority revised the findings to address issues involving the application of the statute of limitations under Article 43, UCMJ. The SJA recommended that the convening authority approve the adjudged sentence, subject to reducing the period of confinement from eight to five years to the cure the prejudice from the erroneous findings. The convening authority revised the findings but only reduced the sentence to seven years. The AFCCA affirmed the findings and sentence as modified by the convening authority. The CAAF held that "[t]he convening authority's action in this case did not cure the prejudice from the military judge's failure to focus the attention of the members on the appropriate period of time under the circumstances of this case. *See Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Accordingly, we shall set aside the affected findings and authorize a rehearing."

I. **[Legacy]** Sentence Credits.

1. *United States v. Minyen*, 57 M.J. 804 (C.G.C.C.A. 2002). Although the court recommends stating all sentence credits in the CA's action, it is not required. *See also United States v. Gunderson*, 54 M.J. 593, 594 (C.G.C.C.A. 2000) (recommending that a CA expressly state all applicable credits in the action).

2. AR 27-10, para. 5-32*a* (11 May 2016), states that "the convening authority will show in his or her initial action all credits against a sentence to confinement, either as adjudged or approved, regardless of the source of the credit (automatic credit for pretrial confinement under *U.S. v. Allen*, 17 M.J. 126 (CMA 1984), or judge-ordered additional administrative credit under *U.S. v. Suzuki*, 14 M.J. 491 (CMA 1983)), R.C.M. 304, R.C.M. 305, or for any other reason specified by the judge."

J. **[Legacy]** Original signed and dated action must be included in the record. *See* R.C.M. 1107(f)(1) and 1103(b)(2)(D)(iv).

K. **[Legacy]** R.C.M. 1107(f)(1). Contents of action. *See also* Appendix 16, MCM, Forms for Actions.

L. **[Legacy]** If confinement is ordered executed, "the convening authority shall designate the place . . . in the action, unless otherwise prescribed by the Secretary concerned." R.C.M. 1107(f)(4)(C).

1. AR 27-10, para. 5-32*a* (11 May 2016) states that the CA does not designate a place of confinement. AR 190-47 controls.

2. AFI 51-201, para. 9.4. "HQ AFSFC/SFC, not the convening authority, selects the corrections facility for post-trial confinement and rehabilitation for inmates gained by HQ AFSFC/SFC [inmates not ordered to serve sentences in local correctional facilities]."

M. **[Legacy]** What if an error is discovered after action is taken? R.C.M. 1107(f)(2) provides that:

1. Before publication or official notice to the accused, CA may recall and modify any aspect of action (including modification less favorable to the accused, such as adding the discharge approval language, as was required in *United States v. Schiaffo*, 43 M.J. 835 (A.C.C.A. 1996)).

2. If either publication or official notice has occurred, CA may only make changes that do not result in action less favorable to the accused.

3. CA must personally sign the modified action.

4. Action after appellate court has the case is a nullity unless subsequent action is directed or case is returned to the CA for further action. *United States v. Klein*, 55 M.J. 752 (N-M.C.C.A. 2001).

N. **[Legacy]** Action potpourri.

1. *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993). Sentence, for purposes of commutation, begins to run on date announced.

2. *United States v. Foster*, 40 M.J. 552 (A.C.M.R. 1994). Court does not have to treat ambiguous action ($214 per month) as forfeiture for one month; may return to CA for clarification of intent.

3. *United States v. Muirhead*, 48 M.J. 527 (N-M.C.C.A. 1998). Accused sentenced to "forfeit all pay and allowances, which is $854.40 for 2 years," and CA approved the same. Held: ambiguous sentence. CA under R.C.M. 1107(d)(1) can return case to court for clarification of ambiguous sentence; if he does not, he can only approve a sentence no more severe than the unambiguous portion. Rather than return to CA, the NMCCA simply affirmed the unambiguous dollar amount.

O. **[Legacy]** Post-trial deals. *United States v. Olean*, 59 M.J. 561 (C.G.C.C.A. 2002). CA authorized to enter into post-trial deals where a rehearing is impracticable. In the case at bar, the CA agreed to approve a sentence of no punishment, dismiss the specifications which were set aside and returned for a rehearing, process the appellant for administrative discharge, and recommend a general discharge. In exchange, the appellant agreed to waive personal appearance before the separation board, remain on appellate leave, and waive any right to accrued pay, allowances, or travel entitlements.

XIII. POST-TRIAL PROCESSING TIME

A. The intent of the MJA 2016 was to reduce post-trial processing time by removing some of the administrative and even substantive requirements. For that reason, it is logical to assume that post-trial processing times will diminish significantly, rendering *Moreno* an artifact. However, it remains to be seen whether appellate courts continue to enforce the 120 day processing time clock or whether they in fact decrease the time, based on the other changes to the post-trial process.

B. **[Legacy]** Service courts have two distinct responsibilities when reviewing allegations of post-trial and appellate delay. First, service courts may grant relief to appellants for excessive post-trial delay under their broad authority to determine sentence appropriateness under Article 66(c), UCMJ. Second, as a matter of law, both the service courts and the CAAF may review claims of untimely review and appeal under the Due Process Clause of the Constitution using the principals announced in the case of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

C. **[Legacy]** From sentence to action. An accused has a right to timely review during the post-trial process. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003).

1. The old, old rule: *Dunlap v. Convening Authority*, 48 C.M.R. 751 (C.M.A. 1974) (when an accused is continuously under restraint after trial, the convening authority must take action within ninety days of the end of trial or a presumption of prejudice arises).

2. The old rule: if prejudice, relief mandated. *United States v. Banks*, 7 M.J. 92 (C.M.A. 1976).

3. Back to the future: the evolution to *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

a) *United States v. Tardif*, 55 M.J. 666 (C.G.C.C.A. 2001), *rev'd and remanded*, 57 M.J. 219 (C.A.A.F. 2002), *on remand*, 58 M.J. 714 (C.G.C.C.A. 2003), *aff'd*, 59 M.J. 394 (C.A.A.F. 2004) (summary disposition). The appellant was sentenced to forfeiture of all pay and allowances, reduction to E1, three years confinement and a DD (the CA only approved two years of confinement). It took the government one year to process the record from

sentencing to action and forwarding to the appellate court. Despite the delay, the CGCCA could find no prejudice that flowed to the accused from the post-trial delay and therefore did not grant any relief. Although the CGCCA did discuss the Army's *Collazo* opinion, it concluded it was bound by the CAAF's precedent regarding undue post-trial delay. On appeal, the CAAF noted that relief under Article 66(c), UCMJ, unlike Article 59(a), UCMJ, does not require a predicate showing of "error materially [prejudicial to] the substantial rights of the accused" and remanded the case to the CGCCA because of the lower court's mistaken belief that it was "constrained" by Article 59(a), UCMJ. Applying principles of sentence appropriateness, CCAs can grant relief under Article 66(c) for unreasonable and unexplained post-trial delay that does not result in prejudice. On remand, the CGCCA agreed with appellant that "neither *United States v. Collazo*, [citation omitted], nor our higher court's decision in this case requires a showing of uniquely personal harm in order to justify a sentence reduction, rather that the delay is to be considered along with the rest of the record in determining what sentence should be approved." The CGCCA reduced appellant's confinement for post-trial delay.

b) *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005). Following his release from custody, appellant had applied for a position as a driver. He submitted to the court his own declaration and declarations from three officials of a potential employer that stated that he would have been considered for employment or actually hired if he had possessed a DD-214, even if his discharge was less than honorable. The employer was aware of appellant's court martial for two specifications of unauthorized absence and two specifications of missing movement by design, in violation of Articles 86 and 87. The CAAF held that those un-rebutted declarations were sufficient to demonstrate ongoing prejudice beyond what would have been a reasonable time for post-trial proceedings. Whether appellant would have had a job for certain was not relevant. The court concluded that setting aside the bad-conduct discharge is a remedy more proportionate to the prejudice that the unreasonable post-trial delay had caused. Appellant was prejudiced by the facially unreasonable post-trial delay, which violated his right to due process. The appropriate remedy was disapproval of the bad-conduct discharge.

4. The current rule. On 11 May 2006, the CAAF released *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). The *Moreno* decision demonstrated that while the CAAF was not willing to return to an inflexible *Dunlap*-style 90-day rule, it was willing to apply heightened scrutiny and find due process violations in cases where post-trial processing crossed certain defined boundaries. In *Moreno*, the CAAF announced that it would apply a presumption of unreasonable delay to any case completed after 11 June 2006 that: (1) did not have initial action taken within 120 days of the completion of the trial; (2) was not docketed within 30 days of the convening authority's action; or, (3) did not have appellate review completed by the Court of Criminal Appeals within 18 months of docketing.

a) Once the post-trial delay in a case is determined to be unreasonable, the court must balance: (1) the length of the delay against; (2) the reason for the delay; (3) the appellant's assertion of the right to timely review and appeal; and, (4) prejudice. This test represented an adaptation of the *Barker v. Wingo*, 407 U.S. 514 (1972), test that had previously only been used to review speedy trial issues in a Sixth Amendment context. While failure to meet the *Moreno* timelines triggers the *Barker v. Wingo* analysis, the government can still rebut the presumption of prejudice by showing that the delay was not unreasonable.

b) When balancing the length of the delay against the other factors, no single factor is required to find that the post-trial delay constitutes a due process violation.

c) An appellate court must evaluate prejudice to the appellant in light of three interests: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern over those convicted awaiting the outcome of their appeals; (3) limiting the possibility that a convicted person's ground for appeal, and his or her defenses in case of reversal or retrial, might be impaired.

d) In *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006), the CAAF further refined the prejudice factor by announcing that when an appellant had not shown actual prejudice under the fourth factor of the *Barker v. Wingo* analysis, the appellate courts could still find a due process violation when, in balancing the other three factors, the delay is "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Id.* at 362.

e) In *Moreno*, the CAAF suggested a non-exclusive list of relief that could include, but was not limited to: (1) day-for-day reduction in confinement or confinement credit; (2) reduction of forfeitures; (3) set aside portions of the approved sentence including a punitive discharge; (4) set aside of the entire sentence, leaving a sentence of no punishment; (5) limitation upon the sentence that may be approved by the convening authority following a rehearing; and, (6) dismissal of the charges and specifications with or without prejudice.

f) In *United States v. Harrow*, 65 M.J. 190 (C.A.A.F. 2007), the CAAF determined that even when the post-trial delay is facially unreasonable, if an appellate court is convinced that any error was harmless beyond a reasonable doubt, there is no need to do a separate analysis of each of the *Barker v. Wingo* factors.

g) Cases.

(1) *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), *on remand*, No. 200100715, 2009 WL 1808459 (N-M.C.C.A. June 23, 2009) (unpublished), *aff'd*, 69 M.J. 36 (C.A.A.F. 2010) (summary disposition). Appellant was tried and convicted by members of rape in violation of Article 120, UCMJ. He was sentenced to reduction to E-1, TF, six years confinement, and DD. On appeal, appellant asserted that he was denied due process as a result of unreasonable post-trial delay. He was sentenced on 29 September 1999. The 746-page Record of Trial (ROT) was authenticated 288 days later. On 31 January 2001 (490 days after the court-martial), the CA took action. The case was docketed at NMCCA 76 days later. The NMCCA granted 18 defense motions for enlargement for time to file an appellate brief. From the end of his court-martial until the NMCCA rendered a decision, it took 1,688 days. In conducting an analysis of the case, the CAAF adopted the four factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), which are: (1) length of the delay; (2) reasons for the delay; (3) assertion by Appellant of the right to a timely review and appeal; and (4) prejudice suffered by Appellant. During the post-trial process, each of these factors will be analyzed based on the circumstances. More importantly for practitioners, the CAAF established new post-trial processing guidelines as follows: (1) from sentence to action, the government has 120 days; (2) from action to docketing at the Court of Criminal Appeals, the government has 30 days; and, (3) from docketing at the Court of Criminal Appeals to appellate decision, the Court has 18 months to render a decision. Failure to meet these processing timelines serves to trigger the four-part *Barker* analysis. However, the government can rebut the presumption by showing that the delay was not unreasonable.

(2) *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006). Appellant, contrary to his pleas, was convicted of rape and assault consummated by battery. On August 13, 1998, he was sentenced to reduction to E-1, forfeiture of all pay and allowances, confinement

for twelve years and a dishonorable discharge. The transcript was 943 pages and the ROT was composed of eleven volumes. It took 2,240 days from the end of trial until the issuance of the NMCCA's decision, a period of over six years.

The NMCCA decision was set aside. The CAAF held that the appellant was denied his due process right to speedy post-trial and appellate review. They set forth the analytical framework using the four *Barker v. Wingo* factors of: (1) length of delay; (2) reasons for the delay; (3) assertion of the right to timely review and appeal; and (4) prejudice. The court determined that the first three factors weighed heavily in favor of the appellant. Moreover, CAAF ruled that where there is no finding of *Barker* prejudice, they will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of fairness and integrity of the military justice system. *See also United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006).

(3) *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006). A 1,794 day delay from sentence to first-level appellate review violated the appellant's right to speedy post-trial relief because he suffered two forms of actual prejudice. First, he was denied timely review of a meritorious claim of legal error (an instructional error made at trial). Second, the lack of "institutional vigilance" by the government resulted in the loss of his right to free and timely professional assistance of detailed military appellate defense counsel. The CAAF granted relief in the form of cap on sentence at a rehearing ordered as a result of the instructional error.

(4) *United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006). Despite not showing prejudice under the fourth prong of the *Barker* analysis, the court found that a 2,031-day delay from trial to first-level appellate review was "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." The CAAF granted relief in the form of a cap on sentence upon rehearing (the case had already been returned for rehearing on another basis).

(5) *United States v. Simon*, 64 M.J. 205 (C.A.A.F. 2006). The government's gross negligence in not mailing a 36-page ROT to the first-level appellate court for 572 days was a violation of the appellant's right to speedy post-trial review. The CAAF returned the case to the NMCCA with direction that it may grant relief under its broad sentence appropriateness authority under Article 66(c) or, as a matter of law, under the Due Process Clause.

(6) *United States v. Canchola*, 64 M.J. 245 (C.A.A.F. 2007). The CAAF specifically rejects the NMCCA's attempt to create a generalized "excludable delay" concept similar to that used under R.C.M. 707(c) to examine pretrial speedy trial issues.

(7) *United States v. Young*, 64 M.J. 404 (C.A.A.F. 2007). The CAAF considered the circumstances and the entire record, and found that 1,637 days from trial through completion of ACCA review was harmless beyond a reasonable doubt.

(8) *United States v. Roberson*, 65 M.J. 43 (C.A.A.F. 2007). The CAAF found that under the facts of this case, 1,524 days from trial to NMCCA review was harmless beyond a reasonable doubt.

(9) *United States v. Pflueger*, 65 M.J. 127 (C.A.A.F. 2007). The NMCCA, in assessing the "unreasonable and unconscionable" post-trial delay in this case, did not approve the BCD. Sentence at trial was a BCD, confinement for four months, and reduction to E-1. CA's action suspended BCD and all confinement in excess of 90 days. The CAAF found

that this was not meaningful sentence relief because the BCD had already been remitted at the end of the suspension period.

(10) *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006). The CAAF found that under the facts of this case, 1,867 days from trial to NMCCA review was harmless beyond a reasonable doubt.

(11) *United States v. Rodriguez-Rivera*, 63 M.J. 372 (C.A.A.F. 2006). The CAAF found that despite the six-year delay in appellate review in this case, any relief that would be actual and meaningful would be "disproportionate to the possible harm generated from the delay." No relief was warranted or granted.

(12) *United States v. Yammine*, 67 M.J. 717 (N-M.C.C.A. 2009). The NMCCA was able to assume, without deciding, that the appellant was denied speedy post-trial processing (214 days from sentencing to CA Action). The NMCCA then found that there was no prejudice and conclude that the error was harmless beyond a reasonable doubt.

(13) *United States v. Bush*, 68 M.J. 96 (C.A.A.F. 2009). Appellant's case file was "apparently lost in the mail for over six years." It took over seven years to review a 143-page guilty plea. The CAAF finds this to be facially unreasonable. On the fourth *Barker v. Wingo* prong, the CAAF held that the appellant's unsupported affidavit that he was denied employment at a store in Alabama was insufficient to establish prejudice. The CAAF holds that *Allende* does not shift the burden to him to establish that the due process violation was not harmless beyond a reasonable doubt. The burden remains upon the government. However, in an unsubstantiated affidavit case, the government's burden of proving any due process violation was harmless beyond a reasonable doubt will be "more easily attained."

(14) *United States v. Schweitzer*, 68 M.J. 133 (C.A.A.F. 2009). Appellant asserted that the eight-year delay from the announcement of sentence until the NMCCA rendered its original opinion violated his due process rights. He submitted an unsupported affidavit claiming that he averaged less than $35,000 a year in annual income since he began his appellate leave, even though persons trained as he was normally earned between $79,000 and $95,000. Citing *Bush*, the CAAF held that there was no prejudice under the fourth *Barker v. Wingo* prong, and that the unsupported affidavit of the appellant allowed the government to more easily demonstrate that any violation of his due process right was harmless beyond a reasonable doubt.

(15) *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). More than eight-year delay from the announcement of sentence until the NMCCA rendered its original opinion violated the appellant's due process rights. However, unsupported (and belated) affidavit claiming that his inability to travel due to his appellate leave status do not establish actionable harm arising from any delay. The CAAF held that under the totality of the circumstances, the post-trial delay was harmless beyond a reasonable doubt. Due to the lack of convincing evidence of prejudice in the record, the court will not presume prejudice from the length of the delay alone.

(16) *United States v. Mullins*, 69 M.J. 113 (C.A.A.F. 2010). Convening authority did not take action for 363 days. After docketing, 448 days passed until the first contact between appellate defense counsel and the appellant. Over the course of the appeals, appellant had four separate appointed attorneys. Appellant also filed writs and motions pro se, including complaints about the delay in the appellate process. Appellant was eventually released from confinement. Two months later, he was allegedly denied unemployment insurance because he was on appellate leave and did not have a DD-214. The CAAF

skipped over most of the analysis and went right to the lack of prejudice. The appellant had three assertions of prejudice: 1) no unemployment benefits due to the lack of a DD-214; 2) anxiety because he had to register as a sex offender; and, 3) a timely appeal would have allowed him to seek legal custody of his children. The CAAF dismissed the latter two arguments since the appellant did not prevail on the merits of his appeal. Turning to the unemployment benefits, the CAAF held that while this may be prejudicial, it was not necessarily so in this case. The appellant provided no affidavits or direct proof that a person in appellant's situation would have been eligible for unemployment benefits. Unlike *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2004), where the appellant provided affidavits from potential employers, this case was lacking of such proof of prejudice. Absent prejudice, the post-trial delay was harmless beyond a reasonable doubt. The CAAF denied relief.

(17) *United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011). The court addressed the eleven-year delay between his conviction and the lower court decision (substantially due to a long USACIL investigation into a forensic chemist that worked on this case), and the appellant's claims that he was prejudiced because the government destroyed the physical evidence and that he was denied United States citizenship due to his conviction. The court assumed that there was error and proceeded directly to the conclusion that the delay was harmless beyond a reasonable doubt. The court had not found merit in the substantive appeal, so the claims of prejudice were harmless.

(18) *United States v. Arriaga*, 70 M.J. 51 (C.A.A.F. 2011). The government took 243 days from trial to convening authority action in this case. Much of this time was devoted to the record of trial. It took the court reporters 82 days to produce the record of trial, and it took the trial counsel 80 days to conduct errata on the record of trial. The remaining 81 days were spread out over the remaining steps in the post-trial process. In a 3-2 decision, the majority of the court found that the accused was denied his due process right to a speedy post-trial review and remanded the case to the AFCCA for appropriate relief. The court made note in dicta, however, that the government's argument that the delay was "only" 123 days because the *Moreno* standard of 120 days should not count against the government was dismissed outright. The court made special note that the clock begins to run on the day that the trial is concluded and stops on the date of action. (Note: This point was specifically agreed to by the dissent, making this "dicta holding" a 5-0 part of the decision.) The primary analysis revolved around prejudice, and more specifically, oppressive incarceration pending appeal. The appellant's original maximum release date (MRD) was March 25, 2012. After the AFCCA lowered his sentence to two years confinement, his MRD was March 25, 2010. The AFCCA decision was released on May 7, 2010, and the appellant was released on May 14, 2010. This amounted to 51 extra days in confinement that would not have been served had the government taken action within 120 days. The CAAF found that the government violated the appellant's due process rights to a speedy post-trial review. The dissent found no due process violation and would have affirmed the AFCCA decision. The dissent spent time discussing that a presumptively unreasonable delay is necessarily dependent on the type of case. Overall, the dissent would not find a 243 day period from trial to action to be prejudicial under the facts and circumstances of this case, and as a result, deny relief on that basis. Even assuming prejudicial delay, the dissent would still refuse to grant relief on the grounds that oppressive incarceration was speculative at best. There is no guarantee that the AFCCA decision would have been released in the same amount of time, even if the government would have taken less than 120 days to action. Even barring that, there is no

guarantee that the AFCCA would have reduced the appellant's sentence to confinement by such a large amount had there been no post-trial delay in this case.

5. The ACCA and the exercise of its Article 66, sentence appropriateness authority – prejudice not required for relief from post-trial delay.

a) *United States v. Collazo*, 53 M.J. 721 (A.C.C.A. 2000). The ACCA came up with a new method for dealing with post-trial processing delay. In *Collazo*, the court granted the appellant four months off of his confinement because the government did not exercise due diligence in processing the record of trial. The court expressly found no prejudice.

b) *United States v. Bauerbach*, 55 M.J. 501 (A.C.C.A. 2001). The only allegation of error was undue delay in the post-trial process. Defense sought relief in accordance with *Collazo*. Applying *Collazo*, the ACCA found that the government did not proceed with due diligence in the post-trial process when it took 288 days to process a 384-page record of trial. Although no prejudice was established, the court granted relief under its Article 66, sentence appropriateness authority reducing confinement by one month. The court did provide valuable guidance to SJAs and Chiefs of Justice regarding what might justify lengthy post-trial delay (remembering that the court will test whether the government has proceeded with due diligence in the post-trial process based on the totality of the circumstances). "Acceptable explanations may include excessive defense delays in the submission of R.C.M. 1105 matters, post-trial absence or mental illness of the accused, exceptionally heavy military justice post-trial workload, or unavoidable delays as a result of operational deployments. Generally, routine court reporter problems are not an acceptable explanation." *Bauerbach*, 55 M.J. at 507.

c) *United States v. Delvalle*, 55 M.J. 648 (A.C.C.A. 2001). Ten months to prepare 459-page ROT was too long; sentence reduced by two months.

d) *United States v. Maxwell*, 56 M.J. 928 (A.C.C.A. 2002). Appellant was convicted at a GCM of desertion terminated by apprehension and wrongful appropriation of a motor vehicle. The adjudged and approved sentence was confinement for five months and a BCD. On appeal, appellant alleged undue delay in the post-trial processing of her case. Held: fourteen months from trial to action in a case where the ROT is only 384 pages is an excessive delay that warrants relief under *Collazo* and *Bauerbach*. Note: appellant failed to cite any prejudice resulting from the delay, however, the ACCA, in exercise of its Article 66, UCMJ, sentence appropriateness authority affirmed the findings and reduced the period of confinement from five to four months. *See also United States v. Paz-Medina*, 56 M.J. 501 (A.C.C.A. 2001) (one year delay in post-trial processing of 718-page ROT unreasonable and indicates a lack of due diligence). *United States v. Hutchison*, 56 M.J. 756 (A.C.C.A. 2002) (419 day delay from trial to action in an 81-page ROT case is unreasonable – 3-month confinement reduction despite the lack of prejudice to the accused).

e) *United States v. Stachowski*, 58 M.J. 816 (A.C.C.A. 2003). Delay of 268 days between sentence and action was not excessive and did not warrant relief for dilatory post-trial processing. Applying a totality of circumstances approach, the court considered the following: that the CA reduced the appellant's confinement by thirty days because of the post-trial delay; while processing the appellant's case, the installation only had one court reporter; the lone reporter doubled as the military justice division NCOIC; the backlog of cases awaiting transcription was significant; and the cases were transcribed on a "first in, first out" basis. *Id*. at 818.

f) *United States v. Bodkins*, 60 M.J. 322 (C.A.A.F. 2004). The CAAF rejected the ACCA's conclusion that the accused is required to ask for timely post-trial processing, and that failure

to do so waived any right to relief. The accused failed to object to dilatory post-trial processing in guilty plea case with a 74-page record of trial (ROT) (i.e., 252 days from sentence to action; 412 days from sentence to receipt of ROT by the ACCA). The CAAF noted that the responsibility to complete post-trial processing in a timely fashion lies with the CA and is not dependent on an accused's request. The CAAF did, however, observe that the absence of a request from the defense is one factor a reviewing court may consider in assessing the impact of any delay in a particular case.

g) *United States v. Garman*, 59 M.J. 677 (A.C.C.A. 2003). Allegations of dilatory post-trial processing will be examined on a case-by-case basis applying a totality of the circumstances approach. Court refuses to adopt a bright line rule regarding post-trial delay. Held: appellant was not entitled to relief despite a post-trial delay of 248 days from sentence to action (i.e., 329 days less 81 days attributable to the defense; the military judge's time to authenticate the record was government time). The factors the court considered were as follows: defense counsel's objection to the post-trial delay was "dilatory," occurring at day 324; after the defense objected, the government acted on the case expeditiously (i.e., in five days); although unexplained, the delay did not exceed 248 days; slow post-trial processing was the only post-trial error; and, the appellant failed to allege any prejudice or harm from the delay. Most significant in the court's decision was the defense counsel's lack of timely objection to the post-trial processing.

h) *United States v. Banks*, 75 M.J. 746 (A.C.C.A. 2016). The ACCA denies Government claim that delay should be attributed to dilatory Defense action. The Court points out that Art. 60, UCMJ, and R.C.M. 1105, provide the Defense with just 20 days to submit post-trial matters. Any time past this 20 day allowance will be charged against the Government's processing time.

XIV. SUSPENSION OF SENTENCE. ARTICLE 71, UCMJ; R.C.M. 1108/R.C.M. 1107

A. This rule will not change much under the MJA 2016. Some of the language will be updated to reflect other changes in the rules. The rule requires the conditions of any suspension to be specified in writing, served on the accused, and receipted for by the probationer. *United States v. Myrick*, 24 M.J. 792 (A.C.M.R. 1987) (there must be substantial compliance with R.C.M. 1108). *See*:

1. AR 27-10, para. 5-35 (11 May 2016);
2. JAGMAN, section 0158; and,
3. AFI 51-201, para. 9.23.

B. Power of the CA to create conditions.

1. *United States v. Cowan*, 34 M.J. 258 (C.M.A. 1992). The accused asked the CA for a method by which she could serve her confinement and still support her 6-year-old child. CA approved the sentence, but suspended for one year confinement in excess of six months and forfeitures in excess of $724.20, suspension of forfeitures conditioned upon:

a) The initiation of an allotment payable to the daughter's guardian of $278.40, for the benefit of the girl; and

b) The maintenance of the allotment during the time the accused is entitled to receive pay and allowances.

Held: Permissible. Note: court recognizes inherent problems; recommends careful use of such actions.

2. *United States v. Schneider*, 34 M.J. 639 (A.C.M.R. 1992), *aff'd*, 38 M.J. 387 (C.M.A. 1993). The accused asked for assistance in supporting his dependents. The ACMR upheld CA's suspension of forfeitures in excess of $400.00 on conditions that the accused:

a) Continue to claim on W-4, as long as he can legitimately do so, single with 2 dependents; and

b) Initiate and maintain allotment to be paid directly to spouse in amount of $2,500.

C. Period of suspension must be reasonable; conditions must not be "open-ended" or "unachievable."

1. Limited by AR 27-10, para. 5-35 (11 May 2016), on a sliding scale from three months in a SCM to two years or the period of unexecuted portion of confinement, whichever is longer, in a GCM.

2. *United States v. Spriggs*, 40 M.J. 158 (C.M.A. 1994). Uncertain and open-ended period of time required to fulfill one of the conditions (self-financed sex offender program) made the period of suspension of the discharge and reduction in grade "unreasonably long." The CMA, especially Judge Cox, signals approval for parties' "creative" and "compassionate" efforts.

3. *United States v. Ratliff*, 42 M.J. 797 (N-M.C.C.A. 1995). Eleven years' probation not unreasonably long under the circumstances (though this extended suspension period may be barred in the Army by AR 27-10).

4. *United States v. Koppen*, 39 M.J. 897 (A.C.M.R. 1994). Suspension of period of confinement in conjunction with an approved discharge should coincide with serving the unsuspended portion of confinement.

5. *United States v. Wendlandt*, 39 M.J. 810 (A.C.M.R. 1994). Directing that suspension period begin on date later than action is not per se improper.

D. Vacation of Suspension of Sentence. Article 72, UCMJ; R.C.M. 1109.

1. The rule sets forth the procedural and substantive requirements for vacating a suspended sentence. It authorizes immediate confinement pending the vacation proceedings, if under a suspended sentence to confinement. *See* Appendix 18, MCM.

2. *United States v. Connell*, 42 M.J. 462 (C.A.A.F. 1995). Appellant challenged the vacation of his suspended bad-conduct discharge because the hearing officer, his special court-martial convening authority (as required by R.C.M. 1109(d)), had imposed nonjudicial punishment on him for the same offense that caused the vacation of his suspended bad-conduct discharge. The CAAF held that this did not make the special court-martial convening authority too personally interested to be a neutral and detached hearing officer as required by R.C.M. 1109.

3. *United States v. Miley*, 59 M.J. 300 (C.A.A.F. 2004). Error for the hearing officer (i.e., SPCMCA) in a vacation of suspended punishment situation to refrain from making findings of fact on whether a basis for vacation existed. The hearing officer's decision, pursuant to R.C.M. 1109, must include an evaluation of the contested facts and a determination of whether the facts warrant vacation. A decision based solely on equitable grounds is improper. Error for the GCMCA to vacate the suspended punishment when the hearing officer failed to comply with R.C.M. 1109. Held: vacation action set aside and returned to the GCMCA for yet another (a third vacation hearing) or reinstatement of the terms of the original pretrial agreement. Note: 3-2 decision with J. Baker and C.J. Crawford dissenting.

XV. EXECUTION OF SENTENCE. UCMJ, ARTICLE 71, UCMJ; R.C.M. 1113/R.C.M. 1206

A. This rule will not change under the MJA 2016.

B. A sentence must be approved before it is executed (but confinement, forfeitures, and reduction may be carried out before ordered executed).

C. Confinement, unless deferred is immediate. Forfeitures, both automatic and adjudged, and reduction, unless deferred, take effect fourteen days after sentence is announced or upon action, whichever is earlier.

D. The CA's initial action may order executed all punishments except a DD, BCD, dismissal or death.

E. A Dishonorable Discharge (DD) or Bad-Conduct Discharge (BCD) may be ordered executed only after a final judgment within the meaning of R.C.M. 1209 has been rendered in the case. If on the date of final judgment, a Servicemember is not on appellate leave and more than six months have elapsed since approval of the sentence by the CA, before a DD or BCD may be executed, the officer exercising GCM jurisdiction over the Servicemember shall consider the advice of that officer's SJA as to whether retention would be in the best interest of the service. Such advice shall include the findings and sentence as finally approved, the nature and character of duty since approval of the sentence by the CA, and a recommendation whether the discharge should be executed.

1. *United States v. Estrada*, 68 M.J. 548 (A.C.C.A. 2009), *aff'd*, 69 M.J. 45 (C.A.A.F. 2010). Purported honorable discharge given before bad-conduct discharge could be executed was void. AR 27-10, para. 5-16 (11 May 2016) automatically voided any purported discharge because the honorable discharge occurred prior to initial action.

2. *United States v. McPherson*, 68 M.J. 526 (A.C.C.A. 2009), *aff'd*, 68 M.J. 408 (C.A.A.F. 2009) (summary disposition). Purported honorable discharge given before bad-conduct discharge could be executed was not void and remits any approved bad-conduct discharge. The honorable discharge in this case occurred after initial action (after a prior honorable discharge issued before initial action was revoked as void).

3. *United States v. Watson*, 69 M.J. 623 (A.C.C.A. 2010). Prior to CA Action, the appellant, a reserve officer, was released from active duty (REFRAD). After CA Action that approved her dismissal, she received an honorable discharge. Because the proper authority (Commander, HRC, St. Louis) voided the erroneous honorable discharge, the dismissal was not remitted.

4. *United States v. Watson*, 69 M.J. 415 (C.A.A.F. 2011). On appeal from the above case, the CAAF (in a 3-2 decision) overturned the decision by the ACCA and held that the administrative honorable discharge was validly issued, and therefore remitted the adjudged dismissal.

5. *United States v. Brasington*, No. 20060033, 2010 WL 3582596 (A.C.C.A. Sept. 13, 2010) (unpublished). Purported honorable discharge given by reserve component of Human Resources Command (Soldier was an active duty Soldier, not reserve) was issued in error and withdrawn by the same command after a request from the Personnel Control Facility. The ACCA held that the reserve component of HRC did not have the authority to discharge the appellant, and his discharged was voidable.

6. *United States v. Tarniewicz*, 70 M.J. 543 (N-M.C.C.A. 2011). The convening authority action stated, in relevant part, "In accordance with the Uniform Code of Military Justice, the Manual for Courts-Martial, applicable regulations, and this action, the sentence is ordered executed. Pursuant to Article 71, UCMJ, the punitive discharge will be executed after final

judgment." The CA's action, to the extent that it ordered the BCD executed, is a legal nullity. *See United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009). The court started by stating that the action did not follow the recommended forms for action in Appendix 16, MCM. However, Article 71, UCMJ, which states in relevant part, "if a sentence extends to . . . bad-conduct discharge . . . that part of the sentence extending to . . . bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings." This means that in a case reviewed by a CCA, the BCD could not be executed until appellate review is final. The court held that the language in the CA's action could be interpreted two ways: 1) the CA attempted to direct the execution of the BCD; or 2) mere commentary on a possible future event – that being affirmance of the case on appeal. In either case, the court held that the language has no effect. Article 71, UCMJ does not allow it.

F. Dismissal of a commissioned officer, cadet or midshipman may be approved and ordered executed only by the Secretary concerned or such Under Secretary or Assistant Secretary as the Secretary concerned may designate.

G. Death. A punishment of death may be ordered executed only by the President.

XVI. [LEGACY] PROMULGATING ORDERS. ARTICLE 76, UCMJ; R.C.M. 1114

A. Promulgating orders will disappear under the MJA 2016. The Entry of Judgment will take its place.

B. A summary of the charges and specifications is authorized. *See* MCM, Appendix 17. *See also* United States Army Court of Criminal Appeals, Office of the Clerk of Court, Post Trial Handbook (2009).

C. The specifications and findings in the promulgating order need to sufficiently apprise a third party of the specific offenses that the accused was tried on. Stating "AWOL" without more is defective because it lacks sufficient specificity to prevent against subsequent prosecution for the same offense.

1. *United States v. Glover*, 57 M.J. 696 (N-M.C.C.A. 2002). R.C.M. 1114(c) requires that the charges and specifications either be stated verbatim or summarized. The promulgating order in this case did neither, providing "no useful information about the offenses" the appellant was convicted of except for the number of the UCMJ Article that was violated. *Id*. at 697. Held: the promulgating order failed to comply with R.C.M. 1114(c) and absent a verbatim summary of the specification, a "meaningful summary" must be provided. *Id*. at 698. The court provided relief in its decretal paragraph, affirming the findings and sentence and ordering that a supplemental promulgating order be issued in compliance with its decision.

2. *United States v. Suksdorf*, 59 M.J. 544 (C.G.C.C.A. 2003). Promulgating order that omits suspension of confinement in excess of 150 days and incorrectly reflects the pleas and findings at trial is erroneous. Similarly, an action which fails to reflect a required suspension of confinement is erroneous. Despite these errors, the appellant failed to allege any prejudice since he was released from confinement at the appropriate time and did not serve any confinement in excess of the required 150 days. Although Article 66, UCMJ, "does not provide general authority for a court of criminal appeals to suspend a sentence, [the CAAF has recognized a service court's] authority to do so when a convening authority failed to comply with the terms of a pretrial agreement requiring suspension of some part of a sentence." *Id*. at 547. As for the lack of attention to detail in the post-trial processing of the case, the CGCCA noted that post-trial processing is "not rocket science, and careful proof-reading of materials presented to the convening authority, rather than inattention to detail, would save time and effort for all

concerned." In affirming the findings and sentence, the CGCCA suspended confinement in excess of 150 days and directed the CA to issue a new promulgating order.

XVII. INEFFECTIVE ASSISTANCE OF COUNSEL

A. *United States v. Lewis*, 42 M.J. 1 (C.A.A.F. 1995). Counsel's refusal to submit handwritten letter as part of post-trial matters was error. Counsel may advise client on contents of post-trial matters but final decision is the client's. The CAAF rejects the ACCA's procedures for handling IAC allegations, originally set out in *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989). Trial defense counsel should not be ordered to explain their actions until a court reviews the record and finds sufficient evidence to overcome the presumption of competence.

B. *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989). Two key points:

1. When the accused specifies error in his request for appellate representation or in some other form, appellate defense counsel will, at a minimum, invite the attention of the CCA to those issues and it will, at a minimum, acknowledge that it has considered those issues and its disposition of them.

2. Guidelines for resolving IAC allegations:

a) Appellate counsel must ascertain with as much specificity as possible grounds for IAC claim.

b) Appellate defense counsel then will allow the appellant the opportunity to make his assertions in the form of an affidavit (explaining the affidavit is not a requirement, but also pointing out that it will "add credence" to his allegations).

c) Appellate defense counsel advises the accused that the allegations relieve the DC of the duty of confidentiality with respect to the allegations.

d) Appellate government counsel will contact the DC and secure affidavit in response to the IAC allegations.

C. *United States v. Dresen*, 40 M.J. 462 (C.M.A. 1994). Counsel's request, in clemency petition, for punitive discharge was contrary to wishes of accused and constituted inadequate post-trial representation. Returned for new PTR and action.

D. *United States v. Pierce*, 40 M.J. 149 (C.M.A. 1994). Factual dispute as to whether DC waived accused's right to submit matters to the CA. Held: where DC continues to represent accused post-trial, there must be some showing of prejudice before granting relief based on premature CA action. Any error by failing to secure accused's approval of waiver was not prejudicial in this case.

E. *United States v. Aflague*, 40 M.J. 501 (A.C.M.R. 1994). Where there is no logical reason for counsel's failure to submit matters on behalf of an accused and where the record glaringly calls for the submission of such matters, the presumption of counsel effectiveness has been overcome and appellate court should do something to cleanse the record of this apparent error.

F. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). Defense counsel submitted no post-trial clemency/response documents. Accused did not meet burden of showing that counsel did not exercise due diligence.

G. *United States v. Carmack*, 37 M.J. 765 (A.C.M.R. 1993). Defense counsel neglected to contact accused (confined at USDB) regarding post-trial submissions. Court admonished all defense counsel to live up to post-trial responsibilities; also, admonished SJAs and CAs to "clean up the battlefield" as much as possible.

H. *United States v. Sanders*, 37 M.J. 628 (A.C.M.R. 1993). Court unwilling to adopt *per se* rule that DCs must submit post-trial matters in all cases.

I. *United States v. Jackson*, 37 M.J. 1045 (N.M.C.M.R. 1993). Since clemency is sole prerogative of CA, where defense counsel is seriously deficient in post-trial representation, court reluctant to substitute its judgment for that of CA.

J. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). IAC in submitting three post-trial documents which were not approved or reviewed by appellant and which seriously undermined any hope of getting clemency; the CAAF also found IAC in counsel's trial performance.

K. *United States v. Key*, 57 M.J. 246 (C.A.A.F. 2002). Without holding, the CAAF hints that counsel may be ineffective if they fail to advise the client on his post-trial right to request waiver of forfeitures for the benefit of his dependents.

L. *United States v. Starling*, 58 M.J. 620 (N-M.C.C.A. 2003). The appellant was not denied post-trial effective assistance of counsel by his counsel's failure to submit clemency matters. The court went on to establish a prospective standard for handling IAC allegations resulting from a failure to submit evidence on sentencing or during post-trial:

> [A]bsent a clear indication of inaction by the defense counsel when action was compelled by the situation, future claims of inadequate representation for failure to exercise sentencing rights or post-trial rights will not be seriously entertained without the submission of an affidavit by the appellant stating how counsel's inaction contrasted with his wishes. If the claim involves the failure to submit matters for consideration, the content of the matters that would have been submitted must be detailed.

Id. at 623.

M. *Diaz v. The Judge Advocate General of the Navy*, 59 M.J. 34 (C.A.A.F. 2003). Article 66, UCMJ, and Due Process entitle appellants to timely post-trial and appellate review. In so holding, the court noted the following: "the standards for representation of servicemembers by military or civilian counsel in military appellate proceedings are identical" and the "duty of diligent representation owed by detailed military counsel to servicemembers is no less than the duty of public defenders to indigent civilians." *Id*. at 38-39. Finally, the differences between the military justice system as compared to the civilian system, to include the [military] appellate courts' unique fact finding authority, compel even "greater diligence and timeliness than is found in the civilian system." *Id*. at 39. *See also United States v. Brunson*, 59 M.J. 41 (C.A.A.F. 2003) (counsel have a duty to aggressively represent their clients before military trial and appellate courts, late filings and flagrant or repeated disregard for court rules subject the violator to sanctions). *Id*. at 43.

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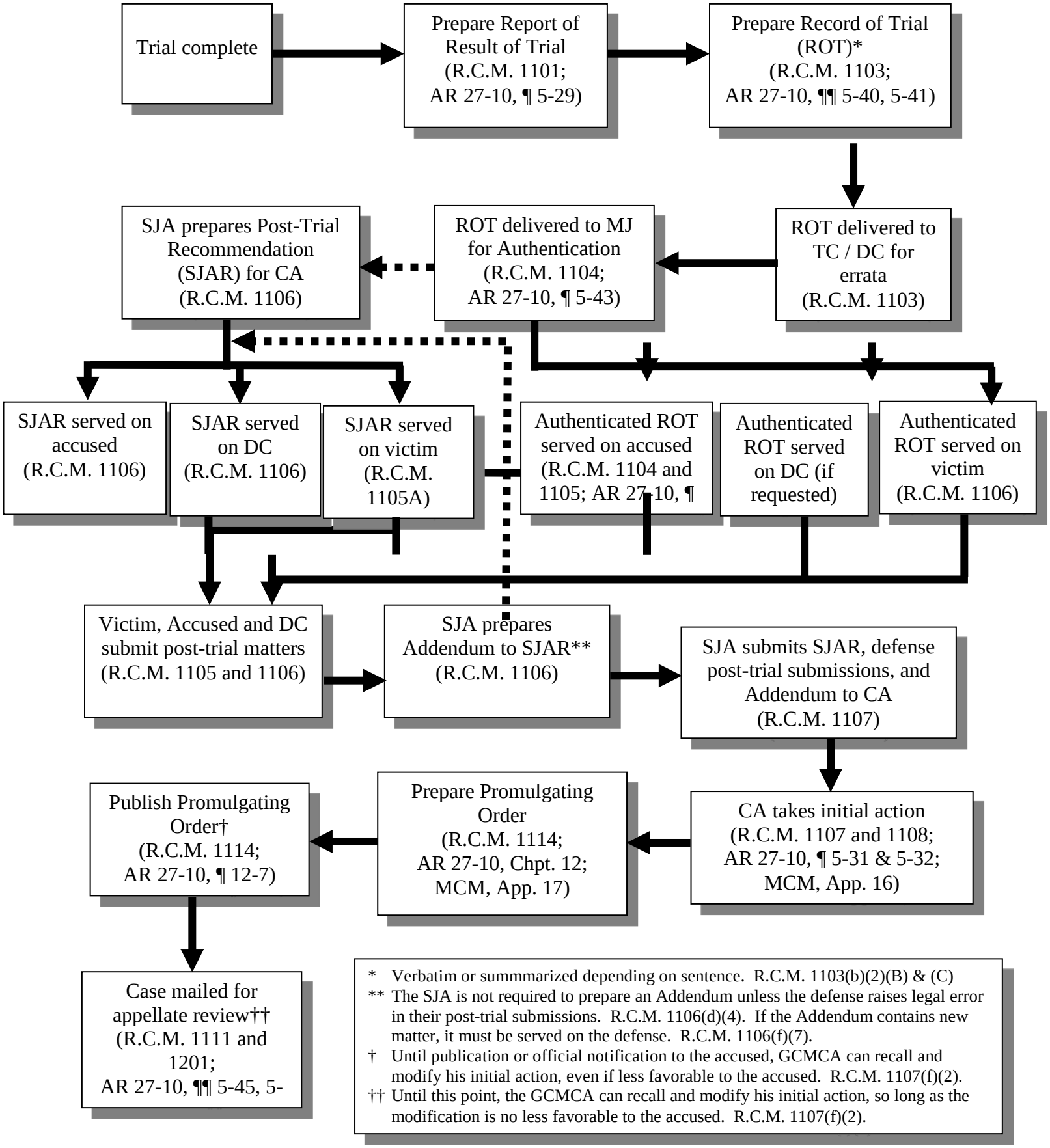
APPENDIX

Typical General/Special Court-Martial Post-Trial Processing (for a visual of the MJA 2016 system, check milSuite for the most up to date version of the MTT training package)



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CHAPTER 29
APPEALS & WRITS

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I. GOVERNMENT APPEALS

A. Article 62, UCMJ; R.C.M. 908(a). In a trial by a court-martial over which a military judge presides the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification, excludes evidence that is substantial proof of a fact material in the proceedings, or affects the disclosure or nondisclosure of classified information. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty, with respect to the charge or specification. Under the MJA 2016, Article 62 will be expanded to cover ANY general or special court-martial. There will no more requirement for the possibility of a punitive discharge. In addition, the MJA 2016 will expand the potential bases for an interlocutory appeal by adding pretrial proceedings under Art. 30a. Where a military magistrate presides, the Government may still appeal the ruling, but it must present the issue to a military judge. The MJA 2016 will also allow for the Government to appeal an order or ruling of the military judge entering a finding of not guilty with respect to a charge or specification following the return of a finding of guilty by the members. Finally, Art. 62 will include an express requirement to "liberally construe" its provisions to effect its purposes. *See United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008). This may be a nod to the potential for interlocutory appeals during Art. 30a proceedings where it may be difficult for the Government to meet one of the above bases for appeal.

IMPORTANT NOTE – the MJA 2016 will add another type of Government right of appeal, under the revised Art. 56(d), specifically, the right to appeal sentences under certain circumstances. This new provision will be covered below as part of the discussion about changes to appellate review under the MJA 2016.

B. Qualifying Proceeding (reflecting MJA 2016 changes).

1. General or special court-martial; or

2. A pretrial proceeding under Art. 30a.

C. Qualifying Ruling.

1. ". . . order or ruling that terminates the proceedings with respect to a charge or specification." R.C.M. 908(a).

a. *Howell v. United States*, 75 M.J. 386 (C.A.A.F. 2015). Article 62 limits interlocutory appeals – an appeal that occurs before the trial court's final ruling on the entire case; this case was not an interlocutory appeal because the trial court had issued findings and sentence and the military judge had authenticated the record before the government appealed.

2. ". . . order or ruling . . . which excludes evidence that is substantial proof of a fact material...." R.C.M. 908(a).

a. *United States v. Jacobsen*, 77 M.J. 81 (C.A.A.F. 2017). The language in Art. 62(a)(1)(B)'s second prong – the evidence excluded by a military judge's trial ruling was evidence that is *substantial* proof of a fact material in the proceeding – is also a threshold jurisdictional requirement for an interlocutory government appeal. While the Government must certify such in any Art. 62 appeal, the Court will look beyond the certification to determine whether appellate jurisdiction exists.

b. *United States v. Vargas*, 74 M.J. 1 (C.A.A.F. 2014). The proper test to apply when determining whether a ruling excludes evidence under Article 62, UCMJ, is whether the ruling at issue in substance or in form has **limited the pool of potential evidence that would be admissible**. A military judge's denial of a government's request for a continuance to accommodate the availability of witnesses did *not* constitute an exclusion of evidence appealable under Article 62.

c. *United States v. Bradford*, 68 M.J. 371 (C.A.A.F. 2010) (finding that a military judge's decision to not "preadmit" evidence **did not** constitute "[a]n order or ruling which excludes evidence that is substantial proof of fact material in the proceeding).

d. *United States v. Pacheco*, 36 M.J. 530 (A.F.C.M.R. 1992) ("it is not necessary that the evidence suppressed be the only evidence in the case"); *United States v. Hamilton*, 36 M.J. 927 (A.F.C.M.R. 1993).

3. Or, the **functional equivalent** of an R.C.M. 908 appealable order.

a. *United States v. Sepulveda*, 40 M.J. 856 (A.F.C.M.R. 1994). The MJ granted defense's motion to dismiss three specifications of indecent acts as lesser-included offenses of three indecent assault specifications also charged, and further granted defense's motion to consolidate three specs of indecent assault into one specification. AFCMR found jurisdiction for appeal appropriate to determine whether dismissal should be with or without prejudice, because the MJ terminated proceedings with regard to indecent acts specifications. Jurisdiction was also proper with regard to the consolidated specifications since consolidation is a functional equivalent of dismissal.

b. *United States v. True*, 28 M.J. 1 (C.M.A. 1989). The MJ's abatement order was the "functional equivalent" of a ruling that terminates the proceedings. The MJ ordered the Government to provide a defense expert and the CA would not pay. Use the "practical effects" test. *See also United States v. Metcalf*, 34 M.J. 1056 (A.F.C.M.R. 1992).

c. *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006). MJ's abatement order in this case was not a "termination of proceedings" and the Government appeal was not valid under Article 62, UCMJ. MJ simply abated proceedings pending enforcement of a warrant of attachment; in this case the Government acknowledged that the Marshal's Service had not enforced the writ of attachment the MJ issued to obtain certain records.

4. **BUT NOT** "an order or ruling that is, or amounts to, a finding of not guilty of a charge or specification."

a. *United States v. Adams*, 52 M.J. 836 (A.F. Ct. Crim. App. 2000). Appellate court lacked jurisdiction to hear government appeal of military judge's granting of defense motion for a finding of not guilty pursuant to R.C.M. 917. *But see United States v. Brooks*, 41 M.J. 792 (Army Ct. Crim. App. 1995). A court-martial panel president announced guilty to specification "by absolute majority." Voir dire of the panel indicated several straw votes

were taken on the specification - which resulted in insufficient votes to convict - MJ entered finding of not guilty to specification. Government filed appeal under R.C.M. 908. The appellate court had jurisdiction, notwithstanding a finding of not guilty, since MJ's characterization of the action was not controlling, and since the case was a members trial, only the panel could evaluate the evidence and render findings as to guilt or innocence (except for R.C.M. 917 finding). Therefore, the act of the MJ amounted to a dismissal with prejudice, and was a proper subject for government appeal.

5. **Classified Information**. The 1996 expansion of Art. 62, and 1998 changes to R.C.M. 908(a), permits appeal of a judge's order or ruling directing disclosure of classified information or imposing sanctions for nondisclosure of classified information. The government may also appeal a refusal of the judge to issue a protective order to prevent disclosure of classified information, or refusal to enforce such an order previously issued by competent authority.

D. Nature of Appellate Review

1. **Review by Court of Criminal Appeals.** When reviewing matters under Article 62(b), UCMJ, a CCA may act only with respect to matters of law. The question during such a review is not whether the reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record. *United States v. Baker*, 70 M.J. 283 (C.A.A.F. 2010). The appellate court will review the military judge's decision directly and will review the evidence in the light most favorable to the party which prevailed below. *United States v. Buford*, 74 M.J. 98 (C.A.A.F. 2014)

2. **Further appellate review.** In *United States v. Lopez de Victoria*, 66 M.J. 67 (2008), the CAAF decided 3-2 that it had statutory authority to exercise jurisdiction over the courts of criminal appeals' decisions in Article 62 cases despite the absence of an express grant of authority in Article 67(a). Relying on the express language in Article 67(a) that the CAAF has jurisdiction over "all cases reviewed by a Court of Criminal Appeals . . . ," the majority reasoned that Congress intended uniformity in the application of the Code between the services. If "all cases" did not include government appeals, which are by their very nature interlocutory appeals, then the purpose of the statute would be defeated. The dissent reasoned that nothing in the plain language of Article 62, Article 67, or any other statute grants the CAAF the statutory authority to entertain an Article 62 appeal.

E. Government Appeal Procedure at the Trial Level.

1. Trial counsel may request a delay of not more than 72 hours. R.C.M. 908(b)(1).

2. A court-martial may not proceed, except as to matters unaffected by the ruling or order.

3. The decision to file a notice of appeal with the judge must be authorized by the SJA or the GCMCA. For example, *see* Dep't. of Army, Reg. 27-10, Military Justice, para. 12-3 (11 May 2016). This is not expected to change with the new AR 27-10.

4. Written notice of the appeal must be filed with the military judge not later than 72 hours after the ruling or order. R.C.M. 908(b)(3).

a. *United States v. Daly*, 69 M.J. 485 (C.A.A.F. 2011). The CAAF held the Government's action was untimely because it failed to file either a motion for reconsideration of the order to dismiss or a notice of appeal within the seventy-two-hour period of government appeals authorized in Article 62(a)(2), UCMJ. Instead, the Government took twelve days to finalize and submit a brief to the military judge asking for reconsideration of the order to dismiss.

b. *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010). The government has an *unqualified* seventy-two hour period to file a notice of appeal. The government need not request a delay

in the proceedings in order to preserve the seventy-two hour period for filing a notice of appeal.

c. *United States v. Flores-Galarza*, 40 M.J. 900 (N.M.C.M.R. 1994). The appellate court found R.C.M. 908 provision to file appeal within 72 hours mandatory, and a MJ has no authority to extend the time for filing appeal notice. To avoid procedural issues in the future, the court recommended the following: 1) MJ should enter essential findings contemporaneously with ruling on motion; 2) MJ should state on record that his action is ruling of the court; 3) if MJ rules adverse to the government on a significant matter, the MJ should then ascertain on the record whether the government is contemplating an appeal; and, 4) if the government is contemplating an appeal, the MJ should state on record the time of the ruling, i.e., the time the 72-hour period will run, and how and where the government may provide the MJ with written notice of appeal. *See also United States v. Santiago*, 56 M.J. 610 (N.M.C.C.A. 2001).

5. Written notice to the military judge shall (R.C.M. 908(b)(3)):

6. Specify the order appealed and the charges and specifications affected.

7. Certify that the appeal is not for the purpose of delay.

8. Certify that the evidence excluded is substantial proof of a material fact. *But see United States v. Jacobsen*, 77 M.J. 81 (C.A.A.F. 2017).

9. **Automatic Stay.** Notice of appeal "automatically stays" trial proceedings except as to unaffected charges or specifications. R.C.M. 908(b)(4).

a. Motions may be litigated in the judge's discretion.

b. If trial on merits has not begun:

(1) Severance at the request of all parties.

(2) Severance requested by the accused to prevent manifest injustice.

10. If trial on merits has begun: a party may put on additional evidence within the judge's discretion.

11. Requesting reconsideration.

a. Should be undertaken upon request. *United States v. Tucker*, 20 M.J. 602 (N.M.C.M.R. 1985). *But see United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990) (military judge did not abuse his discretion in denying the prosecution's request to reopen after granting the defense motion to suppress the accused's confession).

b. Scope of reconsideration. *Harrison v. United States*, 20 M.J. 55 (C.M.A. 1985). A trial judge has inherent authority, not only to reconsider a previous ruling on matters properly before him, but also to take additional evidence in connection therewith.

c. Effect of reconsideration and time limits. *United States v. Santiago*, 56 M.J. 610 (N.M.C.C.A. 2001). The denial of a reconsideration ruling can be appealed, and the time limit within which to appeal does not start until the trial court rules on the petition for reconsideration. While the MCM does not address timeliness of request for reconsideration, the time limits from Article 62 and R.C.M. 908 are appropriately applied to such requests in assessing the timeliness for purpose of appeal.

12. **Tolls Speedy Trial.** Article 62(c), UCMJ, provides that delays resulting from an appeal under Article 62 shall be excluded from speedy trial analysis unless an appropriate authority

determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. *United States v. Danylo*, 73 M.J. 183 (C.A.A.F. 2014). The government gets a NEW 120 DAY CLOCK. R.C.M. 707(b)(3)(C).

13. Pretrial confinement of accused pending government appeal. R.C.M. 908(b)(9): If an accused is in pretrial confinement at the time the United States files notice of its intent to appeal, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the United States, should consider the same factors which would authorize the imposition of pretrial confinement under R.C.M. 305(h)(2)(B).

14. Record of trial:

15. Prepared and authenticated to the extent necessary to resolve the issue appealed. R.C.M. 908(b)(5).

16. Essential findings.

a. When ruling on motions to suppress evidence, military judges are required to state their essential findings of fact on the record (R.C.M. 905(d)).

b. Findings should be logical and complete enough so that there is no need to resort to other parts of the record for meaning.

c. Military judge should state the legal basis for the decision—the legal standards applied and the analysis of the application of these standards to the facts previously stated.

d. Military judge should state any conclusions made and the decision.

e. Help frame issues at the trial level; seek clarity and precision in judge's ruling.

17. Military judge or Court of Criminal Appeals may require additional portions of the record.

18. "Forwarding" of the appeal to government representative, designated by the Judge Advocate General. R.C.M. 908(b)(6). The matter forwarded shall include:

19. Statement of the issues appealed.

20. The original record or summary of the evidence.

21. Such other matters as the Secretary concerned may prescribe

22. The government must forward the appeal to the government representative within 20 days from the date written notice of appeal is filed with the trial court. Article 62.

a. *United States v. Crain*, 2018 CCA LEXIS 140 (Army Ct. Crim. App. Mar. 15, 2018). Government appeal dismissed for lack of jurisdiction for failure to promptly forward an original and 2 copies of the record IAW A.C.C.A. Rule 21. *Cf.* R.C.M. 908(b)(6) ("Upon written notice to the military judge under paragraph (b)(3) of this rule, trial counsel shall *promptly and by expeditious* means forward the appeal to a representative of the Government designated by The Judge Advocate General.") (emphasis added).

b. *United States v. Combs*, 38 M.J. 741 (A.F.C.M.R. 1993). Government appeal properly dismissed for failure to promptly forward.

c. *United States v. Snyder*, 30 M.J. 662 (A.F.C.M.R. 1990). The government failed to forward the authenticated ROT within 20 days; the accused had remained in pretrial confinement pending resolution of appeal. HELD: "The right to liberty is too fundamental to apply an 'almost good enough' standard to the government's actions."

23. Mailing within 20 days meets the requirements of "forwarding." *United States v. Bolado*, 34 M.J. 732 (N.M.C.M.R. 1991) *aff'd* 36 M.J. 2 (C.M.A. 1992).

24. The Chief, Government Appellate Division, makes the decision whether to file the appeal; therefore coordinate with Government Appellate from the beginning.

F. Government Appeal Procedure at the Appellate Level

1. Initially, *must be* filed at Court of Criminal Appeals.

2. Appellate counsel represent the parties. But trial counsel and trial defense counsel must maintain close contact with appellate counsel.

3. Courts of Criminal Appeals "may take action only with respect to matters of law." *See United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986). A Court of Criminal Appeals has no authority to find facts in an Article 62 appeal. *See United States v. Baker*, 70 M.J. 283 (C.A.A.F. 2010).

4. Standard of review.

a. Did the military judge "err as a matter of law"?

(1) Questions of law are reviewed de novo. *United States v. Kosek*, 41 M.J. 60 (1994).

(2) *See United States v. Rittenhouse*, 62 M.J. 509 (A.C.C.A. 2005) (holding military judge erred in applying the law to computer evidence and admissions).

b. Findings of fact

(1) "[I]f a military judge's finding of fact is supported by the evidence of record (or lack thereof), then it shall not be disturbed on appeal taken under Article 62." *United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990).

(2) *United States v. Lincoln*, 42 M.J. 315 (1995). N.M.C.M.R. reversed MJ on a government appeal of the suppression of a confession, and ordered the confession admitted into evidence. CAAF noted, "on questions of fact the appellate court is limited to determining whether the military judge's findings are clearly erroneous or unsupported by the record. If the findings are incomplete or ambiguous, the 'appropriate remedy . . . is a remand for clarification' or additional findings."

(3) *United States v. Reinecke*, 30 M.J. 1010 (A.F.C.M.R. 1990). When ruling on motions to suppress, the MJ is required to state essential findings on the record; findings stated separately and succinctly; findings logical and complete enough so the appellate court does not have to resort to other parts of record for meaning; after stating findings, MJ should state legal basis for decision, *i.e.*, legal standards applied and analysis of the application of the standards to the facts previously stated; and, MJ should state any conclusions made and why.

(4) **BUT** "clearly erroneous" factual findings do not bind Courts of Criminal Appeals.

(5) *United States v. Burris*, 21 M.J. 140 (C.M.A. 1985); *United States v. Clarke*, 23 M.J. 519 (A.F.C.M.R. 1986), *aff'd* 23 M.J. 352 (C.M.A. 1987) "We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law…." *United States v. Dooley*, 61 M.J. 258 (2005), citing *United States v. Gore*, 60 M.J. 178 (2004).

(6) *United States v. Hatfield*, 43 M.J. 662 (N.M.C.C.A. 1995). MJ dismissed charges on speedy trial grounds. NMCCA reversed on government appeal, applying standard of

review that "findings by the trial court are 'clearly erroneous' when, although there is some evidence to support them, the appellate court is left with the definite and firm conviction that a mistake has been made." Appellate court cannot simply substitute its own judgment of what constitutes "reasonable diligence."

5. The CAAF or U.S. Supreme Court may stay trial pending additional review.

II. EXTRAORDINARY WRITS

A. The All Writs Act.

1. "All Writs Act." 28 U.S.C. § 1651(a). "The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

2. "[A]ll courts established by act of Congress." Includes both Court of Appeals for the Armed Forces and service Courts of Criminal Appeals. *United States v. Dowty*, 48 M.J. 102 (1998); *McKineey v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997). *See also Noyd v. Bond*, 395 U.S. 683 (1969); *United States v. Curtin*, 44 M.J. 439 (1996); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979); *McPhail v. United States*, 1 M.J. 457 (C.M.A. 1976); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

B. No Automatic Stay. At trial, if a party (usually defense) seeks extraordinary relief, there is no requirement to continue the trial to allow the party to petition the appellate court. If the appellate court grants a stay, however, the military judge must stop the proceedings pending resolution of the issue.

C. Theories of Jurisdiction.

1. **Actual Jurisdiction**: The authority of the appellate courts to review a court-martial on direct review.

a. Article 66, UCMJ—Court of Criminal Appeals jurisdiction. The expansion of Art. 66 under the MJA 2016 will be discussed in more detail below.

b. Article 67, UCMJ—Court of Appeals for the Armed Forces jurisdiction. Every court-martial in which the sentence as affirmed by a Court of Criminal Appeals extends to death . . . cases certified by the Judge Advocate General . . . and cases reviewed by Courts of Criminal Appeals where accused shows good cause for grant of review.

c. Article 69, UCMJ—Pursuant to the MJA 2016, the Court of Criminal Appeals will be able to review TJAG's action under Art. 69 where TJAG orders the case to ACCA OR where the accused submits an application which demonstrates a "substantial basis for concluding that the action on review . . . constituted prejudicial error." This latter basis is new. *Cf. United States v. Arness*, 74 M.J. 441 (C.A.A.F. 2015) Baker, J., dissenting ("Whatever was intended with Article 69, UCMJ, the fact is TJAGs do not as a matter of practice refer cases to the CCA or to this Court pursuant to Article 69, UCMJ, review. That means that a majority of cases arising under the UCMJ are sub-jurisdictional. That also means that a majority of courts-martial are not subject to appellate judicial review or civilian judicial review.)

2. **Potential Jurisdiction**. The authority to determine a matter that may reach the actual jurisdiction of the court.

a. *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996). Petition for writ of mandamus to open Article 32 hearing to public where USAF major charged with murder of child. Court found jurisdiction to consider petition for extraordinary

relief in exercising supervisory authority over court-martial process, and over cases that may potentially reach court on appeal. Since Article 32 hearing is integral part of court-martial process, then court has jurisdiction to supervise each tier of military justice process. *And see, The Denver Post Corp. v. The United States and CPT Robert Ayers*, 2005 WL 6519929 Army No. 20041215, (February 23, 2005) (unpublished) (holding, pursuant to all writs authority, respondent's decision to completely close the Article 32 clearly erroneous and a usurpation of authority, also finding the decision would resolve recurrent issues that would appear in future cases, and finding awaiting relief in the ordinary course of appellate review would be an inadequate remedy to preserve the public interest at issue).

b. *U.S.N.M.C.M.R. v. Carlucci, et al*, 26 M.J. 328 (C.M.A. 1988); *Waller v. Swift*, 30 M.J. 139, 142 (C.M.A. 1990). ("The sentence adjudged by the court-martial included a punitive discharge and so was of a severity that would have authorized direct appellate review by this court. Indeed, even in its commuted form, the sentence is of such severity."*). See also Addis v. Thorsen*, 32 M.J. 777 (C.G.C.M.R. 1991) (CCA had potential jurisdiction to review record of case in which accused petitioned for extraordinary relief in nature of writ of habeas corpus from adjudged confinement through referral of case by judge advocate general for review of record, and accordingly CCA had jurisdiction to entertain the extraordinary writ, although case was awaiting decision on accused's request for referral by judge advocate general)

3. **Ancillary jurisdiction**. The authority to determine matters incidental to the court's exercise of its primary jurisdiction, such as ensuring adherence to a court order. *Boudreaux v. U.S.N.M.C.M.R.*, 28 M.J. 181 (C.M.A. 1989) (court retained ancillary jurisdiction over case which it had remanded, to ensure that case was resolved in manner consistent with mandate of court, notwithstanding that accused received punishment on remand well below the statutory threshold for mandatory review); *United States v. Montesinos*, 28 M.J. 38, n.3 (C.M.A. 1989) (Because the integrity of the judicial process is at stake, appellate courts can issue extraordinary writs on their own motion).

4. **Supervisory Jurisdiction**. The broad authority to determine matters that fall within the supervisory function of administering the military justice system.

a. *Unger v. Zemniak*, 27 M.J. 349 (C.M.A. 1989). Military appellate courts have jurisdiction to grant extraordinary relief under the All Writs Act over courts-martial that do not qualify for review in the ordinary course of appeal.

b. *Jones v. Commander*, 18 M.J. 198 (C.M.A. 1984) (Everett, C.J., dissenting). The court refused to exercise writ jurisdiction over a nonjudicial punishment proceeding.

D. Actual v. Supervisory Jurisdiction; the All Writs Act and Goldsmith

1. Background: Pre-Goldsmith Case Law.

a. *ABC Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997). Absent "good cause," petitions for extraordinary relief should be submitted initially to the Court of Criminal Appeals. The CAAF exercised supervisory jurisdiction under the All Writs Act to grant relief during an Article 32(b) Investigation.

b. *Loving v. Hart*, 47 M.J. 438 (C.A.A.F. 1998). The CAAF has jurisdiction to issue a writ under the All Writs Act even after the case has been affirmed by the Supreme Court. The accused sought extraordinary relief because his death sentence was based in part on a conviction of felony murder that was unsupported by a unanimous finding of intent to kill or reckless indifference to human life. This was an issue raised by Justice Scalia during oral argument before the Supreme Court. The CAAF heard the petition but denied relief.

c. *United States v. Dowty*, 48 M.J. 102 (C.A.A.F. 1998). The CAAF has authority under the All Writs Act to exercise jurisdiction over issues arising from proceedings where the Court would not have had direct review.

d. *Dew v. United States*, 48 M.J. 639 (A. Ct. Crim. App. 1998). Under the All Writs Act, the Army Court has supervisory jurisdiction to consider, on the merits, a writ challenging the action taken by The Judge Advocate General pursuant to Article 69(a), UCMJ. The accused was convicted of making and uttering worthless checks by dishonorably failing to maintain funds. The Office of the Army Judge Advocate General reviewed the case and denied relief. The accused petitioned the Army Court, challenging the decision made by the Office of the Judge Advocate General. The Army Court exercised its supervisory authority under the All Writs Act, heard the petition, but denied relief.

e. *Morgan v. Mahoney*, 50 M.J. 633 (A.F. Ct. Crim. App. 1999). The government involuntarily recalled the accused (a member of the retired reserves) to active duty to face a court-martial. At trial, the accused challenged the jurisdiction of the court-martial. The military judge denied the accused's motion, and the accused petitioned the Air Force Court seeking an extraordinary writ ordering the military judge to dismiss all charges and specifications. The service court held that it had jurisdiction under the All Writs Act to hear the issue and denied the accused's relief. In denying the writ, the court found that the accused was a member of retired reserves, which made him part of the reserve component and subject to lawful orders to return to active duty. Since the accused was in an active duty status at the time of trial, the court-martial did not lack *in personam* jurisdiction.

2. *Clinton v. Goldsmith*, 119 S.Ct. 1538 (1999). The CAAF exercised supervisory jurisdiction under the All Writs Act to stop the government from dropping the accused from the rolls of the Air Force. The Supreme Court held that the CAAF lacked jurisdiction, under the All Writs Act, to issue the injunction in question because, (1) the injunction was not "in aid of" the CAAF's strictly circumscribed jurisdiction to review court-martial findings and sentences; and (2) even if the CAAF might have had some arguable basis for jurisdiction, the injunction was neither "necessary" nor "appropriate," in light of the alternative federal administrative and judicial remedies available, under other federal statutes, to a service member demanding to be kept on the rolls. In a unanimous decision, the Supreme Court held that CAAF exceeded its supervisory jurisdiction under the All Writs Act.

3. Jurisdiction Case Law (Post-Goldsmith).

a. *United States v. Byrd*, 53 M.J. 35 (2000). In October 1996, the Navy-Marine Corps Court affirmed the accused's conviction and sentence, which included a punitive discharge. The accused did not petition CAAF for review until 22 January 1997. On 2 January 1997 the convening authority executed his sentence under Article 71. The service court held that since the accused did not petition CAAF for review within 60 days, the intervening discharge terminated jurisdiction. CAAF vacated the lower court's decision on the grounds that the government failed to establish the petition for review as being untimely and, therefore, the sentence had been improperly executed. CAAF also stated it has jurisdiction to review such a case under the All Writs Act, notwithstanding execution of the punitive discharge, but declined to decide which standard of review was more appropriate, direct or collateral.

b. *Ponder v. Stone*, 54 M.J. 613 (N-M. Ct. Crim. App. 2000). Accused refused order to receive anthrax vaccination and submitted a request for a stay of proceedings by way of a writ of mandamus. Government argued that the Navy court lacked jurisdiction to entertain the petition under *Goldsmith*, because the court could only grant extraordinary relief on matters affecting the findings and sentence of a court-martial. NMCCA disagreed, stating

that review of the petition under the All Writs Act was properly a matter in aid of its jurisdiction.

c. *Fisher v. United States*, 56 M.J. 691 (N-M. Ct. Crim. App. 2001). Accused filed petition for extraordinary relief. The government argued that the appellate court had no jurisdiction to consider the petition because the accused's court-martial was final under Article 76. The NMCCA disagreed and considered the petition but denied it.

d. *United States v. Denedo*, 129 S. Ct. 2213 (2009). The accused filed an extraordinary writ in the Navy-Marine Court, alleging ineffective assistance of counsel almost ten years after his case had become final under Article 71. The Navy-Marine Court denied relief. The CAAF granted review of the accused's extraordinary writ. The government appealed the CAAF's decision to the Supreme Court, asserting that neither the Navy-Marine Court nor the CAAF had jurisdiction in this case. Without overturning *Goldsmith*, the Supreme Court ruled that the CAAF and the Navy-Marine Court did, in fact, have jurisdiction. The Supreme Court reasoned that jurisdiction was proper since the accused's petition directly challenged the validity of his conviction. Article 76, UCMJ, addressing the finality of a court-martial conviction after completion of direct review, provides a prudential constraint on collateral review, not a jurisdictional limitation.

E. Extraordinary Circumstances.

1. Much like the military appellate courts, federal courts struggle with the scope of their jurisdiction under the All Writs Act. The Supreme Court held that federal courts can exercise writ jurisdiction to protect the legal rights of parties, and are not limited to orders protecting just the courts' own duties and jurisdiction. *See United States v. New York Telephone Co.*, 434 U.S. 159 (1977).

2. Ordinary course of appellate review of trial cannot give adequate relief. *Andrews v. Heupel*, 29 M.J. 743 (A.F.C.M.R. 1989). "An extraordinary writ is not to be a substitute for an appeal even though hardship may ensue from delay and perhaps an unnecessary trial."

3. Circumstances warrant extraordinary relief.

a. *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993). Petitioner seeks extraordinary writ for release from confinement. CA commuted BCD to four months, but did so five months after sentencing. Accused was immediately taken to the brig at Camp Lejeune. The brig determined that the accused's sentence ran from date of sentence and not confinement and released the accused. A week later, the accused was taken to an Army facility. The Army facility took the position that the accused's sentence began on the date that the CA commuted the BCD to six months and incarcerated petitioner. Proper subject for review by Court, and ordered release.

b. *Keaton v. Marsh*, 43 M.J. 757 (Army Ct. Crim. App. 1996). Petition for writ of habeas corpus by accused who was ordered released from pretrial confinement by military magistrate, and subsequently ordered back into pretrial confinement by military judge. Court found propriety of accused's pretrial confinement proper subject for extraordinary writ, and ordered release.

c. Petition for writ of prohibition by accused who was a retiree challenging the right of the military justice system to exercise jurisdiction over him was an extraordinary situation warranting consideration. *Pearson v. Bloss*, 28 M.J. 764 (A.F.C.M.R. 1989). *See also Sands v. Colby*, 35 M.J. 620 (A.C.M.R.). 1992).

d. *Toohey v. United States*, No. 04-8019, 2004 CAAF LEXIS 656 (Jul. 2, 2004). Petitioner seeks extraordinary writ for release from confinement because of lengthy appellate delay. The chronology of the case indicates that the Petitioner has not received his first level of appeal as of right more than five years and ten months after his sentence was adjudged. Court agrees that delay is unreasonable but does not order release. Court gives Navy-Marine Corps Court 90 days to issue decision.

e. *United States v. Kreutzer*, 60 M.J. 453 (2005). (Crawford, J., dissenting). As Petitioner not currently under sentence of death, writ of mandamus granted to the extent that Petitioner must be moved from death row.

f. *United States v. Buber*, 61 M.J. 70 (2005). (Crawford, J., dissenting). Army Court dismissed specification supporting remaining confinement and Government filed for reconsideration. Writ of habeas corpus granted with direction to release Petitioner from post-trial confinement immediately.

4. Available remedies are exhausted.

5. Relief will advance judicial economy.

a. Maximize utility of judicial resources.

b. Resolve recurrent issues that will inevitably lead to more cases in the future.

c. To prevent a waste of time and energy of military tribunals.

F. Writ classifications.

1. **Mandamus**. Directs a party to take action; rights are not established or created; pre-existing duty enforced. In order to prevail on a writ of mandamus, appellant must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. *See Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012).

2. **Prohibition**. Directs a party to cease doing an act or prohibits execution of a planned act that violates a law or an individual's rights.

3. **Error Coram Nobis**. "Error in our court"; a review of a court's own prior judgment predicated on a material error of fact, or to correct constitutional or fundamental errors, including those sounding in due process.

4. **Habeas Corpus**. "That you have the body"; directs the release of a person from some form of custody.

G. Filing a writ.

1. Preliminary Considerations.

a. Does the case qualify?

(1) Jurisdiction.

(2) Relief sought.

(3) Extraordinary Circumstance.

b. Must the military judge grant a continuance?

(1) Discretion of the military judge (R.C.M. 906(b)(1)).

(2) No automatic stay; but once a stay is issued by CCA or CAAF, proceedings **must** stop.

c. Which forum?

(1) There is a preference for initial consideration by a CCA. *See ABC, Inc. v. Powell*, 47 M.J. 363 (1997); *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981) (opinion of Cook, J.); *See also* R.C.M. 1204(a), Discussion (C.M.R. filing favored for judicial economy).

(2) CAAF, Rules of Practice and procedure, Rule 4(b)(1): The Court may, in its discretion, entertain original petitions for extraordinary relief . . .. Absent good cause, no such petition shall be filed unless relief has first been sought in the appropriate Court of Criminal Appeals. Original writs are rarely granted.

d. Considerations of time and subject matter.

2. Special rule for trial counsel. Before filing an application for extraordinary relief on behalf of the government, government representatives should (will) coordinate with Appellate Government.

H. Procedure.

1. Petitioner has initial burden of persuasion to show jurisdiction and extraordinary circumstances. The party seeking relief has an "extremely heavy burden." *McKinney v. Jarvis*, 46 M.J. 870, 873 (Army Ct. Crim. App. 1997; *United States v. Mahoney*, 36 M.J. 679, 685 (A.F.C.M.R. 1992). The petitioner must show that the complained of actions were more than "gross error" and constitute a "judicial usurpation of power." *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996).

2. The "show cause" order shifts burden.

III. VICTIM WRITS

A. Article 6b, UCMJ, was amended in 20015 and 2016, to state that if a victim of an offense under the UCMJ believes that a ruling by a military judge, or an Art. 32 preliminary hearing officer, violates the victim's rights afforded by Military Rules of Evidence 412, 513, 514, and 615, or that orders a victim to submit to a deposition, the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the court-martial to comply with the Military Rules of Evidence, or to quash the deposition order. Article 6b is unique in that it provides victims a statutory right to petition for a Writ of Mandamus even before a case has been referred to a court-martial. Although there is an express grant of jurisdiction under Article 6b for those rights covered under Article 6b, it is arguable that *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013) affords victims the right to file a writ so long as they meet the requirements of the case, even if the claimed right falls outside the exact strictures of Art. 6b.

IV. WAIVER AND/OR WITHDRAWAL OF APPELLATE REVIEW. ARTICLE 61, UCMJ; R.C.M. 1110/R.C.M. 1115

A. The MJA 2016 will make some fairly substantial changes to waiver of appellate review. The new rule will be R.C.M. 1115. Withdrawal will not change substantially with the MJA 2016.

1. What. The new rule will continue to allow an accused to waive appellate review for any GCM, except one in which the approved sentence includes death. It will expand the ability of an accused to waive appellate review in a special court-martial to situations not only where the approved sentence includes and BCD, but also where there is no punitive discharge but also

confinement for more than 6 months. This change to those cases eligible for waiver reflect the new jurisdictional limits for the CCAs under the MJA 2016. The SPCMs below the cited limits are not otherwise eligible for appellate review, so there is nothing to waive.

B. When. Under the MJA 2016, the accused will be able to sign a waiver anytime after the entry of judgment. Currently, the accused may sign a waiver of appellate review any time after the sentence is announced. The waiver may be filed only within 10 days after the accused or defense counsel is served with a copy of the action under R.C.M. 1107(h). On written application of the accused, the CA may extend this period for good cause, for not more than 30 days. *See* R.C.M. 1110(f)(1). The accused may file a withdrawal at any time before appellate review is completed.

C. Right to counsel. The right to consult with counsel will not change substantially for either waive or withdrawal.

1. Waiver.

   a) Counsel who represented the accused at the court-martial.

   b) Associate counsel.

   c) Substitute counsel.

2. Withdrawal.

   a) Appellate defense counsel.

   b) Associate defense counsel.

   c) Detailed counsel if no appellate defense counsel has been assigned.

   d) Civilian counsel.

D. Procedure. Under the MJA 2016, the waiver can either be filed with the CA OR with TJAG, reflecting the newly extended timeline for waiver. Once filed in substantial compliance with either the old or new rules, the waiver or withdrawal is irrevocable. It is important to note, however, that, under the MJA 2016, the accused CANNOT waive TJAG review (see R.C.M. 1201(a)(2)(A)).

1. *United States v. Smith*, 44 M.J. 387 (C.A.A.F. 1996). May not validly waive appellate review, under Article 61, UCMJ, before CA takes initial action in a case, *citing*, *inter alia*, *United States v. Hernandez*, 33 M.J. 145 (C.M.A. 1991) (Article 61(a) permits such waiver "within 10 days after the action . . . is served on the accused or on defense counsel." R.C.M. 1110(f) must be read in this context. Clearly the R.C.M. cannot supersede a statute, but careful reading of the R.C.M. reveals that it may be signed "at any time after the sentence is announced" but "must be *filed* within 10 days after" service of the action (emphasis added)). *Smith*, 44 M.J. at 391-392.

2. *United States v. Walker*, 34 M.J. 317 (C.M.A. 1992). Documents purporting to withdraw accused's appeal request were invalid attempt to waive appellate review prior to CA's action.

3. *United States v. Smith*, 34 M.J. 247 (C.M.A. 1992). Waiver of appellate representation 58 days before action by CA was tantamount to waiver of appellate review; therefore, was premature and without effect.

4. *Clay v. Woodmansee*, 29 M.J. 663 (A.C.M.R. 1989). Accused's waiver of appellate review was null and void as it was the result of the government's promise of clemency.

V. APPEALS AT THE COURTS OF CRIMINAL APPEALS: ARTICLES 66 AND 69, UCMJ; R.C.M. 1201

A. Cases automatically reviewed by a Court of Criminal Appeals (Article 66).

1. Cases in which the approved sentence includes death.

2. The MJA 2016 will change it from cases in which the approved sentence includes a punitive discharge or confinement for a year or more to cases in which the approved sentence includes a punitive discharge and confinement for 2 years or more.

B. "Quasi-automatic" reviewed cases by the Court of Criminal Appeals (Article 66)

1. This is entirely new under the MJA 2016. There will be four, potentially five, additional methods for gaining access to the CCA.

a) Timely appeal from the accused with a sentence of more than 6 months, but less than 2 years and no punitive discharge.

b) Timely appeal from an accused where the Government previously appealed under Art. 62.

c) Timely appeal from the accused where TJAG has sent a case for review under Art. 56(d). This appears confusing based on the below provision. The problem is use of the term "review" versus "appeal" to alternately refer to a Government right to access appellate review. It may be this provision in Art. 66 is duplicative with the provision in Art. 56, but using the term "review" versus "appeal" confuses matters.

d) Timely Government appeal under Art. 56(d). Although there is now an explicit statutory provision allowed the Government to appeal sentences under Art. 56(d), it would appear that this provision will be a nullity from the outset. The Government appeal made sense as part of the MJRG's larger proposal to adopt sentencing guidelines. However, without those guidelines, it is difficult to see how a court-martial might adjudge an "illegal sentence" (given the multiple safety valves for ensuring mandatory minimums are correctly adjudged) or how a court might determine that a sentence is "plainly unreasonable." Currently, there is caselaw which has developed around appellants making somewhat similar claims at the CCA, however, it is not often successful. *See Sentence Appropriateness Relief in the Courts of Criminal Appeals*, 66 A.F. Law Rev. (2010). Even if the Government were to prevail, the CCA cannot reassess the sentence (except to reduce it IAW Art. 66(f)(2)), so the only option is to order a rehearing, where the revised R.C.M. will allow for an increase, although there is no provision which would allow the appellate courts to essentially provide guidance in the form of some kind of new minimum "reasonable" sentence in the case.

e) Timely appeal from accused to review TJAG under Art. 69(d)(1)(B). This is perhaps the most interesting new mechanism for appeal, appearing to address the problem identified by the dissent in *United States v. Harness*, 74 M.J. 441 (C.A.A.F. 2015), notably, an entire class of "subjurisdictional" cases subject only to internal review. Now, an accused may appeal TJAG's review, under certain limited circumstances.

C. Scope of CCA review: both law and fact (except for cases appealed by an accused under the MJA's new Art. 69, which will be limited to taking action with respect to "matters of law")

1. *United States v. Clifton*, 35 M.J. 79 (C.M.A. 1992). Courts of Military Review need not address in writing all assignments of error, so long as the written opinion notes that judges considered any assignments of error and found them to be without merit.

2. *United States v. Quigley*, 35 M.J. 345 (C.M.A. 1992). Choice of whether to call appellate court's attention to issue rests with counsel, although choice is subject to scrutiny for effective assistance of counsel in each case.

3. *United States v. Gunter*, 34 M.J. 181 (C.M.A. 1992). Error for CMR to deny accused's motion to submit handwritten matter for consideration by that court (detailed summary by appellate defense counsel not sufficient).

D. Power of Courts of Criminal Appeals (CCAs). UCMJ, Article 66(c):

1. "It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

2. *United States v. Kelly*, 77 M.J. 404 (C.A.A.F. 2018). Holding that Art. 56(b) (mandates that an accused convicted of certain offenses be punished with a dismissal or dishonorable discharge) does not restrict a CCA's ability to review mandatory minimum sentence for sentence appropriateness.

3. *United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010). CAAF found error where CCA set aside and dismissed finding of guilty to the child pornography offense based on "unique circumstances." While the CCA clearly has the authority to disapprove part or all of the sentence and findings, nothing suggests that Congress intended to provide the CCAs with unfettered discretion to do so for any reason, for no reason, or on equitable grounds, which is a function of the command prerogative of the convening authority.

4. *United States v. Cole*, 31 M.J. 270 (C.M.A. 1990). "Article 66(c)['s] . . . awesome, plenary, *de novo* power of review" grants CCAs the authority to substitute their judgment for that of the MJ. It also allows a "substitution of judgment" for that of the court members.

5. *United States v. Claxton*, 32 M.J. 159 (C.M.A. 1991). A "*carte blanche*" to do justice. J. Sullivan in dissent notes CCAs are still bound by the law.

6. *United States v. Keith*, 36 M.J. 518 (A.C.M.R. 1992). In appropriate cases, the ACMR may fashion equitable and meaningful remedy regarding sentence.

7. *United States v. Smith*, 39 M.J. 448 (C.M.A. 1994). Plenary, *de novo* power of CCA does not include finding facts regarding allegations of which fact finder has found accused not guilty.

8. *United States v. Lewis*, 38 M.J. 501 (A.C.M.R. 1993), *aff'd*, 42 M.J. 1 (C.A.A.F. 2005). Appellate court has authority to investigate allegations of IAC, including authority to order submission of affidavits and a hearing before a MJ.

9. *United States v. Joyner*, 39 M.J. 965 (A.F.C.M.R. 1994). In reviewing severity of sentence, appellate court's duty is to determine whether accused's approved sentence is correct in law and fact based on individualized consideration of nature and seriousness of offense and character of accused. *United States v. Smith*, 56 M.J. 653 (A. Ct. Crim. App. 2001) (holding that nine-year sentence for escape from Disciplinary Barracks and related offenses not inappropriately severe even though co-accused and individual who initiated the scheme to escape only received three years). *See also United States v. Hundley*, 56 M.J. 858 (N-M. Ct. Crim. App. 2002); *United States v. Ransom*, 56 M.J. 861 (A. Ct. Crim. App. 2002).

10. *United States v. Ragard*, 56 M.J. 852 (A. Ct. Crim. App. 2002). Clemency power is not within the powers granted to appellate courts by Article 66, UCMJ. Appellant argued that his

medical condition (having AIDS) made his dismissal an inappropriately severe sentence because his dismissal would limit his access to medical care. The Army court disagreed, noting that sentence appropriateness involves a judicial function of ensuring that the accused gets the punishment deserved while clemency involves "bestowing mercy."

11. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). Appellate court may reassess a sentence if it is convinced that the sentence would have been of at least a certain magnitude, even if there is no error. If there is an error, such a reassessment must purge the prejudicial impact of the error. If the error was of constitutional magnitude, the court must be persuaded beyond a reasonable doubt that its reassessment has rendered any error harmless. If the appellate court cannot be certain that the prejudicial impact can be eliminated by reassessment and that the sentence would have been of a certain magnitude, it must order a rehearing on sentence. *See also United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000) (noting that appellate courts must also make the same determination if a sentence has been reassessed by a convening authority).

12. *United States v. Doss*, 57 M.J. 182 (C.A.A.F. 2002). Appellant convicted of assault consummated by a battery, assault with a dangerous weapon, and soliciting another to murder his wife. At trial, the DC presented no evidence on appellant's mental condition other than his unsworn statement. On appeal, the NMCCA found appellant's defense counsel ineffective during the sentencing portion of the trial by failing to present evidence of appellant's mental condition. The court reassessed the appellant's sentence and reduced the period of confinement from eight to seven years. On appeal, the CAAF found that the DC's omissions could not be cured (i.e., rendered harmless beyond a reasonable doubt) by reassessing the sentence because it was impossible to determine what evidence a competent defense counsel would have presented. The court, therefore, held that the lower court abused its discretion in reassessing the sentence instead of ordering a rehearing.

13. *United States v. Mitchell*, 58 M.J. 446 (C.A.A.F. 2003). Appellant convicted of, among other offenses, five drug distribution specifications and sentenced to a BCD, ten years confinement, total forfeitures, and reduction to E-1. On appeal, the ACCA set aside two distribution specifications and ordered a rehearing on sentence. On rehearing, the appellant was sentenced to a DD, six years confinement, and reduction to E-1. The ACCA affirmed the sentence finding that under an objective standard, a reasonable person would not view the rehearing sentence as "in excess of or more severe than" the original sentence; therefore, Article 63, UCMJ, and R.C.M. 810(d)(1) were not violated. The CAAF reversed as to sentence, finding that a DD is more severe than a BCD and no objective equivalence is available when comparing a punitive discharge with confinement. The CAAF affirmed only so much of the sentence as provided for a BCD, six years confinement, and reduction to E-1.

14. *United States v. Commander*, 39 M.J. 972 (A.F.C.M.R. 1994). Appellate courts may examine disparate sentences when there is direct correlation between each accused and their respective offenses, sentences are highly disparate, and there are no good and cogent reasons for differences in punishment. *See also United States v. Kelly*, 40 M.J. 558 (N.M.C.M.R. 1994).

15. *United States v. Pingree*, 39 M.J. 884 (A.C.M.R. 1994) (inappropriately severe sentence reassessed, dismissal disapproved). *See also United States v. Hudson*, 39 M.J. 958 (N.M.C.M.R. 1994) (court disapproved BCD); *United States v. Triplett*, 56 M.J. 875 (A. Ct. Crim. App. 2002) (court reduced accused period of confinement from fifteen years to ten years based on the five- and six-year sentences two co-accused received).

16. *United States v. Dykes*, 38 M.J. 270 (C.M.A. 1993). Standard for ordering post-trial hearing on issue presented to appellate court:

a) Not required where no reasonable person could view opposing affidavits, in light of record of trial, and find the facts alleged by accused to support claim.

b) Required where substantial unresolved questions concerning accused's claim.

17. *United States v. Fagan*, 58 M.J. 534 (A. Ct. Crim. App. 2003), *rev'd*, 59 M.J. 238 (C.A.A.F. 2004). The lower court was correct in holding that *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997)[1] provides the proper analytical framework for dealing with a post-trial affidavit raising a claim of cruel and unusual punishment. The lower court, however, erred in holding that it could grant relief at its level "in lieu of ordering a *DuBay* hearing (*United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967)), to resolve the disputed factual issues raised by the appellant's affidavit. "The linchpin of the *Ginn* framework is the recognition that a Court of Criminal Appeals' fact-finding authority under Article 66(c) does not extend to deciding disputed questions of fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties." 59 M.J. 238, 242 (C.A.A.F. 2004). Finally, the lower court erred in finding a conflict, "where none exists" between *Ginn* and *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998). 59 M.J. at 243. "The exercise of the 'broad power' referred to in *Wheelus* flowed from the existence of an acknowledged legal error or deficiency in the post-trial review process. It is not a 'broad power to moot claims of prejudice' in the absence of acknowledged legal error or deficiency, nor is it a mechanism to 'moot claims' as an alternative to ascertaining whether a legal error or deficiency exists in the first place." 59 M.J. at 244.

18. *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002). Standard for handling post-trial discovery issues:

a) Has appellant met his threshold burden of demonstrating that some measure of appellate inquiry is warranted? If no – stop. If yes, then –

b) What method of review should be used (e.g., affidavits, interrogatories, fact-finding hearing, etc.)?

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[1] In *United States v. Ginn*, the CAAF established six principles for dealing with allegations of error raised for the first time on appeal in a post-trial affidavit:

a. First, if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in the appellant's favor, the claim may be rejected on that basis.

b. Second, if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis.

c. Third, if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers and affidavit that expressly agrees with those facts, the Court can proceed to decide the legal issues on the basis of those uncontroverted facts.

d. Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.

e. Fifth, when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

f. Sixth, the Court of Criminal Appeals *is required to order a factfinding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a DuBay proceeding.*

Fagan, 58 M.J. at 537 (emphasis in original).

19. *United States v. Hutchison*, 57 M.J. 231 (C.A.A.F. 2002). Sentence review limited to determining appropriateness of sentence. Consideration of whether civilian criminal prosecution was "appropriate" is an improper consideration for the CCA.

20. *United States v. Perron*, 58 M.J. 78 (C.A.A.F. 2003). Appellate courts (i.e., CCAs) cannot impose alternative relief on an unwilling appellant to rectify a mutual misunderstanding of a material term of a PTA. Appellant must consent to the proposed relief or be afforded the opportunity to withdraw from the prior plea. *But see United States v. Lundy*, 63 M.J. 299 (C.A.A.F. 2006).

21. *United States v. Holt*, 58 M.J. 227 (C.A.A.F. 2003). The lower court (AFCCA) erred, depriving the appellant of a proper Article 66(c) review limited to the record of trial, when it considered numerous exhibits for the truth of the matters asserted, "alter[ing] the evidentiary quality of the [exhibits]" when the military judge ruled otherwise and instructed the members that they were not to consider the cited evidence for the truth of the matters asserted. *Id*. at 233. "Article 66(c) limits the Courts of Criminal Appeals to a review of the facts, testimony, and evidence presented at trial, and precludes a Court of Criminal Appeals from considering 'extra-record' matters when making determinations of guilt, innocence, and sentence appropriateness (citation omitted). Similarly, the Courts of Criminal Appeals are precluded from considering evidence excluded at trial in performing their appellate review function under Article 66(c)." *Id*. at 232.

22. *United States v. Osuna*, 58 M.J. 879 (C.G. Ct. Crim. App. 2003). Appellate courts are limited, absent clearly erroneous findings or legal error, to the factual determinations made by prior panels of that court. In appellant's first appeal, the court affirmed the findings but remanded for a new review and action because there was no evidence that the CA considered the appellant's clemency submissions or that he was ever advised to consider the defense's written submissions. C.J. Baum, in the first appeal, dissented re: findings on several offenses citing to a lack of factual sufficiency. On appeal the second time, the appellant renewed his challenge to the findings. The court, in an opinion authored by C.J. Baum, held "it would be inappropriate for us to readdress our previous factual determination, absent a legal error necessitating such action." *Id*. at 880.

23. *United States v. Castillo*, 59 M.J. 600 (N-M. Ct. Crim. App. 2003). The appellant was convicted of unauthorized absence terminated by apprehension and sentenced to reduction to E-1, fifty-one days confinement, and a BCD. On appeal [*Castillo I*], the appellant alleged that her sentence was inappropriately severe, an allegation that the court agreed with, setting aside the CA's action and remanding with the following direction:

> The record will be returned to The Judge Advocate General for remand to the [CA], who may upon further consideration approve an adjudged sentence no greater than one including a discharge *suspended* under proper conditions.

Id. at 601 (*quoting United States v. Castillo*, No. 200101326, 2002 WL 1791911 (N-M. Ct. Crim. App. Jul. 31, 2002) (unpublished)). Upon remand, the SJAR erroneously advised the CA that the appellate court "recommended" that the punitive discharge be set aside. The defense counsel disagreed with the SJAR noting that the guidance from the NMCCA was not a recommendation. The CA, following the SJA's advice, again approved a punitive discharge. Held: the CA's decision to disregard the court's guidance was "a clear and obvious error," a decision based on advice that was similarly "clearly erroneous" and "misguided." *Id*. Finally, the court advised that "[p]arties practicing before trial and appellate courts have only three options when faced with [their] rulings [: comply with the decision, request reconsideration, or appeal to the next higher authority to include certification of an issue by the Judge Advocate General]." *Id*.

In exercising its sentence appropriateness authority under Article 66(c), UCMJ, the court approved only so much of the sentence as provided for reduction to E-1 and 51 days confinement, and disapproved the BCD.

E. Cases reviewed by TJAG. As discussed, Art. 69 will undergo fairly major revisions as part of the new MJA 2016, thereby allowing an accused to petition the CCA for review of TJAG's review. In addition, the MJA 2016 will amend Art. 65 to move the requirement to conduct review of cases not otherwise subject to review under Art. 66 to Art. 65. Article 64 covers review of summary courts-martial.

VI. REVIEW BY THE COURT OF APPEALS FOR THE ARMED FORCES: ARTICLES 67 & 142, UCMJ; R.C.M. 1204

A. The MJA 2016 will not make major changes to the CAAF. It will require notification to other service TJAGs and the SJA to the Commandant of the Marine Corps prior to certifying a case for review. It will also amend language about the scope of its review to reflect the other changes to post-trial processing procedures.

B. Cases reviewed.

1. All cases in which the sentence as approved by a Court of Criminal Appeals extends to death.

2. All cases reviewed by a Court of Criminal Appeals which TJAG orders sent to the CAAF for review.

3. All cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the CAAF has granted a review.

4. Extraordinary writ authority.

C. *Ortiz v. United States*, 138 S. Ct. 2165 (2018). Professor Aditya Bamzai of UVA Law School filed an amicus brief in support of neither party arguing that the Supreme Court lacked jurisdiction to review cases from the CAAF. Though called a "court" by statute, Prof. Bamzai argued that the CAAF is located for constitutional purposes within the Executive Branch and does not exercise the "judicial Power" of the United States or of any sovereign. According to Prof. Bamzai, Chief Justice Marshall's opinion in *Marbury v. Madison* makes it clear that the Supreme Court cannot exercise "appellate Jurisdiction" under Article III directly from an officer of the Executive Branch. There is no basis in law or logic to distinguish between a single officer (James Madison in Marbury) and a body composed of multiple officers (the CAAF), even if the latter is designated a "court" by statute. Accordingly, the Court's exercise of jurisdiction over cases directly from the CAAF violates Article III. The Supreme Court disagreed and rejected the argument that the CAAF was not a "court" and not subject to review by the Supreme Court, although at least 2 Justices dissented from this conclusion.

D. *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993). Equal protection and due process challenge to TJAG's authority to certify issues under Article 67.

E. *United States v. Jones*, 39 M.J. 315 (C.M.A. 1994). Power of the CAAF usually does not include making sentence-appropriateness determinations; that is the province of the Courts of Criminal Appeals.

F. *United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009). Article 67(b), UCMJ, provides that the appellant has sixty days from the date of notification of a Court of Criminal Appeals decision to petition the Court of Appeals for the Armed Forces for review. The appellant in this case filed his petition for review approximately 73 days after notification of the NMCCA decision. The United States Supreme Court decided *Bowles v. Russell*, 551 U.S. 205 (2007), shortly before the NMCCA

decision in this case. Bowles concluded that statutory periods within which an accused may file a petition for review are jurisdictional. The CAAF holds that Article 67(b) is jurisdictional. Appeal was outside the authority of the CAAF to grant.

G. Abatement Ab Initio. *United States v. Rorie*, 58 M.J. 399 (C.A.A.F. 2003). Appeal to the CAAF under Article 67(a)(3), UCMJ, is a matter of discretion and NOT a matter of right. As such, the CAAF will no longer grant abatement ab initio upon death of an appellant pending Article 67(a)(3) appellate review, reversing a policy followed by the court since 1953. Abatement ab initio is a "matter of policy in Federal courts," not mandated by the Constitution or statute, and is not part of the Rules of Practice and Procedures for the CAAF. By reversing its prior 50-year policy, the court is now in line with the rule established by the Supreme Court in *Dove v. United States*, 423 U.S. 325 (1976). To the extent that *United States v. Kuskie*, 11 M.J. 253 (C.M.A. 1981) and *Berry v. The Judges of the United States Army Court of Military Review*, 37 M.J. 158 (C.M.A. 1983) are inconsistent with this decision, they were overruled. *See also United States v. Ribaudo*, 62 M.J. 286 (C.A.A.F. 2006).

H. Decisions of the Court of Appeals for Armed Forces may be reviewed by the Supreme Court by writ of certiorari. However, the Supreme Court may not review by writ of certiorari any action of CAAF in refusing to grant a petition for review.

VII. FINALITY OF COURTS-MARTIAL: R.C.M. 1209

A. When is a conviction final?

1. Review is completed under R.C.M. 1201(a) (the MJA 2016 amended Art. 65)

2. When review is completed by a Court of Criminal Appeals and —

a) The accused does not file a timely petition for review by CAAF and the case is not otherwise under review by that court; or

b) A petition for review is denied or otherwise rejected by CAAF; or

c) Review is completed in accordance with the judgment of CAAF and:

(1) A petition for a writ of certiorari is not filed within applicable time limits;

(2) A petition for a writ of certiorari is denied or otherwise rejected by the Supreme Court; or,

(3) Review is otherwise completed in accordance with the judgment of the Supreme Court.

3. For summary courts, a JA completes review under R.C.M. 1307(d) and no further action in required under R.C.M. 1307(e).

B. *United States v. Jackson*, 38 M.J. 744 (A.C.M.R. 1993). Abatement after death of appellant, before appeal to Court of Military Appeals. *See also United States v. Huey*, 57 M.J. 504 (N-M. Ct. Crim. App. 2002) (findings and sentence set aside based on accused's death prior to final action – motions to vacate and attach granted). *But see United States v. Rorie*, 58 M.J. 399 (C.A.A.F. 2003) (the CAAF will no longer grant abatement ab initio upon death of an appellant pending Article 67(a)(3) appellate review, reversing a policy followed by the court since 1953).

C. Finality and execution of sentences.

1. A DD or BCD may be ordered executed only after a final judgment within the meaning of R.C.M. 1209.

2. Dismissal may be approved and ordered executed only by the Secretary concerned.

3. Only President may order execution of death penalty. R.C.M. 1207.

VIII. PETITION FOR A NEW TRIAL: ARTICLE 73, UCMJ; R.C.M. 1210

A. Within 3 years of initial action by the CA. Requirements (this is a MJA 2016 amendment to change the time from 2 to 3 years):

1. Evidence discovered after trial or fraud on the court.

2. Evidence not such that it would have been discovered by petitioner at time of trial in exercise of due diligence.

3. Newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

B. Approval authority: OTJAG, CCA, or CAAF.

C. Concern for avoiding manifest injustice is adequately addressed in three requirements in R.C.M. 1210(f). *United States v. Williams*, 37 M.J. 352 (C.M.A. 1993).

D. *United States v. Hanson*, 39 M.J 610 (A.C.M.R. 1994). Petition for new trial based on newly discovered evidence.

E. *United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011). Petition for a new trial based upon misconduct by USACIL serology analyst. The CAAF cited to the three requirements above and held that this evidence would not have resulted in a substantially more favorable result for the appellant. Several of the judges would also have found this request for a new trial time barred under Article 73, UCMJ, which requires a petition to be filed within two years of CA action. In this case, the request came in four years after the two year window (due to the late discovery of the serology analyst misconduct).

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CHAPTER 30
CORRECTIONS & POST-CONVICTION CONSEQUENCES

I. Introduction
II. Corrections
III. Clemency and Parole
IV. Resources

I. INTRODUCTION

A. The military, as well as civilian society, analyzes five reasons when determining an appropriate sentence once an individual has been convicted. Those reasons are rehabilitation, punishment, protection of society, preservation of good order and discipline, and deterrence. *See* R.C.M. 1001(g). *See also* MJA 2016 revisions to Art. 56(c). The types of sentences that a court-martial panel member or military judge may impose include no action, reduction in rank, forfeitures, fine, hard labor without confinement, confinement, punitive discharge, or death.

II. CORRECTIONS

A. DoD policy states that the Military Services' correction programs should strive to achieve uniformity, effectiveness, and efficiency in the administration of corrections functions. Additionally, the military departments shall administer the clemency and parole programs to foster safe and appropriate release of military offenders under such terms and conditions that are consistent with the needs of society, the rights of victims, and the rehabilitation of the prisoner. DoD Instruction 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole*, March 11, 2013.

B. Military corrections have three objectives:

1. Provide a safe and secure environment for the incarceration of military offenders;

2. Protect the community from offenders;

3. Prepare military prisoners for their release whether return to duty or civilian status with the prospect of becoming productive Soldier/citizens for conforming to military or civilian environments.

C. DoD Correctional Facilities include confinement facilities, Regional Corrections Facilities (RCFs), and a centralized, long-term corrections facility, the United States Disciplinary Barracks (USDB).

1. Confinement facilities (Level 1) provide pretrial and short-term post-trial confinement support. Each service will determine the time limit for confinement at each of its level one facilities. The current norm for the Army is up to 90 days; when necessary the Level 1 facility may confine prisoners more than 90 days, but may not exceed 1 year. A Level 1 facility provides custody and control, administrative support, and limited counseling support for military prisoners.

2. Regional Corrections Facilities (RCF) (Level 2) house prisoners sentenced to confinement of five (5) years or less. For sentences over five years, each Service must evaluate its prisoners to determine whether they can be appropriately confined at a RCF (Level 2 facility). A Level 2 facility provides multifaceted correctional treatment programs, vocational and military training, administrative support, basic educational opportunity, employment, selected mental health

programs, custodial control, and training to prepare military prisoners for return to duty, if deemed suitable, or to civilian society as a productive citizen.

3. United States Disciplinary Barracks, Fort Leavenworth, KS (only DoD Level 3 facility).

D. Federal Bureau of Prisons (FBOP) Facilities. Prisoners with approved sentences to confinement may be transferred to a FBOP facility with the concurrence or by direction of the appropriate Secretary of Military Department or designee. Authority to transfer the prisoners to the FBOP confers no right on prisoners to request transfer. Once transferred to the FBOP, prisoners will not return to DoD custody unless the transfer was temporary for medical issues.

1. Factors considered when determining whether to transfer a prisoner to a FBOP include:

a) The prisoner's demonstrated potential for return to military service or rehabilitation.

b) The nature and circumstances of the prisoner's offenses.

c) The prisoner's incarceration record, including participation in rehabilitation programs.

d) The status of the prisoner's court-martial appeal and involvement in other legal proceedings.

e) The nature and circumstances of the prisoner's sentence, including length of sentence to confinement.

f) The prisoner's age.

g) Any other special circumstances relating to the prisoner, the needs of the Service, or the interests of national security.

2. Commitments based on lack of mental capacity to stand trial or acquittal because of lack of mental capacity at time of offense may be transferred to the FBOP. *See* AR 190-47, para 3-4.

E. The Department of the Army, Provost Marshal General determines the place of incarceration for prisoners who are sentenced to more than 30 days based on operational requirements and programs.

F. Prisoner Status.

1. Pretrial prisoner: a person subject to the UCMJ who is properly ordered to confinement pending preferral of charges, disposition of charges, or trial by court-martial, or a person properly ordered to confinement while awaiting trial by a foreign court is a pretrial prisoner. For pretrial confinement rules and guidance, see the Pre-Trial confinement chapter of this deskbook.

2. Adjudged prisoner: a person whose sentence to confinement has been announced in open court by not yet approved by the convening authority.

3. Sentenced prisoner: occurs when the convening authority takes action to approve the confinement portion of the sentence.

4. Discharged prisoner: occurs upon completion of appellate review and execution of the punitive discharge.

G. Abatement of Confinement.

1. Good conduct time (GCT) is a deduction from a prisoner's release date for good conduct and faithful observance of all facility rules and regulations.

2. FOR SENTENCES ADJUDGED PRIOR TO 1 JANUARY 2005:

	Sentence	**Rate**
a)	< 12 months	5 days per month
b)	1 < 3 years	6 days per month
c)	3 < 5 years	7 days per month
d)	5 < 10 years	8 days per month
e)	10 years or more	10 days per month
f)	Life or death	None

3. FOR SENTENCES ADJUDGED ON OR AFTER 1 JANUARY 2005:

a) Five days for each month of confinement, and 1 day for each 6-day portion of a month, regardless of sentence or multiple sentence length.

b) Extra good conduct time (EGCT) or earned time (ET) is a deduction from a prisoner's release date earned for participation and graded effort in the areas of work, offense-related or other rehabilitation programs, education, self-improvement and personal growth, and support activities. This credit is awarded only when overall evaluations are average or higher.

c) **New rule: Maximum of 8 days earned time may be awarded per month.** Old rule: During first year of confinement, not to exceed 3 days per month; thereafter, not to exceed 5 days per month.

d) Special acts abatement (SAA) is a deduction from a prisoner's release date earned for a specific act of heroism, humanitarianism, or extraordinary institutional or community support deemed appropriate by the correctional facility commander. Prisoner without a release date (e.g. life without parole, death) may earn SAA, but it shall be held in abeyance and only awarded if the sentence is reduced to a determinate sentence length.

e) Maximum award of 2 days of SAA per month for a period not to exceed 12 months for a single act. Additional special acts may only extend period of abatement, not the monthly rate of earning.

f) Total of GCT, ET, and SAA awarded for any one month shall not exceed 15 days.

g) Minimum release date is calculated upon arrival at facility based on good conduct time that could be earned for entire period of sentence. Inmate is released at minimum release date absent parole or forfeiture of good conduct time or extra good conduct time, if any.

h) Maximum release date

i) A reduction in confinement by clemency will adjust the minimum release date.

j) Inmates accepting parole waive all time abatements and remain on parole until maximum release date.

k) Prisoners who have an approved finding of guilty for an offense that occurred after 1 October 2004, the award of good conduct time, earned time, and special act abatement shall be conditioned on the prisoner submitting an acceptable release plan and fully cooperating in all other respects with the mandatory supervised release policy, if directed to do so.

l) Forfeiture and restoration of abatements. As a consequence of violations of institutional rules or the UCMJ, a facility commander may direct forfeiture of GCT, ET, and SAA.

Discipline and Adjustment Boards are used to ensure due process. Forfeited time can be reinstated at the discretion of the facility commander.

H. Mandatory Supervised Release. Prisoners who are not granted parole prior to their MRD (minimum release date) can be ordered on a supervised release.

1. Policy of the DoD to use supervised release in all cases except where it is determined by the Service Clemency and Parole Boards to be in appropriate.

2. Terms and conditions are identified in the release plan. The prisoner acknowledges the receipt of the terms and conditions.

3. The Service Clemency and Parole Boards may modify or release any terms or conditions of supervision or may terminate supervision entirely.

4. A violation of the supervised release will be considered equivalent to a violation of the terms and conditions of parole and processed in the same manner.

5. *United States v. Pena*, 64 MJ 259 (2007) – The Air Force Clemency and Parole Board ordered Pena to participate in the Mandatory Supervised Release Program for seventy-two days – terminating on his maximum release date. The Board set forth twenty-five conditions to include participating in a community based sex offender treatment program and consent to periodic examinations of his computer. Prior to his release he submitted a declaration that noted a number of hardships his participation in the program created. CAAF looked to see if his participation in the program constituted cruel or unusual punishment or otherwise violated an express prohibition in the UCMJ; unlawfully increased his punishment; or rendered his guilty plea improvident. CAAF held that the program did not constitute cruel or unusual punishment, that Pena did not demonstrate that the collateral consequences actually imposed increased his punishment; and that the plea agreement was provident.

III. CLEMENCY & PAROLE

A. Service Clemency & Parole Boards

1. Senior civilian employees and field grade officers.

2. Act for Service Secretaries, **except for** parole considerations for prisoners in FBOP facilities which are decided by U.S. Parole Commission.

B. Clemency Eligibility.

1. Clemency is an action taken to remit or suspend the unexecuted part of a court-martial sentence, upgrade a discharge, or restore an individual convicted at CM. Death sentence cases are not eligible for review by boards, unless sentence commuted to a lesser punishment. *See* AR 15-130, para. 3-1d(6).

2. Review timelines are as follows:

Initial Review	
Sentence is 12 months – 10 yrs	NLT 9 months after confined
Sentence is 10-20 years	NLT 24 months after confined
Sentence is 20-30 years	NLT 3 years after confined
Sentence greater than 30 years	NLT 10 years after confined (for offenses after 16 Jan 2000)
Life w/o parole	NET 20 years after confined (requires Service Secretary Approval)
After Initial Review	
12 months to 20 years	Annually
20-30 years	After 3 years
30 years to Life w/o parole	After 10 years
Life w/o parole	Every 3 years after 20 years of confinement (requires Service Secretary Approval)

C. Parole Eligibility.

1. Parole is the early release of a prisoner. Must have sentence of at least twelve (12) months confinement and a punitive discharge. Once considered, inmate will be considered annually by service board unless transferred to FBOP. Inmate may waive parole consideration.

	Sentence	**Eligibility**
a)	12 months - 30 years	1/3 of sentence, but NET < 6 mos.
b)	30 years to life	10 years
c)	Life	20 years (if offense occurred after 16 Jan 2000)
d)	Death or Life w/o parole	Not eligible

D. Considerations.

1. Nature and circumstances of offenses.

2. Civilian and military history.

3. Confinement record.

4. Personal characteristics, such as age, education, marital and family status, and psychological profile.

5. Victim impact.

6. Protection and welfare of society.

7. Need for good order and discipline.

8. Other matters as appropriate.

E. Conditions for parole release.

1. Prisoner must submit a parole plan and agree to abide by the plan.

2. The plan must include:

a) A statement of where the prisoner plans to reside and with whom.

b) Guaranteed employment, an offer of effective assistance to obtain employment, or acceptance in a valid educational or vocational program.

c) A requirement that the prisoner shall comply with State and local registration requirements in the location the prisoner plans to reside.

d) Other requirements such as a restitution plan, completion of a substance abuse treatment, participation in counseling or therapy programs, etc.

3. The Board may establish and subsequently modify conditions or release as it considers reasonable or appropriate.

4. Prisoners who accept parole waive all GCT and EGCT and serve parole till the expiration of their full sentence.

F. Parole supervision: Individuals released on parole are under the direct supervision of Federal probation officers.

G. Parole revocation.

1. Standard—violation of condition that warrants revocation.

2. Suspension of parole.

3. Preliminary interview.

4. Parole revocation hearing.

5. Forfeiture of credit for service of sentence on parole.

H. Additional Opportunities for Clemency.

1. Discharge Review Boards can review discharges not given by general courts-martial.

2. Boards for Correction of Military Records may grant clemency after Clemency & Parole Boards lose review authority; however, may not overturn conviction.

3. Presidential Pardons.

IV. RESOURCES

Army Review Boards Agency (ARBA) Web page: http://arba.army.pentagon.mil.

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CHAPTER 31
IMPROPER SUPERIOR-SUBORDINATE RELATIONSHIPS & FRATERNIZATION

I. References
II. Introduction
III. MJA Effective Date Information for Portfolio Area
IV. Improper Superior-Subordinate Relationships
V. Fraternization and Related Offenses
VI. Case Law

I. REFERENCES

A. Army References.

1. Dep't of Army, Reg. 600-20, Personnel--General: Army Command Policy (6 Nov 2014)

2. Manual for Courts-Martial, United States [hereinafter MCM].

3. Dep't of Army, Pam. 600-35, Personnel--General: Relationships Between Soldiers of Different Rank (21 July 2017).

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

1. OPNAVINST 5370.2C, Navy Fraternization Policy (6 January 2016).

2. Marine Corps Manual 1100.4 (as amended by HQMC, ALMAR 185/96, 130800Z May 96, subject: Marine Corps Manual (MCM) Change 3) and MARCORMAN 1100.4 (13 May 96).

3. Department of Air Force Instruction 36-2909, Personnel: Professional and Unprofessional Relationships (13 Aug 2004, Incorporating Change 2, 13 Mar 2017).

II. INTRODUCTION

A. Prohibited Relationships between Soldiers of Different Grade

1. Improper Superior – Subordinate Relationships.

a) Any relationship that has an actual or perceived effect on supervisory authority, leads to actual or perceived unfairness, involves the improper use of rank or position for personal gain, is actually or appears to be exploitative or coercive, or adversely impacts good order and discipline or mission accomplishment.

b) Broad category which allows for counseling, or investigation upon perception.

c) Sexual harassment does not fall under this category, and has a separate process of reporting and investigation (see deskbook chapter 32).

2. Fraternization.

a) Generally, fraternization is a violation of a per-se status based relationship prohibition in either AR 600-20 or under Article 134, UCMJ.

b) Any ongoing business relationship, dating, shared living accommodation or gambling is prohibited between an officer and enlisted member or a non-commissioned officer and junior enlisted member.

(1) These relationships are specifically prohibited by AR 600-20, para. 4-14, which is a punitive provision

(2) A violation may be prosecuted under Article 92, UCMJ.

c) If the accused is an officer, then any relationship with an enlisted member which violates a custom of the Service that officers should not fraternize with enlisted members on terms of military equality, and that the relationship was prejudicial to good order and discipline, or service discrediting may be a violation of Article 134, Fraternization.

B. A Spectrum of Misconduct. Violations of the fraternization policy apply across the services and are gender neutral.

III. MJA EFFECTIVE DATE INFORMATION FOR PORTFOLIO AREA

A. Changes to RCMs and punitive articles will take effect on 1 January 2019.

B. It is anticipated that the upcoming revision of Army Regulation (AR) 600-20 will amend relevant paragraphs 4-14 through 4-16. At the time of this deskbook publication, AR 600-20 was not amended. This deskbook chapter will revise the below text in accordance with the new AR 600-20 upon the next publication date.

IV. IMPROPER SUPERIOR - SUBORDINATE RELATIONSHIPS

A. History:

1. Task Force found disparate treatment between Services.

2. New policy announced by Secretary Cohen on 29 Jul 98.

3. Not effective immediately; gave Services 30 days to provide draft new policies to DoD. Essence of guidance now included within AR 600-20, paras 4-14 through 4-16.

4. Does NOT cover all senior / subordinate relationships.

5. Directs Service Secretaries to prohibit by policy:

a) Personal relationships, such as dating, sharing living accommodations, engaging in intimate or sexual relations, business enterprises, commercial solicitations, gambling and borrowing between officer and enlisted regardless of their Service; and

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

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

1. Part One: "Army policy does not hold dating or most other relationships between soldiers (sic) [of different ranks] as improper, barring the adverse effects listed in AR 600-20." Old DA Pam 600-35, Para. 1-5(e). Therefore, Army policy did <u>not</u> prohibit dating (even between officers and enlisted Soldiers), *per se*.

2. Part Two:

a) "Relationships between soldiers (sic) of different rank that involve, or give the appearance of, partiality, preferential treatment, or the improper use of rank or position for

personal gain, are prejudicial to good order, discipline, and high unit morale. It is Army policy that such relationships will be avoided." Old AR 600-20, paragraph 4-14.

b) "Commanders and supervisors will counsel those involved or take other action, as appropriate, if relationships between soldiers (sic) of different rank

(1) Cause actual or perceived partiality or unfairness.

(2) Involve the improper use of rank or position for personal gain.

(3) Create an actual or clearly predictable adverse impact on discipline, authority or morale." Old AR 600-20, para 4-14a.

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

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

1. **A New Distinction (as of November 2014):** The Army updated its strict prohibitions to include relationships between junior enlisted Soldiers and noncommissioned officers.

2. **THREE** Part Analysis:

a) Part 1: Is this a "strictly prohibited" category?

b) Part 2: If not, are there any adverse effects?

c) Part 3: If not "strictly prohibited" and there are no adverse effects, then the relationship is not prohibited.

3. Para 4-14: Relationships between military members of different grade.

a) "Officer" includes commissioned and warrant officers.

b) "Noncommissioned officer" refers to a Soldier in the grade of corporal to command sergeant major/sergeant major.

c) "Junior enlisted soldier" refers to a Soldier in the grade of private to specialist.

d) Applies to relationships between Soldiers in both the Active and Reserve components, and between Soldiers and members of other services.

e) Is gender-neutral.

f) (THIS IS PARA 4-14b.) The following relationships between Soldiers of **different grades** are prohibited:

(1) Relationships that compromise or appear to compromise the integrity of supervisory authority or the chain of command;

(2) Relationships that cause actual or perceived partiality or unfairness;

(3) Relationships that involve or appear to involve the improper use or rank or position for personal gain;

(4) Relationships that are, or are perceived to be, exploitative or coercive in nature; and

(5) Relationships that cause an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

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

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

(1) Ongoing business relationships (including borrowing or lending money, commercial solicitations and any other on-going financial or business relationships), **except**:

(a) Landlord / tenant; and

(b) One time transactions (such as car or home sales).

(c) All ongoing business relationships existing on the effective date of this prohibition, that were otherwise in compliance with the former policy, were not prohibited until 1 Mar 00 ("grace period").

(d) This prohibition does not apply to USAR / ARNG Soldiers when the ongoing business relationship is due to the Soldiers' civilian occupation or employment.

(2) Personal relationships, such as dating, shared living accommodations (other than as directed by operational requirements), and intimate or sexual relationships.

(a) This prohibition does not affect marriages (change as of 13 May 2002)

(b) Otherwise prohibited relationships (dating, shared living accommodations [other than directed by operational requirements] and intimate or sexual relationships), existing on the effective date of this prohibition, that were not prohibited under prior policy, were not prohibited until 1 Mar 00.

(c) Relationships otherwise in compliance with this policy are prohibited under this policy solely because of the change in status of one party to the relationship (such as commissioning). The couple does have one year to either terminate the relationship or marry within one year of the actual **start date** of the program or before the change in status occurs, whichever is later.

(d) Reserve Component (RC)/RC exclusion when the personal relationship is primarily due to civilian acquaintanceship, unless on active duty (AD) or full-time National Guard duty (FTNGD) other than annual training (AT).

(e) AD/RC exclusion when the personal relationship is primarily due to civilian association, unless on AD or FTNGD other than AT.

(3) Gambling. NO EXCEPTIONS.

(a) An NCAA basketball pool with a monetary buy-in is prohibited when there is a mix of officer and enlisted personnel participants. There is no prohibition against gambling between officers.

(b) An NCAA bracket competition with a certificate or trophy to the winner even with officer and enlisted personnel participants is permissible.

(c) Remember the Joint Ethics Regulation (JER), § 2-302 also addresses gambling. While it may not be prohibited under AR 600-20, it may violate the JER.

(4) These prohibitions are not intended to preclude normal team-building associations between Soldiers, which occur in the context of activities such as community organizations, religious activities, family gatherings, unit social functions or athletic teams or events.

(5) All Soldiers bear responsibility for maintaining appropriate relationships between military members. The senior military member is usually in the best position to terminate or limit relationships that may be in violation of this paragraph, but all Soldiers involved may be held accountable for relationships in violation of this paragraph.

4. Para 4-15: Other Prohibited Relationships.

a) Trainee / Soldier. Any relationship between IET trainees and permanent party Soldiers (not defined) not required by the training mission is prohibited. This prohibition applies regardless of the unit of assignment of either the permanent party Soldier or the trainee.

b) Recruit / Recruiter. Any relationship between a permanent party Soldier assigned or attached to USAREC, and potential prospects, applicants, members of the Delayed Entry Program or members of the Delayed Training Program, not required by the recruiting mission, is prohibited. The prohibition applies regardless of the unit of assignment or attachment of the parties involved.

5. Para 4-16: Paragraphs 4-14b. 4-14c and 4-15 are punitive. Violations can be punished as violations of Article 92, UCMJ.

D. Commander's Analysis: How does the commander determine what's improper?

1. JAs must cultivate the idea that commanders should consult with OSJA.

2. Use common sense. "The leader must be counted on to use good judgment, experience, and discretion. . . ."

3. Keep an open mind. Don't prejudge every male/female relationship. Relationships between males of different rank or between females of different rank can be as inappropriate as male/female relations. "[J]udge the results of the relationships and not the relationships themselves." DA Pam 600-35.

4. Additional scrutiny should be given to relationships involving (1) direct command/supervisory authority, or (2) power to influence personnel or disciplinary actions. "[A]uthority or influence . . . is central to any discussion of the propriety of a particular relationship." DA Pam 600-35. These relationships are most likely to generate adverse effects.

5. Be wary that **appearances of impropriety** can be as damaging to morale and discipline as actual wrongdoing.

E. Command Response.

1. The commander has a wide range of responses available to him and should use the one that will achieve a result that is "warranted, appropriate, and fair." Counseling the Soldiers concerned is usually the most appropriate initial action, particularly when only the potential for an appearance of actual preference or partiality, or an appearance without any adverse impact on morale, discipline or authority exists.

2. Adverse Administrative Actions: Order to terminate, relief, re-assign, bar to re-enlistment, reprimand, adverse OER/NCOER, administrative separation.

3. Criminal Sanctions: Fraternization, disobey lawful order, conduct unbecoming, adultery.

F. Commander's Role.

1. Commanders should seek to prevent inappropriate or unprofessional relationships through proper training and leadership by example. AR 600-20, para. 4-14(f).

2. Don't be gun-shy. Mentoring, coaching, and teaching of Soldiers by their seniors should not be inhibited by gender prejudices. Old AR 600-20, para. 4-14 (e)(1).

3. Training. DA Pam 600-35.

V. FRATERNIZATION AND RELATED OFFENSES

A. General.

1. Fraternization is easier to describe than define.

2. There is no stereotypical case. Examples include sexual relations, drinking, and gambling buddies.

B. Fraternization. UCMJ art. 134.

1. The President has expressly forbidden officers from fraternizing on terms of military equality with enlisted personnel. MCM, pt. IV, ¶ 101.

2. Elements: the accused

a) was a commissioned or warrant officer;

b) fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

c) knew the person(s) to be (an) enlisted member(s); and

d) such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

e) under the circumstances, the conduct of the accused was (i) to the prejudice of good order and discipline in the armed forces; or (ii) was of a nature to bring discredit upon the armed forces; or (iii) was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

3. "Hard to define it, but I know it when I see it."

4. Article 134 has also been successfully used to prosecute instances of officer-officer fraternization, *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986), and even enlisted-enlisted relationships. *United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), *aff'd*, 27 M.J. 361 (C.M.A. 1989).

5. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 101d.

6. Custom.

a) The gist of this offense is a violation of the custom of the armed forces against fraternization; it does not prohibit all contact or association between officers and enlisted persons.

b) Customs vary from service to service, and may change over time.

c) Custom of the service must be proven through the testimony of a knowledgeable witness. *United States v. Wales*, 31 M.J. 301 (C.M.A. 1990).

7. Factors to Consider in Deciding How to Dispose of an Offense.

a) Nature of the military relationship;

b) Nature of the association;

c) Number of witnesses;

d) Likely effect on witnesses.

C. Failure to Obey Lawful General Order or Regulation. UCMJ art. 92.

1. Elements. MCM, pt. IV, ¶ 18(b)(1).

a) There was in effect a certain lawful general order or regulation;

b) the accused had a duty to obey it; and

c) the accused violated or failed to obey the order or regulation.

2. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 18(d)(1).

3. Applications.

a) Applicable to officers and enlisted.

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

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

1. Elements.

a) Accused did or omitted to do certain acts; and

b) That, under the circumstances, the acts or omissions constituted conduct unbecoming an officer and gentleman.

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

E. Sexual Harassment.

1. Charged under Article 93 as Cruelty and Maltreatment.

2. Other offenses may be possible given the facts and circumstances of the case such as extortion, bribery, extramarital sexual conduct (formerly adultery), indecent acts or assault, communicating a threat, conduct unbecoming, and conduct prejudicial to good order/discipline.

VI. CASE LAW

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

B. *United States v. Fuller*, 54 M.J. 107 (2000). Appellant was convicted of numerous offenses stemming from his sexual relations with subordinate female members of his unit. The CAAF granted review on the issue of whether the evidence was legally sufficient to sustain a conviction for cruelty and maltreatment of one of the victims. The evidence showed that while assigned to an inprocessing unit where the appellant was her platoon sergeant, the victim voluntarily went to the appellant's apartment with a friend, drank 10-12 oz. of liquor, kissed appellant, and got undressed and engaged in

repeated sexual intercourse with appellant and another platoon sergeant. Additionally, the victim stated that in her decision to have sexual intercourse with the appellant, she never felt influenced by his rank and that he never threatened her or her career. Finally, the CAAF concluded that the evidence did not support a finding that the victim showed any visible signs of intoxication prior to the sexual intercourse with appellant. Although the CAAF found that the evidence was not legally sufficient to sustain a conviction for cruelty and maltreatment, they did find that it supported a conviction for the lesser-included offense of a simple disorder in violation of Article 134, UCMJ, since the appellant's conduct was prejudicial to good order and discipline or service discrediting. In mentioning that "appellant's actions clearly would support a conviction for violation the Army's prohibition against improper relationships between superiors and subordinates…", the CAAF cited to the current version of Army Regulation 600-20 (15 Aug[sic] 1999). The court, however, did not address the fact that the appellant's conduct occurred in 1996, when the regulation was not punitive and that therefore he could not have been found guilty for failure to obey a general regulation under Article 92, UCMJ.

C. *United States v. Brown*, 55 M.J. 375 (2001). ISSUES: The CAAF considered the issues, inter alia, of: 1) whether the trial court erred by admitting the Air Force's pamphlet on discrimination and sexual harassment for the members to consider on findings and sentencing; and 2) whether the charges of conduct unbecoming an officer were supported by legally sufficient evidence.

1. FACTS: The appellant, a captain and an Air Force nurse, was convicted of conduct unbecoming an officer for his comments to and physical contact with three co-workers over a ten month period. Appellant was married, had one child, and had served nearly ten years on active duty. All victims were female and, like the appellant, were company grade officers and Air Force nurses. All the victims worked in the operating room with the appellant at some point. The physical contact for which appellant was convicted included placing his hand on the other nurses' hair, thighs, knees, and buttock. The verbal conduct for which appellant was convicted included persistent complements on their hair, eyes, and physical appearance and questions about their weight, whether they were happily married, whether they had a boyfriend, if they had ever had an affair, and in the case of one nurse, what type of bathing suit she wore and if women masturbated. Additionally, he asked them for their home phone numbers and asked them out for dates. Some of the victims showed their displeasure with appellant's physical contact with them by moving away from the appellant, and one told the appellant that she did not like the way he touched her. Contrarily, none of the complainants made their disapproval of the appellant's verbal comments known to him or to anyone in their chain-of-command.

2. HOLDING: The CAAF ruled that the military judge did not abuse his discretion when he admitted the nonpunitive Air Force Pamphlet (AFP) 36-2705, Discrimination and Sexual Harassment (28 February 1995) over defense objection. In so ruling, the CAAF agreed with the military judge that the AFP was relevant to establish notice of the prohibited conduct and the applicable standard of conduct in the Air Force community to the appellant. Additionally, the CAAF stated that in cases were evidence of the custom of the service is needed to prove an element of an offense, it is likely that the probative value will outweigh the prejudicial effect. With regard to the sufficiency of the evidence, the CAAF focused on the fact that government relied on the AFP to establish the applicable standard of conduct. When considering the standards in the AFP, combined with the facts of the case, the CAAF concluded that the government had to show that: "(1) appellant's conduct was 'unwelcomed'; (2) it consisted of verbal and physical conduct of a sexual nature and (3) it created an intimidating, hostile, or offensive work environment that was so severe or pervasive that a reasonable person would perceive that work environment as hostile or abusive, and the victim of the abuse perceived it as such." The CAAF went on to analyze the verbal comments and physical contact by the appellant

separately. In finding the evidence legally insufficient to support appellant's convictions for the verbal comments, the CAAF noted that the record was clear that none of the victims ever informed the appellant that any of his remarks were unwelcome. While the AFP does not require a recipient of sexual remarks to tell the speaker that the remarks were unwelcome, the CAAF felt that a recipient's action or inaction in response to the remarks is relevant in determining whether the speech was unwelcome. The CAAF further noted from the record that the working atmosphere of the parties regularly accepted conversations involving physical appearance and sexual matters. This atmosphere cut against a finding that the appellant's comments created a work environment that was "hostile or abusive." However, the CAAF affirmed the convictions for the physical contact, concluding that it was not reasonable for the appellant "to assume that [the victims] would consent to physical contact of an intimate nature absent some communication of receptivity or consent."

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

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

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

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

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

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

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

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CHAPTER 32
VICTIMS' RIGHTS/PROGRAMS & SEXUAL ASSAULT POLICY (SVC, SHARP, VWAP, FAP)

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4. Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1503, 1505, 1510, 1512-1515, 3146, 3579, 3580.

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12. DoD Instruction (DoDI) 5505.18, Investigation of Adult Sexual Assault in the Department of Defense (25 January 2015), *Incorporating Change 3, 22 March 2017,* http://www.dtic.mil/whs/directives/corres/pdf/550518p.pdf

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II. INTRODUCTION

A. Generally. This chapter combines previous chapters on the Victim Witness Assistance Program, Sexual Harassment/Assault Response and Prevention Program (SHARP), and Family Advocacy Program (FAP) while adding sections describing Victims' Rights, Sexual Assault Policy, and the Special Victim Counsel (SVC) Program. The resulting chapter is intended to act as a reference guide and general overview for existing programs serving all crime victims as well as adult and child victims of sexual offenses and domestic abuse.

B. References. Section I includes a list of references specific to each section. Review the source documents for a more detailed understanding of the applicable rules and policy.

III. MJA EFFECTIVE DATE INFORMATION FOR PORTFOLIO AREA

A. The RCMs and punitive articles discussed in this deskbook chapter will take effect 1 January 2019.

B. Further changes to the RCMs or MREs may be signed into law through executive order and this deskbook chapter will be updated upon the next publication date after revision.

IV. VICTIMS' RIGHTS

A. Generally. In 1990, Congress passed the Victims' Rights and Restitution Act, which was replaced by 18 U.S.C. § 3771, the 2004 Crime Victims' Rights Act (CVRA). The CVRA grants crime victims certain rights in federal criminal cases. In general, a victim of a federal crime is guaranteed the right to be protected from the accused, the right to notice, the right not to be excluded from court proceedings, to be reasonably heard, the right to restitution and the right to confer with an attorney. The CVRA also dictated that proceedings should be free from unreasonable delay and respect the victim's dignity and privacy

Since the late 1990's, many high profile military sexual assault cases focused a spotlight on military culture, handling of sexual crimes, and data collection. The Air Force responded by creating a sexual assault victim's counsel program in January 2013. In July 2013, the Court of Appeals for the Armed Forces (CAAF) decided *LRM v. Kastenberg*, an Air Force case which established a limited right for victims to be heard through counsel at military courts-martial. In response, and to ensure victims

were afforded the same protections granted to federal crime victims, Congress passed the 2014 National Defense Authorization Act (NDAA) which included the addition of Article 6b, Uniform Code of Military Justice (UCMJ) – Rights of a Victim of an Offense Under the UCMJ, as well as a new 10 U.S.C. § 1044(e) establishing a Special Victim Counsel (SVC) under the Legal Assistance program authority. The rights outlined in Article 6b mirror the CVRA and apply to ALL individuals who have suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ (see Article 6b(b)).

While Article 6b applies to all crime victims of an UCMJ offense, eligibility for Army Sexual Harassment/ Assault Response and Prevention (SHARP) services, Family Advocacy Program (FAP) services and Special Victim Counsel (SVC) representation varies by type of crime and victim status. The command, office of the staff judge advocate (OSJA) and personnel across programs should work together to ensure that the rights of all crime victims are enforced. However, the Staff Judge Advocate is specifically tasked with ensuring local policies and procedures are established to give crime victims the rights described. (see AR 27-10, paragraph 17-10(b) (11 May 2016)).

B. Definition of Victim. Individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ. If a victim is under 18 years old, incompetent, incapacitated or deceased, the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section. (Article 6b sections (b) and (c); RCM 801(a)(6); RCM 1001(c)(2); see AR 27-10, paragraph 17-10(a) (11 May 2016)).

C. Crime Victims' Rights. ARTICLE 6b, UCMJ; AR 27-10, PARA. 17-10.

1. The right to be reasonably protected from the accused;

2. The right to reasonable, accurate, and timely notice of any of the following:

   a) A public hearing concerning the continuation of confinement prior to trial of the accused.

   b) A preliminary hearing under section 832 of this title (article 32) relating to the offense.

   c) A court-martial relating to the offense.

   d) A public proceeding of the service clemency and parole board relating to the offense.

   e) The release or escape of the accused, unless such notice may endanger the safety of any person.

3. The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or preliminary hearing officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.

4. The right to be reasonably heard at any of the following:

   f) A public hearing concerning the continuation of confinement prior to trial of the accused.

   g) A sentencing hearing relating to the offense.

   h) A public proceeding of the service clemency and parole board relating to the offense.

5. The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).

6. The right to receive restitution as provided in law.

7. The right to proceedings free from unreasonable delay.

8. The right to be treated with fairness and with respect for victim's dignity and privacy.

D. Army Staff Judge Advocate Responsibilities (AR 27-10, Chapter 17, specifically paras. 17-10, 17-14, 17-15, 17-16).

1. Staff Judge Advocates will ensure that local policies and procedures are established to provide for crime victim rights (see AR 27-10, paragraph 17-10(b) (11 May 2016)).

2. Victims should be advised of stages in the military criminal justice system, the role that they can be expected to play in the process, and how they can obtain additional information concerning the process and the case. The DD Forms 2701 (Initial Information for Victims and Witnesses of Crime) and DD Form 2702 (Court-Martial Information for Victims and Witnesses of Crime) should be should be provided to the victim as early in the investigation as possible, by the Military Police (MPs), CID or the VWL. Further explanation may be required by the VWL, Trial Counsel, or SVC if applicable.

3. Additional articulated rights for crime victims (AR 27-10, para. 17-10(a) (11 May 2016)).

a) The right to information regarding conviction, sentencing, imprisonment, and release of the offender from custody.

b) The right to submit matters for consideration by the convening authority to the PHO upon Article 32 completion (see RCM 405(k)).

c) The right to submit matters for consideration by the convening authority in granting clemency (see RCM 1106A).

4. During investigation and prosecution of crime, will provide victims the earliest possible notice of significant events in the case (reasonable, accurate and timely), to include:

a) Status of investigation of crime, with limits.
b) Apprehension of suspected offender.
c) Decision to prefer (or file in civilian court) or dismiss charges.
d) Initial appearance of suspect before pretrial confinement hearing or at Article 32, UCMJ investigation.
e) Scheduling of each court proceeding victim is required or entitled to attend.
f) Detention or release from detention of offender or suspected offender.
g) Acceptance of plea of guilty or other verdict.
h) Opportunity to consult with trial counsel concerning evidence in aggravation.
i) Result of trial or other disposition.
j) If sentenced to confinement, probable parole date.
k) General information regarding corrections process.
l) How to submit victim impact statement to Army Clemency and Parole Board.

5. Protection of victims and witnesses (AR 27-10, para. 17-19 (11 May 2016))

a) The SJA will ensure that victims and witnesses are advised that their interests are protected, and that tampering with testimony or retaliation against a victim or witness are punishable under Federal law (18 USC 1512, 1513) or Army Regulation (Army Directive 2014-20).

b) The trial counsel, VWL, or other Government representative will immediately notify the SJA whenever a victim or witness expresses genuine concern for his or her safety. In cases where the life or safety of a victim or witness is jeopardized by his or her

participation in the military justice process, the SJA will ensure that appropriate law enforcement agencies are immediately notified.

c) Commanders can take action to protect a victim or witness, to include temporary attachment or assignment, permanent reassignment, or in some cases the provision of State, other Federal, or foreign protective assistance. Commanders can also provide victim protection by issuing a written order to the suspect not to contact the victim except when supervised by a member of the chain of command, or by revoking the suspect's pass privileges. Commanders should normally use DD Form 2873, Military Protective Order, when issuing a written no-contact order. Commanders should consult with their judge advocate before taking administrative measures to protect a victim.

d) At hearings (Article 32 and courts-martial) victims and Government witnesses should be afforded the opportunity to wait in an area separate from the accused or defense witnesses. In a deployed environment, victims and Government witnesses should be afforded a separate waiting area to the greatest extent practicable.

6. Upon sentence to confinement, the trial counsel or Government representative (VWL) will:

a) Formally inform the victim (or victim's SVC), regarding post-trial procedures

(1) Victim's eligibility to submit matters for consideration by the convening authority during the clemency phase (RCM 1106A)

(2) Notify if the offender's confinement or parole status changes, and when the offender will be considered for parole or clemency

b) Provide DD Form 2703 (Post-Trial Information for Victims and Witnesses of Crime) and complete DD Form 2704 (Victim/Witness Certification and Election Concerning Inmate Status).

E. Consultation with Victims (RCM 705; AR 27-10, para 17-15 (11 May 2016)).

1. Pretrial agreement victim consultation. Whenever practicable, prior to the convening authority accepting a pretrial agreement the victim shall be provided an opportunity to express views concerning the pretrial agreement terms and conditions in accordance with regulations prescribed by the Secretary concerned. The convening authority shall consider any such views provided prior to accepting a pretrial agreement. For purposes of this rule, a "victim" is an individual who is alleged to have suffered direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration. RCM 705(c)(3)(B)

2. The trial counsel, VWL, or other Government representative will consult crime victims or if applicable, the SVC regarding the below critical determinations.

a) Decisions not to prefer charges.

b) Decisions concerning pretrial restraint of the alleged offender or his or her release.

c) Pretrial dismissal of charges.

d) Negotiations of pretrial agreements and their potential terms.

3. Consultation may be limited when justified by the circumstances, such as to avoid endangering the safety of a victim or a witness, jeopardizing an ongoing investigation, disclosing classified or privileged information, or unduly delaying the disposition of an offense. The victim's preference

is not controlling and the command retains discretion to determine the disposition of the offenses to best maintain good order and discipline. (AR 27-10, para 17-15 (11 May 2016); see Article 6b(d)(3))

F. Defense Interviews (Article 6b(f))

1. Once the government notifies the defense counsel of the intention to call an alleged victim as a witness at any hearing, the defense counsel shall make any request to interview the victim through the Special Victim's Counsel or other counsel for the victim.

2. Upon the victim's request, the defense interview shall take place only in the presence of government counsel, victim's counsel or victim advocate.

G. Property Return and Restitution (Army Regulation 27-10, para 17-16 (11 May 2016)).

1. SJAs or designees will ensure that all noncontraband seized property that has been acquired as evidence for use in the prosecution of an offense is safeguarded and returned to the appropriate person, organization, or entity as expeditiously as possible per AR 195–5, or AR 190–30, as applicable.

2. Victims who suffer personal injury or property loss or damage as a result of an offense should be informed of the various means available to seek restitution.

a) If loss of property is the result of a wrongful taking or willful damage by a member of the Armed Forces then look to Article 139, UCMJ. Article 139 investigations should be conducted in a manner that does not interfere with any ongoing criminal investigations or courts-martial proceedings.

3. Victims should also be informed of the possibility of pursuing other remedies

a) Claims

b) Private lawsuits

c) Federal or State crime victim compensation programs

(1) Transitional Compensation Program for abused family members under 10 USC § 1059 (*see infra* Section IX)

(2) Civilian sources and points of contact to assist

(a) Local claims office

(b) Legal assistance or lawyer referral services

4. Court-martial convening authorities will consider appropriateness restitution as a term and condition in pretrial agreements, and will consider whether the offender has made restitution to the victim when taking clemency action under RCM 1110.

5. Army Clemency and Parole Board will also consider the appropriateness of restitution in clemency and parole actions.

H. Victim Attendance at Article 32 Preliminary Hearing (RCM 405(g)(1))

1. A "victim" for purposes of RCM 405(g)(1) is defined as "a person who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ."

2. The victim has a right to reasonable, accurate and timely notice of the proceeding, a right to be protected from the accused and the reasonable right to confer with counsel for the government during the hearing.

3. The victim who has alleged harm as a result of the matters set forth in a charge or specification under consideration, and is named in one of the matters set forth in a charge or specification, is NOT required to testify at the preliminary hearing. RCM 405(h)(2)(A)(iii) However, the victim has the right to be present and not excluded from any portion of the hearing, unless the preliminary hearing officer (PHO), after receiving clear and convincing evidence, determines the testimony by the victim would be materially altered if the victim heard other testimony at the proceeding.

4. The victim shall be excluded if a privilege is invoked under MRE 412, 513 or 514 or evidence is offered under MRE 412, 513 or 514 for charges other than those in which the victim is named.

I. Victim Attendance at Court Proceedings (MRE 615)

1. A "victim" for purposes of MRE 615 is defined as "a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including (A) in the case of a victim that is an institutional entity, an authorized representative of the entity; and (B) in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference): (i) a spouse; (ii) a legal guardian; (iii) a parent; (iv) a child; (v) a sibling; (vi) another family member; or (vii) another person designated by the court." See MCM, Appendix 22, Analysis of MRE 615 (MCM 2016 ed.).

2. Military Rule of Evidence 615 (Excluding Witnesses) prohibits the military judge from sequestering certain categories of witnesses to prevent them from hearing the testimony of other witnesses, including: "(e) A victim of an offense from the trial of an accused for that offense, unless the military judge, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that hearing or proceeding."

a) Subparagraph (e) extends to victims at courts-martial the same rights granted to victims by the Crime Victims' Rights Act, 18 U.S.C. §3771. Victim is defined as a person directly and proximately harmed as a result of the commission of a Federal offense, and the victim has "the right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding." 18 U.S.C. §3771(a)(3).

b) The rules allowing victims to remain in the courtroom are subject to other rules, such as those regarding classified information, witness deportment, and conduct in the courtroom. See MCM, Appendix 22, Analysis of MRE 615 (MCM 2016 ed.).

J. Crime Victims' Right to be Reasonably Heard at Presentencing (RCM 1001(c)).

1. A "crime victim" for purposes of RCM 1001(c) is defined as "a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules."

2. Procedure

a) First, the trial counsel presents matters and evidence in aggravation, to include any evidence of financial, social, psychological and medical impact on any entity or person who was the victim of an offense committed by the accused. To present this evidence, the trial counsel may call the victim.

b) After presentation by trial counsel, a crime victim has the right to be reasonably heard. The victim may exercise this right regardless of whether the victim was called to testify by either the government or the defense. If the crime victim exercises the right to be heard, the court-martial will call the victim, and any documents or statements presented by the victim will NOT be marked as prosecution exhibits.

3. Scope of the Right to be Heard. The crime victim's right to be heard in a non-capital case includes the right to make a sworn or unsworn statement. The contents of the statement may only include victim impact (any impact directly relating to or arising from the offense for which the accused was found guilty) or mitigation (any matter which may lessen the punishment of which the accused has been found guilty), and may NOT include a recommendation of a specific sentence.

a) In capital cases, the victim may only make a sworn statement.

b) Unsworn statement.

(1) If the victim makes an unsworn statement, the victim may not be cross-examined. The prosecution or defense may rebut any statement of fact within the unsworn statement.

(2) The unsworn statement may be oral, written or both and requires a copy be presented to the trial counsel and defense counsel after announcement of findings (the judge may waive for good cause).

(3) A victim who makes an unsworn statement is not a witness under Article 42(b).

K. Post-Trial

1. Victim entitled to copies of the record of trial (Article 54(e), UCMJ; RCM 1112(e)(1); AR 27-10, para. 5-45 (11 May 2016))

(a) In a GCM or SPCM a court reporter shall provide a copy of a certified record of trial, free of charge, to:

(1) The accused;

(2) The victim of the offense if the victim testified during the proceedings;

(3) The victim named in a specification of which the accused was charged, without regard to the findings of the court-martial, upon request of the victim.

(b) If impracticable to send directly to victim, send to victim's attorney. The record will not contain classified information, information under seal or recordings of closed sessions of the court-martial.

(c) Any victim entitled to a copy of the certified record of trial shall be notified of the opportunity to receive a copy.

(d) ROT service on a qualifying victim. The ROT should contain the documents listed in RCM 1112(b).

L. Post-Trial - Matters Submitted by a Crime Victim (RCM 1106A)

1. Defined. For purposes of this rule, a "crime victim" is "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty, and on which the convening authority may take action under RCM 1109 or 1110, or the individual's lawful representative or designee appointed by the military judge under these rules."

2. Matters Submitted. May submit any matters that may reasonably tend to inform the convening authority (CA), but the CA is only required to consider written submissions. Submissions do not have to conform to the MREs, however, the matters may not relate to the character of the accused unless the evidence was introduced at trial.

3. Timing. After a trial by general or special courts-martial, a crime victim may submit matters within 10 days of announcement of sentence, and within 7 days of announcement of sentence in a summary court-martial. The CA may, for good cause, extend the period for not more than 20 days. Good cause ordinarily does not include the need to obtain matters that could have been obtained prior to the conclusion of the court-martial.

4. Waiver. The victim is entitled to one opportunity to submit matters to the CA under RCM 1106A. Failure to submit matters within the time limits waives the right to submit matters. The victim may also waive the right to submit matters. The waiver needs to be in writing and once filed, may not be revoked.

M. Disclosure of Information to Crime Victims (TJAG Policy Memo 17-08, December 2017)

1. Upon Preferral of Charges the Government will provide to the victim (or SVC):

a) A copy of all statements and documentary evidence produced or provided by the victim;

b) An excerpt of the charge sheet setting forth the preferred specifications pertaining to the victim;

c) The date time and location of any pretrial confinement review pursuant to RCM 305, and the preliminary hearing pursuant to Article 32, UCMJ.

2. Upon Receipt or Filing, the Government will provide to the victim (or SVC):

a) A summarized transcript of the victim's testimony at the preliminary hearing;

b) An excerpt of the charge sheet setting forth the referred specifications pertaining to the victim;

c) Any docket requests, as well as docketing or scheduling orders including deadlines for motions and the date and location of trial sessions;

d) A copy of any motion or responsive pleading that may limit a victim's ability to participate, affect the victim's possessory rights in any property, concern privileged communications or private medical information or involve the victim's right to be heard;

e) Any defense request to interview the victim.

3. Any additional crime victim requests for documents or investigative reports may be processed through the Freedom of Information Act (FOIA) or Privacy Act.

N. Protection from Retaliation. All crime victims will be protected from restriction of their communications, reprisal by their command for making a report, ostracism or social retaliation by their peers, and cruelty and maltreatment.

1. Reprisal (Professional Retaliation) – Whistleblower Protection Act (10 U.S.C. §1034); Army Regulation 20-1 (Inspector General Activities and Procedures); Army Directive (AD) 2014-20; NEW Article 132, UCMJ (effective date no later than January 2019).

a) Military Whistleblower Protection (DoD Directive 7050.06 and AR 600-20, para. 5-12; para. 6-11; 8-5(m)(27)(a))

(1) Restricting Communications with Members of Congress and Inspector General (IG) and Members of Congress Prohibited. No person may restrict a member of the armed forces in communicating with a Member of Congress or an IG.

(2) Prohibition of Retaliatory Personnel Actions for Communications. No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing or being perceived as making or preparing communications to the following (including but not limited to);

(a) Member of Congress or an Inspector General

(b) Member of a Department of Defense audit, inspection, investigation, or law enforcement organization

(c) Any person or organization in the chain of command or any person designated to receive such communications (refer to AR 600-20, para. 5-12).

(3) Investigations completed by IG or DoD IG. Administrative actions may be taken in response to a founded IG investigation.

b) Retaliation, Article 132, UCMJ

(1) Any person subject to the UCMJ who, with the intent to retaliate against any person for reporting or planning to report a criminal offense, or making or planning to make a protected communication, or with the intent to discourage any person from reporting a criminal offense or making or planning to make a protected communication:

(a) Wrongfully takes or threatens to take an adverse personnel action against any person; or

(b) Wrongfully withholds or threatens to withhold a favorable personnel action with respect to any person; shall be punished as a court-martial may direct.

(2) The term protected communication includes a communication to a member of Congress or the Inspector General (IG), as well as a communication to covered individuals (see 10 U.S.C. §1034(b)(1)(B)) that the member reasonably believes constitutes evidence of a violation of law or regulation (including sexual harassment or unlawful discrimination) or gross mismanagement of funds, abuse of authority, or a substantial and specific danger to public health or safety.

(3) The new retaliation (reprisal type) punitive article mirrors the Whistleblower Protection Act, but adds an intent element which may be difficult to prove. It is possible that the IG continues to investigation reprisal complaints with a hand off to CID when the intent to retaliate is substantiated.

c) Reprisal type retaliation defined in Army Directive (AD) 2014-20 as "taking or threatening to take an adverse or unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, with respect to a victim or other member of the

Armed Forces because the individual reported a criminal offense or was believed to have reported a criminal offense."

(1) Investigations completed by IG or DoD IG if high ranking subject or sexual assault victim reported. Punitive and prosecuted under Article 92, UCMJ.

d) Command actions in evaluation.

(1) Raters are required to document significant deviations from commitment to unlawful discrimination and/or sexual harassment and identify instances of reprisal/retaliation taken by the rated individual in that evaluation report.

(2) If a Soldier's separation appears to be in retaliation for the Soldier filing an unrestricted report of sexual assault, SCMCA and GCMCA should consider in their mandatory review in consultation with the SJA.

2. Ostracism and Social Retaliation (Army Directive 2014-20)

a) Defined as "excluding from social acceptance, privilege or friendship a victim or other member of the Armed Forces because:

(1) the individual reported a criminal offense;

(2) the individual was believed to have reported a criminal offense; or*

(3) the ostracism was motivated by the intent to discourage reporting of a criminal offense or otherwise to discourage the due administration of justice."

b) *Given the constitutional issues associated with the enforcement of the prohibition against ostracism, judge advocates should consult their supervisory SJA or OTJAG before advising their clients as to the nature and extent of this prohibition. (see 2014 MilSuite message from BG Thomas Ayres, DJAG indicating that the "or" should be read as "and")

c) Technically, AD 2014-20 is punitive and may be prosecuted under Article 92, UCMJ. According to the DoD Retaliation Prevention and Response Strategy (April 2016), military justice responses to offenses of ostracism may engender resentment and further retaliation against a crime victim. More effective methods to reduce ostracism fall under command prevention strategies and informal resolution.

d) Allegations of ostracism/social retaliation will be referred to and investigated by, the victim's chain of command or supervision or by any other appropriate investigative agency, organization or entity.

3. Cruelty and Maltreatment (Article 93, UCMJ; AD 2014-20)

a) Defined. Cruelty, oppression or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment and sexual harassment may constitute the offense. The imposition of necessary or proper duties and the exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both. (see Article 93, UCMJ).

b) Between members of different ranks. Cruelty toward, oppression or maltreatment of any person subject to the orders or the alleged offender may be punished under Article 93, UCMJ

(1) Allegations of a subordinate against a superior Servicemember will be referred to and investigated by the appropriate investigative agency, organization or entity (usually victim's chain of command, Military Police/CID).

c) Between peers or other persons. Acts of cruelty, oppression or maltreatment (as defined in Article 93, UCMJ) committed against a victim, an alleged victim or another member of the Armed Forces *by peers or other persons*, because the individual reported, or was believed to have reported a criminal offense.

(1) Allegations of cruelty, oppression or maltreatment between peers or other persons will be referred to and investigated by the victim's chain of command or by any other appropriate investigative agency, organization or entity.

(2) Punishable under the punitive AD 2014-20/ Article 92, UCMJ.

4. Reporting and tracking in cases of sex assault. The SARC will track incidents of retaliation at the SARB and the command will address in accordance with the DoD Retaliation Response and Prevention Strategy and Implementation Plan and AD 2015-16. (*see infra* Section VI)

5. Online misconduct, or the use of electronic communication to inflict harm, includes communication of a threat, indecent language, obstruction of justice, stalking, sexual harassment, bullying, hazing, retaliation or any other types of misconduct that undermine dignity and respect. (see ALARACT 058/2018 Professionalization of Online Conduct; Department of the Army Memorandum, "Implementation Plan – Professionalization of Online Conduct," dated 16 June 2015)

a) Soldiers or civilian employees who participate in or condone misconduct, whether offline or online, may be subject to criminal, disciplinary, and/or administrative action. Contractor employee misconduct will be referred to the employing contractor through applicable contracting channels for appropriate action.

b) Personnel who experience or witness online misconduct should report matters to the chain of command, supervisor, family support services, equal opportunity/equal employment opportunity, SHARP, IG or Army law enforcement.

c) When the electronic communication is the primary means or most important charge of misconduct, then the OSJA (usually the Chief of Justice) should report the allegation using the "Report of Online Misconduct and Disposition" form to OTJAG, Criminal Law Division, within one week of the command's disposition of the allegation of online misconduct. Do not report if the online misconduct is evidence or a minor charge.

O. Enforcement:

1. By Appellate Courts (Article 6b(e))

a) Petition for a writ of mandamus

(1) If the victim of an offense believes that a preliminary hearing ruling under Article 32 or a court-martial ruling violates the rights of the victim afforded by an Article or rule (specifically including MRE 412, MRE 513, MRE 514 or MRE 615), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the Article or rule.

(2) If the victim of an offense is subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such order.

(3) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals (CCA) and, to the extent practicable, shall have

priority over all other proceedings before the CCA. Review of any CCA decision by the Court of Appeals for the Armed Forces (CAAF), shall have priority as determined under CAAF rules. (See 2018 NDAA, sec. 531(a))

2. Congressional Inquiry. Public Law entitles constituents to correspond with their elected officials. Interested parties may ask elected officials to help with a matter involving the DoD. http://open.defense.gov/Transparency/Congressional-Inquiries/

3. Inspector General (IG) Complaint. (AR 20-1)

a) Any Army military or civilian member may file.

b) Complaint may be filed with command or supervisor, IG or other established grievance channel.

4. Complaints of Wrongs (Article 138, UCMJ)

a) Any member of the armed forces may apply to his/her commanding officer for redress of a perceived wrong.

b) If refused, the Soldier may complain to any superior commissioned officer who forwards the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made.

5. Informal Resolution. In cases of government mistake or negligence, a negotiated solution between victim or victim's representative and Government counsel or command may be appropriate.

6. Nothing in Article 6b should authorize a cause of action for damages, or create /imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Article 6b(d).

7. Nothing in Article 6b should impair the exercise of discretion under Articles 30 and 34 (preferring and referring charges). This 2017 NDAA added provision could be interpreted to mean that victims do not decide whether or not charges are preferred or referred and that the command still decides what disposition is appropriate after an allegation. Article 6b(d).

P. Victims' Rights Case Law

1. *United States v. Rorie*, 58 M.J. 399 (C.A.A.F. 2003). CAAF overturns 53 years of precedent and holds that it will no longer follow a policy of *abatement ab initio* for appellants who die following review by the intermediate service courts but prior to final review by the Court of Appeals for the Armed Forces. The rationale for overturning the abatement policy rested on two grounds: first, even after the death of a military defendant "there remains a substantial punitive interest in preserving otherwise lawful and just military convictions"; and second, the impact of abatement *ab initio* on victims' rights, and, in particular, the issue of restitution as a condition of a pretrial agreements, reduced sentence, clemency, or parole. "Particularly where there has been one level of appeal of right, abatement *ab initio* at this level frustrates a victim's legitimate interest in restitution and compensation."

2. *United States v. Ducharme*, 59 M.J. 816 (N-M. Ct. Crim. App. 2004). Appellant was tried in July, 1999, prior to the effective date of changes to MRE 615 permitting sentencing witnesses to observe trial on the merits (the effective date of those changes is 15 May 2002). The court held that the military judge did not err when he ruled that, under Mil. R. Evid. 806 (control of spectators), one of the government's sentencing witnesses (negligent homicide victim's mother) could remain in the courtroom throughout trial. In addition, under Mil. R. Evid. 615 as it existed

at the time of appellant's trial which required sequestration of witnesses upon request of either party, the trial defense counsel waived the issue. Finally, even assuming the military judge erred under Mil. R. Evid. 615 as it existed at the time of appellant's trial, any error was harmless.

3. *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013). Widely viewed to be the precursor to Article 6b and the Special Victim Counsel (SVC) program, *LRM* strengthened the right of the victim to be heard on issues of privilege and MRE 412 during a court-martial. The three issues certified by the Air Force Judge Advocate General to C.A.A.F. include whether the service court of appeals (CCA) erred by holding it lacked jurisdiction to hear victim's petition for a writ of mandamus under the All Writs Act; whether the military judge erred by denying the victim the opportunity to be heard on an MRE 513 issue through counsel in violation of protections under the MRE, the CVRA and the U.S. Constitution; and whether C.A.A.F. should issue a writ of mandamus to the lower court. *LRM* held that the C.A.A.F. has statutory jurisdiction to review the CCA's finding on the basis of TJAG certification, and that the CCA erred in determining there was no subject-matter jurisdiction because the court did not apply the correct analysis. The court also determined that even though victims are not a party to the litigation, they are not precluded from asserting standing to contest a ruling on a held privilege, stating "a reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel." Declining to issue a writ of mandamus, C.A.A.F. returned the issue back to the trial court reinforcing the military judge's discretion to impose reasonable limitations on the victim's right to be heard under RCM 801.

4. *EV v. United States & Martinez*, 75 M.J. 331 (C.A.A.F. Jun. 21, 2016). In light of the plain language of Article 6b, C.A.A.F. claims lack of jurisdiction to entertain a writ-appeal by alleged victim who sought to reverse a military judge's order for disclosure of mental health records (MRE 513). Article 6b(e) granted right to victims allowing for mandamus petition to a court of criminal appeals ends at the CCA. This precedent may be negated by the 2018 NDAA, sec. 531 which adds to Article 6b the language "(C) Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces."

5. *Randolph v. HV & United States*, No. 16-0678 (C.A.A.F. Feb. 2, 2017). In light of the plain language of Article 6b, C.A.A.F. also lacks jurisdiction to entertain an accused's appeal of a CCA decision to grant victim petitioner's request for a writ of mandamus, denying the trial court's order to disclose mental health records (MRE 513). The accused argued that jurisdiction existed under Article 67(a)(3) of the UCMJ, however C.A.A.F. concluded that there was no precedent to apply Article 67 cases to a petition filed under Article 6b, and that "it would violate congressional intent for this Court to review Article 6b cases upon petition by the accused but not the victim." This precedent may be negated by the 2018 NDAA, sec. 531 which adds to Article 6b the language "(C) Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces."

<u>Victim's Unsworn Statement</u>

6. *United States v. Barker*, 77 M.J. 377 (C.A.A.F. 2018) - Harmless error to admit victim impact statement (under former RCM 1001A) from NCMEC in a child porn case. CAAF concludes inadmissible because the victim did not actually participate in the proceeding.

7. *United States v. Hamilton*, 77 M.J. 579 (A.F. Ct. Crim. App. Dec. 20, 2017) - Victim unsworn statement under RCM 1001A is not evidence (akin to the accused's unsworn statement).

Therefore, MRE 403 does not apply. *US v. Barker* 76 M.J. 748 (A.F. Ct. Crim. App. July 7, 2017) is overruled on this point. (Pending CAAF review).

Pre-referral Petitions for Writs of Mandamus

8. *AG v. Hargis*, 77 M.J. 501 (A. Ct. Crim. App. Aug. 16, 2017) – Article 6b petition for writ of mandamus requires a preliminary hearing, a court-martial ruling, or an order to submit to a deposition. In a discovery request made prior to preferral of charges, Article 6b(e) doesn't apply, and the petition is frivolous.

9. *A.M. v. United States*, No. 201700158 (N-M. Ct. Crim. App. Jul. 31, 2017) – Petition argued right not to be excluded included the right to view the parties' submissions to the Article 32 PHO. The victim's right not to be excluded does not include the right to all documents submitted by the parties.

V. SEXUAL ASSAULT POLICY: PROCEDURAL PROTECTIONS FOR VICTIMS

A. Generally. Besides the protections afforded to all crime victims under Article 6b, victims of sexually related offenses are provided additional procedural protections, with the greatest protections granted to victims of rape, sexual assault, forcible sodomy and attempts of those crimes. While this section will address baseline DoD policy and Army implementation, it is important to note that victims from other services may be afforded additional protections, and that each Army General Court Martial Convening Authority (GCMCA) may impose additional requirements or withholding policies with regard to sexually related offenses. When arriving to a new location, always check the existing local policies.

B. Definitions

1. The definitions of "Sexual Assault" and "Sex Related Offenses" may vary depending on the source or regulation as well as the date of the alleged offense and the applicable language of Article 120 at the time of the offense. Always check the source document's definition.

2. In general, the policy term "Sexual Assault" includes: Violations of Article 120 (rape, sexual assault, aggravated sexual contact, abusive sexual contact), Article 125 (forcible sodomy) and attempts of any of the above offenses in violation of Article 80, UCMJ. This definition of sexual assault is used in surveys and data collection regarding the prevalence of offenses in in the military.

3. In general, the term "Sex Related Offenses" includes: Violations of Article 120 (rape, sexual assault, aggravated sexual contact, abusive sexual contact), Article 120a (pre-1 January 2019 stalking; post-1 January 2019 depositing obscene matters in the mail), Article 120b (rape and sexual assault of a child), Article 120c (other sexual misconduct – indecent viewing/visual recording/broadcasting; forcible pandering; indecent exposure), and attempts of any of the above offenses in violation of Article 80, UCMJ. If an offense falls under one of these articles, then the victim has the right to an SVC, and the command must take certain actions throughout the process.

4. There are additional offenses under Article 134, UCMJ which could encompass sexual conduct which do not explicitly fall under the definition of sex related offenses and do not require additional protections above and beyond the rights provided to all victims. These offenses include indecent conduct, indecent language, pandering and prostitution, child pornography as well as the post-1 January 2019 Article 130 stalking offense.

5. NOTE: The 2017 NDAA and Military Justice Act (MJA) will revise the above definitions with an effective date of no later than 1 January 2019.

C. Rights for Victims of Sex Related Offenses. In addition to the rights and protections afforded to all victims of crimes under the UCMJ, victims of sex related offenses may be eligible for the following procedural protections.

1. Option to file a Restricted Report (*see infra* Section IV).

2. Access to Sexual Assault Response Coordinator (SARC) and Victim Advocate (VA) along with medical and counseling services in accordance with the Sexual Harassment/ Assault Response and Prevention (SHARP) program (see infra Section IV).

3. Ability to request Expedited Transfer (see infra Section IV).

4. Right to consult and retain SVC (10 USC §1044e) see infra Section VI and Army Regulation 27-10, para. 17-10 (a) (11 May 2016))

a) Must be notified of right to consult with SVC prior to interview or making an official statement and upon initial contact with the following individuals:

(1) Military Criminal Investigator

(2) Government Counsel (Trial Counsel)

(3) Sexual Assault Response Coordinator (SARC)

(4) Victim Advocate (VA)

(5) Victim Witness Liaison (VWL)

b) An eligible victim may decline representation by an SVC.

5. Withholding Sexual Assault Initial Disposition Authority (SA-IDA) to the O-6 Brigade Commander (see infra Section IV).

6. Command (O-6 Brigade Commander) deferral of victims' collateral misconduct adjudication until after final disposition of the charges against the accused (see infra Section IV).

a) Assignment of TDS counsel to represent the victim (TDS Policy Memorandum # 2014-01, Detailing of Defense Counsel and Formation of Attorney-Client Relationships with Alleged Victims of Sexual Offenses)

b) Commander must consider immunity for the victim if the collateral misconduct is deferred. (See DoDI 6495.02, Enclosure 5)

7. Interviews (Article 6b(f), UCMJ; AR 27-10, paragraph 17-10(11)(a) (11 May 2016); RCM 701(e)(1); 10 U.S.C. § 1044e(b)(6)):

a) Victim may have escort/ SVC with them during law enforcement interviews.

b) Defense Counsel Interviews

(1) Defense Counsel (DC) should request interview through Trial Counsel (TC), VWL, SVC or other victim representative.

(2) Upon TC notice to DC of intent to call alleged victim to testify at an Article 32 Preliminary Hearing or a court-martial, DC must make any request to interview victim through SVC or other victim's counsel.

(3) If requested by alleged victim, any interview shall take place only in the presence of the TC, victim's counsel/SVC, SHARP VA.

8. Opportunity to Express Preference Regarding Prosecution Venue (RCM 306(e); AR 27-10, paragraph 17-10(a)(11)(c) (11 May 2016)):

a) Alleged victim of an offense committed in the United States shall be provided with an opportunity to express views as to whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense.

b) The TC, VWL, other Government representative or SVC will obtain the preference, and the convening authority shall consider the victim's preference for jurisdiction prior to making an initial disposition determination and shall continue to consider the victims views until final disposition.

c) The convening authority shall ensure that the civilian authority with jurisdiction is notified of the victim's preference.

9. Command Preferral and Referral Decisions

a) The convening authority shall not consider the service history of the accused in the decision to prefer or refer charges of sexual assault

b) If the convening authority and SJA agree that referral of sexual assault charges are not appropriate in a case, then the decision will be reviewed by the next highest commander. If the SJA believes that charges should be referred and the convening authority decides that referral of charges is not appropriate, then that decision shall be reviewed by the Secretary of the Army. (AR 27-10, para. 5-19 (11 May 2016); formerly AD 2014-19)

c) If the convening authority refers a charge for rape, sexual assault, rape of a child, sexual assault of a child or attempts of the above (Articles 120(a), 120(b), 120b(a) and 120b(b), and Article 80), then the charges must be referred to a General Court Martial. (RCM 201(f)(1)(D)).

10. Mandatory minimums. If the accused is found guilty of rape, sexual assault, rape of a child, sexual assault of a child, or attempts of the above (Articles 120(a), 120(b), 120b(a) and 120b(b) or Article 80), then the punishment must include, at a minimum, dismissal or dishonorable discharge. (Article 56(b), UCMJ).

11. Command Review of Administrative Separations. All SPCMCA and GCMCAs will review all administrative separation actions involving victims of sexual assault. The review must consider the following. (AR 600-20, para. 8-5; AR 635-200, para. 1-15)

a) If the separation appears to be in retaliation for the Soldier filing an unrestricted report of sexual assault. If so, consult with SJA.

b) If the separation involves a medical condition related to the sexual assault, to include Post Traumatic Stress Disorder. If so, consult with the medical personnel.

c) If the separation is in the best interests of the Army, the Soldier, or both. If not, consult with SJA.

d) Status of the case against the alleged offender, and the effect of the Soldier's (victim's) separation on the disposition or prosecution of the case. If the case is still open, consult CID and SJA.

VI. SEXUAL HARASSMENT/ASSAULT RESPONSE AND PREVENTION PROGRAM (SHARP)

A. Generally.

1. The Sexual Harassment/Assault Response and Prevention (SHARP) Program reinforces the Army's commitment to eliminate incidents of sexual assault through a comprehensive policy that centers on awareness and prevention, training and education, victim advocacy, response, reporting and follow-up. Army policy promotes sensitive care and confidential reporting for victims of sexual assault and accountability for those who commit these crimes.

2. Sexual Assault Policy. Sexual assault is a criminal offense that has no place in the Army. It degrades mission readiness by devastating the Army's ability to work effectively as a team. It is incompatible with the Army Values and is punishable under the UCMJ and other federal and local civilian laws.

3. Relationship with DoD Sexual Assault Response and Prevention Office (DoD SAPRO). The DoD SAPRO office is the single point of accountability for sexual assault policy and assessment within the DoD and it provides oversight to ensure that each of the Service's programs complies with DoD policy and DoD Instruction (DoDI) 6495.02, Sexual Assault Prevention and Response Program Procedures. The Army SHARP program provides services to those who report both sexual assault and sexual harassment.

B. Eligibility for SHARP services.

1. SHARP Sexual Assault Response Coordinator (SARC) and Victim Advocate (SHARP VA) services. Active duty (AD) Service members, National Guard (NG) and Reserve Component (RC) members, and Department of the Army Civilians (see Army Directive 2017-02 and extension of pilot program for DA civilians) will be eligible to receive advocacy services from a SARC or SHARP VA regardless of whether the assault took place while on active duty, prior to enlistment or commissioning, or while performing inactive duty training.

2. Eligibility to file a Restricted or Unrestricted report of Sexual Assault. Service members, NG and RC members, DoD Civilian employees (see AD 2017-02), and military dependents over 18 years of age who were victims of a perpetrator other than a spouse or intimate partner, will be eligible to file a restricted report regardless of whether the assault took place while on active duty, prior to enlistment or commissioning, or while performing inactive duty training. Dependents under 18 and all other non-military victims are not eligible to file a restricted report.

3. Medical Care. Service members, NG and RC members are eligible for treatment at a military treatment facility (MTF). Non-military victims of sexual assault are only eligible for medical services at an MTF if that individual is otherwise eligible as a Service member or TRICARE beneficiary of the military health system to receive treatment in an MTF at no cost to them.

a) A reserve component sexual assault victim whose reported offense occurred while on active duty and who is expected to be released from active duty before the Line of Duty (LOD) determination is made, may request that the Service Secretary retain the member on active duty until completion of an LOD determination to assure continuity of health care services.

4. Non-military individuals, including DoD Civilian employees and their family dependents over 18 years of age, along with US citizen DoD contractor personnel when authorized to accompany the force, are offered LIMITED SAPR services to be defined as the assistance of a

Sexual Assault Response Coordinator (SARC) and a SAPR Victim Advocate (VA) while undergoing emergency care OCONUS and limited emergency medical care at an MTF.

5. Victims of sexual assault, domestic abuse or child abuse will be referred to the Family Advocacy Program (FAP) victim advocacy in accordance with Department of Defense Instruction (DoDI) 6400.06.

C. Definition of Sexual Assault. For the purpose of DoD-wide sexual assault prevention and response awareness training and education, the term "sexual assault" is defined as intentional sexual contact, characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent. "Consent" shall not be deemed or construed to mean the failure of the victim to offer physical resistance. Consent cannot be given when the offender uses force, threat of force, coercion, or when the victim is asleep, incapacitated, or unconscious. The term includes a broad category of sexual offenses consisting of the following specific UCMJ offenses:

1. Article 120, UCMJ: Rape, sexual assault, aggravated sexual contact, abusive sexual contact (now including the former forcible sodomy Article 125, UCMJ)

2. Article 80, UCMJ: Attempts to commit Article 120 acts

D. Definition of Sexual Harassment. (see AR 600-20, Chapter 7; 10 USC 1561)

1. Definition of Sexual Harassment.

a) Conduct involving unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when—

(1) submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career;

(2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or

(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment; and

(4) The conduct is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile or offensive. (NOTE: This language is a change from the previous language of the statute. Previously, the hostile "environment" was termed hostile "working environment." It is expected that harassing behavior outside of work can fall under sexual harassment).

b) Use or condonation, by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the armed forces or a civilian employee of the Department of Defense

c) Deliberate or repeated unwelcome verbal comments or gestures of a sexual nature by any member of the armed forces or civilian employee of the Department of Defense.

2. Categories of Sexual Harassment:

a) Verbal: telling sexual jokes, using sexually explicit profanity, threats, sexually oriented cadences, or sexual comments. Can include "honey, sweetheart, babe, hunk."

b) Non-verbal: blowing kisses, winking, staring (undressing with eyes).

c) Physical: touching, kissing, but also blocking hallways, unsolicited back or neck rubs. (**Note:** There is significant overlap between that physical contact which constitutes Abusive Sexual Contact (a type of sexual assault) and that physical contact which constitutes sexual harassment. Any unwanted physical contact reported or alleged related to or in context of sexual harassment must be reported immediately to USACIDC for investigation. The USACIDC investigation process will determine if the physical contact meets the legal definition of sexual assault. On 1 January 2019, the definition of Abusive Sexual Contact will no longer include these types of offenses but USACIDC guidance may be revised, so consult with the Special Agent in Charge of the local CID office.)

3. Types of Sexual Harassment:

a) Quid pro quo: conditions placed on career or teams of employment in return for favors. Includes implicit or explicit threats of adverse action. Can include third-party victims who are affected by job actions granted to another in exchange for sexual favors. Examples include sexual favors in exchange for promotion, award or assignment, or a poor evaluation for Soldier or civilian who refuses a dating request.

b) Hostile environment: Brings the topic of sex or gender differences into the workplace and can include behaviors outside of the workplace. Need not be quid pro quo. If physical acts, sexual comments, or non-verbal actions unreasonably interfere with the job performance of another, it is sexual harassment. Can include comments about body parts, sexual jokes, suggestive pictures.

4. Procedure: Complaints of sexual harassment follow same procedures as Equal Opportunity complaints. *See* AR 600-20, chapter 7, for details.

E. Victim Advocacy Program Personnel. Victim's use of advocacy services is optional; however, commanders must ensure that victims have access to a well-coordinated, highly responsive sexual assault victim advocacy program that is available 24 hours a day/seven days a week both in garrison and in a deployed environment.

1. Sexual Assault Response Coordinator (SARC). The SARC is the single point of contact (POC) for all sexual assault, sexual harassment and retaliation complaints. This is a 2012 change from past practice, in which sexual harassment was handled by Equal Opportunity officers (see ALARACT 007-2012).

a) Full time SARCs and SHARP VAs required at the brigade (or equivalent) level. Collateral duty SARC and SHARP VAs required at the Battalion & Installation level.

b) Senior Commander appoints Lead SARC

c) Appointed Installation or Brigade SARC reports to Lead SARC

d) Supervises & oversees:

(1) Supervises SHARP VAs

(2) Serve as the program manager of victim support services who coordinates and oversees the local implementation and execution of the Sexual Assault Prevention and Response Program.

(3) Ensure overall local management of sexual assault awareness, prevention, training, and victim advocacy.

(4) Oversee Victim Advocates and Unit Victim Advocates in the performance of their duties providing victim services.

(5) Ensure victims are properly advised of their options for restricted and unrestricted reporting. Ensure victim acknowledges in writing his/her preference for restricted or unrestricted reporting on a DD Form 2910, Victim Reporting Preference Statement (VRPS).

(6) Ensure all unrestricted reported incidents of sexual assault are reported to the installation commander within 24 hours.

(7) Ensure that non-identifying personal information/details related to a restricted report of sexual assault is provided to the Installation Commander within 24 hours of occurrence. This information may include: rank, gender, age, race, service component, status, time and location. Ensure that information is disclosed in a manner that preserves a victim's anonymity. Careful consideration of which details to include is of particular significance at installations or other locations where there are a limited number of minority females or female officers assigned.

(8) Ensure victims are notified of the resources available to report instances of retaliation, reprisal, ostracism, maltreatment, sexual harassment or to request a transfer or MPO.

(9) Responsible for entering information into Defense Sexual Assault Information Database (DSAID) and tracking reports of sexual assault, sexual harassment and retaliation.

2. Each brigade has a unit SARC appointed by the brigade commander. In addition, each battalion is assigned two deployable unit victim advocates.

3. Requires 80-hour TRADOC MTT-provided training course.

4. Requires 90-day "right seat" training w/ VA and EO personnel.

5. Grade/Rank requirement:

(a) Battalion level SARC/SHARP: SFC, MAJ, CW3, GS-11 or higher

(b) Brigade and below VA/SHARP: SSG, 1LT, CW2, GS-9 or higher

F. Sexual Harassment/Assault Response and Prevention Victim Advocate (SHARP VA)

1. Seven week TRADOC MTT-provided training course. Five additional weeks for VA instructors.

2. 90-day "right seat" training w/ VA and EO personnel

3. Grade/rank: SSG, 1LT, CW2, GS-9 or higher

4. Duties:

a) When assigned by the SARC, provide crisis intervention, referral, and ongoing non-clinical support to the victim. The victim alone will decide whether to accept the offer of victim advocacy services. VAs are not counselors, they are facilitators of services.

b) Referral to services includes: psychological treatment, medical, legal, housing assistance; full range of FAP and civilian victim support services

c) Report to and coordinate directly with the SARC when assigned to assist a victim.

d) Inform victims of their options for restricted and unrestricted reporting, and explain the scope and limitations of the SARC's role as an advocate.

e) If the victim chooses restricted reporting, ensure the victim is taken to a healthcare provider in lieu of reporting the incident to law enforcement or chain of command.

f) If victim chooses the unrestricted reporting option, the SHARP VA will immediately notify law enforcement and healthcare provider.

g) Safeguard documents in their possession pertaining to sexual assault incidents and protect information that is case related.

G. Commander Responsibilities (see AR 600-20, chapter 8-5o and appendix F)

1. The victim's unit commander must take the following actions in the case of an **unrestricted report** of sexual assault.

a) Immediately notify CID. Do NOT conduct an internal command directed investigation of the sexual assault.

b) Notify the Sexual Assault Response Coordinator (SARC) and report all incidents of sexual assault to the office of the staff judge advocate within 24 hours.

c) Ensure the victim's physical safety. This frequently will involve coordinating with the accused's commander to issue a Military Protective Order (MPO). Ensure that victims of sexual assault receive sensitive care and support and are not re-victimized as a result of reporting the incident. If the victim's safety is in jeopardy, establish a High-Risk Response Team (HRRT).

d) Require that the victim receives timely access to medical and psychological treatment and make sure the victim was asked if s/he would be willing to have a Sexual Assault Forensic Examination (SAFE). Facilitate access to all available services and inform the victim of the opportunity to consult with an SVC or legal assistance attorney.

e) Complete and send any required Critical Commander Information Reports (CCIR) through the chain of command within 24 hours for incidents involving sexual assault and harassment. Strictly limit information pertinent to an investigation to those who have an official need to know.

f) Confirm the SARC entered all reported sexual assaults into the DoD Sexual Assault Incident Database (DSAID) within 48 hours of the report.

g) Complete the Sexual Assault Incident Response Oversight Report (SAIRO) within eight days of the report. Send the SAIRO to the installation commander as well as through the victim's chain of command. (see Army Directive 2015-10)

h) Collaborate closely with the SARC, legal, medical, and chaplain offices and other service providers to provide timely, coordinated, and appropriate responses to sexual assault issues and concerns.

i) Continue to make administrative & logistical coordination for movement of victim to receive care, regardless of whether the victim is cooperating in the investigation or prosecution.

j) If the incident is a domestic incident, refer the victim to FAP victim advocacy.

k) Monitor for incidents of coercion, ostracism, discrimination or reprisals against the victim in the unit, workplace or through social media.

2. The accused's unit commander must take the following actions in the case of an **unrestricted report** of sexual assault.

a) Immediately notify CID. Do NOT conduct an internal command directed investigation of the sexual assault.

b) Complete and send a Critical Commander Information Report (CCIR) through the chain of command within 24 hours for incidents involving sexual assault and harassment. (see April 2018 Department of the Army Memo "Guidelines and Process for Commander's Critical Information Requirements (CCIR) Regarding Sexual Assault and Sexual Harassment Incidents"). Strictly limit information pertinent to an investigation to those who have an official need to know.

c) Monitor well-being of the alleged offender, particularly for any indications of suicidal ideation or other unhealthy attempts to cope with stress and ensure appropriate assistance is rendered.

d) Flag any Soldier under charges, restraint, or investigation for sexual assault in accordance with AR 600-8-2, and suspend the Soldier's security clearance in accordance with AR 380-67.

e) Monitor for incidents of coercion, ostracism, discrimination or reprisals against the victim in the unit, workplace or through social media.

f) Complete and send abbreviated SAIRO report if victim is civilian who is not eligible for SAPR services.

g) Coordinate with victim's commander and JA for MPO.

3. The victim's battalion commander must check in with and notify the victim of the status of the **unrestricted** case at the following times. (see AR 600-20, para 8-5 and DoDI 6495.02, Encl 5)

a) Personally update the victim on the status of the case within 14 calendar days of the report.

b) Ensure the company commander notifies the victim of the status of the case on a monthly basis, usually within 72 hours of the Sexual Assault Review Board (SARB).

c) Ensures the victim is updated on the final case disposition and that the DA Form 4833 is completed.

d) Personally follow up with the victim to make sure the victim's needs have been addressed within 45 days after final disposition of the case.

4. Commander's responsibilities - administrative separations.

a) GCMCA is the lowest separation authority for cases involving Soldiers who filed an unrestricted report of sexual assault in the last 24 months.

b) When initiating an administrative separation on any Soldier for any reason (voluntary or involuntary), include on the Notification / Acknowledge / Election of Rights form:

(1) Whether the Soldier filed an unrestricted report of sexual assault in the last 24 months.

(2) Whether the Soldier does / does not believe that this separation is a direct / indirect result of the sexual assault.

c) If the separation appears to be in retaliation for the Soldier filing an unrestricted report of sexual assault consult with the JA.

d) If the separation involves a medical or mental health condition that is related to the sexual assault, to include PTSD consult with the appropriate medical personnel and the JA.

e) If the separation is NOT in the best interests of the Army, the Soldier, or both, consult with the JA.

f) The status of the case against the alleged offender, and the effect of the Soldier's (victim's) separation on the disposition or prosecution of the case. If the case is still open, consult with the servicing CID unit and JA.

g) Commanders will initiate the administrative separation of any Soldier convicted of a sex-offense whose conviction did not result in a punitive discharge or dismissal. Sex-offense is defined as an offense requiring sex offender registration under 42 USC section 16911 or as defined in AR 27-10, Chapter 24.

(1) Note that if the Soldier was convicted of rape, sexual assault, rape of a child, sexual assault of a child, forcible sodomy or attempts of the above, the Soldier will receive a mandatory minimum of a dismissal or dishonorable discharge (see Article 56(b), UCMJ).

(2) If the separation authority approves retention of an enlisted Soldier, the separation authority will initiate separation under the Secretarial plenary separation authority under AR 635-200, para. 5-3.

5. Commander's responsibilities – Documenting and reviewing (AR 600-37; AD 2013-21).

a) Commanders (O-5 or higher) will screen the record brief of current and incoming Soldiers for court-martial convictions, nonjudicial punishment or punitive administrative actions for sex related offenses. The purpose is to ensure commanders are aware of the history of sex-related offenses of Soldiers within their formations.

b) Any court martial or punitive administrative action (including but not limited to reprimand, admonishment or censure at any level of command), nonjudicial punishment or court-martial conviction for a sex-related offense must be placed in the Soldier's permanent record in the Army Military Human Resources Record (AMHRR). The SJA must draft a memorandum identifying the offense as a sex-related offense, coordinate to receive the accused's matters, then send a packet to HRC for processing of an assignment consideration code (ACSO) which will be placed in the Soldier or Officer's ERB/ORB.

c) Any OCONUS Soldier convicted of a sex-offense whose conviction did not result in a punitive discharge or dismissal shall be reassigned to a CONUS or permitted OCONUS location (e.g. Hawaii, Alaska, Puerto Rico). Soldiers convicted of a sex-offense shall not be assigned or deployed on temporary duty (TDY), temporary change of station (TCS), or permanent change of station (PCS) to non-permitted OCONUS locations.

d) Sex related offenses include any offense under Article 120, Article 120a, Article 120b, Article 120c, or an attempt under Article 80, UCMJ. Sex-offense is defined as an offense requiring sex offender registration under 42 USC section 16911 or as defined in AR 27-10, Chapter 24.

6. Initial Disposition Authority

a) Baseline DoD policy dictates that disposal of cases resulting from allegations of rape, sexual assault, forcible sodomy and attempts are withheld to the Brigade commander level, O-6 and above. A commander authorized to dispose of cases involving an allegation of sexual assault, otherwise known as the sexual assault initial disposition authority (SA-IDA), may do so only after receiving the advice of the servicing judge advocate. *See* DODM April

20, 2012: Withholding Initial Disposition Authority under the Uniform Code of Military Justice in Certain Sexual Assault Cases. Additionally, any collateral misconduct of the victim directly related to the report of sexual assault will also be withheld to the victim's O-6 Brigade commander.

b) According to AR 600-20, paragraph 8-5, disposal of "sexual assault" cases are withheld to the Battalion commander level, O-5 and above. Because rape and sexual assault are withheld to the O-6 commander, allegations of aggravated sexual contact, abusive sexual contact and attempts would be the type of sexual assault cases within the O-5 commander's initial disposition authority.

H. Reporting Options: There are two possible reporting options for victims of sexual assault. The victim may make an unrestricted report of sexual assault which results in a CID investigation, collection of a Sexual Assault Forensic Examination (SAFE), provision of counseling, medical/ mental health care services and opportunities for transfer to another unit. The victim may also make a restricted report of sexual assault. A restricted report does not result in a CID investigation while allowing the collection of the SAFE, counseling, medical and mental health care services. The restricted report will not allow for other services requiring command knowledge, such as an expedited transfer.

1. Unrestricted Reporting. A Soldier who is sexually assaulted and desires medical treatment, counseling, and an official investigation of his/her allegation, may use current reporting channels (e.g., chain of command, law enforcement) or he/she may file a DD Form 2910 with the SARC or the on-call SAPR victim advocate to elect an unrestricted report. Upon receiving an unrestricted report of sexual assault, the SARC will immediately assign a victim advocate and will notify the installation and immediate commander within 24 hours. Additionally, with victim's consent, the healthcare provider shall conduct a forensic examination, which should include the collection of evidence. Details regarding the incident will be limited to only those personnel who have a legitimate need to know.

2. Chain of Command (CoC) responsibilities. If any member of the CoC learns of the sexual assault from any source, s/he must report that information to CID. The CoC includes commanders, non-commissioned officers in the victim's CoC and civilian supervisors.

3. Restricted Reporting. A Soldier or a military dependent 18 years of age or older who is sexually assaulted may, on a confidential basis, disclose the details of his/her assault to specifically identified individuals and receive medical treatment and counseling, without triggering the official investigative process.

a) The following are the only individuals capable of accepting or receiving a Restricted Report: SARC; SHARP Victim Advocate; Healthcare Provider (to include psychotherapists).

(1) The Restricted Report is officially made when the restricted reporting option is elected on a DD Form 2910, completed and signed by the victim.

(2) Healthcare personnel who receive a restricted report shall contact a SARC or SHARP VA to ensure that a DD Form 2910 is correctly completed and that the victim is offered SAPR services.

b) Privilege and confidentiality exist with the following individuals: SARC (when acting as a victim advocate in accordance with MRE 514); SHARP/FAP Victim Advocate (MRE 514); DoD SAFE Helpline Staff (MRE 514); Chaplain (MRE 503); Legal Assistance Attorney/SVC (MRE 502); Psychotherapist (MRE 513).

(1) A chaplain, SVC or legal assistance attorney cannot accept or receive a Restricted Report.

(2) If in the course of otherwise privileged communications, a victim indicates that he/she wishes to file a Restricted Report, then the individual with privilege shall facilitate contact with a SARC or SHARP VA to ensure the provision of services and the completion of the DD Form 2910.

c) SARC Reporting. The SARC shall report non-PII concerning sexual assault incidents (without any identifying information on the victim or alleged assailant) to the installation commander within 24 hours of the report.

d) If the victim confides in a person who is not in the chain of command and who does not have a designated privilege or confidentiality (i.e. friend, roommate, team member), then according to DoDI 6495.02, the victim may still maintain the option to make a restricted report. The timing of the Restricted Report filing is crucial.

(1) If the victim elects the Restricted Report option and signs the DD Form 2910 before the SARC is notified by law enforcement or the command, then the victim maintains the Restricted Report and ALL communications with the SARC and VA remain privileged and confidential along with the SAFE kit.

(2) If the victim does not sign the DD Form 2910 before the SARC is notified by law enforcement or the command, then the report must be Unrestricted and law enforcement launches an investigation.

(a) SARC informs victim that the option to file a restricted report is no longer available.

(b) All communications between the victim and SHARP VA will remain privileged except for the minimum necessary to make the Unrestricted Report.

(3) If CoC or law enforcement discovers the sexual assault allegation, an independent investigation is initiated regardless of the status of the report.

(a) All communications between the victim and individuals without privilege (i.e. friend, roommate, team member) are not confidential and may be disclosed to law enforcement pursuant to the investigation.

(b) If the report is Restricted, then communications between the victim and the SARC and SHARP VA are confidential and no PII may be released to law enforcement.

4. Converting a Restricted Report to an Unrestricted Report

a) A sexual assault victim may convert from a Restricted Report to an Unrestricted Report at any time. The victim may NOT convert an Unrestricted Report to a Restricted Report.

b) In cases where a victim elects restricted reporting, the SARC, assigned VA (whether uniformed or civilian), and healthcare providers may not disclose covered communications to law enforcement or command authorities, either within or outside DoD, unless a specified exception applies. Covered communications are oral, written or electronic communications of personally identifiable information related to the sexual assault, made by a victim and related to the sexual assault to SARC, assigned VA or healthcare provider.

c) If an exception to restricted reporting applies, then the SARC will evaluate the confidential information, and contact the installation SJA office (administrative law attorney)

who shall advise as to whether one of the exceptions apply. In cases of uncertainty or disagreement, the matter shall be brought to the attention of the installation commander for decision utilizing non-PII information.

d) Improper disclosure of covered communications, improper release of medical information, and other violations of this policy are prohibited and may result in discipline under the UCMJ, loss of credentials, or other adverse personnel or administrative action.

e) The following exceptions authorize a disclosure of a Restricted Report ONLY if SJA consultation has occurred:

(1) Authorized by the victim in writing.

(2) Necessary to prevent or mitigate a serious and imminent threat to the health or safety of the victim or another person (ex. multiple reports involving same alleged offender or safety/security exceptions contained in MRE 514).

(3) Required for fitness for duty or disability determinations. Limited to information necessary to process to those who need to know (Disability Retirement Boards and officials). There is no obligation to report to law enforcement or command for investigation.

(4) Required for supervision of coordination of direct victim healthcare or services. SARC, SHARP VA or healthcare provider can disclose specifically requested information to those with an official need to know.

(5) Ordered by a military official (e.g., a duly authorized subpoena in a UCMJ case), Federal or State Judge in a court of competent jurisdiction. Until determination is made after the SARC/ VA consults with the installation SJA, then only non-PII should be disclosed.

5. Regardless of whether the Soldier elects restricted or unrestricted reporting, confidentiality of medical information will be maintained IAW current guidelines on Health Information Privacy Portability Act (HIPPA).

6. A victim's disclosure of his/her sexual assault to persons outside the prospective sphere of persons covered by this policy may result in an investigation of the allegations.

NOTE: AR 600-20, paragraph 8-2 states that all Soldiers aware of a sexual assault, should immediately (within 24 hours) report. The paragraph does not direct a specific recipient for the report and the "Victim Confiding in Another Person" provision of DoDI 6495.02 conflicts with that guidance. Victims who tell another Soldier retain their ability to make a restricted report under the DoD policy. Commanders should be made aware of the conflict and, in consultation with the JA, establish policies and training in an attempt to reduce the number of unwilling reports.

7. This SAPR policy does not create any actionable rights for the alleged offender or the victim, nor constitute a grant of immunity for any actionable conduct by the offender or victim. Covered communications that have been disclosed may be used in disciplinary proceedings against the offender or the victim, even if such communications were improperly disclosed.

8. Improper disclosure of covered communications, improper release of medical information, and other violations of this policy are prohibited and may result in discipline under the UCMJ, loss of credentials, or other adverse personnel or administrative action.

9. Confidential statements made by a victim to a SARC/VA for the purposes of facilitating advice or support are privileged under MRE 514.

I. Expedited transfer of sexual assault victims who file unrestricted reports. AR 614-200, para. 5-18 November 2017 (enlisted transfers)

1. Soldiers who file an unrestricted report of sexual assault will be informed at the time of making the report, or as soon as practicable, of the option to request a temporary or permanent transfer from their assigned command or base, or to a different location within their assigned command or base.

2. Army policy is that there is a presumption of approval following a credible report of sexual assault. Commanders and civilian leaders will consider requests for transfer or reassignment in an expedited manner. The commander with the appropriate approval authority must act w/in 72 hours of request.

3. Soldier may request transfer by submitting a DA Form 4187 which includes a CID case number/ civilian investigation reference, or an assignment deletion if the alleged offender is assigned or inbound to the Soldier's gaining location. The request must be based on assaults that occurred while the Soldier is assigned to the contemporaneous unit or location and should include a statement from the Soldier explaining why they want to be moved or deleted from assignment, to their commanding officer. Victims are encouraged to include all their concerns in the request to aid the commander in understanding their needs and in making an informed decision.

4. The battalion commander shall make a credible report determination at the time of the request, after considering the advice of their legal advisor and available evidence. Only credible reports will be forwarded to the approval authorities. Commanders may consider the following factors in determining whether a transfer or reassignment is appropriate, and, if so, the lowest level of transfer or reassignment that would meet both the needs of the victim and the Army:

a) Concerns of the victim.

b) Operational necessity, including situationally unique requirements in deployed areas.

c) The nature and circumstances of the offense.

d) The location of the alleged offender.

e) Potential transfer or reassignment of the alleged offender instead of the victim.

f) The alleged offender's status (Soldier or civilian).

g) Status of the investigation and the potential impact of the victim's transfer or reassignment on the investigation, future disposition of the allegation and potential prosecution or other adverse action that may be initiated against the alleged offender.

h) Potential disposition of collateral misconduct.

i) Any other pertinent circumstances.

5. Approval Authorities

a) Local moves. Lowest level commander exercising authority over both the losing and the gaining unit.

b) Local moves that cross ACOM, ASCC, and/or DRU. Senior mission commander (SMC) at the installation. The SMC can also serve as the disapproval authority if the SMC is a GO.

c) PCS moves. Chief, EPMD, HRC is the approval authority and the Commander, HRC is the disapproval authority.

6. Expedited transfer procedures are not safety transfer procedures. If there is a threat to life or safety, immediately report to command & law enforcement.

7. Army policy is that there is a presumption of approval following a credible report of sexual assault. Commanders and civilian leaders will consider requests for transfer or reassignment in an expedited manner. The commander with the appropriate approval authority must act w/in 72 hours of request.

J. Sexual Assault Incident Response Oversight Report (SAIRO) (DoDI 6495.02; Army Directive 2015-10; DTM 14-007 – Expired but good resource)

1. Purpose. To provide General/Flag officer (G/FO) level commanders with oversight of the local response to sexual assault report from a victim service member or report against a subject service member. The goal is to assure victim care, visibility and transparency to senior leaders and system accountability.

2. Responsible Commander

a) If the victim is a service member, the victim's immediate commander prepares and files SAIRO when notified of an unrestricted report or independent investigation. SARC and CID provide input to the report. SARC is responsible for providing all victim information required in the SAIRO for unrestricted reports. The SARC will usually not be responsible for providing victim information for independent investigations as CID will be responsible for providing all information.

b) If the victim is a civilian and subject is the service member, then the subject's immediate commander prepares and files an abbreviated SAIRO.

c) If the subject is the responsible commander, then the next highest commander will prepare and file the report.

d) SAIRO is required even if reported sexual assault occurred before enlistment or commissioning.

3. When: Within the first eight calendar days of the unrestricted report or independent investigation. Triggers for eight day clock include:

a) When unrestricted report is made to SARC or SHARP VA and DD Form 2910 is completed and signed.

b) Conversion of restricted report to unrestricted report on DD Form 2910.

c) If an independent investigation is started, when CID notifies immediate commander.

4. SAIRO Recipients (only those with a need to know).

a) Installation commander (if incident occurred on or in the vicinity of a military installation)

b) First O-6 and first G/FO in the victim's chain of command (if victim is a service member)

c) First O-6 and first G/FO in the subject's chain of command (if subject is a service member)

d) If alleged subject is a possible recipient, SAIRO will go to next highest commander.

5. SAIRO Contents.

a) Incident Data. May only be obtained through CID, as command directed investigations are prohibited. No victim PII should be included in the report.

(1) Victim gender, duty status, Service affiliation, assigned unit, grade and current geographic area where the victim is stationed and lives.

(2) Subject gender, duty status, Service affiliation, assigned unit, grade and current geographic area where subject is stationed and lives.

(3) Most serious alleged sexual assault offense.

(4) Location, date and time of alleged sexual assault.

(5) Date victim was referred to the SARC or SHARP VA.

(6) Date offense was reported to CID or other MCIO.

(7) If subject is Service member, then whether the subject has been temporarily moved.

(8) Any other relevant information

b) Advocacy services offered. Including SAPR advocacy services of a SARC/ SHARP VA as well as SVC.

(1) Confirmation that SARC entered information into Defense Sexual Assault Incident Database (DSAID) within 48 hours.

(2) Description of any circumstance in the response that adversely affected the command's ability to address the victim's needs (including timeliness, obstacles to care, retaliation or reprisal).

(3) Before releasing any privileged communications, SARC will obtain victim consent for disclosure and confirm that victim was informed of the ability to speak to a Special Victims' Counsel (SVC).

(4) Summary of the SAPR services offered.

(5) Date of next SARB or Case Management Group (CMG).

c) Victim's Immediate Commander Input.

d) Healthcare.

(1) Do not include PII or individually identifiable health information.

(2) Provide date when victim was offered medical and mental health care.

(3) Provide date when the victim was offered a sexual assault forensic examination (SAFE) at the appropriate location. If not offered, explain why.

e) Investigation. Information provided by CID.

(1) Case number.

(2) Confirmation victim has been provided with DD Form 2701.

f) Safety. Information provided by SARC.

(1) Date safety assessment was conducted and whether there was a need to assemble a High-Risk Response Team.

(2) Date victim was provided with information on MPOs and Civilian Protective Orders (CPO) and whether they were filed.

(3) What safety measures were taken (if in a deployed environment).

g) Expedited Transfers. If victim is service member, SARC will provide immediate commander assigned to prepare SAIRO report.

(1) Date victim was given information regarding expedited transfers.

(2) A report on whether or not the victim requested an expedited transfer. If in processing include date of receipt.

h) Legal Services.

(1) Date eligible victim informed of SVC program.

(2) Confirmation that victim was notified that SVC is not the prosecution and will represent the victim and the victim's interest through the provision of legal advice and representation.

K. Sexual Assault Review Board (SARB) (DoDI 6495.02, Enclosure 9; AR 600-20, Appendix E)

1. The SARB provides executive oversight, procedural guidance and feedback concerning the installation's SAPR program. The SARB reviews the installation's prevention program and the response to any sexual assault incidents. This includes reviewing cases and procedures to improve processes, system accountability and victim access to quality services.

2. The senior commander or designated representative will chair the SARB.

3. SARB Members include:

a) Installation SARC (required)

b) Victim Advocate (as appropriate and deemed necessary by the senior commander)

c) CID Agent

d) SJA (usually an administrative law attorney)

e) Provost Marshal or representative law enforcement

f) Chaplain or representative

g) Sexual assault clinical provider or sexual assault care coordinator

h) Chief, Behavioral Health

i) Other members may be appointed or invited (ex. victim's commander SVWL, ASAP, SVC)

4. Responsibilities

a) The SARB will convene monthly to review sexual assault cases and facilitate monthly updates to victims within 72 hours of the SARB.

b) The senior commander will send findings through the appropriate channels noting deficiencies in processes and procedures, while recommending improvements for preventing or responding to sexual assault.

c) The senior commander will ask all members whether there has been any retaliation against the victim, the individual who reported, any witnesses, the SARC or VA in any cases. If so, the incident of retaliation will be reported, tracked at the SARB and the victim's O-5 Battalion Commander will draft a plan to respond to and address the retaliation. (AD 2015-16)

d) The senior commander will maintain the integrity of confidential cases and will not use identifying information when discussing cases.

e) The SARB will conduct reviews of MOAs with other Services and civilian agencies regarding SAPR support.

f) Commanders should be careful not to comment on desired outcomes in cases.

L. Collateral Misconduct of Victim. In unrestricted reported sexual assault cases where there is evidence of collateral victim misconduct (most commonly underage drinking, fraternization adultery, drug use), to prevent the erroneous perception that the Department of Defense views a victim's collateral misconduct as more serious than the crime of sexual assault, commanders should consider deferring discipline of any victim's misconduct until all investigations are complete and the sexual assault allegation has been resolved, unless extenuating or other overriding circumstances make delay inappropriate in the judgment of the commander and/or legal counsel. Initial disposition authority for collateral misconduct is withheld to an O-6 with special court-martial convening authority.

1. Additionally, for those sexual assault cases for which command action on victim's collateral misconduct is deferred, Military Service command action reporting and processing requirements should take such deferrals into consideration and allow for the time deferred to be subtracted from applicable metrics and processing times.

2. Commanders and judge advocates must also be mindful of any potential statute of limitations when determining whether to defer action.

3. Deferral may be bad trial strategy. A victim whose own misconduct is deferred is subject to attack on the theory that she has complained of sexual assault for the purpose of avoiding punishment for her drinking, or other behavior. If the misconduct is punished beforehand (for alcohol, the routine punishment is generally minimal), then this defense argument is negated. The victim should be consulted, and the pros & cons explained before proceeding with un-deferred collateral misconduct punishment.

4. If the command defers action on the victim's collateral misconduct until after a court-martial, the command must consider requests for testimonial or transactional immunity for the victim's testimony. Testimonial or transactional immunity may only be approved by the GCMCA and only provides immunity from military criminal prosecution.

M. Training and Prevention. The objective of SAPR training is to eliminate incidents of sexual assault through a comprehensive program that focuses on awareness and prevention, education, victim advocacy, reporting, response, and follow up. There are four categories of training for the SAPR Program. The categories are Professional Military Education (PME) training, Unit Level training, Pre-Deployment training, and Responder training. Training is now handled by Mobile Training Teams, arranged through the SHARP/SARC.

1. PME training is progressive and sequential in areas such as (including but not limited to):

a) Initial Entry Training;

b) Pre-commissioning/Basic Officer Leadership Instruction – I (BOLC I) to include ROTC;

c) Captain's Career Course;

d) Pre-command Course.

e) Unit Level Training. All Soldiers will attend and participate in unit level SAPR training annually. Training will be scenario based, using real life situations to demonstrate the entire

cycle of reporting, response, and accountability procedures. The I.AM.STRONG campaign is the primary provider of soldier training, which will no longer be presented by the local SARC

f) Responder Training. Primary responders to sexual assault incidents will receive the same baseline training throughout the DoD, to ensure that any Service member who is assaulted will receive the same level of response regardless of Service component. SARC & VA training will be provided by TRADOC MTTs. Other first responder components will design their own training. Training should emphasize that coordinating victim support services is a team effort and to be effective all the team members must be allowed to do their job and must understand the role of the others on the team. First responder agencies include:

(1) Healthcare;

(2) MPs and CID;

(3) Judge Advocates;

(4) Chaplains;

(5) SARCs; and

(6) Victim Advocates

N. Sexual Assault Forensic Examination (SAFE). The 2014 NDAA mandated that all military treatment facilities have SAFE availability. However, if a DoD healthcare provider is not available, the victim will be appropriately referred to a civilian provider for the forensic examination, if the victim requests such a forensic examination.

1. Whenever possible, military installations should have established formal memoranda of understanding (MOU) with military facilities or off-base non-military facilities for the purpose of conducting sexual assault examinations.

2. The SARC or victim advocate will ensure that a victim is aware of any local or state sexual assault reporting requirements that may limit the possibility of restricted reporting, prior to proceeding with the SAFE at the local off-post non-military facility.

O. Restricted Report Case Number (RRCN).

1. Each Military Service will designate a military agency to generate an alpha-numeric RRCN, unique to each incident, that will be used in lieu of personal-identifying information to label and identify the evidence collected from a SAFE (i.e., Sexual Assault Evidence Collection kit (SAE kit), accompanying documentation, personal effects, clothing).

2. Upon completion of the SAFE, the HCP will package and label the evidence with the RRCN and notify the service-designated military agency trained and capable of collecting and preserving evidence, to assume custody of the evidence using established "chain of custody" procedures. MOUs with off-post non-military facilities should include instructions for the notification of a SARC, receipt and application of a RRCN and disposition of evidence back to the military agency. The RRCN and general description of the evidence shall be entered into a log to be maintained by the military agency.

3. Five year storage period for restricted SAFE evidence.

a) Thirty days prior to the expiration of the five-year storage period, the military agency shall notify the appropriate SARC that the storage period is about to expire. The SARC shall notify the victim accordingly.

b) If a victim does not desire to change to an unrestricted report and does not request the return of any personal effects or clothing maintained as part of the evidence prior to the expiration of the storage period, in accordance with established procedures for the destruction of evidence, the military agency shall destroy the evidence maintained under the victim's RRCN.

c) The evidence shall similarly be destroyed if, at the expiration of five years, victims do not advise the SARC of their decision or the SARC is unable to notify a victim because the victim's whereabouts are no longer known.

d) If, at any time, a victim elects to change their reporting preference to the unrestricted reporting option, the SARC shall notify CID, who will then assume custody of the evidence maintained by the RRCN from the military agency under established chain of custody procedures.

P. Cases Involving SHARP Training and Panel Selection

1. *United States v. Rogers*, 75 M.J. 270 (C.A.A.F. 2016) - An uncorrected panel member's erroneous belief that too drunk to remember equals incapable of consent constitutes panel member bias.

2. *United States v. Hines*, 20131049 (A. Ct. Crim. App. Jul. 24, 2016) – Like *US v. Rogers*, a panel member held an erroneous belief about the law surrounding consent to sexual acts. However, the facts were distinguished and the court noted five factors to consider when evaluating the totality of the circumstances in cases where the military judge has denied an implied bias challenge for cause based on a member's erroneous view of the law: 1. Did the Government cause or endorse erroneous view?; 2. Is the misunderstanding a fundamental principle of law or technical legal misunderstanding?; 3. Is erroneous view strongly held?; 4. Was erroneous view corrected?; 5. Importance of legal issue to case.

3. *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018) - Gender was improperly used as a criteria for selection of the members of the court-martial. Four out of the seven panel members were victim advocates, and the reversal of the conviction and dismissal of the charges was found to be an appropriate remedy for panel "tampering" or selection of panel members outside of the Article 25, UCMJ criteria.

VII. OFFICE OF THE STAFF JUDGE ADVOCATE (OSJA) VICTIM/WITNESS ASSISTANCE PROGRAM (VWAP)

A. Objectives (AR 27-10, paras. 17-4, 17-6 (11 May 2016))

1. Mitigate the physical, psychological and financial hardships suffered by victims and witnesses of offenses investigated by Department of the Army authorities and foster full cooperation of victims and witnesses within the military criminal justice system.

2. Encourage development and strengthening of victim and witness services, consolidate information pertaining to victim and witness services, coordinate multidisciplinary victim/witness services by and through victim witness liaisons (VWLs).

B. Definitions (AR 27-10, para. 17-5 (11 May 2016))

1. Victim: a person who has suffered direct physical, emotional or pecuniary harm as the result of a commission of a crime in violation of the UCMJ (or in violation of the law of another jurisdiction if any portion of the investigation is conducted primarily by the DoD components), **including but not limited to**:

a) Military members and their family members;

b) When stationed OCONUS, DoD civilian employees and contractors, and their family members;

c) Institutional entity's representative (federal, state and local agencies are not eligible for services available to individual victims);

d) Victim under age 18, incompetent, incapacitated, or deceased (in order of preference): a spouse, legal guardian, parent, child, sibling, other family member, or court designated person; and

e) Includes victims identified as a result of investigations of potential UCMJ violations conducted under the provisions of AR 15-6.

2. Witness: person who has information or evidence about a crime, and provides that knowledge to a DoD component about an offense within the component's investigative jurisdiction. If witness is a minor, includes a family member of legal guardian. BUT not a defense witness, perpetrator or accomplice.

C. Victim Witness Liaison (VWL)

1. SJA designates in writing.

2. Guides victims and witnesses through the trial process. Provides services to all victims as a facilitator and coordinator for services, benefits (including transitional compensation) and possibly travel. Provides services to witnesses, sometimes experts, as a facilitator and coordinator for services, benefits and possibly travel. Maintains relationship with the local confinement facility and helps coordinate confinement.

3. Ensures victims are notified of their rights and complete DD Forms 2701-2706.

4. The VWL must be perceived as impartial actors in the prosecution process and may work in any department of the JAG office. The VWL is not part of the prosecution team.

5. The VWL is not a victim advocate. There is no privilege between the VWL and the victim/witness, and communications are not confidential.

D. Special Victim Witness Liaison (SVWL)

1. The Trial Counsel Assistance Program (TCAP) hires specially trained SVWLs to work with Special Victim Prosecutors (SVP) in the field and serve as the VWL in special cases. The SVWL's primary duty is to support victims and witnesses in cases of domestic violence, sexual assault (including Article 120, 120b, and Article 125, UCMJ), and child abuse/molestation. Ideally, the SVWL is present during all phases of the court-martial to ensure the victim understands to the process, and is informed of their rights and resources, and may act as the primary POC for information and updates in special cases.

2. The most important difference between the VWL and the SVWL is that the SVWL works directly for the SVP and is part of the prosecution team. The SVWL's notes are not discoverable as they are considered attorney work-product.

3. The SVWL may or may not provide services to government witnesses/experts, as a facilitator and coordinator for services, benefits and possibly travel. Will not provide services to defense witnesses.

4. Ensures victims are notified of their rights and complete DD Forms 2701-2706 and coordinate as a facilitator for services, benefits and possibly travel. Works with the OSJA VWL as a team.

5. The SVWL is not a victim advocate. There is no privilege between the VWL and the victim/witness, and communications are not confidential.

6. Use of the SVWL varies by installation. The position description for the SVWL is purposefully broad and the SVP, SVWL and OSJA should tailor the duties of the SVWL to support the special victim needs and caseload of the individual installation.

E. SJA Responsibilities

1. SJA's are designated as the "local responsible official" and have the following responsibilities:

a) Establish and supervise Victim/Witness Assistance Program (VWAP) within their GCM jurisdiction. Ensure establishment of local policies and procedures to afford crime victims' Article 6b rights.

b) Establish a Victim and Witness Assistance Council to extent practicable, at "each significant military installation," to ensure interdisciplinary cooperation.

c) Designate, in writing, Victim/Witness Liaison (VWL).

(1) Preference for a commissioned or warrant officer or civilian (GS-11 and above).

(2) Exceptional circumstances allow SSG or GS-6 and above.

(3) VWL's should be outside the military justice section "to the extent permitted by resources."

(4) To the extent resources permit, SJA's "should refrain from appointing attorneys as VWL's." If an attorney is appointed, the attorney must explain that there is no attorney-client relationship formed as a result of providing VWL services.

2. ENSURE COMMUNICATION WITH THE VICTIM. Victims have a right to be informed at the earliest opportunity of significant events in the status of the case, and every 30 days following proffer of charges. Keeping victims informed is a requirement of the victim's bill of rights and is good practice to maintain a cooperative relationship.

3. Ensure Law Enforcement Agencies (LEA) inform victims and witnesses of VWL's name, location and phone number.

4. TRAINING! Must ensure annual training is provided to all agencies involved in program. At a minimum, training will cover victims' rights; available compensation through federal, state, and local agencies, providers' responsibilities under the VWAP program, and requirements and procedures of AR 27-10, Chapter 17.

5. Ensure DoD Victim and Witness Bill of Rights/ Article 6b Rights are posted in office of commanders and agencies providing victim and witness assistance.

6. Establish separate waiting areas at courts-martial and other investigative proceedings. "In a deployed environment, victims and Government witnesses should be afforded a separate waiting area to the greatest extent practicable."

7. Ensure victims and witnesses are advised that their interests are protected by administrative and criminal sanctions, i.e. obstruction of justice charges, etc., and that victims and witnesses

should promptly report any attempted intimidation, harassment, or other tampering to military authorities.

8. Ensure appropriate law enforcement agencies are immediately notified in case where the life, well-being, or safety of a victim or witness is jeopardized by his or her participation in the criminal investigation or prosecution process.

9. Ensure victim's and witness' requests for investigative reports or other documents are processed under FOIA or Privacy Act.

10. Ensure DD Forms are distributed/completed.

11. Coordinate with criminal investigative agents to ensure all noncontraband property seized as evidence is safeguarded and returned; ensure victims are informed of applicable procedures for requesting return of property.

F. DD and DA Forms (download at http://www.apd.army.mil/)

1. DD Form 2701, Initial Information for Victims and Witnesses of Crime.

2. DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime.

3. DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime.

4. DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status.

5. DD Form 2705, Victim/Witness Notification of Confinee Status.

6. DD Form 2706, Annual Report on Victim and Witness Assistance.

7. DA Form 7568, Army Victim/Witness Liaison Program Evaluation.

G. Responsibilities (VWL, trial counsel, or other government representative).

1. VWL (recommended).

a) As soon as possible, but NLT appointment of Art. 32 Preliminary Hearing Officer or referral of charges, ensure victims and witnesses have been provided DD Form 2701 (Initial Information for Victims and Witnesses of Crime).

b) Provide DD Form 2702.

c) Inform victim of the place where the victim may receive emergency medical care and social service support.

d) Inform victims of where they can obtain financial, legal, and other support, including right to file Article 139 claim and right to transitional compensation, if applicable.

e) During investigation and prosecution of crime, will provide victims the earliest possible notice of significant events in the case, to include:

(1) Status of investigation of crime, with limits.

(2) Apprehension of suspected offender.

(3) Decision to prefer or dismiss charges.

(4) Initial appearance of suspect before pretrial confinement hearing or at Article 32, UCMJ investigation.

(5) Scheduling of each court proceeding victim is required or entitled to attend.

(6) Detention or release from detention of offender or suspected offender.

(7) Acceptance of plea of guilty or other verdict.

(8) Result of trial.

(9) If sentenced to confinement, probable parole date.

(10) General information regarding corrections process.

(11) Opportunity to consult with trial counsel concerning evidence in aggravation.

(12) How to submit victim impact statement to Army Clemency and Parole Board.

(13) The VWL will "make reasonable efforts to notify witnesses and representatives of witnesses, when applicable and at the earliest opportunity" of numbers one through ten above.

f) Advise victims and witnesses of protections from intimidation. See Military Protective Order, Section V and Appendix, below.

g) Act as intermediary between victims and witnesses, when requested, to arrange interviews by defense or government.

(1) Advise victims on property return and restitution.

(2) Notification of victims' and witness' employers and creditors.

(3) Witness fees and costs.

h) During trial and investigative proceedings, provide to victims and witnesses:

(1) Assistance in obtaining child care.

(2) Transportation/parking.

(3) Lodging.

(4) Separate waiting area outside presence of accused and defense witnesses.

(5) Translators/interpreters

i) Upon sentence to confinement provide victims (and witnesses "adversely affected by the offender"):

(1) General information regarding post-trial procedures (DD Form 2703).

(2) Prepare DD Form 2704. Victims and witnesses elect whether they want notification of changes in inmate status. Ensure copy forwarded to confinement facility and ensure offender does not have access to copy of information.

2. Trial counsel.

a) Consult victims concerning:

(1) Decision not to prefer charges;

(2) Decisions concerning pretrial restraint or release;

(3) Pretrial dismissal of charges; and

(4) Negotiations of pretrial agreements and their potential terms.

Note: Victim does not have veto power over command's decision on these matters; view is considered, not controlling.

b) Establish separate waiting areas at courts-martial and other investigative proceedings.

c) In coordination with SJA and CMCA, consider making restitution a term and condition of pretrial agreements. Also consider whether restitution was made when action is taken.

3. Commander, Confinement Facility.

a) Upon entry into confinement facility commander ensures receipt of DD Form 2704 and determines whether victim and/or witness requested notification of changes in confinement status. If victim and/or witness so indicated, commander will advise of:

(1) Offender's place of confinement and minimum release date.

(2) Earliest possible notice of:

(a) Clemency/parole hearing dates.

(b) Transfer of inmate to another facility.

(c) Escape, recapture, or other form of release from confinement.

(d) Release from supervised parole.

(e) Death of inmate.

b) Forward DD Form 2704 if inmate is transferred.

c) Protect against disclosure to inmate of victim and witness addresses.

d) Reporting requirements as set forth below.

H. Reporting Requirements.

1. For each calendar year (CY), not later than 15 February of each year, SJA of each command having GCM jurisdiction must report the number of persons who received DD Form 2701, 2702 or 2703 from trial counsel, Victim Witness Liaison (VWL) or designee

a) SJA will obtain data for their reports from subordinate commands attached or assigned to their GCM jurisdiction for military justice purposes, including RC units.

b) Negative reports are required.

c) Use DD Form 2706.

2. Forward report through MACOM channels to Criminal Law Division, ATTN: DAJA-CL, HQDA, Office of The Judge Advocate General, 1777 North Kent Street, Rosslyn, VA 22209-2194.

I. Other required reports (*Negative reports required*).

1. Military Police channels report the number of:

a) Victims and witnesses who received DD Form 2701 or 2702 from LEA personnel.

b) Victims and witnesses who were informed of their right (via DD Form 2704 or otherwise) to notification of changes in inmate status.

c) Victims and witnesses who were notified using DD Form 2705.

d) Confinees, by service, in Army facilities about whom victim/witness notifications must be made.

2. OTJAG Criminal Law prepares consolidated report for submission to DoD Under Secretary for Personnel and Readiness, Legal Policy Office)

J. Evaluation of Victim/Witness Liaison Program

1. SJAs will ensure that each victim and witness in an incident that is prosecuted at a GCM or SPCM, or investigated pursuant to UCMJ, Art. 32, in those cases not disposed of by GCM or SPCM, receives a victim/witness evaluation form.

a. SJAs will use DA 7568 (Army Victim/Witness Liaison Program Evaluation).

b. Evaluation forms will be reviewed locally by the SJA and copies forwarded quarterly to Criminal Law Division, ATTN: DAJA-CL, ATTN: Victim/Witness Coordinator, Office of The Judge Advocate General, HQDA, 1777 North Kent Street, Rosslyn, VA 22209-2194, by mail or electronically.

K. Anonymous submission requirement for DA 7568 and SJA cover letter.

1. The evaluation form may be provided to victims and witnesses by hand, by mail or otherwise, but must be returned in an anonymous manner. AR 27-10, paragraph 18-28d (11 May 2016) suggests the installation of a drop box away from the military justice section or the provision of a pre-addressed envelope or "other anonymous means of return" to victims and witnesses.

2. The recipients of the evaluation form must be advised that the form will be returned in an anonymous manner and cannot be accepted in any other manner. The evaluation form will be accompanied by a cover letter under the signature of the SJA. The cover letter will thank the victim/witness for assisting the prosecution, and emphasize the need for a response and the anonymous nature of the response.

L. Other Assistance Available to Victims.

1. Installation assistance. VWL will assist victim in contacting agencies or individuals responsible for providing necessary services and relief.

a) Command Chaplain.

b) Family Advocacy Center/Army Community Service.

c) Emergency Relief Funds.

d) Legal Assistance, if appropriate.

e) American Red Cross.

f) If victims are not eligible for military services, or where military services are not available, "the VWL will provide liaison assistance in seeking any available nonmilitary services within the civilian community."

2. Pretrial Agreements - negotiated restitution.

3. Transportation and shipment of household goods. (See JFTR).

4. State and local assistance.

5. Transitional Compensation. 10 U.S.C. § 1059; DoD Instruction 1342.24, Change 1 (16 January 1997); AR 608-1, *Army Community Service*, (22 December 2016).

a) Dependent-abuse offenses resulting in separation of service member from active duty or total forfeiture of all pay and allowances pursuant to court-martial conviction or administrative separation.

(1) Applies to cases on or after 30 November 1993.

(2) Applies to voluntary and involuntary separation proceedings (example: discharge in lieu of trial by court-martial UP Chapter 10, AR 635-200).

(3) Dependent-abuse offenses - conduct by an individual while a member of the armed forces on active duty for a period of more than thirty days that involves abuse of the then-current spouse or dependent child of the member and that is a criminal offense defined by the Uniform Code of Military Justice or other criminal code applicable to the jurisdiction where the act of abuse is committed. Offenses that may qualify as dependent abuse offenses include but are not limited to sexual assault, rape, sodomy, assault, battery, murder, and manslaughter.

(4) Dependent Child. An unmarried child, including an adopted child or stepchild, who was residing with the member at the time of the dependent abuse offense and who is

(a) Under 18 years of age;

(b) Eighteen or older and incapable of self-support because of mental or physical incapacity that existed prior to age 18 and who is dependent on the member for over one-half of the child's support;

(c) 18 or older, but less than 23, and is a college student and who is dependent on the member for over one-half of the child's support.

(5) Unborn Child. An unborn child who was carried during pregnancy when a dependent abuse occurred that resulted in the separation of the Soldier and who was subsequently born alive to the eligible spouse or former spouse is entitled to a dependent share of transitional compensation.

6. Compensation.

a) Duration of payments dependent upon the unserved portion of the member's obligated active duty service (no less than 12 months, but no more than 36 months).

b) Start-date:

(1) Date sentence is adjudged if the sentence, as adjudged, includes a dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances.

(2) If there is a pretrial agreement that provides for disapproval or suspension of a dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances, then start date is the date of the approval of the court-martial sentence if the sentence, as approved, includes an unsuspended dismissal, dishonorable discharge, bad conduct discharge, or forfeiture of all pay and allowances;

(3) If pursuant to administrative separation, the date of initiation of separation proceedings.

c) Amount of compensation increases with each dependent. See 38 U.S.C. § 1311(a)(1).

d) Dependent loses payments if remarries or cohabitates with abuser, or is an active participant in the abuse.

e) Payment stops if administrative separation is disapproved.

f) Payment stops if dismissal, dishonorable discharge, of bad-conduct discharge is remitted, set aside, or mitigated to a lesser punishment that does not include any such punishment.

g) Application for transitional compensation: individual submits request through military service of member.

h) Requires annual certification of entitlement to funds by spouse and dependent children.

i) Payment is from Operation and Maintenance Funds. Defense Finance and Accounting Service issues the payments, and administrative oversight of the funds (approval of payments and such) is through the Community and Family Support Center (CFSC), a DA level organization.

7. Other benefits –

a) Commissary and exchange privileges for length of time eligible for transitional compensation;

b) Medical and dental care for up to one year for injuries related to dependent abuse offense(s). Applies to dependents of a member separated due to dependent abuse offense (includes discharge as result of conviction as well as administrative separation).

c) Commanders should ensure that when a Soldier is separated as a result of a dependent-abuse offense that the victim and the offense are clearly specified in the separation action to document the basis for this entitlement (see AR 608-1, app H)

M. Deferral and waiver of forfeitures.

1. Deferral.

a) Accused may request, in writing, deferment of forfeitures. RCM 1101(c)(2).

b) Accused burden to show "the interests of the accused and the community in deferral outweigh the community's interest in imposition of the punishment on its effective date [e.g., forfeitures]." RCM 1101(c)(3).

c) Applies to adjudged forfeitures (Article 57(a)(2), UCMJ; RCM 1101(c)) AND automatic forfeitures (Article 58b(a)(1), UCMJ)). *United States v. Lundy*, 60 M.J. 52 (C.A.A.F. 2004); *United States v. Adney*, 61 M.J. 554 (A. Ct. Crim. App. 2005).

2. Waiver of forfeitures.

a) Accused may request waiver of automatic forfeitures (Article 58b, UCMJ) or the CA may waive *sua sponte*. Request does not have to be made by accused; may be made by dependents or someone (VWL) on behalf of dependents.

b) The accused's request should be in writing.

c) Waiver is allowed for a period not to exceed six months and is for the purpose of providing support to the accused's dependents, as defined in 37 U.S.C. § 401.

d) Factors CA may consider include: "the length of the accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. 1059." RCM 1101(d)(2).

e) Waiver of forfeitures is authorized as soon as they become effective; need not wait until action.

VIII. SPECIAL VICTIMS' COUNSEL (SVC) PROGRAM

A. Generally. The Special Victims' Counsel (SVC) program was codified in 10 U.S.C. § 1044e, pursuant to the 2014 National Defense Authorization Act (NDAA) section 1716 "Special Victims' Counsel for victims of sex-related offenses." The program provides victims of sex related offenses legal counsel to advise and represent the victim through the court-martial process.

B. Scope of Representation. Army SVCs are legal assistance attorneys who receive specialized training and are certified by TJAG to represent victims of certain sex related offenses.

1. Sex related offenses include any offense under Article 120, Article 120a, Article 120b, Article 120c, or an attempt under Article 80, UCMJ.

2. Primary responsibility is to provide zealous representation to their clients throughout the full spectrum of the military justice process.

a) Represent best interests of their client even when interests do not align with the Government.

b) Empower client by fostering victim's understanding of the military justice and administrative processes of investigation and courts-martial.

c) Represent victims who file both Unrestricted and Restricted Reports.

3. Duration of representation: From initial investigation to convening authority action.

a) Convening authority action includes no action.

b) At a court-martial, final convening authority action on the sentence is considered "initial action" post submission of clemency matters.

4. An SVC may provide the following services (10 USC §1044e)

a) Legal consultation regarding potential criminal liability of the victim stemming from, or in relation to the circumstances surrounding the alleged sex-assault offense and the victim's right to seek trial defense service (TDS) counsel.

b) Legal consultation regarding the VWAP program, the rights and benefits afforded to the victim, the role of the VWAP liaison and what privileges do or do not exist. A distinction between the privilege held by an attorney or advocate must be explained in relation to the lack of privilege held by the VWL/ SVWL.

c) Legal consultation regarding the responsibilities and support provided to the victim by the SARC, SHARP VA or domestic abuse advocate (FAP VA) to include any privileges that may exist regarding communications.

d) Legal consultation regarding third-party litigation (against parties other than the United States).

e) Legal consultation regarding the military justice system, including but not limited to:

(1) Roles and responsibilities of the parties/investigators.

(2) Military justice proceedings.

(3) Government's authority to compel cooperation and testimony.

(4) Victim's responsibility to testify and other duties to the court.

f) Representing the victim at any proceeding in connection with reporting, investigation and prosecution.

g) Legal consultation regarding eligibility and requirements for services available from appropriate agencies or offices for emotional and mental health counseling and other medical services.

h) Legal consultation and assistance:

(1) In personal civil legal matters (Note that an SVC shall not represent a victim in any civilian proceeding but may provide assistance in accordance with AR 27-3);

(2) In any proceedings of the military justice and administrative process in which a victim can participate as a witness or other party;

(3) In understanding the availability of, and obtaining any protections offered by, civilian and military protection or restraining orders; and

(4) In understanding the eligibility and requirements for, and obtaining, any available military and veteran benefits, such as transitional compensation benefits and other State and Federal victims' compensation programs.

(5) In all cases in which the victim reports allegations of professional or social retaliation, the SVC will work with local stakeholders to address the retaliation. The SVC will also record the allegations in CIS in a narrative format detailing the nature of the allegation and the disposition or resolution.

i) Legal consultation and assistance in connection with:

(1) Any complaint against the government including any allegation under review by the Inspector General and a complaint regarding equal employment opportunities.

(2) Any request to the government for information, including a request under 5 U.S.C. § 552a, Freedom of Information Act (FOIA) request.

(3) Any correspondence and other communications with Congress.

(4) Such other legal assistance as the Secretary of Defense may authorize in regulations proscribed.

j) In those instances where the victim has a Medical Evaluation Board (MEB) or Physical Disability Evaluation Board (PEB) pending, the Soldiers' MEB or PEB counsel or other appropriate representative is primarily responsible for advising and representing the victim on these matters.

C. Eligibility

1. All active duty Army Soldiers who report they are a victim of a sex related offense are eligible for SVC representation.

a) Soldiers who are on active duty, but were victims of sexual assault prior to enlistment or commissioning are generally not eligible for SVC representation but may be eligible for legal assistance.

b) Soldiers who report they are a victim of sex offenses under State and Federal laws are also eligible for limited SVC assistance.

c) Victims assaulted by foreign military members may be entitled to appointment of a local counsel from the host country, paid for by the victim's unit.

2. Eligibility for Reserve Component (RC) Soldiers

a) Regardless of duty status, RC Soldiers are eligible for SVC representation if the circumstances of the alleged sex-related offense have a nexus to the military service of the victim.

b) While the victim may receive SVC representation, to assure continuity of medical and mental health care services, the command should complete a Line of Duty (LOD) Investigation. Commanders can assist the NG or RC member in requesting contractual active duty status (or be brought onto active duty status) to complete an LOD in order to assure continuity of healthcare.

3. Eligibility for Dependents and Other Victims (10 U.S.C. Section 1072)

a) Dependents who report they are victims of a Servicemember are eligible for SVC representation.

b) Former dependents will be eligible if they were entitled to legal assistance at the time of the offense.

c) All remaining categories of individuals eligible for legal assistance under AR 27-3 or 10 USC 1044 are eligible for SVC representation.

d) Dependent children (under 18 years of age) are also eligible for representation.

4. Eligibility for Members of Other Services

a) The service of the victim dictates the service of the SVC.

b) An Army SVC must get approval to represent a victim from another service, and the victim's service must decline representation

5. Eligibility for Department of Defense Civilian Employees

a) A civilian employee who is not eligible for military legal assistance, is eligible for SVC representation. (see Army Directive 2017-16).

D. Victim Notification of Right to an SVC

1. The first responsible party to make contact with a victim, to include the SHARP VA, SARC, FAP, criminal investigator, VWL, or TC, will inform eligible victims of their right to an SVC (see 10 U.S.C. 1565b).

2. The victim may decline representation. However, an initial declination of SVC services does not permanently waive the right to an SVC. An SVC may be requested at any time throughout the military justice process.

E. Representation Through Military Justice Process

1. If victim has filed an unrestricted report and has retained an SVC, the SVC will serve the SJA, Chief of Military Justice, SDC, CID, the VWL and the SARC/VA/FAP with a notice of representation.

2. The SVC should attend interviews of the victim by the investigators, TC and DC and should ensure that another individual (paralegal or VWL) is present. Requests by defense counsel to interview the victim must be made through the SVC.

3. The SVC will make regular contact with counsel for the parties to make sure that the victim receives all due notifications and documents upon preferral of charges and upon filing. (See infra. Sections II, III, V)

4. After preferral of charges, the TC will ensure the SVC's information is included on the Electronic Docket Request (EDR).

5. SVCs have limited standing to represent victims before Army courts and shall follow all Rules of Court to the same extent as the parties. According to the SVC Handbook, a victim of a sex assault has a right to be heard through counsel on issues implicating MRE 412 (rape shield), MRE 513 (psychiatrist-patient privilege), MRE 514 (victim advocate-victim privilege), MRE 615 (exclusion of victim from trial) and any other matter where the client's interest or rights are at stake.

a) The right to be heard through counsel is affirmed in the language of MRE 412 (rape shield), MRE 513 (psychiatrist-patient privilege), and MRE 514 (victim advocate-victim privilege). Because a ruling on MRE 615 and any other matter where the client's rights are at stake can be the subject of a writ of mandamus, it is assumed that the victim retains the right to be heard through counsel on those issues.

b) Article 6b grants all crime victims the right to be reasonably heard at a public hearing concerning the continuation of confinement prior to trial of the accused, a sentencing hearing relating to the offense and a public proceeding of the service clemency and parole board relating to the offense.

c) *LRM v. Kastenberg* (see infra Section II) articulated when a victim retains the right to be heard through counsel. Even though victims are not a party to the litigation, they are not precluded from asserting standing to contest a ruling on a held privilege, as the court stated "a reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel."

IX. DOMESTIC ABUSE AND THE FAMILY ADVOCACY PROGRAM

A. Department of Defense Instruction (DoDI) 6400.06 (Domestic Abuse Involving DoD military and Certain Affiliated Personnel) defines "domestic abuse" as domestic violence, or a pattern of behavior resulting in emotional/psychological abuse, economic control, and/or interference with personal liberty that is directed to a person who is: a current or former spouse; a person with whom the abuser shares a child in common, or a current or former intimate partner with whom the abuser shares or has shared a common domicile.

B. Department of Defense (DoD) Policy. "Domestic violence is an "offense against the institutional values of the Military Services of the United States of America." Leaders at all levels within the DoD must "take appropriate steps to prevent domestic violence, protect victims, and hold those who commit it accountable."

1. Like the Sexual Assault Prevention and Response Program, the domestic violence policy does not create any actionable rights for the alleged offender or the victim, nor constitute a grant of immunity for any actionable conduct by the alleged offender or victim, nor does it create any form of evidentiary or testimonial privilege.

C. Domestic abuse is a pervasive problem, not only in society, but also in the military.

1. In the ten-year period from FY 01-13, the military averaged 12.04 substantiated incidents of spousal abuse per 1000 couples. *See* Department of Defense Family Advocacy Program, *Department of Defense Family Advocacy Program Fiscal Year 2013 Data*, available at http://www.ncdsv.org/images/DoD_ChildAbuseAndDomesticAbuseDataTrendsFY2001-2013_5-20-2014.pdf (last visited 30 October 2018). Abuse includes acts of physical violence and/or

sexual violence and/or emotional abuse. Overall, incidents of abuse experienced a significant downward trend: 16.5 substantiated incidents of spousal abuse per 1000 couples in FY 01 compared to 11.1 in FY 13. Also in the same time period, FY01-13, the military averaged 5.85 substantiated incidents of child abuse per 1000. These rates were fairly constant throughout the ten-year period.

2. Data from FY 08-17 on spouse abuse include only those incidents involving currently married individuals. Either the victim or the offender may have been an active duty Service member or the civilian spouse of an active duty Service member. In FY17, the rate of reported spouse abuse per 1,000 couples was 24.5, which is an increase of 5 percent compared to the rate in FY16 (23.4). However, this is just the reporting rate. In FY17, the unduplicated rate of victims of spouse abuse was 9.1 per 1,000 couples, which is actually a decrease of 5 percent from the FY16 rate (9.3). The DoD is also collecting statistics on intimate partner abuse, which was added to capture incidents involving (1) a former spouse, (2) a person with whom the victim shares a child in common, or (3) a current or former intimate partner with whom the victim shares or has shared a common domicile. In such cases, the victim or the offender may have been an active duty Service member or civilian.

D. Army policy for domestic abuse.

1. Army Regulation 608-18, The Army Family Advocacy Program (RAR 13 September 2011), establishes Army policy for handling domestic violence issues.

2. DA takes a cooperative approach with local communities to:

a) Identify, Report and Investigate child and spouse abuse cases;

b) Protect abused victims from further abuse in both emergency and nonemergency situations; and

c) Provide services and treatment to Families in which child abuse has occurred.

E. Responsibilities.

1. At DA level, the Assistant Chief of Staff for Installation Management (ACSIM) has responsibility for the Family Advocacy Program.

2. The Commander, U.S. Army Community and Family Support Center develops policy and programs.

3. Installation Commanders:

a) Establish programs for preventing, reporting, and treating spouse and child abuse as per AR 608-18 (13 Sept 2011). http://www.apd.army.mil/pdffiles/r608_18.pdf

b) Appoint an installation Family Advocacy Program (FAP) Manager on orders to manage the program and ensure compliance with regulation.

c) Review and approve FAP funding.

d) Submit consolidated FAP budget requirements through MACOM for forwarding to Community and Family Support (CFSC).

e) Designate a reporting point of contact (RPOC) and ensure a 24-hour emergency response system.

f) Establish mandatory counseling and educational programs under the FAP for Soldiers involved in substantiated abuse.

g) Establish voluntary educational and counseling programs and encourage maximum participation.

h) Consider Case Review Committee (CRC) recommendations when taking or recommending disciplinary or administrative actions on Soldiers or civilians involved in abuse.

i) Direct development of a Memorandum of Agreement (MOA) with Child Protective Services (CPS) and other civilian agencies adjoining Army installations.

j) Appoint members of the CRC, the Family Advocacy Committee (FAC), and the Fatality Review Committee (FRC) by written order and name for a minimum 1-year appointment.

k) Review CRC and FAC minutes and FRC recommendations.

l) Establish training to ensure that all subordinate commanders and senior enlisted advisers (E-7 to E-9) are briefed on FAP within 45 days of assuming command, and annually thereafter.

4. Unit Commanders:

a) Attend spouse and child abuse commander education programs designed for unit commanders.

b) Schedule time for Soldiers to attend troop awareness briefings.

c) Be familiar with rehabilitative, administrative, and disciplinary procedures relating to abuse.

d) Report and investigate suspected abuse to RPOC.

e) Direct Soldier to participate in FAP assessment.

f) Attend Case Review Committee (CRC) presentations when unit Soldiers involved.

g) Encourage Soldier cooperation in Family Advocacy Programs (also ensuring that Soldiers are properly advised of Article 31 rights).

h) Provide written no-contact orders, as appropriate; counsel Soldiers; and take other actions, as appropriate, regarding compliance with civilian orders of protection.

i) Support and comply with CRC recommendations to maximum extent possible.

j) Consider CRC recommendations before taking administrative or disciplinary action.

k) Notify CRC chairperson when reassigning Soldiers or moving family members who are involved in treatment for abuse.

l) Encourage participation of civilian family members in treatment programs.

m) Be aware of Lautenberg Amendment issues.

F. The Family Advocacy Program

1. Army policy is to prevent spouse and child abuse, to protect those who are victims of abuse, to treat those affected by abuse, and to ensure personnel are professionally trained to intervene in abuse cases. Commanders have authority to take appropriate disciplinary or administrative action, and the FAP will promote public awareness within the military community and coordinate professional intervention at all levels within the civilian and military communities, including law enforcement, social services, health services, and legal services.

2. The FAP is designed to break the cycle of abuse by identifying abuse as early as possible and providing treatment for affected Family members. Key players and responsibilities include:

a) FAP Manager (FAPM) - works for the director of Army Community Services on-post. The FAPM has numerous responsibilities, among them:

(1) Coordinates all FAP efforts to ensure compliance with regulation.

(2) Ensures that all abuse reports from ACS are forwarded to the RPOC.

(3) Central installation POC for all FAP briefing or training requests.

(4) Supervises ACS prevention staff.

(5) Provides liaison with civilian and military service providers. Has lead responsibility for developing and coordinating an installation MOA.

(6) Assesses the special FAP needs of military families on installation and in surrounding communities.

(7) Identifies prevention and treatment resources and submits budget requests.

(8) Develops training programs, provides statistical reports.

b) The Family Advocacy Committee (FAC):

(1) The FAC is the multidisciplinary team that advises installation commander on FAP policy and procedure.

(2) The FAC is chaired by the garrison or base support battalion commander or designee.

(3)`The FAC is composed of the following members:

(a) FAPM

(b) Chief, SWS/CRC chairperson

(c) Pediatrician or other MD

(d) Community Health Nurse (ad hoc)

(e) DENTAC commander or representative

(f) Provost Marshall or senior representative

(g) CID representative.

(h) SJA or representatives (CRC representative and the victim/witness coordinator)

(i) ASAP clinical director or senior representative

(j) Child and Youth Services coordinator

(k) Installation Chaplain or representative

(l) Installation Command Sergeant Major

(m) Public Affairs Officer

(n) Consultants (e.g. school liaison officers, child protective services, and local court representative).

(4) The FAC meets at least quarterly.

(5) The FAC identifies trends requiring a command or community response, coordinates civilian and military resources, facilitates an integrated community approach to the prevention of child and spouse abuse, develops community, command and troop education prevention programs, publicizes how to report abuse, and addresses administrative details.

c) Case Review Committee (CRC):

1) The CRC is a multidisciplinary team appointed on orders by the installation commander and supervised by the medical treatment facility (MTF) commander.

2) The CRC is ordinarily chaired by the Chief, Social Work Services.

3) The unit commander exercising UCMJ authority over the alleged abusers will be invited to attend when the case involves one of his/her personnel.

4) The CRC tracks and evaluates cases of reported abuse.

(a) The CRC should determine if the cases are substantiated or unsubstantiated.

(b) The standard of review is a preponderance of the evidence.

(c) A majority of the CRC members present must vote to substantiate.

5) The CRC meets monthly; each case is reviewed at least quarterly.

6) The CRC determines whether civilian courts should intervene.

7) The CRC determines whether to recommend removal of children from home.

8) The CRC recommends corrective measures.

9) The CRC briefs the commander on status of case.

10) CRC recommendations, such as treatment, foster care, etc., do not preclude criminal or adverse administrative action against a Soldier.

G. Reporting Options and requirements

1. Restricted Reporting Policy for Incidents of Domestic Abuse

a) The DoD is committed to ensuring victims of domestic abuse are protected, treated with dignity and respect, and provided support, advocacy, and care. DoD policy also strongly supports effective command awareness and prevention programs and law enforcement and criminal justice activities that will maximize accountability and prosecution of perpetrators of domestic abuse. To achieve these dual objectives, the DoD policy prefers that personnel report suspected domestic abuse incidents promptly to activate both victims' services and accountability actions. However, a requirement that all domestic abuse incidents be reported can represent a barrier for victims hoping to gain access to medical and victim advocacy services without command or law enforcement involvement.

b) In order to address these competing interests, the Department of Defense issued an instruction, DoD Instruction 6400.06 providing victims of domestic violence two reporting options: unrestricted reporting and restricted reporting. Also see Army Regulation 190-45, para. 4-15 for Military Police procedures for restricted and unrestricted reporting of domestic violence incidents.

1) Unrestricted Reporting**.** Victims of domestic abuse who want to pursue an official investigation of an incident should use current reporting channels, e.g., chain of command, Family Advocacy Program (FAP), or law enforcement. Upon notification of a

reported domestic abuse incident, victim advocacy services and FAP clinical services will be offered to the victim. Additionally, at the victim's discretion/request, the healthcare provider shall conduct any forensic medical examination deemed appropriate. Details regarding this incident will be limited to only those personnel who have a legitimate need to know.

2) Restricted Reporting**.** In cases where an adult victim elects restricted reporting, the victim advocate and healthcare providers may not disclose covered communications (defined in the policy memorandum) to either the victim's or offender's commander or to law enforcement either within or outside DoD, except as provided by exceptions within the policy memorandum.

(a) Restricted reports must be made to one of the following individuals:

(1) Victim advocate;

(2) Healthcare provider (defined in the policy memo);

(3) Supervisor of victim advocate.

(b) Exceptions to Confidentiality. In cases in which victims elect restricted reporting, the prohibition on disclosing covered communications is waived to the following persons when disclosure would be for the following reasons:

(1) Named individuals when disclosure is authorized by the victim in writing.

(2) Command officials and law enforcement when necessary to prevent or lessen a serious and imminent threat to the health or safety of the victim or another person.

(3) FAP and any other agencies authorized by law to receive reports of child abuse or neglect when, as a result of the victim's disclosure, the victim advocate or healthcare provider has a reasonable belief that child abuse has also occurred. However, disclosure will be limited only to information related to the child abuse.

(4) Disability Retirement Boards and officials when disclosure by a healthcare provider is required for fitness for duty for disability retirement determinations, limited to only that information which is necessary to process the disability retirement determination.

(5) Supervisors of the victim advocate or healthcare provider when disclosure is required for the supervision of direct victim treatment or services.

(6) Military or civilian courts of competent jurisdiction when a military, Federal, or State judge issues a subpoena for the covered communications to be presented to the court or to other officials or when required by Federal or State statute or applicable U.S. international agreement.

(7) Other officials or entities when required by Federal or State statute or applicable U.S. international agreement.

H. Reporting Requirements.

1. Report Point of Contact (RPOC). AR 608-18, Para. 3-3:

a) Designated by installation commander as a central POC.

b) Normally the MTF emergency room or MP Desk.

c) Manned 24 hours.

d) Publicly disseminate on an "ongoing basis."

2. Who must report suspected abuse?

a) All Soldiers, civilian employees and members of military community should be encouraged to report known or suspected cases.

b) Law enforcement, medical, social work and school personnel, Family Advocacy personnel, Child Youth Services personnel, and psychologists must report.

c) Commanders must report.

3. Commanders will report allegations of abuse involving their Soldiers to the RPOC.

I. Records of Reported Abuse.

1. The US Medical Command, Fort Sam Houston, maintains an Army-wide, centralized data bank containing a confidential index of victim-based reported spouse and child abuse cases – Army Central Registry (ACR). Used to assist in the early identification, verification, and retrieval of reported cases of spouse and child abuse.

2. Must be substantiated spouse and child abuse.

a) The standard used by the Case Review Committee – a preponderance of the evidence available indicates abuse occurred.

b) Distinguish the standard used by CID in titling decisions: credible information exists that a crime was committed and this person did it.

3. CRC chairperson will initially notify the unit commander within 24 hours after receiving any report of spouse or child abuse.

J. Protecting alleged victims

1. Removal of Children from Home.

a. Medical Protective Custody AR 608-18, para. 3-20. If the child is properly at the MTF, child may be taken into medical protective custody as follows:

1) Obtain parental consent, if possible.

2) If consent is not given, ask whether the child suffers from abuse or neglect by a parent to the extent that immediate removal from the home is necessary to avoid imminent danger to the child's life or health.

3) The treating physician makes the initial determination.

4) Approved by MTF commander.

5) Unit commander will be notified.

b. Children cannot be removed from a home, school or child care facility unless a bona fide medical emergency exists. Coordination with civilian authorities may be appropriate.

c. Foster Care.

(1) Generally, need parental consent or order from state or foreign court with jurisdiction.

(2) U.S. - seek court order and work with the local child protection service even if parental consent is given.

(3) Foreign Country - Coordinate with host nation authorities.

d. Emergency situations. The installation commander may authorize if abuse is substantiated and child at risk of imminent death or serious bodily harm, or serious mental or physical abuse.

K. Military Protective Orders (MPOs).

1. In unrestricted reporting cases, commanders *shall* execute the following procedures regarding MPOs DoDI 6495.02 (28 March 2013):

2. Require the SARC or the SHARP VA must inform sexual assault victims protected by an MPO, of the option to request transfer from the assigned command.

3. Notify the appropriate civilian authorities of the MPO.

4. Place the MPO in the National Crime Information Center (NCIC).

5. Advise the person seeking the MPO that the MPO is not enforceable by civilian authorities off base.

6. Complete DD Form 2873, "Military Protective Order (MPO)" and provide to the victim(s) and the alleged offender(s).

7. Definitions:

a) Domestic violence: An offense under the US Code, the UCMJ, or state law that involves the use, attempted use, or threatened use of force or violence against a person of the opposite sex, or a violation of a lawful order issued for the protection of a person of the opposite sex, who is:

1) A current or former spouse;

2) A person with whom the abuser shares a child in common; or

3) A current or former intimate partner with whom the abuser shares or has shared a common domicile.

b) Child Abuse: The physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child. It does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

8. Commanders will:

a) Issue MPOs when necessary to safeguard victims, quell disturbances, and maintain good order and discipline while victims have time to pursue issuance or enforcement of protective orders through the civilian courts.

b) Use DD Form 2873 for MPOs.

c) Provide distribution for DD Form 2873 as listed on the form.

9. Issues for commanders to consider:

a) May want to limit SSN and address of victim in Block 2 of the form.

b) Higher commanders may want to establish a level of authority for issuance of MPOs . . . should it be company or battalion level?

Note the comprehensive nature of protections and limitations in the MPO: prohibits all direct and third-party contact, e-mail or telephonic contact; requires mandatory counseling; requires surrender and/or disposal of both government and privately-owned weapons.

L. Lautenberg Amendment

1. Department of Defense Implementation:

a) Memorandum, Assistant Secretary of Defense, Force Management Policy, Subject: Interim DoD Policy on Domestic Violence Amendment to the Gun Control Act (22 Oct 1997).

b) Message, 151100Z Jan 98, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Message on Interim Implementation of Lautenberg Amendment (15 Jan. 1998).

2. Message, 311108Z Oct 97, Headquarters, Dep't of Army, DAJA-LA, subject: Interim Guidance on Lautenberg Amendment Issues (31 Oct. 1997).

3. Message, 211105Z May 99, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Guidance on Deployment Eligibility, Assignment, and Reporting of Solders Affected by the Lautenberg Amendment.

4. Memorandum, Under Secretary of Defense for Personnel and Readiness, Subject: Department of Defense Policy for Implementation of Domestic Violence Misdemeanor Amendment to the Gun Control Act for Military Personnel (27 Nov. 2002).

5. Final DA Implementation: Message, 221927Z October 2004, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Message on Final Implementation of the Lautenberg Amendment to the Gun Control Act of 1968.

6. AR600-20, ch.4-22 (6 November 2014)

7. JAGCNet site for Legal Assistance: https://www.jagcnet2.army.mil/LegalAssistance#

8. Basic Provisions.

a) 18 U.S.C. § 922(d) prohibits the transfer of "any firearm or ammunition to any person whom you know or have reasonable cause to believe . . . has been convicted in any court of a misdemeanor crime of domestic violence."

b) 18 U.S.C. § 922(g) prohibits "any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence . . . to receive any firearm or ammunition which has been shipped in interstate or foreign commerce."

c) Violations of either prohibition are punishable by 10 years confinement, $250,000 fine, or both. 18 U.S.C. § 924(a)(2).

d) 18 U.S.C. § 925 formerly exempted "any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof." This "federal exemption" has been eliminated for individuals "convicted in any court of a misdemeanor crime of domestic violence."

e) What is a "Misdemeanor Crime of Domestic Violence?" 18 U.S.C. § 921(a)(33).

(1) The person was convicted of a crime classified as a misdemeanor in the jurisdiction where the conviction was entered.

(2) The offense had as an *element* the use or attempted use of physical force, or threatened use of a deadly weapon. This is the *only* required element.

(a) *U.S. v. Hayes*, 555 U.S. 415 (2009): in a prosecution for violation of the Gun Control Act, the court held that the *underlying misdemeanor* need only include an element of violence. To obtain the Gun Control conviction, however, the government must also prove beyond a reasonable doubt that the victim of the misdemeanor was a domestic partner.

(b) *U.S. v. Smith*, 56 M.J. 711, 714 (A.F. Court Crim. App. 2001): look behind the misdemeanor violence conviction to find relationship of the victim; *see also U.S. v. Shelton*, 325 F.3d 553, 562 (5th Cor. 2003): the predicate offense need not include an element identifying the defendant/victim relationship.

f) The offender was at the time of the offense:

(1) A current or former spouse, parent or guardian of the victim;

(2) A person with whom the victim shared a child in common;

(3) A person who was cohabiting with or has cohabited with the victim as a spouse, parent or guardian of the victim;

(4) A person who was similarly situated to a spouse, parent, or guardian of victim.

g) The convicted offender was represented by counsel, or knowingly and intelligently waived the right to counsel.

h) If entitled to have the case tried by jury, the case was actually tried by a jury or the person knowingly and intelligently waived the right to have the case tried by a jury.

i) The conviction has not been expunged or set aside, or the convicted offender has not been pardoned for the offense or had civil rights restored, unless the pardon, expungement, or restoration of civil rights provides that the offender may not ship, transport, possess, or receive firearms.

9. Dep't of Defense and Dep't of Army Response.

a) Interpretation.

(1) Conviction of a misdemeanor crime of domestic violence does not include a summary court-martial conviction or nonjudicial punishment under Article 15.

(2) The law does not apply to crew served weapons or major weapons systems (tanks, missiles, aircraft, etc.).

(3) The law applies to all other Army issue and privately owned firearms and ammunition.

(4) The Army policy applies worldwide (including hostile fire areas).

(a) There is no "military exception" to Lautenberg.

(b) Pursuant to the 27 November 2002 DoD Policy Memorandum, felony crimes of domestic violence are now considered qualifying convictions for Lautenberg Amendment purposes.

10. AR 600-20, 4-22:

a) Senior mission commander must:

(1) Ensure immediate implementation of the message.

(2) Display the message outside unit arms rooms and all facilities in which Government firearms or ammunition are stored, issued, disposed, or transformed.

(3) Inform Soldiers that they have an affirmative and continuing obligation to inform their superiors if they have, or later obtain, a qualifying conviction. DD Form 2760 shall be used for this purpose. Soldiers will also be informed of the use immunity provisions of DD Form 2760 (neither the information nor evidence gained from filling out the form can be used in any prosecution against a Soldier for past violations of the Lautenberg Amendment).

(4) Ensure that company-level commanders collect completed DD Form 2760s and file in local MPRF.

(5) Ensure that local pre-command courses inform company-level commanders of their obligations.

(6) Implement procedures to track domestic violence arrests and convictions off-post.

11. Reporting Requirements. All Soldiers with qualifying convictions must be identified and reported to ensure compliance with the law.

12. Commanders who have reasonable cause to believe there is a qualifying conviction should take action to investigate. An investigation may be initiated by ordering a Soldier to complete DD Form 2760.

13. Soldiers who have or believe they have a qualifying conviction should be referred to a legal assistance attorney for advice. Legal assistance attorneys can assist in seeking pardon or expungement of convictions.

14. Soldiers will be given a reasonable time to seek expungement or pardon for a qualifying conviction. Commanders can extend up to one year for that purpose. Factors to consider are in AR600-20, 4-22(8).

15. If a Soldier has a qualifying conviction, or there is reasonable cause to believe he has one, the commander will immediately retrieve all government-issued firearms and ammunition and advise the Soldier to consult with a legal assistance attorney on the lawful disposal or sale of privately-owned firearms or ammunition.

16. Personnel policies.

a) Utilization. Soldiers with qualifying convictions:

(1) Must be detailed to meaningful duties that do not require bearing weapons or ammunition.

(2) May be reassigned to TDA units that deny them access to weapons and ammunition.

(3) May not be appointed or assigned to leadership, supervisory, or property accountability positions that would require access to firearms or ammunition.

(4) May not attend any service school where instruction with firearms or ammunition is part of the curriculum.

(5) Must be counseled that inability to complete service schools could impact future promotion and retention.

b) Mobilization/Deployment. Soldiers with qualifying convictions are not mobilization assets and are nondeployable for missions requiring possession of firearms or ammunition.

c) Assignment.

(1) Lautenberg Soldiers are not eligible for OCONUS assignments.

(2) OCONUS active and AGR Soldiers will complete their tours.

(3) Soldiers will not be curtailed from OCONUS assignments.

(4) For purposes of this message, OCONUS does not include Alaska, Hawaii, or Puerto Rico.

d) Retention.

(1) The Army does not have a specific "Lautenberg Chapter."

(2) Bar to reenlistment

(3) No waivers for enlistment

(4) Commanders may separate Soldiers based on the underlying conduct that led to the qualifying conviction or for the conviction itself.

(5) Soldiers may be temporarily accommodated pending a bar to reenlistment or involuntary separation. Must be assigned ETS not more than 12 months from notice of conviction.

(6) Inability to perform certain missions due to a qualifying conviction may be appropriate comments for evaluation and efficiency reports.

(7) Soldiers will not be given a waiver for enlistment or reenlistment.

(8) Soldiers with qualifying convictions are not eligible for indefinite reenlistment.

(9) Soldiers who have reenlisted for options requiring a CONUS PCS will proceed to new assignment.

(10) OCONUS Soldiers will receive new assignment instructions from HRC.

(11) Soldiers who have reenlisted for retraining in an MOS where instruction includes weapons or ammunition training will be deleted from assignment instructions and may request voluntary separation.

17. Officers. Officers may request REFRAD or submit an unqualified resignation. RC officers not on active duty may submit an unqualified resignation or be recommended for involuntary separation.

18. Reporting Requirements.

a) Active Army. All Soldiers will be identified at nondeployable and added to the nondeployable total under the code 'LA.'

b) Reserve Components. The ARNG Directorate will report for Army National Guard. USARC will report for USAR. IRR, standby reserve, and retired reserve not subject to reporting requirement.

19. USR. Commanders will continue to report non-deployable personnel under this policy on the USR.

M. Prosecuting Domestic Violence

1. On 1 January 2019, pursuant to the 2018 NDAA, the UCMJ will be amended to include a specific punitive article addressing domestic violence.

2. Article 128b: Domestic Violence

a) Any person who—

(1) commits a violent offense against a spouse, an intimate partner, or an immediate family member of that person;

(2) with intent to threaten or intimidate a spouse, an intimate partner, or an immediate family member of that person—

(A) commits an offense under this chapter against any person; or

(B) commits an offense under this chapter against any property, including an animal;

(3) with intent to threaten or intimidate a spouse, an intimate partner, or an immediate family member of that person, violates a protection order;

(4) with intent to commit a violent offense against a spouse, an intimate partner, or an immediate family member of that person, violates a protection order; or

(5) assaults a spouse, an intimate partner, or an immediate family member of that person by strangling or suffocating;

Shall be punished as a court-martial may direct.

3. A conviction for a violent offense against a spouse, intimate partner or immediate family member will result in an increased maximum confinement time for the violent offense.

4. Strangulation and suffocation will also be considered aggravated assaults under Article 128.

APPENDIX A
Commander Must Do Items

1. Ensure victim safety (MPO, safety transfer of victim, etc.)
2. Immediately notify CID
3. Immediately notify SARC
4. Immediately notify higher-level command
5. Notify SJA
6. Notify victim of right to SVC (if not already done)
7. Notify victim in unrestricted report case of right to request expedited transfer
8. Through order to subordinates ensure:
   a. The protection of victim privacy including limiting incident information to personnel with need to know
   b. Personnel are reporting incidents of retaliation
9. Complete Sexual Assault Incident Response Oversight (SAIRO) report within 8 days
10. Battalion Commander conducts initial victim update brief within 14 days of report
11. Updates victim within 3 days of SARB/CMG (at least monthly)
12. Victim's commander attends SARB/CMG
13. Complete DA Form 4833 after final disposition
14. Battalion Commander conducts final victim brief within 45 days after final disposition

The actions in the following list are to be taken in the event of receiving a report of sexual assault. Although the commander has significant leadership responsibility for actions after a report of sexual assault, not necessarily all of the actions listed below will be taken by the commander personally. This list is non-inclusive. Commanders must review AR 600-20, AR 27-10, DoDI 6495.02, the Commander's Legal Handbook, and the SHARP Guidebook along with other pertinent guidance regarding sexual assault to ensure they are aware of all requirements.

Victim's Commander

1. _____Ensure the physical safety of the victim-determine if the alleged offender is still nearby and if the victim needs protection.

2. _____Provide the victim emergency healthcare, regardless of visible injuries, unless the victim declines healthcare. Ensure that sexual assault victims are given priority, and treated as emergency cases.

3. _____Notify CID and commanders in the chain of command (as appropriate) immediately, as soon as the victim's immediate safety is assured, and medical treatment procedures elected by the victim are initiated.

4. _____Ensure the SARC is notified immediately.

5. _____Ensure the victim understands the availability of victim advocacy and the benefits of accepting confidential advocacy and support.

6. _____Inform the victim of the availability of the Special Victim Counsel (SVC), to confidentially explain, among other issues, the military justice process.

7. _____Contact your judge advocate.

8. _____Collect only the necessary information (e.g., victim's identity, location, and time of the incident, name and/or description of offender(s)). DO NOT ASK DETAILED QUESTIONS AND/OR PRESSURE THE VICTIM FOR RESPONSES OR INFORMATION ABOUT THE INCIDENT.

9. _____Ask if the victim needs a support person to immediately join them,

- If the support person is a personal friend or family member, advise the victim this support person could later be called to testify as a witness if the case goes to trial.

10. _____Ask if the victim would like a chaplain to be notified and notify accordingly.

11. _____Make appropriate administrative and logistical coordination for movement of victim to receive care. (Involve minimum number of personnel possible on a need-to-know basis).

12. _____Ensure the victim is made aware of his/her options during each phase of the medical, investigative, and legal processes to include notification of the right to Special Victim Counsel. (Reference AR 600-20, AR 27-10, DoDI 6495.02, DoDI 1030.2)

13. _____Ensure CID notifies victims and witnesses of their rights through a completed Victims and Witnesses of Crime form, DD Form 2701. (Reference AR 27–10).

14. _____Inform the victim of the resources available through the Victim and Witness Assistance Program (VWAP) (AR 27–10). Also, inform the victim of resources accessible from anywhere in the world (that is, Military One Source (from U.S.: 1–800–464–8107; International: 800–464– 81077; International collect: 484–530–5889, 24-hours-a-day, 7-days-a-week)).

15. _____To the extent practicable, strictly limit knowledge of the facts or details regarding the incident to only those personnel who have a legitimate need-to-know. Protect the victim's privacy.

16. _____Take action to safeguard the victim from any formal or informal investigative interviews or inquiries, except those conducted by authorities who have a legitimate need-to-know, including but not limited to, the Criminal Investigation Command investigator(s) and the trial counsel.

17. _____Throughout the investigation, consult with the victim, and listen/engage in quiet support, as needed, and provide the victim appropriate emotional support resources.

18. _____Continue to monitor the victim's well-being, particularly if there are any indications of suicidal ideations.

19. _____Determine the best courses of action for separating the victim and the alleged offender during the investigation:

- Determine whether the victim desires to be transferred to another unit.
- Determine if the alleged offender needs/desires to be transferred to another unit.
- Consider whether a Military Protection Order (MPO) (DD Form 2873), referred to as "no contact order," is appropriate.
- Coordinate with sexual assault response agencies and the chain of command (involve as few people as possible and only on a need to know basis, protecting the victim's privacy) to determine if the victim's condition warrants redeployment or reassignment until there is a final legal disposition of the sexual assault case and/or the victim is no longer in danger.
- To the extent practicable, preferential consideration related to the reassignment should be based on the victim's desires.

20._____If the alleged offender is a foreign national or from a coalition force, confer with SJA on responsibilities, options, and victim's rights (in theater).

21._____Brigade commanders should consider deferring discipline for victim misconduct until all investigations are completed and the sexual assault allegation has been resolved. Keep in mind the implications of this decision on speedy trial and/or statute of limitations and consult your TC.

22._____When practicable, consult with the servicing legal office, CID, and notify the assigned SAPR VA or SARC prior to taking any administrative or disciplinary action affecting the victim.

23._____Reporting and Notification Requirements

24._____Complete a CCIR in accordance with local policy.

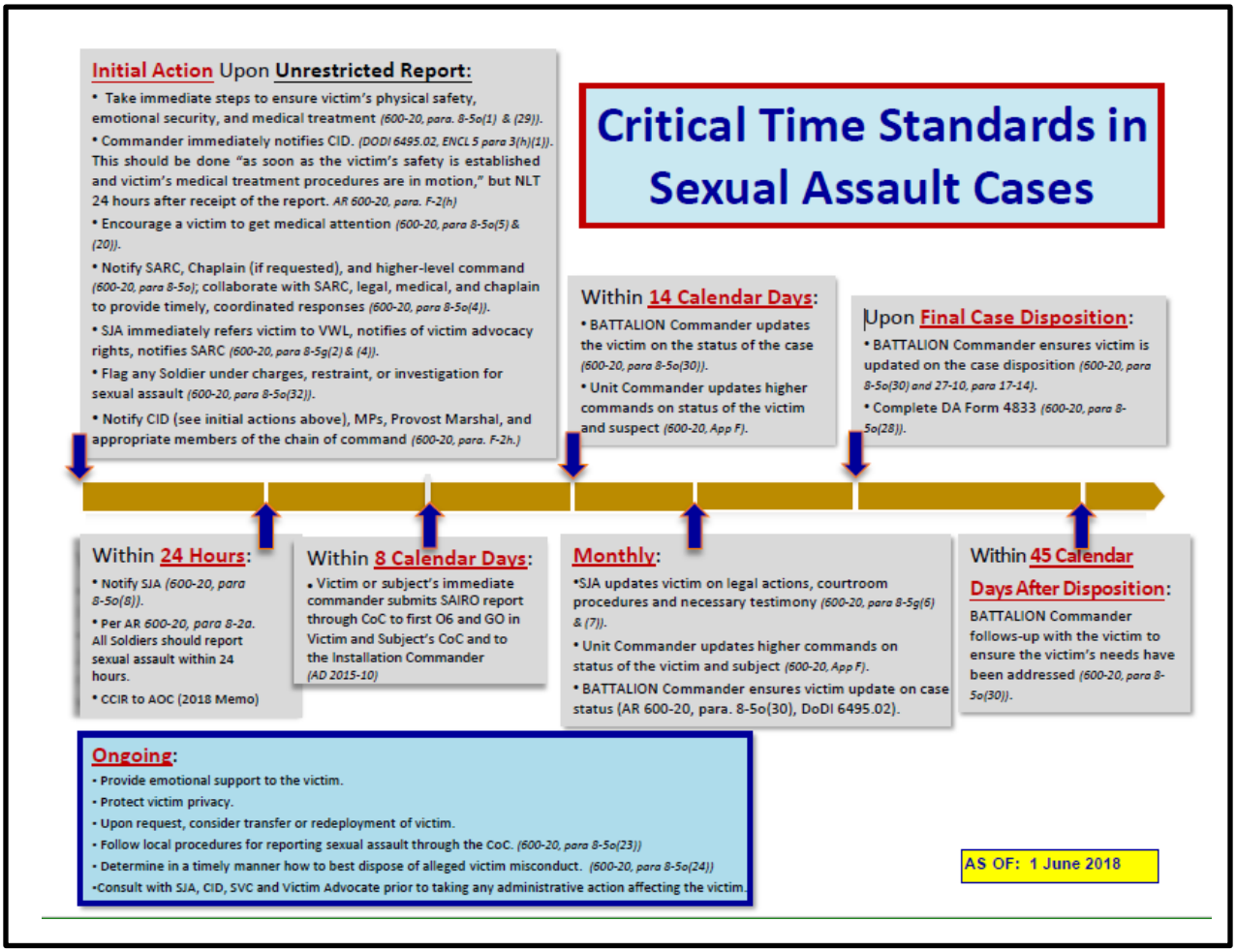
25._____Confirm the SARC entered all reported sexual assaults into the DoD Sexual Assault Incident Database (DSAID) within 48 hours of the report.

26._____Complete and forward the SAIRO report within 8 calendar days of the unrestricted report.

27._____Attend the monthly Sexual Assault Review Board (SARB) Meeting. If the Deputy Installation Commander, chair the monthly SARB meeting. Direct the required SARB members attend the meetings.

28._____Update the victim on the status of the case within 72 hours of the monthly SARB.

29._____Ensure the victim receives monthly reports regarding the status of the sexual assault investigation from the date the investigation was initiated until there is a final disposition of the case (the commander can update the victim within 72 hours of the SARB). If the victim or alleged offender is transferred or redeployed prior to the case closing, coordinate with investigative and SJA personnel before ceasing monthly updates on parties involved.

30. If you are the Battalion Commander, update the victim on the status of the case within 14 days of the unrestricted report and within 45 days of the final disposition of the accused's case.

APPENDIX B
Critical Time Standards – Sexual Assault