Criminal Law Deskbook

Volume III

Current as of 3 August 2012

Trial and Evidence

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

FOREWORD

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

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

HOW TO USE THIS VOLUME

This volume replaces The Advocacy Trainer. We owe a great debt to those before us who authored that groundbreaking publication.

We designed this volume so that it can managers and practioners can grab it and train on short-notice. Use this in conjunction with the videos we have available for you on our webpage:

https://www.jagcnet.army.mil/TJAGLCSCrimLaw.

Watch a short video on the trial skill that you or your attorneys need to practice, read the short outline on that topic that is found in this volume, and then conduct the drills that are listed in the outline.

The very best fact pattern to use is the fact pattern in the case that you or your counsel are currently working on. If you do not have a current case or otherwise want everyone to work on one fact pattern, use the United States v. Archie fact pattern that is found in this volume. This is the fact pattern that everyone is already familiar with. We use the United States v. Archie fact pattern our Basic Course, Intermediate Trial Advocacy Course, Advanced Trial Communications Course, Graduate Course, Military Justice Managers Course, and Military Judge Course. Your counsel will already know the facts well enough that they can rapidly jump into the drills without having to use up valuable brain energy and time trying to sort through new characters and new facts.

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* Tab is currently under construction.

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

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

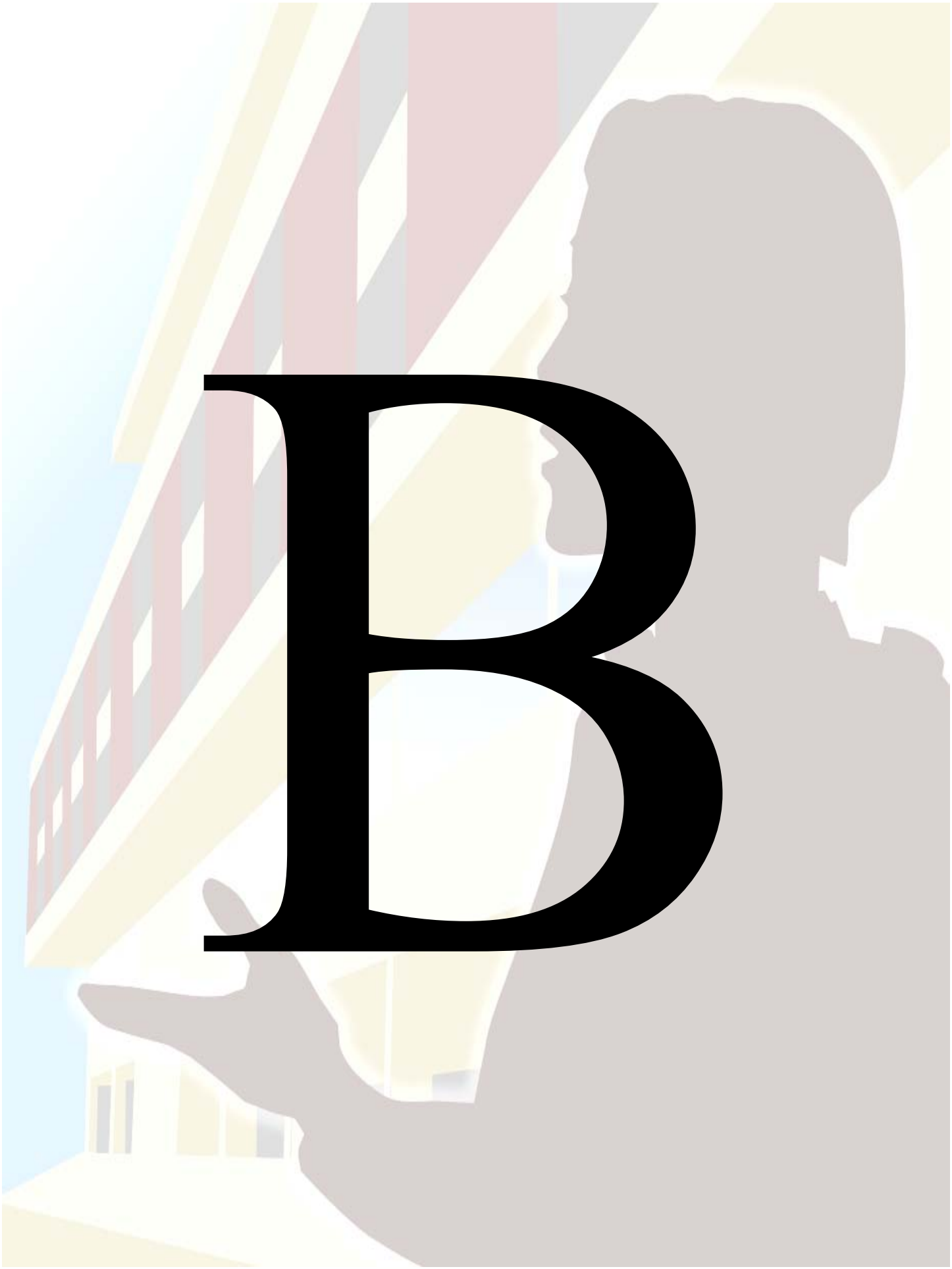
See the CRIMINAL LAW DESKBOOK VOL. IV (SPECIAL TOPICS IN MILITARY JUSTICE) for: cyber law, urinalysis, sexual crimes and domestic violence, commissions, protection of military installations/SAUSA, media, capital litigation, and mental responsibility, competence, and sanity boards.


A

CASE CONSTRUCTION

TAB A

Is Currently Under Construction



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MAJ Sean Mangan
August 2012

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TRIAL NOTEBOOKS AND CHECKLISTS

Few things are brought to a successful issue by impetuous desire, but most by calm and prudent forethought.

—Thucydides

I. INTRODUCTION

A. Welcome to criminal trial advocacy! As students of trial advocacy, you are studying one of the most exciting and rewarding areas in the legal profession. As a courtroom advocate, you will find yourself at the center of the intersection of statutory and case law, procedural and evidentiary rules, written and oral argument, emotion of various types and drama. Trial advocacy often can be a head-spinning experience for the new and experienced advocate alike. As has been aptly said, "trying a case can be a trying experience." Yet the pre-trial process and trial itself can be tamed into a logical, methodical and manageable process. Each trial advocacy student is provided a range of tools (checklists, outlines, sample questions), which, with sufficient organization and preparation, can maximize the chances of a successful outcome.

II. ORGANIZATION

A. Whether as Trial Counsel or Defense Counsel, the goal of the trial advocate is hardly attainable without careful and thorough planning and organization. A well-organized trial demonstration will not guarantee the desired outcome, but it certainly enhances your credibility with your audience and the chances of prevailing. Indeed, the presiding judge, the jury, and client expect it. Moreover, judges abhor surprises and neither the presiding judge nor the jury have much tolerance for any delay caused by an unprepared trial attorney.

B. Instead, each trial advocate should strive to be the one person in the courtroom to whom the judge and the jury looks for a trusted and most accurate picture of the facts, the law, and the rules of evidence. To get there, each trial advocate will develop a unique pre-trial organization method. All trial advocates are strongly encouraged, however, to thread common, proven steps into the pre-trial organization procedure. The Criminal Trial Advocacy student is provided very helpful tools to guide the pre-trial organization, and the checklists (e.g., Trial Counsel Checklist, Defense Counsel Checklist, Expert Witness Checklist) are among the most useful. The final pretrial result will be an understandable and credible presentation of evidence elicited from witness testimony and from exhibits.

III. WITNESSES

A. Witnesses generally come in three forms: professional (e.g., law enforcement), lay/civilian (e.g., victim, eye witness), and expert (e.g., chemist, fingerprint analyst). In addition, a witness can be favorable to your case or hostile. A trial advocate can follow steps and checklists to evaluate the credibility of a witness (e.g., knowledge, bias, education and training); determine whether the witness is essential or non-essential or, if essential, whether the witness testimony will be most effective in the case-in-chief or in rebuttal; and to prepare a witness to testify on the witness stand. There are a few key differences in each type of witness that will dictate how each will be prepared for testimony.

B. In most criminal cases, the witness list will include at least one professional law enforcement witness, such as the responding/reporting Military Police officer and/or the assigned Criminal Investigator. These witnesses very likely have at least minimal training and experience in the criminal justice system, having reported and testified in trial or in an Article 32. A Trial Counsel will want to interview this witness as early as possible. Doing so will help determine whether there are additional and necessary investigatory steps that must be taken before proceeding with the matter further or to improve the existing case. (E.g., identify and interview other possible lay witnesses, gather documentation to corroborate victims and witnesses). Additionally, and particularly in the instances when there are multiple law enforcement officers who respond to a crime scene, interviewing all of them together will be tremendously helpful as they assist each other recall or clarify facts and observations.

C. Lay witnesses and victims particularly require a different preparation method, largely because they are unlikely to have any experience with the criminal justice system and may never have testified or been inside a courtroom. This especially applies to a child witness/victim. To be sure, the trial advocate will follow the checklists to evaluate this witness for testimony, gauging memory, refreshing recollection, preparing for direct- and cross-examination as well as the difference, and rehearsing. In addition, it will be necessary for the trial advocate to take steps with this witness to alleviate confusion and intimidation of the process, and to educate on, for example, the procedures to follow, the time-line of the case, and the roles of the personnel in the courtroom. In addition, a trial advocate might consider taking the witness to the courtroom where the witness can sit in the witness stand for a few minutes to become familiar with the setting. Of central importance in preparing a lay witness is to familiarize the witness with as much of the process and personnel, including the trial advocate.

D. A lay witness might be hostile to the trial advocate's case and will often require a different approach altogether. First, the trial advocate might decide to do no pretrial preparation with a hostile witness, thus avoid giving the witness a chance to prepare their answers. Sometimes simply asking the witness the first time in trial is the most effective. This approach can be unpredictable and risky. In most cases, a hostile witness may be useful to the case for a very limited purpose, to prove a fact or small set of facts that cannot be proved any other way, to lay a foundation of an exhibit or to corroborate another witness that is helpful. It is advisable to be mindful of the specific purpose, get it from the witness with a limited direct and, correspondingly thus limit the cross-examination. If the witness has made a helpful written statement, it will be very useful for the witness to admit writing it, that it was true when it was written, and that it was written when nearer to events in question.

E. An expert witness may be necessary for one party or the other to prove their case, usually by assisting the fact finder with facts and an opinion on how the facts relate to the subject at issue. Generally, this can be accomplished when the expert explains what may be sophisticated scientific and forensic principles as well as testing procedures so that they are understandable to the untrained fact finder. The expert must be qualified to render an opinion, and the checklist is a valuable tool to assist trial counsel for this purpose or, conversely, to challenge an opposing expert's qualifications. In either event, the trial counsel should endeavor to know the subject matter on which the expert will testify at least as well or better than the expert. This is important to prepare the expert for cross-examination and avoid errors and discrepancies, particularly with opposing expert testimony. It may also be necessary to hire a consulting expert to help build the requisite understanding and to help develop cross-examination questions for the opposing expert.

IV. EXHIBITS

A. In most cases, trial advocates will consider whether to utilize exhibits to prove a case at trial. The exhibits may be actual objects or documents that are factual and probative (murder weapon, forged check, written/recorded admission) or demonstrative (charts, diagrams, models) that may have little or no intrinsic probative value. The former are essential for trial while the latter are helpful but not necessarily essential to prove the case.

B. It is always helpful and even necessary for the trial advocate, especially Trial Counsel, to identify and inspect all possible exhibits that may be used at trial when meeting with witnesses pre-trial. This is especially helpful when, for example, trial counsel is meeting with all possible law enforcement witnesses to determine which witnesses are necessary to identify the exhibit, foundation, chain of custody, and in that matter help determine which witnesses are essential for trial. In addition, it is always helpful to mark the evidence/exhibits at this stage particularly when determining the number or letter sequence of the exhibits for trial to demonstrate a logical presentation (e.g., chronological).

V. PRE-TRIAL MOTIONS

A. Inevitably, a trial advocate will identify one or multiple legal issues while evaluating the merit of a case or while preparing for trial. One clear example is where Defense Counsel will challenge an arrest, seizure, or any statements/admissions on Constitutional grounds. In addition, trial counsel are advised to evaluate the anticipated evidence and determine whether to litigate the admissibility of the evidence in the pre-trial context with, for example, a motions *in limine*. Trial advocates will often weigh how the resolution of these issues tactically will impact the case. As a tactical matter, an aggressive, forward-leaning pre-trial motions practice can be very effective. Moreover, resolving legal issues before the court prior to the commencement of trial serves to streamline the trial into a more predictable and organized presentation of evidence and reduces the chance of mid-trial litigation and delay. The Motions Checklist will guide the trial advocate in this process.

B. In certain cases, these pre-trial litigative steps are essential. For example, trial advocates may find it necessary in sexual assault cases to litigate the admissibility of the accused's history under MRE 413 (evidence of similar crimes in sexual assault cases). In this instance, trial counsel will move the court in limine to admit such evidence while defense counsel may move to exclude. In the same way, trial counsel may move in limine to exclude evidence under MRE 412 (sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition), while defense counsel may move to admit. In addition, a motion *in limine* to admit or exclude evidence under MRE 404(b) (character evidence, other crimes, wrongs, or acts), is advisable in most cases

VI. DISCOVERY

A. A critical element of pre-trial organization is the obligation of trial advocates to comply with the Discovery rules. Both Trial Counsel and Defense Counsel possess this reciprocal obligation in order to ensure a fair trial. For Trial Counsel, however, this obligation is especially significant because most if not all incriminating evidence is in the control of the prosecution and material to the preparation of the defense. When Trial Counsel possesses exculpatory or impeachment evidence that is material to guild or punishment, this evidence must be disclosed to the defense. These rules are established by RCM 701, the

Jencks Act, found at RCM 914, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). It is absolutely imperative that trial advocates know these rules and consider thoroughly how to meet these obligations in each case.

B. Trial Counsel should be mindful that while the rules provide that the disclosures be made in sufficient time to permit the defendant to make effective use for the information at trial, it is never a wise practice to withhold the evidence for tactical purposes, only to disclose it in advance of trial but allowing the defense minimal opportunity to prepare. This is not an area for gamesmanship. Generally, providing broad and early discovery promotes the truth-seeking aspect of the pre-trial and trial process and can help foster speedy resolution of cases. There are countervailing circumstances to consider, however, particularly the safety of victims and witnesses, protection of privacy, privileged information, integrity of on-going investigations, etc. Trial advocates should be familiar with the rules and seek guidance from supervisors. Additionally, trial advocates should keep a thorough record regarding such disclosures. And failure to disclose this evidence has severe ethical consequences.

VII. LIST OF APPENDICES

A. Counsel Checklists

B. Case Preparation Tools

C. Witness Preparation

D. File Organization Tools

E. Defense Client Advice

Appendix A
Counsel Checklists

DATE OF SPEEDY TRIAL TRIGGER (PREFERRAL / PRETRIAL CONFINEMENT / RESTRICTION): _____
(Call the Company Commander to see if the Accused has been under any kind of restraint).

120TH DAY:_____

DATE **PRETRIAL ACTIONS**:

1. PRELIMINARY ACTIONS:

_____ a. Receive / review investigation (MP/CID, etc).
_____ b. Detail a 27D to the case.
_____ c. Check with Command on pretrial restraint/conditions on liberty/counsel.
_____ d. Request SMIF/ unit file / 2A and 2-1.
_____ e. Request OMPF.
_____ f. Notify MILPO to flag the soldier.
_____ g. Look for previous convictions.
_____ h. Interview witnesses / visit crime scene.
--Consider depositions, as necessary.
_____ i. Request admin hold on witnesses.
_____ j. Inspect evidence.
_____ k. Brainstorm for additional evidence
--Friends, teachers, neighbors, relatives, soldiers in command.
_____ l. Begin formulating:
--Theories of admissibility for evidence.
--Case theme (means, motive, opportunity)
--Closing argument.
--Sentencing argument.
_____ m. Anticipate defense arguments.
_____ n. Coordinate with Co, Bn and Bde on appropriate level of disposition.
_____ o. Obtain personal data for Charge Sheet on the accused.
--Cross-checked with 2A and 2-1 for accuracy.
--Double-checked for jurisdiction over the soldier.
_____ p. Draft charges and endorsements.
--Check charges and specs against sample specs in BB.
--Check for jurisdiction over the offense and the soldier.
_____ q. Requested / obtained Art 32 Officer from Adjutant.
_____ r. Draft witness list for Art 32
_____ s. Prepare disclosure of Accused statements learned about through interviews.
_____ t. Prepare pre-trial SJA memo

_____ u. Run charges / endorsements / 32 appointment memo through STC, CMJ.
--Compile preferral packet (inside cover-charge sheet; front 1st flap-transmittal docs; front 2d flap-pretrial SJA memo; back 2d flap-allied papers.)
Checked charges and specs against sample specs in MCM.

_____ v. Coordinate with Accuser for date/time for preferral of charges.

_____ w. Coordinate with SCMCA and SPCMCA for date /time of forwarding endorsements. (Same day as preferral).

_____ x. Coordinate with TDS for appointment of DC.

_____ y. Prepare preferral packet (everything we have to this point). Not mandated by disclosure.

MANDATORY DISCLOSURE REQUIREMENTS

_____ 1. Evidence favorable to the defense

_____ 2. Before evidence is used up in testing, inform accused.

2. PREFERRAL AND RECOMMENDATIONS:

_____ a. Prefer charges. Have accused present to be provided a copy of charge sheet (then complete Block 12, DD Form 458).

_____ b. Meet with SCMCA for signature on forwarding endorsement. Complete Block 13, DD Form 458.

_____ c. Meet with SPCMCA for signature on endorsement / Art 32 appointment memo (as appropriate).

MANDATORY DISCLOSURE REQUIREMENTS

_____ 2. Evidence favorable to the defense

3. ARTICLE 32:

_____ a. Contact Art 32 IO and provide written request for Government witnesses.

_____ b. Supervise coordination of:
1. Location.
2. All arrangements for witnesses.
3. All necessary paperwork for payment of witnesses.

_____ c. Meet with SPCMCA. Get signed endorsement.

_____ d. Capture all delays in writing.

MANDATORY DISCLOSURE REQUIREMENTS

_____ 1. DC copy of Art 32 report (include all charge sheets, sworn statements, evidence custody documents, copies of pictures)/ serve copy on accused (with signed receipt).

_____ 2. DC and Court-Reporter each a copy of the Court-Martial packet (any papers that accompanied the charges when they were referred, any signed/sworn statements in TC's possession, convening order/amended

orders) and preferred Charge Sheet.

_____ 3. Evidence favorable to the defense

4. REFERRAL:

_____ a. Check CMCOs for possible grounds for disqualification. Notify Chief of Justice, as necessary.

_____ b. Provide preferred Charge Sheet, all signed endorsements and Art 32 report to Chief of Justice for referral.

_____ c. Capture all delays in writing.

_____ d. Prepare Docket Notification.

MANDATORY DISCLOSURE REQUIREMENTS

_____ 1. DC and Court-Reporter each a copy of the Court-Martial packet (any papers that accompanied the charges when they were referred, any signed/sworn statements in TC's possession, convening order/amended orders) and referred Charge Sheet.

_____ 2. Evidence favorable to the defense

5. POST-REFERRAL:

_____ a. Serve Docket Notification on Defense within 24 hours of referral.

_____ b. Serve SJA Pretrial Advice, referred Charge Sheet and CMCO on Accused and DC. Complete Block 15 on Charge Sheet. Serve as much of the pre-arraignment disclosure requirements as possible at this time.

_____ c. Collect Docket Notification from Defense 24 hours after receipt, send to Judge.

_____ d. Check Charge Sheet, CMCO and CA Action for proper referral to trial.

_____ e. Re-check CMCO for possible grounds for disqualification. Notify SJA, as necessary.

_____ f. Provide the MJ and Court Reporter with a copy of CMCO and referred Charge Sheet.

_____ g. Capture all delays in writing.

MANDATORY DISCLOSURE REQUIREMENTS

_____ 1. Evidence favorable to the defense

6. TRIAL PREPARATION: Substantive.

_____ a. Consult DC for:
--Plea / possible PTA
--Stipulations of Fact (MUST be signed and submitted prior to PTA going to the CA).
--Forum
--Motions

_____ b. Request Sanity Board (as required).
_____ c. If Defense discovery request, prepare and serve Government Reciprocal Discovery Request.
_____ d. Request from defense names and addresses of any witnesses whom the defense intends to call at pre-sentencing procedures, and written material that will be presented.
_____ e. Submit written Notice of Motions (IAW local rules of court).
_____ f. Draft and submit motion briefs / respond to Defense motions.
_____ g. Prepare items for judicial notice. Provide to DC.
_____ h. Prepare proposed instructions (see instructions checklist in DA Pam 27-9).
_____ i. Provide witness notification to the DC (merits and sentencing).
_____ j. Draft Voir Dire questions.
_____ k. Examine evidence; motion in limine for documentary/real evidence.
_____ l. Assemble Trial Notebook.

MANDATORY DISCLOSURE REQUIREMENTS

_____ 1. Evidence favorable/material to the defense
_____ 2. Witnesses (name and address of case-in-chief, or rebuttal to alibi, innocent ingestion, lack of mental responsibility)
_____ 3. Five days prior to arraignment:
--Notice of intent to introduce evidence of the victim's past sexual behavior
--Similar crimes in sex assault/child molestation cases.
_____ 4. Prior to arraignment:
--Any records of prior civilian/military convictions of the accused that the TC is aware of and may offer on the merits for ANY purpose.
--All statements (oral or written) made by the accused that are: relevant to the case, known to the TC, within control of the armed forces.
--All evidence seized from the person/property of the accused that the TC intends to offer into evidence against the accused at trial.
--All evidence of prior identifications of the accused as a lineup or other identification process that the TC intends to offer into evidence at trial.
--SHOULD: any statements (signed, adopted, or approved by the witness) by the witness relating to the subject matter testified about.
_____ 5. In response to Defense request:
--Books, papers, documents, photographs, tangible objects, buildings, places, results/reports of physical/mental examinations, scientific tests/experiments IF intended for use by TC in case in chief, OR material to preparation of defense AND in TC's possession/control.
--Sentencing witnesses (names/addresses) and written material to be offered in pre-sentencing proceedings
--Pretrial notice of general nature of the evidence of other crimes, wrongs, or acts which the TC intends to introduce at trial.
_____ 6. Reasonable time prior to testimony:
--Grants of immunity/leniency in exchange for testimony.
--Notice of intent to use 803(6)
--Residual hearsay exception.
_____ 7. Reasonable time in advance of trial:

--Impeach with conviction greater than 10 years

7. TRIAL PREPARATION: Administrative.

_____ a. Prepare a list of witnesses (Government and Defense) for MJ, Court Reporter and Bailiff.
_____ b. Draft Flyer.
_____ c. Draft Findings Worksheet.
_____ d. Draft Stip of Facts
_____ e. Prepare script.
_____ f. Draft Sentencing Worksheet.
_____ g. Draft seating chart.
_____ h. Supervise coordination of:
--Witnesses:
--Civilian (subpoena AND tender of fees required for a warrant of attachment).
--Military (on post). Coordinate with commander.
--Military (off-post). Coordinate with commander.
--Panel members. CALL THEM PERSONALLY.
--Bailiff.
--Transportation after trial to confinement.
_____ i. Assist DC, if required, in getting accused's uniform complete.
_____ j. Exhibits premarked (by the Court Reporter).

8. THE DAY OF TRIAL:

_____ a. Provide the MJ with:
--Original Charge Sheet, marked as an Appellate Exhibit.
--All CMCOs.
--MJ Alone request (if applicable).
--Flyer.
--List of witnesses.
_____ b. Provide the DC with:
--Flyer.
--Findings Worksheet.
--Sentencing Worksheet.
--Charge Sheet.
--All CMCOs.
--Members' seating chart.
_____ c. Provide the Court Reporter with:
--List of witnesses.
--All CMCOs.
_____ d. Ensure the Court reporter has:
--Provided members with folders containing:
--All CMCOs
--Members Question Forms
--Flyer
--Note paper

--Pencil / pen.
--Placed a copy of the Members' seating chart in the deliberations room.

MANDATORY DISCLOSURE REQUIREMENTS

_____ 1. After direct, on motion by opposing party, any statements (signed, adopted, or approved by the witness) by the witness relating to the subject matter testified about.

9. POST-TRIAL

_____ a. Have Court reporter prepare / TC sign Report of Result of Trial.
_____ b. Have Court reporter prepare / TC sign Confinement Order.
_____ c. Provide escorts with copies of Report of Result of Trial and Confinement Order (escort gets original Confinement Order, to be delivered to Confinement Facility).

DEFENSE COUNSEL CHECKLIST

JUDGE'S DEADLINE: _____ 120 DAYS: _____

I. PRETRIAL CONFINEMENT:

_____ a. **Use pretrial confinement checklist**.

_____ b. Meet with client in confinement facility within 24-hours.

_____ c. Provide client with a Pretrial Confinement Information Sheet.

II. PRELIMINARY ACTIONS:

_____ a. Review Allied Papers / Client Questionnaire. If urinalysis case, check the code.

_____ b. Proof(ed) specs on Charge Sheet against the MCM with _____.

_____ c. Identify legal elements and defenses (check MCM, MCM discussions, Benchbook (all related instructions), TJAGLCS Deskbooks, New Developments materials, Crimes and Defenses Handbook, all available at JAGCNET).

_____ d. Inspect transmittals and verify command authority and relationships.

_____ e. Call client within 48-hours of detailing to set appointment.

_____ f. Have the paralegals provide the client with a copy of the allied papers. Have the client review statements and highlight discrepancies or things the client believes is false, and ask if the client thinks any pieces of evidence are missing.

_____ g. Have paralegals give the client a copy of rights advisement, elements, discharge info paper.

III. INITIAL MEETING WITH CLIENT.

_____ a. Listen to the client.

_____ b. Talk to the client about the client's goals in life.

_____ c. Complete the initial rights advisement.

_____ d. Inform client of effects of discharge, status at conviction (felon / drug offender / sex offender). Determine the value that the client places on confinement versus discharge.

_____ e. Verify personal data on charge sheet with client.

_____ f. Verify ETS date and time in service. If near retirement, order retirement audit.

_____ g. Advise the client to remain silent, and to not do any investigation on his or her own without your direction. Give the client an office card.

_____ h. Give client card to 27D.

IV. SENTENCE CREDIT AND SPEEDY TRIAL ANALYSIS.

_____ a. *Allen* (pretrial confinement): YES / NO

_____ b. *Mason* (restriction tantamount to confinement): YES / NO

_____ c. *Chaney* (other past civilian confinement not yet credited): YES / NO

_____ d. *Pierce* (Article 15 punishment for same offenses): YES / NO

_____ e. 305(k) (noncompliance with pretrial confinement reviews): YES / NO

_____ f. 305(k) + *Rendon* (*Mason* + physical restraint and no 305 reviews): YES / NO

_____ g. 305(k) (unusually harsh pretrial confinement conditions): YES / NO

_____ h. Art. 13 (pretrial punishment): YES / NO

_____ i. Art. 33 (GCM, client in pretrial, and unit did not do Art. 32 or forward memo to CA within 8 days; use 305(k) (abuse of discretion) YES / NO

_____ j. 305(k) (any abuse of discretion while the client was in pretrial confinement) YES / NO

_____ k. Art. 10 (slow processing of case that does not rise to dismissing charges) YES / NO

TYPE OF SPEEDY TRIAL TRIGGER	
DATE OF SPEEDY TRIAL TRIGGER	
ALL TYPES OF RESTRAINT / WHEN IMPOSED	
120TH DAY:	

V. SANITY BOARD ANALYSIS.

_____ a. Talk to client about the client's mental health. Look for indicators of depression, mania, or schizo-spectrum disorders. Ask client about any mental health treatment during lifetime, and any mental health records.

_____ b. Ask client about family history of mental health.

_____ c. Refer client to mental health, if necessary.

_____ d. Decide whether to submit a sanity board request or find some other way to document any potential mitigating evidence.

_____ e. Gather evidence to support a sanity board request.

_____ f. Submit a sanity board request.

VI. EVIDENCE PREPARATION:

_____ a. Marshal the evidence

_____ 1. Inspect evidence at CID / MPI.

_____ 2. Interview witnesses / take statements (third party observer?).

_____ 3. Visit crime scene.

_____ b. Create chronology.

_____ c. Convert legal elements into claims (merits and sentencing).

_____ d. Identify the crucial claims.

_____ e. Brainstorm for additional evidence.

_____ f. Conduct evidence analysis.

_____ g. Check discovery requirements

Burden	When	What	Source	Done?
Government	As soon as practicable after preferral	Identification of accuser	M.R.E. 308	
Government	As soon as practicable	Evidence that reasonably tends to be favorable to the accused	RCM 701(a)(6)	

Government	Before evidence used up in testing	Inform accused that testing may consume all available samples of evidence (even if that evidence is apparently not exculpatory)	Trombetta, Youngblood, and Garries	
Government	As soon as practicable after service of charges (referral)	Papers accompanying the charges; convening orders; & statements	RCM 701(a)(1)	
Government	**Defense Request** (after service of charges (referral))	Documents, tangible objects and reports etc.	RCM 701(a)(2)	
Government	**Defense Request**	Information to be used at sentencing	RCM 701(a)(5)	
Government	**Defense Request**	Notice of Uncharged misconduct	M.R.E. 404(b)	
Government	**Defense request** (prior to referral of charges) or government claim of privilege	Classified Information	M.R.E. 505	
Government	**Defense Request** (prior to referral of charges)	Privileged information other than classified information	M.R.E. 506	
Government	Government (claim of privilege); **Defense** (motion to disclose)	Identity of informant	M.R.E. 507	

_____ h. Requests.

_____ 1. Draft and submit to the TC your witness production lists (request for expert witness and expert assistance; witness production at trial under RCM 703; discovery of witnesses prior to trial under RCM 701; and depositions under RCM 702).

_____ 2. Draft and submit to the government your case-in-chief and sentencing witness notification.

_____ 3. Draft and submit to the TC your discovery requests (based on what you need to tell your story at trial, and RCM 701(e) and 703).

VII. CONSTRUCT ARGUMENTS.

_____ a. Construct arguments for each crucial factual proposition.

_____ b. Identify government's story and evidentiary requirements.

VIII. MOTIONS ANALYSIS:

_____ a. Evaluate motions (**use motions checklist**).

_____ b. Draft motions. Remember to request anything that the CA has disapproved (experts, witnesses, sanity board). Prepare proposed instructions, items for judicial notice, requested voir dire questions, etc.

_____ c. Draft notice of motions for the judge.

IX. EVALUATE THE CASE.

_____ a. Create courses of action for the client.

_____ b. Give the client your professional opinion about the most likely outcome if the case goes to trial, and give your professional opinion of the lowest and highest reasonably likely outcomes.

_____ c. Discuss good time credit / parole proceedings and how they will affect the time spent in jail.

_____ d. Discuss courses of action with client and get decisions on:
Pleas (Contest / Mixed Plea / PTA / Chapter 10).
Forum (JA / Officer Panel / Enlisted Panel).
Client's testimony.

X. ARTICLE 32 INVESTIGATION:

_____ a. Identify goals for Art. 32.

_____ b. Prepare and submit request for continuance, if necessary.

_____ c. Interview government and defense witnesses.

_____ d. Submit request for defense witnesses and evidence.

_____ e. Scrub the government's physical evidence against R.C.M. 405(g)(5) and testimonial evidence against R.C.M. 405(g)(4) and prepare objections.

_____ f. Prepare voir dire for IO, if necessary.

_____ g. Request verbatim transcript, if necessary.

_____ h. If client is in confinement, seek the report within 8 days.

_____ i. Prepare / file objections to 32 with CA within 5 days of service of report on client.

_____ j. Check discovery requirements.

Burden	When	What	Source	Done ?
Government	Promptly after report is completed	Article 32 Investigating Officer's Report	M.R.E. 405(j)(3)	

XI. POST-REFERRAL ACTIONS.

_____ a. Check Charge Sheet, CMCO and CA Action for proper referral to trial.

_____ b. Submit case-in-chief and sentencing witness notification to judge.

_____ c. Submit motions, plea and forum notice, and notice of certain defenses to judge.

_____ d. Review panel member questionnaires

_____ e. Prepare voir dire, opening, closing, direct, cross.

_____ f. Verify discovery requirements.

Burden	When	What	Source	Done ?
Proponent	Sufficient advance notice	Notice of intent to impeach w/ > 10 year old conviction	M.R.E. 609	
Government	Completion of sanity board	Mental examination of accused – distribution of the report	RCM 706(c)(3)(B)	
Defense	Government request	Pre-sentencing witnesses and evidence	RCM 701(b)(1)(B)	
Defense	Government request after earlier defense discovery request	Documents and tangible objects; Reports of results of mental examinations, tests, and scientific experiments	RCM 701(b)(3) RCM 701(b)(4)	
Defense	Before trial on merits	Names of witnesses and statements	RCM 701(b)(1)(A)	
Defense	Before trial on merits	Notice of certain defenses (alibi; lack of mental responsibility; innocent ingestion, intent to introduce expert testimony	RCM 701(b)(2)	

		on mental condition)		
Government	Defense notice under RCM 701(b)((1) or (2); Before start of trial	Witnesses to rebut certain defenses	RCM 701(a)(3)(B)	

XII. ARRAIGNMENT.

_____ a. Check referral-to-trial timeline (Article 35). Advise client if fewer than 3 days elapsed (special), 5 days elapsed (general) between service of charges and arraignment. Prepare for judge's waiver inquiry.

_____ b. Check discovery requirements

Burden	When	What	Source	Done ?
Proponent	Minimum of 5 days before entry of pleas	Rape shield	M.R.E. 412(c)	
Government	Before arraignment	Prior convictions of accused to be offered on the merits for any reason, including impeachment	RCM 701(a)(4)	
Government	Before arraignment or within reasonable time before witness testifies	Immunity	M.R.E. 301	
Government	Before arraignment	Statements of accused relevant to case, regardless of whether government intends to use them	M.R.E. 304(d)	
Government	Before arraignment	Property seized from accused	M.R.E. 311(d)	
Government	Before arraignment	Identifications of accused	M.R.E. 321(c)	
Government	Capital cases, before arraignment	Notice of aggravating factors	RCM 1004(b)(1),	

XIII. TRIAL PREPARATION.

_____ a. Check discovery requirements.

Burden	When	What	Source	Done ?
Government	Before start of trial	Witnesses in case-in-chief	RCM 701(a)(3)(A)	
Government	Minimum of 5 days before scheduled date of trial	Evidence of similar crimes (child molestation and sexual assault cases)	M.R.E. 413/414	

Government	Before start of trial	Witnesses in case-in-chief	RCM 701(a)(3)(A)	
Defense	Accused to testify in motion to suppress evidence seized from accused; suppress confession; suppress out of court identification	Notice that accused will testify for limited purposes of the motion	M.R.E. 311(f) M.R.E. 304(f) M.R.E. 321(e)	
Proponent	After witness testifies on direct, on motion of opposing party	Production of statements concerning which witness testified	RCM 914 (Jencks Act)	

_____ b. Update list of witnesses for MJ, Court Reporter and Bailiff.

_____ c. Re-verify personal data on the top of the Charge Sheet with the client.

_____ d. Make additional copies of Defense Exhibits, as required.

_____ e. Premark exhibits with the Court Reporter.

_____ f. Review Government Findings Worksheet (as required).

_____ g. Review Government Sentencing Worksheet.

_____ h. Prepare / discuss with client the Post-trial and Appellate Rights Form.

1. Deferment of confinement request?
2. Deferment of forfeitures / reduction request?
3. Waiver of forfeitures request?
4. VEL Request?
5. Exception to Policy for Shipment of Household Goods?
6. Your request for a copy of the authenticated ROT, IAW R.C.M. 1106(f)?

_____ i. Assemble Trial Notebook (and client's folder). For guilty pleas, ensure at a minimum:

____ Judge Alone Request (original and three copies)
____ Charge Sheet (two copies)
____ Stipulation of Fact Signed by All Parties (two copies)
____ Offer to Plead Guilty (two copies)
____ Quantum (two copies)
____ Post-Trial and Appellate Rights (original and two copies)
____ Letters (original and three copies)
____ Stipulations of Expected Testimony (original and three copies)
____ Awards/Certificates (ask for substituted in the record to get originals back)
____ Corrected ERB/2-1(original and three copies)
____ Unsworn Statement (if applicable)

_____ j. Obtain a list of clemency witnesses from client. Provide client an address and fax number to return his clemency statement

_____ k. Have TDS NCO check the client's uniform.

_____ l. Provide client with paper / pencil for trial.

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MOTIONS CHECKLIST

APPROPRIATE RELIEF	RULE	APPLIES?	
Defective preferral	905(b)(1), 307	YES	NO
Defective forwarding	905(b)(1), 401	YES	NO
Defective investigation or pretrial advice	905(b)(1), 405, 406	YES	NO
Defective referral	905(b)(1), 407, 601	YES	NO
Defective charge or specification (other than failure to state offense or jurisdiction)	905(b)(2)	YES	NO
Compel discovery	905(b)(4), 906(b)(7), 914, 701, 703, 1001(e)	YES	NO
Production of statements	914(a)	YES	NO
Severance of accused	905(b)(5), 906(b)	YES	NO
Severance of charges	905(b)(5), 906(b)(10)	YES	NO
Severance of duplicitous charges	906(b)(5), 907(b)(3)(B), 307	YES	NO
Objection to denial of counsel	905(b)(6), 906(b)(2)	YES	NO
Withdraw from pretrial agreement	705(d)(4)	YES	NO
Withdraw from stipulation agreement	811(d)	YES	NO
Withdraw plea	910(h)(1)	YES	NO
Improper selection of members	912(b)(1)	YES	NO
Recusal of military judge	902(d)(1)	YES	NO
Continuance	906(b)(1)	YES	NO
Amendment of charges or specifications	906(b)(4), 603(a)	YES	NO
Bill of particulars	906(b)(6)	YES	NO
Relief from improper pretrial confinement	906(b)(8), 305(j)	YES	NO
Change of venue	906(b)(11)	YES	NO
Determination of capacity to stand trial	906(b)(14), 706, 909(c)(2)	YES	NO
Determination of mental capacity – affirmative defense	906(b)(14), 706, 916(k)(3)(A)	YES	NO
Request for immunity of defense witness	704(c)	YES	NO
Mistrial	915(a)	YES	NO
Preliminary ruling on admissibility of evidence	906(b)(13)	YES	NO
Request for investigative or expert assistance	701, 703(c), (d)	YES	NO

SUPPRESS	RULE	APPLIES?	
Statements	905(b)(3), M.R.E. 304	YES	NO
Evidence	905(b)(3), M.R.E. 311	YES	NO
Identifications	905(b)(3), M.R.E. 321	YES	NO

Consent searches	905(b)(3), M.R.E. 314	YES	NO

DISMISS	RULE	APPLIES?	
Lack of jurisdiction	907(b)(1)(A)	YES	NO
Failure to state an offense	907(b)(1)(B)	YES	NO
Speedy trial	707(c)(2), 907(b)(2)(A)	YES	NO
Statute of limitations	907(b)(2)(B)	YES	NO
Former jeopardy	907(b)(2)(C)	YES	NO
Prosecution barred (immunity, condonation of desertion, double jeopardy)	907(b)(2)(D)	YES	NO
Defective specification	907(b)(3)(A)	YES	NO
Multiplicity	907(b)(3)(A)	YES	NO
Inadequate Art. 32 investigation	905(b)(1)	YES	NO
Unlawful command influence	Case law (22 M.J. 388)	YES	NO
Lack of due process	Case law (25 M.J. 650)	YES	NO
Vindictive prosecution	Case law (20 M.J. 148)	YES	NO

FINDING OF NOT GUILTY	RULE	APPLIES?	
	917	YES	NO

POST-TRIAL MOTIONS	RULE	APPLIES?	
Improper instructions	920(f)	YES	NO
Impeachment of findings or sentence	923, 1009, M.R.E. 606(b)	YES	NO
Reconsideration	905(f), 924, 1009, 1102(b)(1)	YES	NO
Defer confinement or forfeitures	1101(c), Art. 57	YES	NO
Correction of record of trial	1103(i)(1)(B)	YES	NO

DEFENSE COUNSEL
PRETRIAL CONFINEMENT CHECKLIST

_____ 1. Explain to the client the review procedures and his or her rights under R.C.M. 305(e). Provide the client with the Pretrial Confinement Handout.

_____ 2. Get a complete packet from the Trial Counsel.

Waiver

_____ 1. Consider the reasons why the client may want to waive personal appearance.

_____ a. The client may flee.

_____ b. The client will get into more trouble if he is released.

_____ c. The client has a drug or alcohol problem.

_____ d. The client is treated poorly or abused by his unit, and wants to get away from them.

_____ e. (If post-trial confinement is likely) The client gets day-for-day credit, and gets paid. After trial, the client probably won't get paid.

_____ f. The command may view pretrial confinement as punishment (even though it is not) and be willing to approve a discharge in lieu of court-martial.

_____ g. The client will likely get strict restrictions anyway, but not strict enough to warrant credit.

_____ h. Pretrial confinement triggers the speedy trial clock and Article 10 protection. If the government is overworked, they may not have the energy to put together a good case.

_____ i. The client may have mental health issues or be suicidal, and pretrial confinement may be the only way the client can get treatment or be properly observed.

Contesting the confinement decision

_____ 1. Probable cause that the accused committed an offense.

_____ a. Did the commander rely on accurate information?

_____ b. Has the government met their burden of production (more than just the 72 hour memo)?

_____ 2. Flight risk.

_____ a. If the offense is not very serious, the client is less likely to flee.

_____ b. If the evidence is weak, the client is less likely to flee.

_____ c. Does the client have lots of ties with the local community (bank accounts, family, off-duty employment, home ownership)? Does the client have unusual family needs?

_____ d. Does the client have a record of appearing at other disciplinary events (Art. 15s, summary courts)?

_____ e. If the client is returning from AWOL, did he return voluntarily? If apprehension, did the client follow the conditions of the travel pass?

_____ f. If the client is returning from AWOL, what caused the client to leave in the first place? Do those reasons still exist?

_____ g. If the client is returning from AWOL, is this the client's first AWOL?

_____ h. Is the client otherwise a "good soldier?"

____ i. Has the client been upfront with the government up to this point? Not tried to cover up the crime?

_____ 3. Future serious misconduct.

_____ a. Is the client suspected of a one-time type crime, or a crime that is easily repeated?

_____ b. Did the client crack under some particular kind of pressure that no longer exists?

_____ c. Did the client commit an opportunistic crime, where the opportunity will not present itself again?

_____ d. Has the client only committed low-end crimes (pain-in-the-neck behavior) that does not rise to the level of serious?

_____ 4. Less severe forms of restraint.

_____ a. Has the command tried other forms in the past, and have they worked (Art. 15s, summary court punishments)?

_____ b. Has the client responded to past counseling forms, showing that he responds to moral pressure?

_____ c. Look at the future serious misconduct that the government is concerned about. Could other forms of restraint prevent it (restraining order, etc.)? What is the real risk to society if the client fails to follow the restraint?

_____ 5. Appeal directly to the commander, if necessary. Stress the cost to the unit from escorting the soldier back and forth to confinement

_____ 6. Seek evidence that will support your client: sworn statements from friends that the accused is not a flight risk, a threat to morale, or that lesser forms of restriction would work.

Building the Case for Credit

_____ 1. Are there any potential R.C.M. 305(k) issues?

_____ a. 48-hour, 72-hour, 7-day reviews satisfied? Did the client get counsel within 72-hours?

_____ b. Did the command put the client in restriction tantamount to confinement *before* putting the client in jail? If so, the client will get additional day -for-day credit, *and*, that date would trigger the 305 review procedures. The government probably will have missed those, so the client will get more credit.

_____ c. Has the confinement (either actual or tantamount) been unduly harsh?

_____ 2. Are there any Article 13 issues?

Prepping for Trial

_____ 1. Complete as much of the Defense Counsel Checklist as practicable during this initial counseling session.

_____ 2. Counsel client to stay quiet in jail.

_____ 3. Counsel client to stay out of trouble. Good behavior in jail can show rehab potential.

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DEFENSE COUNSEL
GUILTY PLEA CHECKLIST

APPELLATE EXHIBITS
____ Judge Alone Request (original)
____ Stipulation of Fact Signed by All Parties (original)
____ Offer to Plead Guilty (original)
____ Quantum (original)
____ Post-Trial and Appellate Rights (original)
____ Letters (original)
____ Stipulations of Expected Testimony (original)
____ Awards/Certificates (ask for substituted in the record to let A get originals back)
____ Corrected ERB/2-1

Packet for Accused and Copy for Government

____ Judge Alone Request (copy)
____ Charge Sheet (copy)
____ Stipulation (copy)
____ Offer (copy)
____ Quantum (copy)
____ Stipulations (copy)
____ Unsworn Statement (if applicable)
____ Post-Trial and Appellate Rights (copy)

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DEFENSE COUNSEL
POST-TRIAL CHECKLIST

CONFINEMENT FACILITY: _____

EXPECTED RELEASE DATE: _____

_____ a. Review the Report of Result of Trial for accuracy (PTC credit, pleas, findings, etc).

_____ b. Call client once he reaches confinement. Verify the facility and expected release date.

_____ c. Send client "initial" letter.

_____ d. Review ROT for errata.

_____ e. Send client the "errata" letter.

_____ f. Receive the authenticated copy of the ROT and SJAR. Scrub the SJAR:

FINDINGS ADJUDGED (must accurately reflect trial findings)	YES	NO
SENTENCE ADJUDGED	YES	NO
MJ/PANEL CLEMENCY RECOMMENDATION	YES	NO
LENGTH/CHARACTER OF SERVICE	YES	NO
AWARDS & DECORATIONS	YES	NO
NONJUDICIAL PUNISHMENT	YES	NO
CONVICTIONS	YES	NO
NATURE/DURATION OF ANY PRETRIAL RESTRAINT	YES	NO
TERMS OF ANY PRETRIAL AGREEMENT	YES	NO
RECOMMENDATION AS TO ACTION	YES	NO

_____ g. Contact client in jail. Get the list of clemency witnesses and prepare clemency matters.

_____ h. Contact the client to confirm that the client has received a copy of the authenticated ROT and SJA PTR.

_____ i. Request addition 20-days for 1105 matters, if necessary.

_____ j. Complete your post-trial submissions (with attachments) and mail a copy of your letter and all attachments to the client.

_____ k. Call the client to discuss your post-trial submissions.

_____ l. Explore post-trial motions possibilities (**use motions checklist**).

_____ m. If you alleged legal error, review SJA addendum:

COMMENT ON LEGAL ERRORS RAISED	YES	NO
CORRECTIVE ACTION NECESSARY	YES	NO
NEW MATTER	YES	NO
SERVICE OF NEW MATTER ON DC	YES	NO

_____ n. Check if the CA is disqualified from taking action.

_____ o. Check Action for accuracy and completeness.

CA DECISION AS TO SENTENCE	YES	NO
ANY GUILTY FINDINGS DISAPPROVED	YES	NO
ORDERS AS TO OTHER DISPOSITION	YES	NO
CA PERSONALLY SIGNED	YES	NO
DEFERMENT OF CONFINEMENT	YES	NO
PRETRIAL CONFINEMENT CREDIT	YES	NO
REPRIMAND	YES	NO
TOTAL FORFEITURES w/o CONFINEMENT	YES	NO
DEFERRMENT/WAIVER OF FORFEITURES	YES	NO

_____ p. Check Promulgating Order for accuracy and completeness.

ISSUED BY CONVENING AUTHORITY	YES	NO
DATE OF ACTION	YES	NO
TYPE OF COURT-MARTIAL	YES	NO
COMMAND BY WHICH COURT-MARTIAL WAS CONVENED	YES	NO
SUMMARY OF CHARGES AND SPECIFICATIONS ARRAIGNED	YES	NO
ACCUSED'S PLEAS	YES	NO
FINDINGS OR OTHER DISPOSITION	YES	NO
SENTENCE	YES	NO
ACTION BY CONVENING AUTHORITY	YES	NO

_____ q. Alert DAD to issues that are not clear from either the ROT or your post-trial submissions.

_____ r. Send letter to client explaining that your actions are done, and that your attorney-client relationship continues ends when appellate counsel is appointed.

Counsel Requested Instructions Checklist

Submitted By: ☐ **Prosecution** ☐ **Defense**

I. FINDINGS INSTRUCTIONS

A. Lesser Included Offenses

Ch / Sp

(_____) _____

(_____) _____

(_____) _____

(_____) _____

(_____) _____

(_____) _____

(_____) _____

(_____) _____

B. Terms Having Special Legal Significance

☐ _____

☐ _____

C. Self-Defense/Defenses to Assaults

Self-Defense (5-2)

- ☐ Homicide/Aggravated Assault (5-2-1)
- ☐ Non-Aggravated Assault (5-2-2)
- ☐ Assault as LIO (5-2-3)
- ☐ Homicide/Unintended Death (5-2-4)
- ☐ Use of Force to Deter (5-2-5)
- ☐ Other Instructions – Self-Defense (5-2-6)
  - ☐ Opportunity to Withdraw (Note 2)
  - ☐ State of Mind (Note 3)
  - ☐ Voluntary Intoxication (Note 4)
  - ☐ Provocateur – Mutual Combat (Note 5)
    - ☐ Burden of Proof (Note 6)
    - ☐ Withdrawal Reviving Right (Note 7)

Defense of Another (5-3)

- ☐ Homicide/Aggravated Assault (5-3-1)
- ☐ Assault/Battery (5-3-2)
- ☐ Homicide/Agg Assault Plus LIO (5-3-3)

☐ Accident (5-4)
☐ Duress (Compulsion or Coercion) (5-5)
☐ Defense of Property (5-7)
☐ Parental Discipline (5-16)
☐ Causation – Lack of (5-19)

D. Other Defenses

☐ Accident (5-4)
☐ Duress (Compulsion or Coercion) (5-5)
☐ Entrapment (5-6)

Obedience to Orders (5-8)

- ☐ Unlawful Order (5-8-1)
- ☐ Lawful Orders (5-8-2)

☐ Physical Impossibility (5-9-1)
☐ Physical Inability (5-9-2)
☐ Financial and Other Inability (5-10)

Ignorance or Mistake of Fact (5-11)

- ☐ Specific Intent / Knowledge (5-11-1)
- ☐ General Intent (5-11-2)
- ☐ Article 134 Check Offenses (5-11-3)
- ☐ Drug Offenses (5-11-4)

☐ Voluntary Intoxication (5-12)
☐ Alibi (5-13)
☐ Voluntary Abandonment (5-15)
☐ Parental Discipline (5-16)
☐ Evidence Negating Mens Rea (5-17)
☐ Self-Help Under a Claim of Right (5-18)
☐ Causation – Lack of (5-19)

E. Pretrial Statements

☐ Pretrial Statements (Chapter 4)

F. Law of Principals (7-1)

☐ Aider and Abettor (7-1-1)
☐ Counseling, Commanding, Procuring (7-1-2)
☐ Causing an Act to be Done (7-1-3)
☐ Liability of Coconspirators (7-1-4)

G. Joint Offenders

☐ Joint Offenders (7-2)

J. Defense of Lack of Mental Responsibility

☐ Mental Responsibility at Time of Offense (6-4)
☐ Partial Mental Responsibility (6-5)
☐ Expert Testimony (7-9-1)
☐ Evaluation of Testimony (6-6)

K. Evidentiary and other instructions

- ☐ Circumstantial Evidence (7-3)
  - ☐ Justifiable Inferences (Note 1)
  - ☐ Proof of Intent (Note 2)
  - ☐ Proof of Knowledge (Note 3)
- ☐ Stipulation of Fact (7-4-1)
- ☐ Stipulation of Testimony (7-4-2)
- ☐ Depositions (7-5)
- ☐ Judicial Notice (7-6)
- ☐ Credibility of Witness (7-7-1)
- ☐ Interracial Identification (7-7-2)
- ☐ Character Evidence – Accused (7-8-1)
- ☐ Character Evidence – Victim (7-8-2)
- ☐ Character for Untruthfulness (7-8-3)
- ☐ Expert Testimony (7-9-1)
- ☐ Polygraph Expert (7-9-2)
- ☐ Accomplice Testimony (7-10)
- ☐ Prior Inconsistent Statement (7-11-1)
- ☐ Prior Consistent Statement (7-11-2)
- ☐ Accused's Failure to Testify (7-12)
- ☐ Uncharged Misconduct – Accused (7-13-1)
- ☐ Prior Conviction to Impeach (7-13-2)
- ☐ Past Sex Behav Nonconsent Sex Victim (7-14)
- ☐ Variance – Find by Except & Subst (7-15)
- ☐ Value, Damage or Amount (7-16)
- ☐ Spill-Over (7-17)
- ☐ "Have you Heard" Impeach Question (7-18)
- ☐ Witness Under Grant of Immunity (7-19)
- ☐ Chain of Custody (7-20)
- ☐ Privilege (7-21)
- ☐ False Exculpatory Statements (7-22)
- ☐ Closed Trial Sessions (7-23)

L. Other Findings Instructions (Tailored or Special)

Attach Proposed Requested Language & Authority

- ☐ Topic: _____
- ☐ Topic: _____
- ☐ Topic: _____
- ☐ Topic: _____
- ☐ Topic: _____
- ☐ Topic: _____
- ☐ Topic: _____
- ☐ Topic: _____

II. SENTENCING INSTRUCTIONS

- ☐ Pretrial Confinement Credit: _____ Days
- ☐ Fine
- ☐ Article 58b CA Clemency Powers (Family)
- ☐ Mental Responsibility Sentencing Factors (6-9)
- ☐ Accused's Failure to Testify
- ☐ Accused's Not Testifying Under Oath
- ☐ Effect of Guilty Plea
- ☐ Mendacity
- ☐ Clemency (Recommend Suspension) (2-7-16)
- ☐ Clemency (Additional Instructions) (2-7-17)

***Wheeler* Factors (E&M or Aggravation)**

E&M	A	
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____
☐	☐	_____

Other Sentencing Instructions (Tailored or Special)

Attach Proposed Requested Language & Authority

- ☐ Topic: _____
- ☐ Topic: _____
- ☐ Topic: _____
- ☐ Topic: _____
- ☐ Topic: _____
- ☐ Topic: _____
- ☐ Topic: _____
- ☐ Topic: _____

Exhibits Check List: US v _____ Tried on: _____ at: _____

APPELLATE		PROSECUTION				DEFENSE			
			O	R			O	R	
I		**1**				**A**			
II		**2**				**B**			
III		**3**				**C**			
IV		**4**				**D**			
V		**5**				**E**			
VI		**6**				**F**			
VII		**7**				**G**			
VIII		**8**				**H**			
IX		**9**				**I**			
X		**10**				**J**			
XI		**11**				**K**			
XII		**12**				**L**			
XIII		**13**				**M**			
XIV		**14**				**N**			
XV		**15**				**O**			
XVI		**16**				**P**			
XVII		**17**				**Q**			
XVIII		**18**				**R**			
XIX		**19**				**S**			
XX		**20**				**T**			
XXI		**21**				**U**			
XXII		**22**				**V**			
XXIII		**23**				**W**			
XXIV		**24**				**X**			
XXV		**25**				**Y**			
XXVI		**26**				**Z**			
XXVII		**27**				**AA**			
XXVIII		**28**				**BB**			
XXIX		**29**				**CC**			
XXX		**30**				**DD**			
XXXI		**31**				**EE**			
XXXII		**32**				**FF**			
XXXIII		**33**				**GG**			
XXXIV		**34**				**HH**			
XXXV		**35**				**II**			
XXXVI		**36**				**JJ**			
XXXVII		**37**				**KK**			

Exhibits Check List: US v ____________________ Tried on: ________________ at: _______________

ADDITIONAL EXHIBITS

APPELLATE		PROSECUTION				DEFENSE			
			O	R			O	R	

INSTRUCTIONS CHECKLIST
MENTAL RESPONSIBILITY
IS IN ISSUE

I. PRELIMINARY - AT ASSEMBLY

(__) Preliminary instructions (P. 36).
- (__) Beyond reasonable doubt (P. 37)
- (__) Credibility of witnesses (P. 37).
- (__) Joint offenders (7-2)
- (__) Elements of offenses (Chp 3)
- (__) Vicarious liability. (Chp 7)
- (__) Preliminary instruction on mental responsibility (6-3)
- (__) _____
- (__) _____

II. FINDINGS

A. (__) **Prefatory Instructions** (P. 49)
B. (__) **Elements of offenses** (Chp 3)
- (__) CH/SP _____ LIO _____
- (__) CH/SP _____ LIO _____
- (__) CH/SP _____ LIO _____
- (__) CH/SP _____ LIO _____

C. (__) Terms having special legal significance.
(__) _____ (__) _____ (__) _____

D. (__) Law of Principals. (7-1)

E. Self-Defense/Defenses to Assaults

Self-Defense (5-2)
- (__) Homicide/Aggravated Assault (5-2-1)
- (__) Non-Aggravated Assault (5-2-2)
- (__) Assault as LIO. (5-2-3)
- (__) Homicide/unintended death (5-2-4)
- (__) Use of Force to Deter (5-2-5)
- (__) Other Instructions - self-defense (5-2-6)
  - (__) _____
  - (__) _____
  - (__) _____
  - (__) _____

Defense of Another (5-3)
- (__) Homicide/Aggravated Assault (5-3-1)
- (__) Assault/Battery (5-3-2)

E. Self-Defense/Defenses to Assaults, con'd
- (__) Homicide/Agg assault plus LIO (5-3-3)
- (__) Accident (5-4)
- (__) Duress (Compulsion or Coercion) (5-5)
- (__) Defense of Property (5-7)
- (__) Parental Discipline (5-16)
- (__) Causation - Lack of (5-19)

F. Other Defenses

- (__) Accident (5-4)
- (__) Duress (Compulsion or Coercion) (5-5)
- (__) Entrapment (5-6)

Obedience to Orders (5-8)
- (__) Unlawful Order (5-8-1)
- (__) Lawful Orders (5-8-2)

- (__) Physical Impossibility (5-9-1)
- (__) Physical Inability (5-9-2)
- (__) Financial and Other Inability (5-10)

Ignorance or Mistake of Fact (5-11)
- (__) Specific intent/knowledge (5-11-1)
- (__) General intent (5-11-2)
- (__) Article 134 Check Offenses (5-11-3)
- (__) Drug Offenses (5-11-4)

- (__) Voluntary Intoxication (5-12)
- (__) Alibi (5-13)
- (__) Voluntary Abandonment (5-15)
- (__) Parental Discipline (5-16)

NO. Evidence Negating Mens Rea (5-17)
- (__) Self-Help Under a Claim of Right (5-18)
- (__) Causation - Lack of (5-19)
- (__) Other _____.
- (__) Other _____.
- (__) Other _____.

G Pretrial Statements.
(__) Pretrial Statements (Chapter 4)

H Law of Principals (7-1). (if not given in Part II D)
- (__) Aider and Abettor (7-1-1)
- (__) Counseling, Commanding, Procuring (7-1-2)
- (__) Causing an Act to be Done (7-1-3)
- (__) Liability of Coconspirators (7-1-4)

I. Joint Offenders.

(__) Joint Offenders (7-2)

J. Defense of Lack of Mental Responsibility

(__) Mental Responsibility at Time of Offense (6-4)
(__) Partial Mental Responsibility (6-5)
(__) Expert Testimony (7-9-1)
(__) Evaluation of Testimony (6-6)

K. Evidentiary and other instructions..

(__) Circumstantial Evidence (7-3)
  (__) Proof of intent .
  (__) Proof of knowledge.
(__) Stipulation of Fact (7-4-1)
(__) Stipulation of Testimony (7-4-2)
(__) Depositions (7-5)
(__) Judicial Notice (7-6)
(__) Credibility of Witness (7-7-1)
(__) Interracial Identification (7-7-2)
(__) Character Evidence - Accused (7-8-1)
(__) Character Evidence - Victim (7-8-2)
(__) Character for Untruthfulness (7-8-3)
(__) (Expert Testimony (7-9-1))
(__) Polygraph Expert (7-9-2*)*
(__) Accomplice Testimony (7-10)
(__) Prior Inconsistent Statement (7-11-1)
(__) Prior Consistent Statement (7-11-2)
(__) Accused's Failure to Testify (7-12)
(__) Uncharged Misconduct - Accused (7-13-1)
(__) Prior Conviction to Impeach (7-13-2)
(__) Past Sexual Behavior of Nonconsensual Sex Victim (7-14)
(__) Variance --Findings by Exceptions and Substitutions (7-15)
(__) Value, Damage or Amount (7-16)
(__) Spill-Over (7-17)
(__) Have you Heard Impeachment Questions (7-18)
(__) Witness Under Grant of Immunity (7-19)
(__) Chain of Custody (7-20)
(__) Privilege (7-21)
(__) False Exculpatory Statements (7-22)
(__) Closed Trial Sessions (7-23)
(__) Brain Death (7-24)
(__) Divers or Specified Conditions (7-25)

L. (__) Closing Substantive Instructions on findings (P.52)

(M. Argument by Counsel.)

N. (__) Procedural Instructions on Findings in cases where mental responsibility is in issue. (6-7)

O. (__) NO SENTENCING PROCEEDINGS
If no sentencing proceedings are required, give Excusal Instruction at P. 106

III. SENTENCING INSTRUCTIONS

(__) Instructions on Sentence
(__) Article 58a
(__) Pretrial Confinement Credit
(__) Article 58b
(__) 58b Clemency Powers by CA
(__) Fine
(__) Punitive discharge
  (__) Vested benefits.
(__) No punishment.
(__) Summary of Evidence in Extenuation/Mitigation
(__) Mental Responsibility Sentencing Factors (6-9)
(__) Accused's Failure to Testify
(__) Accused's not Testifying Under Oath
(__) Effect of Guilty Plea
(__) Mendacity
(__) Argument for Specific Sentence
((__) Clemency (P. 129))
(__) Other _____.
(__) Other _____.
(__) Other _____.

(__) Concluding Instructions

IV. EXCUSING MEMBERS. Give Excusal Instruction at P. 106

INSTRUCTIONS CHECKLIST
MENTAL RESPONSIBILITY
NOT IN ISSUE

I. PRELIMINARY - AT ASSEMBLY

(__) Preliminary instructions (P. 36).
- (__) Beyond reasonable doubt (P. 37)
- (__) Credibility of witnesses (P. 37).
- (__) Joint offenders (7-2)
- (__) Elements of offenses (Chp 3)
- (__) Vicarious liability. (Chp 7)
- (__) _____
- (__) _____

II. FINDINGS

A. (__) **Prefatory Instructions** (P. 49)

B. (__) **Elements of offenses** (Chp 3)
- (__) CH/SP _____ LIO _____
- (__) CH/SP _____ LIO _____
- (__) CH/SP _____ LIO _____
- (__) CH/SP _____ LIO _____

C. (__) Terms having special legal significance.
(__) _____ (__) _____ (__) _____

D. (__) Law of Principals. (7-1)

E. Self-Defense/Defenses to Assaults

Self-Defense (5-2)
- (__) Homicide/Aggravated Assault (5-2-1)
- (__) Non-Aggravated Assault (5-2-2)
- (__) Assault as LIO. (5-2-3)
- (__) Homicide/unintended death (5-2-4)
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  - (__) _____
  - (__) _____
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- (__) Homicide/Aggravated Assault (5-3-1)
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E. Self-Defense/Defenses to Assaults, con'd
- (__) Accident (5-4)
- (__) Duress (Compulsion or Coercion) (5-5)
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- (__) Parental Discipline (5-16)
- (__) Causation - Lack of (5-19)

F. Other Defenses
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- (__) Duress (Compulsion or Coercion) (5-5)
- (__) Entrapment (5-6)

Obedience to Orders (5-8)
- (__) Unlawful Order (5-8-1)
- (__) Lawful Orders (5-8-2)

- (__) Physical Impossibility (5-9-1)
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- (__) Specific intent/knowledge (5-11-1)
- (__) General intent (5-11-2)
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- (__) Voluntary Intoxication (5-12)
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- (__) Voluntary Abandonment (5-15)
- (__) Parental Discipline (5-16)
- (__) Evidence Negating Mens Rea (5-17)
- (__) Self-Help Under a Claim of Right (5-18)
- (__) Causation - Lack of (5-19)
- (__) Other _____.
- (__) Other _____.
- (__) Other _____.

G Pretrial Statements.
- (__) Pretrial Statements (Chapter 4)

H Law of Principals (7-1). (if not given in Part II D)
- (__) Aider and Abettor (7-1-1)
- (__) Counseling, Commanding, Procuring (7-1-2)
- (__) Causing an Act to be Done (7-1-3)
- (__) Liability of Coconspirators (7-1-4)

I. Joint Offenders.

(__) Joint Offenders (7-2)

J. Evidentiary and other instructions..

(__) Circumstantial Evidence (7-3)
  (__) Proof of intent .
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(__) Stipulation of Fact (7-4-1)
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(__) Depositions (7-5)
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(__) Character Evidence - Accused (7-8-1)
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(__) Expert Testimony (7-9-1)
(__) Polygraph Expert (7-9-2)
(__) Accomplice Testimony (7-10)
(__) Prior Inconsistent Statement (7-11-1)
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(__) Accused's Failure to Testify (7-12)
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(__) Prior Conviction to Impeach (7-13-2)
(__) Past Sexual Behavior of Nonconsensual Sex Victim (7-14)
(__) Variance --Findings by Exceptions and Substitutions (7-15)
(__) Value, Damage or Amount (7-16)
(__) Spill-Over (7-17)
(__) Have you Heard Impeachment Questions (7-18)
(__) Witness Under Grant of Immunity (7-19)
(__) Chain of Custody (7-20)
(__) Privilege (7-21)
(__) False Exculpatory Statements (7-22)
(__) Closed Trial Sessions (7-23)
(__) Brain Death (7-24)
(__) Divers or Specified Conditions (7-25)
(__) _____
(__) _____
(__) _____

K. (__) Closing Substantive Instructions on findings (P. 52)

(L. Argument by Counsel.)

M. (__) Procedural Instructions on Findings (P. 54)

N. (__) NO SENTENCING PROCEEDINGS
If no sentencing proceedings are required, give Excusal Instruction at P. 106

III. SENTENCING INSTRUCTIONS

(__) Instructions on Sentence
(__) Article 58a
(__) Pretrial Confinement Credit
(__) Article 58b
(__) 58b Clemency Powers by CA
(__) Fine
(__) Punitive discharge
  (__) Vested benefits.
(__) No punishment.
(__) Summary of Evidence in Extenuation/Mitigation
(__) Accused's Failure to Testify
(__) Accused's not Testifying Under Oath
(__) Effect of Guilty Plea
(__) Mendacity
(__) Argument for Specific Sentence
((__) Clemency (P. 129))
(__) Other _____.
(__) Other _____.
(__) Other _____.

(__) Concluding Instructions

IV. EXCUSING MEMBERS. **Give Excusal Instruction at P. 106**

TRIAL COUNSEL
PRETRIAL CONFINEMENT CHECKLIST

1. Determine whether SM meets burden for PTC versus other less restrictive means of restraint. *RCM 305(d)*

   a. Probable cause that an offense triable by CM has been committed;
   b. PC that the person to be restrained committed the offense; and
   c. Circumstances require PTC.

2. Review Military Justice policy memoranda to determine if any CA withheld authority to approve PTC (GCMCA will often require approval).

3. If GCMCA requires approval, contact the CoJ to request SJA drive-by. Provide CoJ facts of the case and why you think the circumstances require PTC. If GCMCA does not require approval, notify CoJ of the command's intent to place SM in PTC.

4. Contact whatever confinement facility will be holding SM.

5. Direct 27D to brief command on prisoner escort procedures, to include signing for handcuffs from the MPs.

6. Direct 27D to contact medical facility to coordinate confinee medical exam.

7. Contact TDS to notify them that the command is putting SM in PTC. Request name of detailed DC and make contact.

8. Draft confinee advice memorandum. *RCM 305(e)*

   a. Nature of the offenses
   b. Right to remain silent
   c. Right to retain civilian counsel and right to request military counsel
   d. Nature of the confinement review procedure

9. Direct 27D to complete confinement order (DD Form 2707) and commander's portion of any local forms. Review the confinement order for accuracy.

10. Have the command assemble the SM and escorts (senior to SM). Commander reads SM his rights and signs the confinement order. Escorts take SM to medical facility then confinement facility.

11. If someone other than the commander ordered the confinement, notify the commander of the name of the prisoner, the offenses charged/suspected, and the name of the person who order or authorized confinement. *RCM 305(h)(1)*

12. Identify a neutral and detached commander to conduct the combined 48-hour PC determination and 72-hour review. This can be another company commander in the same battalion. *RCM 305(h)(2)*

13. Draft the 48-hour PC determination/72 hour-hour review memorandum and have the neutral and detached commander review it and sign it. The neutral and detached commander can sign this memorandum any time after the confining commander signs the confinement order but must be within 48 hours.

14. Coordinate with PTMM for 7-day review. This review can be any time after confinement and after 48-hour determination/72-hour review and should generally be as soon as possible. Include detailed TDS attorney on all correspondence with PTMM. Notify TDS of time for review hearing. *RCM 305(i)*

15. Attend the 7-day review. If PTMM orders continued confinement, monitor SM's confinement and ensure SM has access to his/her DC. If PTMM directs release, notify command and help the command come up with less restrictive restraint IAW RCM 304.

16. If continued confinement, charge SM as soon as possible IAW Article 10, UCMJ and RCM 707. If immediate charging is not an option due to ongoing investigation, document all forward progress on the case on a daily log for use during Article 10 hearing.

120 days from day confined (from order, not after 7-day review): _____

DEPOSITION CHECKLIST

1. Determine if you need to conduct a deposition. YES, if:

a. Witness may be unavailable for Article 32 (see RCM 405(g)); OR

b. Witness may be unavailable for trial (see RCM 703(b)). Pay particular attention to civilian witnesses travelling to foreign country to testify at trial; OR

c. Counsel wants to preserve sworn testimony for trial for some other reason (impeachment).

2. Identify who has the authority to order the deposition (RCM 702(b)):

a. Pre-referral: The commander who has the charges for disposition. This is usually the brigade commander.

b. Post-referral: The convening authority or the military judge.

3. TC: If you cannot attend the deposition, request support from local MJ office through your COJ. This is common when the case will occur OCONUS and your witness is CONUS (deployed trial or OCONUS trial with civilian CONUS witnesses).

4. COJ: Identify COJ in local jurisdiction and request logistical and TC support (deposition officer, courtroom, reporter, government counsel, witness transport, etc.). Deposition officer is usually a JAG attorney.

5. TC: Make your formal request to the appropriate authority using format in RCM 702(c). If the charges are pre-referral, prepare deposition order IAW RCM 703(d) and provide notice to opposing party IAW RCM 703(f).

6. TC: If requesting local support, BPT brief the local TC on the basic facts of the case, your goal with the deposition, and provide a list of questions for him/her to ask.

7. Depo Officer:

a. Notify parties and witnesses of time/date of deposition.

b. If pre-referral and stationed OCONUS, coordinate with IA attorney to subpoena foreign civilian witnesses IAW local law.

c. If post-referral and CONUS, subpoena witnesses.

d. Be present on day of deposition and follow all procedures outlined in RCM 703(f).

8. Reporter: Record and transcribe the deposition. Send to testifying witnesses, deposition officer, TC present and deposition, and DC for authentication.

9. TC: Continue preparing for trial as if witness will attend. Obtain ITO, passport, visa, and plane tickets. Have 27D in charge of witness travel document or save all communications with witness. You need to prove to the court that you've done everything possible to bring the witness to trial.

10. Disclose to the DC your intent to use deposition testimony IAW RCM 701. Check the PTO to see if MJ requires notice of intent to use deposition testimony.

GUIDE TO ARTICULATING PROBABLE CAUSE TO SEARCH

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. The 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 the 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. The witness is a good, honest Soldier; you know him from personal knowledge or by reputation or opinion of chain of command.

2. The witness has given reliable information before; he has a good track record (CID may have records).

3. The witness has no reason to lie.

4. The witness has a truthful demeanor.

5. The witness made a 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. The witness made an admission against his or her 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.

Encl 8 (Military Magistrates SOP)

NOTES ON REQUEST FOR SEARCH AUTHORIZATION

Date/Time Called: _____

Called By: _____ of the _____office.

The requester **did/did** not present an affidavit.

The requester **was/was not** sworn. (The requester was not sworn because _____).

The requester **had/had not** previously requested another magistrate, judge or commander, to grant the same request. (If such a previous request was made, what new information - if any - has been obtained? _____
_____

The offense being investigated was: _____
_____

The requester requested to search for the following items: _____
_____

The requester wanted to search for the items at/in following place(s) or upon the following person: _____
_____

Why does the requester believe that what he/she wants to search for is located at the place(s) he/she wishes to search? (Indicate here a narrative of the information the requester presents. If an affidavit is attached, indicate only information that is not contained in the affidavit. Use "Fact Notes" sheets to detail information.)
_____
_____
_____
_____
_____
_____

Documents or reports **were/were not** reviewed in making my decision. The names of the items I reviewed **are/are not** listed on reverse. I **did/did not** initial all pages of documents I reviewed.

Probable cause to search exists when there is a reasonable belief that the property, or evidence sought is located in the place or on the person to be searched.

The request was **approved/disapproved/approved with the following modifications:**_____
_____.
A written search authorization **was/was not** executed.

Encl 9 (Military Magistrates SOP)

CHECKLIST FOR REVIEW OF PRETRIAL CONFINEMENT

1. Is the confinee subject to the UCMJ?

2. Was the confinee confined by order of a commissioned officer of the Armed Forces?

3. Was the confinee previously confined for the same offense(s) and released by any person authorized under R.C.M. 305(g)?

4. Did the confinee's commander decide within 72 hours of ordering the confinee into pretrial confinement, or receipt of a report that a member of his unit was confined, whether pretrial confinement would continue?

5. Did the commander prepare a memorandum of his reasons for approving continued pretrial confinement?

6. Has a charge sheet been prepared?

7. Is the confinee charged only with an offense normally tried by summary court-martial?

8. Did the confinee have or request military counsel prior to this review or meeting with the prisoner?

9. Was the confinee's counsel informed of the date, time and place of any meeting with the prisoner?

10. Has the confinee been informed of:

a. The nature of the offenses for which held;

b. The right to remain silent and that any statement made by the confinee may be used against the confinee;

c. The right to retain civilian counsel at no expense to the United States, and the right to request assignment of free military counsel; and

d. The procedures by which continued pretrial confinement will be reviewed?

11. Is there a reasonable belief that:

a. An offense triable by court-martial has been committed;

b. The confinee committed it; and

c. Pretrial confinement Is required?

12. Has a written memorandum of the decision to approve continued pretrial confinement or order immediate release, including the factual findings upon which they were based, been prepared?

13. Have the confinee and the commander been informed of the decision?

14. Has a copy of the memorandum of the decision with all documents considered been kept on file?

Encl 11 (SOP for Military Magistrates)

List of nonexclusive factors to consider in determining whether continued PTC is warranted		
Factor	**Discussion**	**Magistrate's Notes**
The nature and circumstances of the offenses charged or suspected, including extenuating circumstances.	The more serious the offense(s), the more likely it may be the confinee might want to avoid prosecution	
The weight of the evidence against the confinee	The more likely there will be a conviction, the more likely it may be the confinee might avoid trial	
The confinee's ties to the community, including house, family, off-duty employment, financial resources, and length of residence	Where is home? What does the confinee have to gain or lose by leaving the area?	
The confinee's character and mental condition.	Law abiding? Follows orders? Violent? Peaceful? Stable?	
The confinee's service record, including any record of previous misconduct. Consider counseling statements if part of the commander's packet.	If the unit is to use conditions on liberty, those conditions are often enforceable only by moral suasion on the confinee. Is the confinee the kind of Soldier that follows orders?	
Has the confinee been disciplined before? How did (s)he respond to corrective action?	Soldiers who respond favorable to corrective action are less likely to engage in future misconduct.	
The confinee's record of appearance at or flight from other pretrial investigations, trials and similar proceedings.	Is there evidence the confinee has missed appointments or hearings?	
The likelihood the confinee can and will commit further criminal misconduct if allowed to remain at liberty pending trial?	This is a combination of a lot of other factors.	
What other forms of restraint have been tried, if any, and found to be ineffective?	The commander is not required to actually try lesser forms of restraint but the magistrate should not continue confinement unless lesser forms of restraint won't work. If the unit has tried lesser forms of restraint, how did the confinee respond to them?	
If AWOL before being confined, how did the confinee come under military control and how long was the absence?	Was the AWOL terminated by apprehension or did the confinee turn himself in. Is there evidence the AWOL was a desertion or just cold feet.	
Does the confinee have a history of AWOL, desertion, FTRs?		

List of nonexclusive factors that might indicate whether the confinee may or may not interfere with trial preparation or obstruct justice		
Factor	**Discussion**	**Magistrate's Notes**
Does the case depend mainly on witness testimony rather than documentary or physical evidence?	Documents don't change. Witnesses can.	
Are the witnesses members of the confinee's unit, live in the confinee's barracks or have a common place of duty with the confine?	Does the confinee have access to the witnesses?	
What is the confinee's reputation, if any, for violence, bribery or false statements.		
Is there reliable information demonstrating threats or acts of violence against witnesses by or at the behest of the confinee?		
Has the confine violated conditions of any previously established no contact or protective orders.		
Other Notes		

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DAPM-ACC 13 Dec 11

MEMORANDUM FOR RECORD

SUBJECT: Department of Army Confinement Procedures Checklist

1. IAW AR 190-47, based on operational requirements and programs, Army Corrections Command (ACC) will determine place of incarceration for all Army prisoners who are sentenced to confinement beyond 30 days. Notification of summary C/M's remaining in local contract jails is required, including the required confinement documents and confinement checklist. Local contract jails may not be used to confine adjudged prisoners beyond 30 days without prior approval from ACC.

2. The enclosed checklist is required for any Courts-Martial resulting in a sentence to confinement and will be completely filled out by the primary SJA POC/representative. All required documents will be scanned and emailed to Mike Chvojka / michael.t.chvojka.civ@mail.mil, Laura Mitchell / laura.l.mitchell.civ@mail.mil or Larry Kester / larry.j.kester.civ@mail.mil or faxed to DSN 328-7722/COM 703-428-7722 (do not e-mail or fax the MPR and ROI. They will be hand carried by escorts).

3. Reassignment orders: Soldiers who receive a sentence of 121 days or more confinement without a punitive discharge/dismissal, or adjudged a punitive discharge/dismissal will be administratively assigned to the appropriate PCF with confinement at the designated correctional facility IAW AR 600-62, Para 3-12. For those prisoners that do not meet the criteria for reassignment the commander/1SG contact information is required (e-mail, phone, and address).

4. The transfer date is coordinated with ACC and the SJA representative/losing unit. The transfer date is not an on or about date. It is the expected arrival date. If the unit is unable to complete the mission on the designated date, ACC or the gaining facility needs to be notified immediately. Before conducting the actual transfer of the prisoner(s), the losing unit or SJA representative will contact the gaining ACC facility and provide the escorts information as well as their travel itinerary. SJA will provide the escorts with the checklist and all required documents to be hand carried to the gaining facility. It is highly encouraged that unit commanders contact the installation PMO for escorting instructions/assistance for high risk/special management prisoners.

5. ACC Points of contact be Mike Chvojka, 703-428-7701, DSN: 328-7701, Laura Mitchell, 703-428-7705, DSN: 328-7705 or Larry Kester 703-428-7713, DSN 328-7713.

GREGORY J. STROEBEL
Operations Chief
Army Corrections Command

Encl
Confinement Procedures Checklist

CONFINEMENT PROCEDURES CHECKLIST

DD Form 2704 (MAR 1999) V/W _____ Initials

DA Form 4430 (MAY 2010) Result of Trial _____ Initials

DD Form 2707 (SEP 2005) Confinement Order _____ Initials

DD Form 458 (MAY 2000) Charge Sheet _____ Initials

Report of Investigation (CID Report) (EMAIL ONLY / DO NOT FAX) _____ Initials

ERB/ORB _____ Initials

Pre-Trial Agreement (if any) _____ Initials

Age of prisoner _____

Is the prisoner currently in pretrial confinement, if so where? _____

Gender: M___ F___

Any previous disciplinary actions? Y___ N___

Were alcohol or drugs a contributing factor in this case? Y___ N___

Is the prisoner currently under a Doctors' care? Y___ N___
(If so, list name and phone number of Health Care Provider)
_____

Does the prisoner have any current or ongoing medical problems or require special medical equipment? Y___ N___

Are there any mental health problems, i.e.: suicidal/homicidal/homosexual/ assaultive thoughts or tendencies or a history of mental health problems? Y___ N___

Does the prisoner have any PTSD related issues? Y___ N___

Has the prisoner assaulted or threatened any staff or other prisoners? Y___ N___

List names of non-psychotropic medications prescribed for prisoner and daily dosages if applicable _____

List names of psychotropic medications prescribed for prisoner and daily dosages if applicable _____

How many days medication supply will prisoner have on hand upon arrival? _____

Is the prisoner an escape risk? Y___ N___ (If yes, explain why)
_____
_____

CONFINEMENT PROCEDURES CHECKLIST CONT.

Was DNA sample collected? Y___ N___ (If yes, include test kit #) _____

Is there any additional information that should be known about this prisoner?
(If so, list it here)

_____

Any additional remarks, comments, or concerns:

_____

_____

_____

_____

Requested move date: _____

Prisoner's UIC: _____

Primary SJA POC: _____

SJA POC legible name

_____

Phone number/Commercial or DSN

_____

Phone number/Cell

_____

Email address

_____

SJA POC legible signature

Appendix B
Case Preparation Tools

ELEMENTS AND EVIDENCE MATRIX

CHARGE ___, Specification ___: ARTICLE ___				
	ELEMENT	EVIDENCE	PROOF PROBLEMS / DEFENSES	ISSUES / ADMISSIBILITY
1				
2				
3				
4				
5				
6				
7				

CHARGE ___, Specification ___: ARTICLE ___				
	ELEMENT	EVIDENCE	PROOF PROBLEMS / DEFENSES	ISSUES / ADMISSIBILITY
1				
2				
3				
4				
5				
6				
7				

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Anticipated Objections to Adversary's Evidence

Witness / Exhibit	Evidence	Objection	Grounds (Rule / Statute / Case Law)	Limited Admission	Curative Instruction

Anticipated Objections to be Made by Adversary

Witness / Exhibit	Evidence	Objection	Grounds (Rule / Statute / Case law)	Response to Objection	Other Sources of Evidence	Offer of Proof	Limited Admission

Pretrial Evidentiary Motions

Motions in Limine	Anticipated Ruling	Alternative Way to Introduce / Oppose Evidence

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ARGUMENT WORKSHEET

Legal element:
Factual claim:
Most Probative Evidence:
Generalization:
Especially when: • • • • • •
Except when: • •

SAMPLE ARGUMENT WORKSHEET

Legal element: (2007 Art. 120)

Mistake of fact cannot be based on the negligent failure to discover the true facts

Claim:

SGT Archie should have at least said, “”Huh?” after he heard, “I don’t want to do this.”

Most Probative Evidence:

SGT Archie did not stop when he heard that.

Generalization:

If a man is trying to have sex with a woman and she says, “I don’t want to do this,” the man will almost always say, “Huh” or try to talk her into it.

Especially when:

- This is the first time they are having sex.
- They don’t really know each other very well.
- She just said, “This is a bad idea.”
- She did not invite him up.
- She has a boyfriend and doesn’t want to cheat on him.
- She did not initiate the kissing.
- She did not do any other foreplay.

Except when:

- Her other behaviors indicate she meant the opposite (grinding).
- The tone in her voice indicated she meant the opposite.
- What she meant was, “Because my boyfriend will find out.”
- She doesn’t care about cheating on her boyfriend.

SENTENCING ARGUMENT WORKSHEET

Opening (why any sentence more than X would be unjust):

Extenuation (what facts explain why the client did this, and why those facts support your proposition that X sentence is just):

-
-
-
-

Rehabilitation (what facts indicate which sentence will best rehabilitate the client, and why those facts support your proposition that X sentence is just)

-
-
-
-

Specific deterrence (what facts indicate whether or not society needs to be protected from your client, and why the facts support your proposition that X sentence is just)

-
-
-
-

General deterrence (what facts indicate that this punishment (if any) will prevent others from doing this, and why the facts support your proposition that X sentence is just):

-
-
-

•
Social retribution (what facts indicate the moral weight of this crime, and why those facts support your proposition that X sentence is just): • • • •
Mitigation (what facts about the client call for mercy, and why those facts support your proposition that X sentence is just): • • • •
Closing (why any sentence more than X would be unjust):

Appendix C
Witness Preparation

WITNESS WORKSHEET

Name: Date:

Rank/MOS: Witness:

Unit: Dates Unavailable:

Service History:

Interview:

WITNESS WORKSHEET

CREDIBILITY CHECKLIST

KNOWLEDGE	
Intelligence	
Ability to observe	
Ability to accurately record	
Authority to engage in the observing conduct	
Reason to engage in the observing conduct	
BIAS (can be proved by extrinsic evidence)	
Friendships	
Prejudices	
Relationship to other side of case	
Manner in which witness might be affected by the verdict	
Motive to misrepresent	
RELATIONSHIP TO OTHER EVIDENCE	
Consistent with what evidence?	
Inconsistent with what evidence?	
Important inconsistency?	
OTHER	
Sincerity	
Character for truthfulness (Can anyone attack it with specific instances on cross? If adverse, who can I call to attack it?)	
Conduct in court	

WITNESS CHECKLIST

Final Interview.

1. Explain the theory of the case and where the witness fits in.

2. Have witness read previous statements.

    a. Is anything misleading? Errors? Do you remember differently now?

    b. Explain impeachment, rehabilitation, refreshing recollection, past recollection recorded.

3. Revisit scene, if necessary.

4. Have the physical evidence in the interview.

    a. If sealed containers, have DC send a representative if necessary.

5. Rehearse.

6. It is okay to talk to the other lawyer. Tell the truth.

Checklist.

1. General:

    a. Wear all badges and decorations.

    b. When outside the courtroom, be serious and polite. Don't discuss the case. Don't speak to other court members.

    c. How to take the stand.

    d. Taking the oath

    e. Be serious but pleasant.

    f. Look at the person asking the question.

    g. Be silent and wait if anyone objects or interrupts.

2. Direct:

    a. Opening questions will be basic stuff. Relax, panel can size you up.

    b. Listen carefully to all questions.

    c. If you don't understand, say so and ask for clarification.

d. Talk in paragraphs.

e. Don't memorize – testify from memory.

f. Explain what you saw, rather than drawing conclusions (he was red, slammed fist into wall rather than he was angry)

g. Don't volunteer information.

h. If an estimate, say so. Time and distance is often off.

i. Don't exaggerate or make overly broad generalizations.

j. If an answer is incorrect or incomplete, correct immediately.

3. Cross examination.

a. You are not on trial – won't expose every bad thing you have done.

b. Tell the truth.

c. Be firm but polite. Be confident. Just explain what you know.

d. No sarcasm.

e. Don't try to outwit the other attorney.

f. Don't be bullied into a yes or no answer if the question can't be answered by yes or no.

g. If you need to explain, explain, but don't volunteer information.

h. Don't be afraid of silence. Wait for the next question.

i. Correct any mistakes immediately.

j. If you don't know, say so. There is nothing wrong with not knowing.

k. I can conduct redirect. This isn't your only chance.

l. Don't look at me if you get in trouble. Look at the judge.

4. LAST:

a. Is there anything else I should know?

b. I'm only interested in the truth.

EXPERT WITNESS CHECKLIST

Name: **Date:**

Business/Occupation	
What	
How long	
Capacity	
Description of field	
Company/Organization	
Where located	
Prior positions	
Descriptions of positions	
Total time practicing in field	
Education	
Undergraduate (Degree, when)	
Field of study	
Graduate (Degree, when)	
Field of study	
Postgraduate	
Field of study	
Training	
Formal courses (what, when)	
Training under recognized expert (who, when, how long)	
Licenses	
What	

When reviewed	
Speciality certifications	
Exams required	
When	
Requirements	
Professional Associations	
What	
Positions held	
Other background	
Teaching positions	
Publications	
Lectures	
Consulting work	
Experience at trial	
How many	
Which sides	
Experience in speciality required for this case	
Has this theory/technique been tested?	
Has it been subject to peer review?	
Error rate?	
Has the scientific community accepted the theory/technique?	

Appendix D
File Organization Tools

TRIAL NOTEBOOK INDEX

CHARGE SHEET AND ALLIED PAPERS

1. Charge Sheet
2. Convening Order
3. Art. 32
4. SJA Pretrial Advice and Transmittals

ELEMENTS OF PROOF CHECKLIST

5. Trial Counsel Memo

MOTIONS

6. Defense Notice of Motion and Motion
7. Government Response
8. Witnesses
9. Research

DISCOVERY AND DISCLOSURE

10. Section III Disclosure
11. Government Requests/Defense Response
12. Defense Requests/Government Response

WITNESSES

13. Government List
14. Defense List
15. Defense Production Requests/Government Response

SENTENCING

16. Pretrial Agreement/Quantum
17. Notice of Plea and Forum Selection
18. Stipulation of Fact and Expected Testimony
19. Government Sentencing Witnesses
20. Defense Sentencing Witnesses

21. MILITARY PAY CHART

22. PRETRIAL ORDER/DOCKET NOTIFICATION

CASE ACTION LOG

US v. _____

DATE	TIME	SUMMARY OF ACTION/ACTIVITY

Page: ____

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TRIAL DEFENSE SERVICE
COURTS-MARTIAL PACKET STANDARD ORGANIZATION

1st Flap (Inside Front Cover)

- DC Checklist
- Elements and Evidence Worksheet
- Case Info Sheet
- Case Suspense Log
- Action Log
- Motions Checklist
- Acknowledgement of Rights Advisement
- Client Questionnaire
- Personal Financial Statement
- Post-Trial and Appellate Rights (GCM or BCD)
- Detailing Order & Release of Military Defense Client
- Attorney Work Product

2rd Flap

- Charge Sheet
- Transmittal
- Vice Order(s)
- Convening Order
- Pre-Trial Confinement
- Discharge/Resignation in Lieu of Court-Martial
- Pre-trial Agreement & Stipulation of Fact
- Immunity
- Sanity Board & Mental Health

3rd Flap

- Discovery
- Motions
- Delays
- Communication between Counsel

4th Flap

- Article 32

5th Flap

- Client's Records
- OMPF
- ERB/2-1 & 2A
- SMIF

6th Flap (Inside Back Cover)

- Witness Statements
- Law Enforcement Reports
- Other Documentary Evidence

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Case File Setup

Flap	Items
1:	**ALL WORK PRODUCT (on top: TC checklists & work log)**
2:	**Charge sheet (always on top); transmittals; CMCOs**
3:	**Closed legal documents**
4:	**Open legal documents**
5:	**Documentary evidence, including statements**
6:	**Post-trial documents**

Appendix E
Defense Client Advice

Instructions for Using the Sex Offender Registration Advice Form

(This page is for Defense Counsel use and need not be given to the accused.)

Using this form is required by *U.S. v. Miller*, 63 M.J. 452 (C.A.A.F. 2006) and DODI 1325.7.

Prior to trial, if the accused is charged with any offense that is listed in the enclosure to the form, have the accused read the form, answer any questions, and have the accused sign it. Counsel will also sign and provide the accused a copy for his records.

If the accused intends to plead guilty to any offense that may require sexual offender registration, it is essential this form be executed *before* the offer to plead guilty is submitted so the accused knows the consequences of his plea. Because of the impact of sex offender registration, it could have a great impact on the decision whether to plead guilty to a qualifying offense. If there is no pretrial agreement, the advice must be executed before the plea is entered.

Have a signed copy of the form available at trial to mark as an Appellate Exhibit. The Military Judge's Benchbook includes an inquiry whether the accused has been so advised.

Because state and territorial laws are so diverse, and where the accused may reside, carry on a vocation, or go to school is uncertain, trial defense counsel should be very cautious on giving advice that an offense is not covered or the exact procedures to register other than "check with local authorities for registration requirements." In other words, even if the offense is not listed on the enclosure, a State or territory may still require sex offender registration. Counsel should not guarantee what a state law may require because some requirements are unpublished and the potential registrant must check with state authorities first. The Coast Guard Court of Criminal Appeals wrote about the dangers of telling a client he would not have to register as a sex offender only to later discover a State had registration requirements that were not generally known despite counsel's researching the issue. *See United States v. Molina*, 68 MJ 532 (C.G.C.C.A. 2009).

Trial Defense Counsel may wish to have the following article available as a list of state points of contact: *Sex Offender Laws and the Uniform Code of Military Justice: A Primer*, The Army Lawyer, August 2009, (hosted on the DCAP Portal in the Army Lawyer articles section).

Also, remember to ensure the accused is advised in writing of his post-trial and appellate rights.

Disposition of original and copies. (This includes both the signed form and the enclosure.)

- Original: For inclusion into record of trial.
- Copy to accused.
- Copy for defense counsel case file.

This form, and the post-trial and appellate rights advisement form, are on the DCAP Portal in the DC101 – Quick Links References (Post-Trial).

References: DODI 1325.7; 42 USC § 16912, 14071, 16991; 18 USC § 2250; U.S. v. Miller, 63 M.J. 452 (C.A.A.F., 2006); Chapter 24, AR 27-10; and DoD Memorandum "Sexual Offense Reporting Requirements," dated Nov 16, 2009.

DCAP FORM 1 (SEX OFFENDER REGISTRATION ADVICE)

Advice Concerning Requirements to Register as a Sex Offender

General Information: Under Federal law, DoD Instruction 1325.7, and Army Regulation 27-10, those who have been convicted of any offense listed on the attached page must register with the appropriate authorities in the jurisdiction (State, District of Columbia, Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, the United States Virgin Islands, and Indian Tribal lands) in which they reside, carry on a vocation, or attend school. Generally, this registration must take place within three days of release from confinement or within three days of conviction if not confined. This requirement exists regardless of whether the service member remains in the Army or is separated. If the service member remains in the military, registration with the installation Provost Marshal is also required.

Advice to Client: Registration as a sex offender is accessible by the public, and I understand that I may encounter substantial prejudice from being classified as a sex offender.

Because each State's laws or territorial laws are different and can be changed or interpreted differently, it will be my responsibility to determine the registration requirements where I reside, carry on a vocation, or am a student to determine the requirements. It is a violation of law to fail to register as a sex offender if the law requires me to do so.

The offenses which commonly require registration as a sex offender are very broad and include, as a minimum, those listed on the enclosure. State or territorial law may be even broader.

I have discussed the above matters with my defense counsel.

I have read and understand the contents of this form and the enclosure and have been provided a copy of them.

_____ _____

Name of Defense Counsel providing advice Defense Counsel's signature

_____ _____

Accused's Rank and Name Accused's signature

Date signed: _____

One enclosure
1. List of reportable offenses

List of Reportable Offenses

(One must check with local authorities where they reside, carry on a vocation, or attend school to determine whether state registration requirements include other offenses not listed below.)

Offenses committed before 1 October 2007
Rape or carnal knowledge, Article 120
Forcible sodomy or sodomy of a minor, Article 125
Conduct unbecoming an officer that involves any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor, Article 133.
Prostitution or pandering involving a minor, Article 134
Indecent assault, Article 134
Assault with intent to commit rape or sodomy, Article 134
Indecent act with a minor, Article 134
Kidnapping of a minor by a person not a parent, Article 134
Pornography involving a minor, Article 134
Conduct prejudicial to good order and discipline involving any sexually violent offense or a criminal offense of a sexual nature against a minor, Article 134
Assimilated Crimes Act conviction under federal or state law of a sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor, Article 134
Any attempt (Article 80), solicitation (Article 82), or conspiracy (Article 81) to commit any of the above offenses, and violations of Article 133, UCMJ, that involve any of the above offenses.

Offenses committed on or after 1 October 2007
Any violation of Article 120
Forcible sodomy or sodomy of a minor, Article 125
Assault with intent to commit rape or sodomy, Article 134
Pornography or prostitution involving a minor, Article 134
Kidnapping of a minor by a person not a parent, Article 134
Conduct unbecoming an officer that describes conduct set out in any provision of this table, Article 133
Article 134 convictions under clauses one or two (prejudicial to good order and discipline or service discrediting) or clause three (Assimilative Crimes Act for violations of state or federal law) that (1) has an element involving the sexual contact with another; (2) involves kidnapping of a minor (except by a parent of the minor); (3) involves false imprisonment of a minor (except by a parent of the minor); (4) involves solicitation of a minor to engage in sexual conduct; (5) involves the use of a minor in a sexual performance; (6) involves video voyeurism of a minor as described in 18 U.S.C. § 1801; (7) involves possession, production, or distribution of child pornography; (8) involves criminal sexual conduct involving a minor, or use of the internet to facilitate or attempt such conduct; or (9) or any conduct that by its nature is a sex offense against a minor.
Article 134 convictions under clause three (Assimilative Crimes Act) under the following provisions of 18 U.S.C.: sections 1152 & 1153 (assimilating federal and state law as to Indian lands); section 1591 (sex trafficking of children); Chapter 109A (sexual abuse) ; Chapter 110 (sexual exploitation and other abuse of children) except §§ 2257 and 2257A (record keeping requirements) and 2258 (failure to report child abuse); and Chapter 117 (transportation for illegal sexual activity and related crimes.)
Any attempt (Article 80), solicitation (Article 82), or conspiracy (Article 81) to commit any of the above offenses, and violations of Article 133, UCMJ, that involve any of the above offenses.
NOTE: Notwithstanding the above listed offenses, an offense involving consensual conduct between adults is not reportable by federal authorities unless the adult victim was under the custodial authority of the offender at the time of the offense, *but the purported offender should check state registration requirement which may include similar offenses not in this table.*
NOTE: Notwithstanding the above listed offenses, an offense involving consensual conduct is not reportable by federal authorities if the victim was at least 13 years old and the offender was not more than four years older than the victim (as determined by dates of birth), *but the purported offender should check state registration requirement which may include similar offenses not in this table.*

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Advice to Clients who are not U.S. Citizens or Nationals

Members of the Trial Defense Service do not have training on the very specialized area of immigration law. However, based on our discussions, it appears that you are neither a U.S. citizen nor national and that you have been charged with an offense, or offenses, that may have an effect on your immigration status if you plead guilty or are found guilty.

Those consequences are that you could be:

1. Deported or removed from the United States.
2. Denied citizenship or naturalization should you apply.
3. Denied reentry into the United States.

Depending on the immigration status and citizenship or nationality of your spouse or children, if any, their immigration status could be affected if it is dependent on yours. The same is true if you have any relatives or other persons whose immigration status is dependent on yours.

We are unable to predict if the United States will or will not take action adverse to your immigration status as described above, but you are advised that is a very real possibility.

If you have more detailed or specific questions, you are encouraged to consult with an attorney who practices in the area of immigration law. Your defense counsel has already determined if there are other Judge Advocates who are immigration attorneys or if the Staff Judge Advocate's legal assistance office has a list of civilian attorneys who practice in this specialty. If so, that information has been provided to you.

_____ _____
Printed name of Defense Counsel Signature of Defense Counsel

_____ _____
Printed name of Accused Signature of Accused

_____
Date

Appellate Exhibit _____

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Instructions *to counsel* for using this form.

DCAP Form 3, (13 May 2010)

(Post Trial and Appellate Rights Advisement)

Do not use other Post Trial and Appellate Rights Advisement Forms

Prior to trial in any Special Courts-Martial or any *non-capital* General Courts-Martial, provide the accused this form, have the accused read it, answer any questions, have the accused make his elections, and have the accused sign the form.

A signed copy of this form should be retained in counsel's records and a signed copy provided to the accused. The original signed copy will be available at trial to be made into an Appellate Exhibit.

If the accused has been charged with any sex offense or offense involving a minor, also have the accused execute DCAP Form 1, "Advice Concerning Requirements to Register as a Sex Offender." (See DCAP Sends 3-31). Instructions for use of that form are included with the form itself.)

With regard to the options in paragraph 12b, it is recommended that in most cases, the accused not elect to have substitute service. See DCAP Sends 4-8; "Substitute Service, Just Say 'No.'" (15 April 2010). In most cases, option 12b(3) is the best.

If the accused is neither a U.S. citizen nor a national of the United States, it will be necessary for the defense counsel to give advice to alien accused, DCAP Form 2. See also the "Advice to Alien Client" section on the DCAP Portal.

In those rare instances where an accused may wish to waive appellate rights, have the accused also execute DD Form 2331.

This form is far more detailed than its superseded predecessor, and there are more choices for the accused to make. Take your time in executing this form.

These instructions are NOT part of the form, need not be given to the accused, and should not be offered as an Appellate Exhibit

DCAP FORM 3 (POST TRIAL AND APPELLATE RIGHTS ADVISEMENT)

U N I T E D S T A T E S v. SOLDIER'S NAME RANK UNIT U.S. Army	)	Post Trial and Appellate Rights Advisement Special Courts-Martial *and* General Courts-Martial (non-capital)

The accused is to initial where there is a ____ and where indicated, either provide information or strike out inapplicable language.

I am the accused whose name appears above. I certify that my trial defense counsel has advised me of the following post-trial and appellate rights in the event that I am convicted of a violation of the Uniform Code of Military Justice.

1. In exercising my post-trial rights, or in making any decision to waive them, I am entitled to the advice and assistance of military counsel provided free of charge or civilian counsel provided at no expense to the government.

2. After the record of trial is prepared, the convening authority will act on my case. The convening authority can approve the sentence adjudged (as limited by any pretrial agreement), or he can approve a lesser sentence, or disapprove the sentence entirely. The convening authority cannot increase the sentence. He can also disapprove some or all of the findings of guilty. The convening authority is not required to review the case for legal errors, but may take action to correct them.

3. Under Rules for Court-Martial 1105 and 1106, I have the right to submit any matters to the convening authority that I wish him to consider in deciding what action to take in my case. These matters include, but are not limited to, a personal statement, personal letters and documents, letters and documents from any other person, requests for deferment and waiver of forfeitures, and any other matter I desire the convening authority to consider before taking action in my case.

a. Before the convening authority takes action, the staff judge advocate will submit a recommendation to the convening authority. This recommendation will be sent to me and/or my defense counsel before the convening authority takes action.

b. If I have matters that I wish the convening authority to consider, or matters in response to the staff judge advocate's recommendation, such matters must be submitted within 10 days after I receive a copy of the record of trial or the recommendation of the staff judge advocate, whichever occurs later. If I authorize substitute service in accordance with paragraph 12 of this form, the 10 day period begins to run after my counsel receives the record of trial or the staff judge advocate's recommendation, whichever occurs later.

c. Upon my request, the convening authority may extend this period, for good cause, for not more than 20 days.

d. I understand that I must work with my defense counsel to assist him/her in collecting and preparing those matters I want to be submitted to the convening authority, and in that regard I must remain in contact with my defense counsel even after my case has been tried.

___ e. **(Strike through inapplicable portions)**. I *(authorize) (do not authorize)* my defense counsel to submit matters pursuant to RCM 1105 and 1106 on my behalf in the event that he is unable to contact me after making reasonable efforts to find me, or if I fail or am unable to provide matters to my defense counsel within the time frames set out above.

4. If the convening authority approves an adjudged punitive discharge (dismissal for officers; bad-conduct or dishonorable discharge for enlisted soldiers) or confinement for one year or longer, my case will be automatically reviewed by the Army Court of Criminal Appeals (ACCA). I am entitled to be represented by counsel before such court. If I so request, military counsel will be appointed to represent me at no cost to me. If I so choose, I may also be represented by civilian counsel at no expense to the United States.

5. After the ACCA completes its review, I may petition the United States Court of Appeals for the Armed Forces (CAAF) to review my case. If that Court grants my petition, I may request review by the Supreme Court of the United States. I have the same rights to counsel before those courts as I have before the ACCA. If I am pending an approved dishonorable or bad-conduct discharge it may only be ordered executed after completion of the appellate process in accordance with Rule for Court-Martial 1209, unless I waive appellate review.

6. ***THIS PARAGRAPH IS APPLICABLE TO ONLY GENERAL COURTS-MARTIAL***. If the convening authority approves no punitive discharge and approves confinement for less than a year, my case will be examined in the Office of The Judge Advocate General for any legal errors and to determine if the sentence is appropriate. The Judge Advocate General (TJAG) may take corrective action as appropriate. This mandatory review under Article 69(a), UCMJ, will constitute the final review of my case unless TJAG directs review by the ACCA.

7. ***THIS PARAGRAPH IS APPLICABLE TO ONLY SPECIAL COURTS-MARTIAL***. If the convening authority approves no punitive discharge and approves confinement for less than a year, my case will be examined by a legal officer for any legal errors and to determine if the sentence is appropriate. The convening authority may take corrective action as appropriate. This mandatory review will constitute the final review of my case, however pursuant to Article 69(b), UCMJ, I may seek review by The Judge Advocate General within two years of action being taken in my case.

8. I may waive or withdraw review by the appellate courts. I understand that if I waive or withdraw review:

a. My decision is final and I cannot change my mind.

b. My case will then be reviewed by a military lawyer for legal error. It will also be sent to the general court-martial convening authority for final action.

c. Within two (2) years after the sentence is approved, I may request The Judge Advocate General (TJAG) to take corrective action on the basis of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over me or the offense, error prejudicial to my substantial rights, or the appropriateness of the sentence.

9. I understand that any period of confinement included in my sentence begins to run from the date the court-martial adjudges my sentence. I may request that the convening authority defer commencement of confinement. The decision to defer confinement is within the sole discretion of the convening authority.

10. Adjudged forfeitures and reduction in rank.

a. Any forfeitures adjudged in my case are effective 14 days after the sentence is adjudged or when the convening authority takes action, whichever occurs first, unless adjudged forfeitures are deferred. If forfeitures are adjudged at the court-martial, I understand that I may petition the convening authority to defer them until action and to disapprove, mitigate, or suspend them at action.

b. Adjudged reduction (enlisted personnel only). Any reduction in rank adjudged in my case is effective 14 days after the sentence is adjudged or when the convening authority takes action, whichever occurs first, unless the reduction is deferred. If a reduction is adjudged at the court-martial, I understand that I may petition the convening authority to defer a reduction in rank until action and to disapprove or suspend it at action.

11. Automatic forfeitures. I understand that by operation of Article 58b of the Uniform Code of Military Justice, any sentence which includes confinement for more than 6 months, or confinement for 6 months or less and a punitive discharge, will result in automatic forfeitures even if no forfeitures are adjudged. In the case of a General Court-Martial, automatic forfeitures are for all pay and allowances. In a Special Court-Martial, the automatic forfeitures are for two-thirds of pay. Automatic forfeitures go into effect 14 days after my sentence is adjudged or when the convening authority takes action, whichever occurs first.

____ a. I understand I may petition the convening authority to defer adjudged or automatic forfeitures, if any, until the time of final action, but such relief is solely within the discretion of the convening authority, who may rescind deferment at any time.

____ b. I understand that if I reach my ETS date while I am in confinement all my pay and allowances will stop on my ETS date, even if a request for deferment or waiver of automatic forfeitures is granted.

____ c. I further understand that if I reach my ETS date while I am in confinement all my pay and allowances will stop on my ETS date, even if a request for deferment or disapproval of adjudged forfeitures is granted.

____ d. *(Applicable if accused has a pretrial agreement).* I further understand that if I reach my ETS date while I am in confinement all my pay and allowances will stop on my ETS date, regardless of what is in my pretrial agreement.

12. I have read and had my post-trial rights explained to me by counsel and I acknowledge these rights and make the elections set forth below.

____ a. I understand my post-trial and appellate review rights.

____ b. I understand that a copy of the authenticated record of trial will be served on me, or if I so request, will be forwarded to my defense counsel pursuant to RCM 1104(b).

Select only one of the following three numbered options. Option (3) is the recommended best option in most cases.

____ (1) I want the record of trial sent to only me; ***or***

____ (2) **(Indicate counsel.)** I want the record of trial forwarded to my defense counsel, _____; ***or***

____ (3) **(Indicate counsel.)** I want the record of trial sent to me AND I request that my defense counsel _____ be provided a copy at the same time I receive my copy in order to expedite preparation of post-trial matters.

_____ c. I further understand that individual copies of the staff judge advocate's post trial recommendation will be served on me and my defense counsel pursuant to RCM 1106(f).

_____ d. **(Indicate counsel.)** My defense counsel _____, will submit R.C.M. 1105 and 1106 matters in my case if I desire. I further understand that I must stay in contact with this counsel to assist him in collecting and preparing the matters for submission.

_____ e. **(Strike through inapplicable portions.)** I *(do) (do not)* want to request deferment of automatic and adjudged forfeitures.

_____ f. **(Strike through inapplicable portions – Enlisted personnel only.)** I *(do) (do not)* want to request deferment of an adjudged reduction in rank.

____ g. **(Strike through inapplicable portions.)** If I have financial dependents, I may request the convening authority waive any or all automatic forfeitures of pay and allowances, to be paid to my dependents during any period of confinement or parole not to exceed six (6) months. I (*do*) (*do not*) have DEERs **(**Defense Enrollment Eligibility Reporting System**)** enrolled dependents. If applicable, I (*request*) (*do not request*) my defense counsel to petition the convening authority to waive automatic forfeitures for the benefits of my dependent(s). If the waiver is granted, I understand that the amounts that would be automatically forfeited will be paid to my dependents.

____ h. **(Strike through inapplicable portions).** If sentenced to confinement, I *(want my defense counsel to request deferment of confinement) (do not want my defense counsel to request deferment of confinement) (will decide later, and inform my defense counsel, if I desire deferment of confinement).*

13. **(Strike through inapplicable portion.)** If applicable, I *(do) (do not)* want to be represented before the Army Court of Criminal Appeals by Appellate Defense Counsel appointed by The Judge Advocate General (TJAG) of the Army. I understand that I may contact my Appellate Defense Counsel by writing to Defense Appellate Division, U.S. Army Legal Services Agency (JALS-DA), 901 North Stuart Street, Arlington, Virginia 22203-1837.

____ I have been informed that I have the right to retain civilian counsel at my own expense to represent me in my appellate decisions. If I have already retained civilian counsel, his/her name and address is written below: _____

_____

____ If I later retain civilian counsel, I must provide the attorney's name and address to: Clerk of Court ATTN: Chief Paralegal, The U.S. Army Court of Criminal Appeals, 901 North Stuart Street, Suite 1200 Arlington, Virginia 22203-1837.

Phone: (703) 588-7922 DSN: 425-7922
FAX: (703) 696-8777 DSN: 426-8777
E-Mail: linda.erickson@hqda.army.mil

DCAP FORM 3 (POST TRIAL AND APPELLATE RIGHTS ADVISEMENT)

14. Pending action on my case, I can be contacted or a message may be left for me at the following address:

NAME: _____

STREET: _____

CITY/ STATE / ZIP CODE: _____

AREA CODE / TELEPHONE NUMBER: _____

EMAIL ADDRESS: _____

CIVILIAN / PERMANENT EMAIL ADDRESS: _____

PERSONAL CONTACT: _____

Date: _____

SOLDIER'S NAME
RANK, US Army
Accused

I certify that I have advised the accused whose name appears above regarding his/her post trial and appellate rights as set forth above, that he/she has received a copy of this document, and that he/she has personally made all the elections herein.

Date: _____

DEFENSE COUNSEL NAME
____, JA
Defense Counsel

DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
ADDRESS

REPLY TO ATTENTION OF:

OFFICE SYMBOL DATE

MEMORANDUM FOR RECORD

SUBJECT: Summary Court-Martial Rights Advisement

1. _____ I, CLIENT NAME, the accused in a case which has been or will be referred to trial by court-martial, hereby acknowledge that I was advised by ATTY of the following:

a. ____ I was told that there exists an attorney-client relationship between myself and my counsel which gives me a privilege and incentive to discuss everything I know about the charges with my counsel. Failure to disclose all information I know about the case will make it difficult for my attorney to represent me to the fullest. Telling my attorney any information which is false will severely inhibit my attorney in defending me. All information I discuss with my attorney is confidential and may not be revealed to others without my consent.

b. ____ That I have the following rights to counsel:

1) ____ I have the right to consult with a lawyer qualified to practice before military courts.

2) ____ ATTY has been, or will be detailed to counsel me prior to my court-martial. He has advised me that I basically operate as my own attorney during the proceeding. I have the right present my case I have the right to call and question witnesses on my behalf, as well as to cross-examine witnesses against me. The summary court officer should assist me in these matters.

3) ____ I also have the right to be represented at trial by a civilian lawyer provided at my own expense, if it will not unreasonably delay the proceedings.

c. ____ I should not discuss any aspect of my case with anyone without the approval of my defense counsel and without my attorney present. This includes, friends, roommates, chain of command, investigators, family members, etc.

d. _____ My case will be heard by an officer appointed by my battalion commander. I may ask that officer questions to see if they are impartial and may challenge them from hearing the case if I have a good reason.

OFFICE SYMBOL
SUBJECT: Summary Court-Martial Rights Advisement

e. ____ I should consider the following rights and other considerations regarding the appropriate plea in my case:

1) I may turn down the summary court-martial and demand a full court-martial.

2) I am legally entitled to plead guilty or not guilty to any or all of the specifications and charges.

2) I may plead not guilty to any offense even though I am guilty, and believe that I am guilty of the offense.

3) I should not plead guilty to an offense unless I am, in fact and in my personal belief, guilty of every element of that offense.

4) A plea of not guilty by me to any offense places the burden upon the prosecution to prove me guilty of that offense beyond a reasonable doubt. I have the right to assert any defense or objection.

5) ____ A plea of guilty to an offense admits every act or omission charged and every element of the offense.

6) ____ A plea of guilty to an offense would permit the court to find me guilty without further proof of that offense.

7) ____ If I plead guilty to an offense, I waive my right against self-incrimination, my right to trial on the facts and my right to confront and cross-examine the witnesses against me as to the offense.

8) ____ I may submit to the convening authority an offer to plead guilty providing that he will approve no sentence greater then a stated amount when he takes action on the finding and sentence in my case. If the convening authority accepts such an offer, he is bound to reduce my sentence in his action to the agreed limits if the sentence adjudged by the court exceeds those agreed limits.

9) ____ The elements of each offense charged have been explained to me as well as the elements of lesser included offenses.

f. ____ Prior to the findings of the court, I may be sworn and take the stand as witness in my own behalf. I have the rights and privileges of any other witness and may be cross-examined if I do testify.

OFFICE SYMBOL
SUBJECT: Summary Court-Martial Rights Advisement

g. ____ I may remain silent and am not required to testify at the trial. If I do remain silent, this will not count against me or be considered as an admission of my guilt nor may the prosecutor comment to the court upon upon my silence.

h. ____ If I am found guilty, I may present evidence in extenuation and mitigation of the offense of which I was convicted. I may testify under oath or I may remain silent. In addition if I wish, I may make an unsworn statement in extenuation and mitigation. I cannot be cross-examined upon this unsworn statement, but the prosecution may offer evidence in rebuttal of the statement. I may make this unsworn statement orally or in writing, or both, and either my counsel or myself, or both of us, may make the statement. I may also present evidence of good duty performance and my potential for rehabilitation. This evidence may be in the form of documents and testimony of witnesses, either in person or by phone.

i. ____ The maximum sentence that can be adjudged against me by the court if I am found guilty of all of the offenses, either pursuant to a plea of guilty or plea of not guilty is

- Confinement: 30 days (or 45 days hard labor w/o confinement or 60 days restriction)
- Discharge: None
- Forfeiture: 2/3 pay for 1 month.
- Reduction the grade of E1:
- Fine: In combination with Forfeitures, cannot exceed 2/3 pay for 1 month.
- Reprimand.

j. ____ Though I can't be given a punitive discharge at this level of court, if I demand a higher level court and I am discharged with either a dishonorable discharge or bad-conduct discharge, the discharge will be a permanent restriction on my employment and government benefits. Conviction at a Special or General Court-Martial is a federal conviction, but I understand that a conviction at this summary court-martial is not a federal conviction.

k. ____ In the event a finding of guilty on any or all charges and specifications has been entered against me, and a sentence is adjudged, I may appeal the findings and the sentence to the convening authority (battalion commander) within 7 days of my hearing.

l. ____ If a sentence adjudged by the court includes confinement, I will begin serving that portion of sentence immediately. I may request the convening authority to defer confinement until he takes action on the case if I can establish a good reason for doing so. I may petition the convening authority for clemency from any sentence by the court before action is taken.

SUMMARY COURTS RIGHTS ADVISEMENT

OFFICE SYMBOL
SUBJECT: Summary Court-Martial Rights Advisement

m. ____ I have checked the information in the top portion of my charge sheet for accuracy. The information is accurate, except for the following: _____.

n. ____ I have received the following advice from my detailed defense counsel:

1) ____ I must comply at all times with every term of any restriction placed upon me. Violation of restriction will most likely result in additional charges and pretrial confinement.

2) ____ I must stay out of trouble while pending court-martial. I must perform my duties as expected, respect superior NCO's and officers and strive to maintain a good attitude.

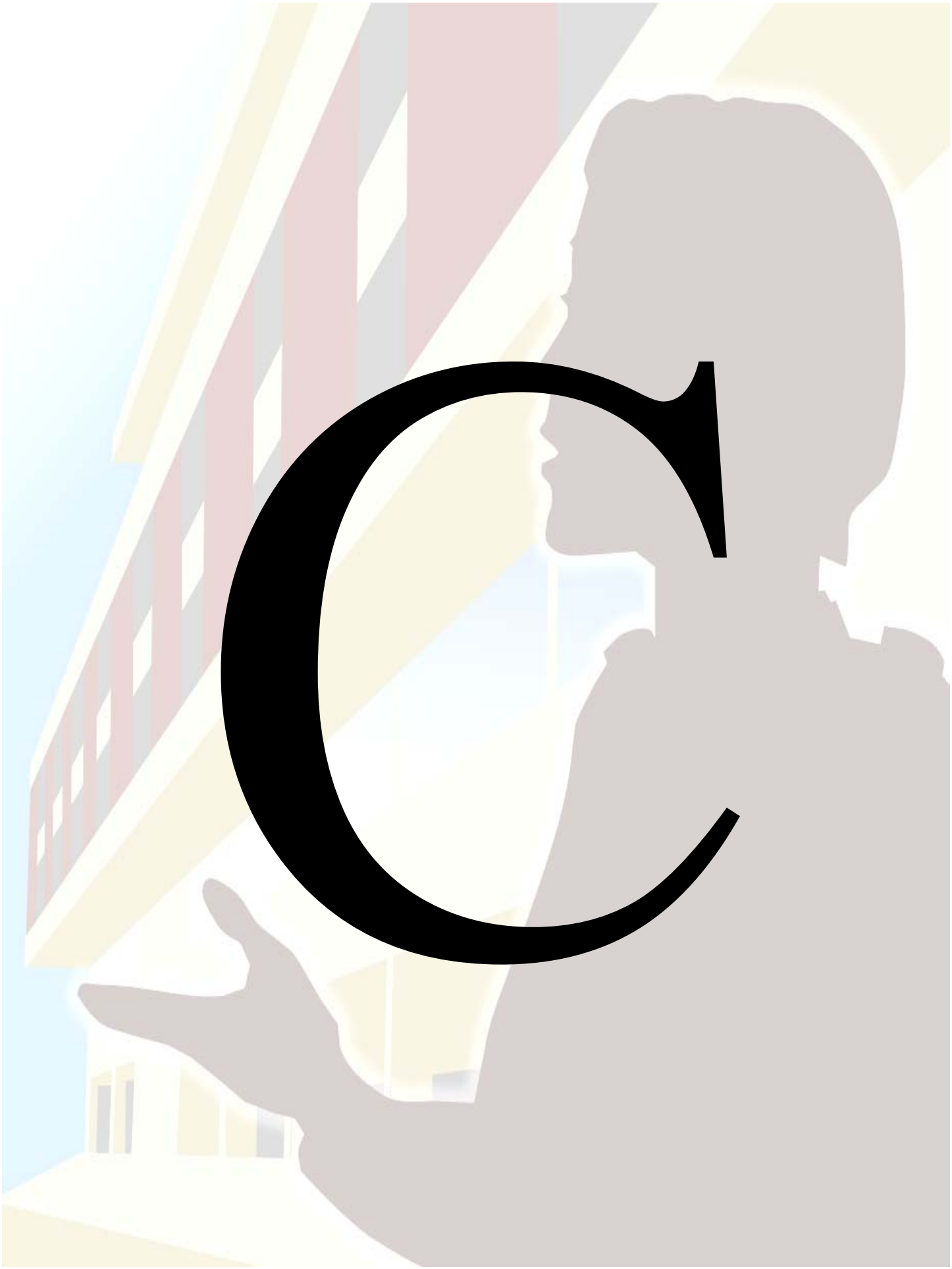
3) ____ I must not discuss my case with anyone. This means roommates, friends, and anyone in my chain of command. If I am asked about my case by anyone, I should simply reply that my lawyer has instructed me not to discuss the case. The only exception to this rule is if my attorney specifically instructs me to do something or talk to a specific person.

4) ____ On the day for trial I must be neatly groomed and be wearing proper Class A uniform.

CLIENT
RANK, USA

On _____ I advised the accused of his rights in accordance with the foregoing. All decisions indicated above were personally made by the accused after receiving legal counseling.

ATTY SIGNATURE BLOCK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ETHICS OF INVESTIGATIONS AND INTERVIEWS

Table of Contents

MAJ SEAN MANGAN

AUGUST 2012

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ETHICS OF INVESTIGATIONS AND INTERVIEWS

Outline of Instruction

I. INTRODUCTION

A. "In one sense, the term 'legal ethics' refers narrowly to the system of professional regulations governing the conduct of lawyers. In a broader sense, however, legal ethics is simply a special case of ethics in general, as ethics is understood in the central traditions of philosophy and religion. From this broader perspective, legal ethics cuts more deeply than legal regulation: it concerns the fundamentals of our moral lives as lawyers." Deborah L. Rhode & David Luban, *Legal Ethics* 3 (1992) (quoted under "Legal Ethics" in BLACK'S LAW DICTIONARY 976 (9th ed. 2004)).

B. Ethical considerations regarding investigations and interviewing appear in four general categories.

1. Investigatory responsibilities.

2. Dealing with access issues such that the rights of witnesses and defendants are respected.

3. Techniques used to investigate and/or prepare witnesses for their testimony.

4. Disclosure obligations which may arise from interviews.

C. This outline is focused on the ethics of interviewing witnesses which are not an attorney's client.

II. SOURCES OF RULES AND GUIDELINES

A. Army Regulations. *See, e.g.* AR 27-10, Military Justice; AR 27-26, Rules of Professional Conduct for Lawyers.

B. ABA Standards for Criminal Justice. The standards are intended to be used as a guide to professional conduct and performance. According to AR 27-10, para. 5-8c, "Judges, counsel, and court-martial clerical support personnel will comply with the American Bar Association Standards for Criminal Justice (current edition) to the extent they are not inconsistent with the UCMJ, MCM, directives, regulations . . .or other rules governing the provision of legal services in the Army." The Standards have discussion sections that deal with many of the thorny issues counsel run into when investigating their cases.

C. Case Law. *See, e.g.*, *Geders v. United States,* 425 U.S. 80, 90 n.3 (1976) ("An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.").

D. Ethical rules from your bar of licensure.

III. INVESTIGATORY RESPONSIBILITIES

A. A trial counsel ordinarily relies on military police, CID, and command personnel for investigation of alleged criminal acts, but the trial counsel has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by others, although this typically will mean requesting one of the above entities to renew

or reopen their investigation. *See* ABA Standards for Criminal Justice: Prosecution Function 3-3.1(a).

B. Throughout the course of the investigation, as new information emerges, the trial counsel should reevaluate:

1. Judgments or beliefs as to the culpability or status of persons or entities identified as "witnesses," "victims," "subjects" and "targets," and recognize that the status of such persons may change; and

2. The veracity of witnesses and confidential informants and assess the accuracy and completeness of the information that each provides.

3. *See* ABA Standards for Criminal Justice: Prosecutorial Investigations 1.4(a).

C. Upon request and if known, the trial counsel should inform a person or the person's counsel, whether the person is considered to be a target, subject, witness or victim, including whether their status has changed, unless doing so would compromise a continuing investigation. *See* ABA Standards for Criminal Justice: Prosecutorial Investigations 1.4(b).

D. Defense counsel should conduct a prompt investigation of the circumstances of the case. *See* ABA Standards for Criminal Justice: Defense Function 4-4.1(a). The investigation should include the interview of witnesses. *Id.,* Comment.

E. Whether you are a trial counsel conducting an official investigation or a defense counsel investigating the facts surrounding a case, "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." AR 27-26, Rule 4.4.

1. Notwithstanding this obligation to avoid needless harm, "an Army lawyer may communicate a correct statement of facts that includes the possibility of criminal action if a civil obligation is not fulfilled." AR 27-26, Rule 4.4, Comment.

IV. ACCESS ISSUES

A. R.C.M. 701(e) provides that "[e]ach 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."

B. On the other hand, "a potential witness at a criminal trial cannot normally be required to submit to a pretrial interview for either side." *United States v. Alston*, 33 M.J. 370, 373 (C.M.A. 1991).

C. Therefore, an issue arises when counsel, after the witness inquires or *sua sponte*, advises the witness about agreeing to an interview with opposing counsel. Army Rule 3.4 makes clear that a "lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." AR 27-26, Rule 3.4 (f); *see also* ABA Standard 11-6.3; 3-3.1(d); ABA Model R. Prof. Conduct 3.4.

1. Generally speaking, it is appropriate to inform a witness that it is their choice whether to speak with an opposing counsel or investigator. *See* ABA Standards for Criminal Justice: Prosecution Function 3-3.1, Comment.

2. However, counsel should scrupulously avoid attempting to subtly encourage witnesses not to agree to speak with the other party. In fact, it is a good practice to advise a witness that their failure to speak to the other side can be fertile ground for cross-examination. Counsel could also tell the witness that if they do not agree to meet with the other party, the witness might be ordered to give a deposition under R.C.M. 703.

3. Nonetheless, during the investigatory phase before charges are preferred, trial counsel may ask potential witnesses not to disclose information, and in doing so, trial counsel may explain to them the adverse consequences that might result from disclosure (such as compromising the investigation or endangering others). However, absent a law or court order to the contrary, trial counsel should not imply or state that it is unlawful for potential witnesses to disclose information related to or discovered during an investigation. Barring exceptional circumstances, those witnesses should be advised that they may agree to be interviewed by defense counsel after the preferral of charges. *See* ABA Standards for Criminal Justice: Prosecutorial Investigations 1.4 (d).

4. When the government is interviewing potentially exculpatory witnesses, counsel should not threaten criminal prosecution of perjury to prevent a witness from testifying. *United States v. Edmond,* 63 M.J. 343 (C.A.A.F. 2006) (a trial counsel threatened a civilian witness (former Soldier) with prosecution by the SAUSA if he testified and then counsel had the SAUSA reiterate the threat of prosecution).

5. It is also "proper to caution a witness concerning the need to exercise care in subscribing to a statement prepared by another person." ABA Standards for Criminal Justice: Prosecution Function 3-3.1, Comment.

D. Asking Potential Witnesses Not to Volunteer Information

1. AR 27-26 Rule 3.4 forbids a lawyer from requesting an individual to not voluntarily provide information unless it is the client; or a relative, employee, or agent of the client and that person's interest will not be adversely affected by their silence.

2. AR 27-26 Rule 4.3 dictates that a lawyer should not give any advice to an unrepresented person other than to obtain counsel, impliedly authorizing an attorney to recommend to an unrepresented witness the attorney is interviewing that the witness seek counsel.

E. Overlay of Victim Witness Program

1. AR 27-10 establishes policy, designates responsibility, and provides guidance for the assistance and treatment of those persons who are victims of crime and those persons who may be witnesses in criminal justice proceedings. This regulation contains provisions which impact access to witnesses. AR 27-10, ch. 18.

2. "Within the guidelines of R.C.M. 701(e), and at the request of the victim or other witness, a VWL [Victim Witness Liaison] or designee may act as an intermediary between a witness and representatives of the government and the defense for the purpose of arranging interviews in preparation for trial. The VWL's role . . . is to ensure that witnesses are treated with courtesy and respect and that interference

with their lives and privacy is kept to a minimum. This paragraph is not intended to prevent the defense or the government from contacting potential witnesses not previously identified or who have not requested a VWL to act as an intermediary." AR 27-10, para. 18-19(d).

3. The regulation requires that the VWL, trial counsel or other government representative inform victims and witnesses of the services available to them which includes the intermediation described in para. 18-19(d). AR 27-10, para. 18-9.

4. Despite the fact that some victim/witness services, such as this intermediation, may limit access to witnesses, "Neither a lawyer acting as a victim/witness liaison nor another person appointed by a lawyer to be a victim/witness liaison unlawfully obstructs another party's access to evidence or to material having potential exculpatory value by performing victim/witness liaison duties in accordance with Army regulation. For example, a victim/witness liaison, *upon the request of a victim or witness*, may require trial counsel and defense counsel to coordinate with the victim/witness liaison for interviews of a victim of or a witness to the crime which forms the basis of a court-martial." AR 27-26, Rule 3.4, Comment.

5. 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 (like a victim/witness liaison) may be permissible. *United States v. Irwin*, 30 M.J. 87 (C.M.A. 1990). If a third party observer is required, that requirement would need to apply to both defense and government interviews. *Id*. at 93. *See also United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980).

6. Many of the requirements in the Army's Victim Witness Program mirror the ethical guidelines promulgated by the ABA. *See* ABA Standards for Criminal Justice: Prosecutorial Investigations 1.4(c) ("The prosecutor should know the law of the jurisdiction regarding the rights of victim and witnesses and should respect those rights.").

   a) Trial Counsel or VWL will provide notification of status and significant events of case. AR 27-10, para. 18-14; *See also* ABA Standards for Criminal Justice: Prosecution Function 3-3.2 (c),(e) and (g).

   b) When appropriate, trial counsel or VWL shall consult with victims of crime concerning: (1) Decisions not to prefer charges, (2) Decisions concerning pretrial restraint of the alleged offender, (3) Pretrial dismissal of charges, and (4) Negotiations of pretrial agreements and their potential terms. AR 27-10, para. 18-15; *See also* ABA Standards for Criminal Justice: Prosecution Function 3-3-3.2(h).

   c) Trial counsel of VWL will immediately notify the SJA whenever a victim or witness expresses genuine concern for his or her safety. AR 27-10, para. 18-19(b); *See also* ABA Standards for Criminal Justice: Prosecution Function 3-3.2(d).

7. If defense counsel finds a government witness uncooperative, particularly the victim, it may be ineffective assistance of counsel to passively wait until they take the stand to first question them. *United States v. Thorton*, NMCCA 200800729 (2009). Thorton's defense counsel requested the victim and her mother testify at

the Article 32 hearing, but both refused. While their statements to NCIS were included with the Article 32 record, both refused to speak to the DC prior to trial. The DC never requested a deposition of either witness under R.C.M. 702(c)(3)(A), which articulates several "exceptional circumstances" under which a counsel can depose a witness, including "unavailability of an essential witness at an Article 32 hearing." Further, the trial defense counsel failed to formally request an opportunity to interview either witness prior to or following the direct examination by the Government. Additionally, DC failed to file a 412 motion that would have provided the DC an opportunity to explore the nature of the relationships, including on MySpace, since the witnesses refused to talk to him about prior to trial. The appellate court found this ultimately led to the DC failing to present an effective theory of the case to the military judge.

8. The trial judge may prohibit communication between a lawyer and a witness during recesses of that witness' testimony at trial. *See Perry v. Leeke*, 488 U.S. 272 (1989). However, such a prohibition on communication between a defense counsel and his client may not last over an overnight recess. *See Geders v. United States*, 425 U.S. 80 (1976).

V. SPECIFIC CIRCUMSTANCES OR TECHNIQUES

A. Article 31(b) Rights

1. In a circumstance where Article 31(b) would require an advice of rights, trial counsel must remember to advise them of their rights. Article 31(b); *See also* ABA Standards for Criminal Justice: Prosecution Function 3-3.2(b); LTC H.L. Williams, *To Read or Not To Read,* ARMY LAW.*,* Sep. 1996 (discussing whether defense counsel has an obligation if interviewee is suspected of crime); ABA Standards for Criminal Justice: Defense Function 4-4.3(c) (guidance that defense counsel has no independent duty to advise of right to non-incrimination).

2. Once charges have been brought against an individual such that they are an "accused," Army Rule 3.8(c) directs that trial counsel shall "not seek to obtain from an unrepresented accused a waiver of important pretrial rights."

3. One ethical issue can arise regarding "improperly" advising a witness of their rights. For instance, if the defense indicates that it intends to call an alibi witness who would inculpate himself while exculpating the defendant, advising the witness of his rights could be seen as a method to rob the defendant of exculpatory evidence. The ABA Standards indicate that "a prosecutor should not so advise a witness for the purpose of influencing the witness in favor of or against testifying." ABA Standards for Criminal Justice: Prosecution Function 3-3.2(b). The best practice would be to approach the military judge and obtain a ruling before taking such a witness' statement.

4. Relatedly, trial counsel should not interfere with, threaten, or seek to punish persons seeking counsel in connection with an investigation. *See* ABA Standards for Criminal Justice: Prosecutorial Investigations 1.4(h).

B. Truthfulness

1. Counsel must ensure that they conduct their interviews consistent with their ethical duties regarding truthfulness.

a) "In the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." AR 27-26, Rule 4.1.

b) While Rule 4.1 makes a failure to disclose an ethical violation in very limited circumstances, one other such exception exists. When "dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonable should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." AR 27-26, Rule 4.3.

2. Having victims present during court-martial proceedings can have a powerful impact. As such, trial counsel may encourage victims to be present even if their testimony is complete or is otherwise not necessary. Nonetheless, trial counsel should not "require victims and witnesses to attend judicial proceedings unless their testimony is essential to the prosecution or is required by law." ABA Standards for Criminal Justice: Prosecution Function 3-3.2(f).

3. Counsel should not imply the existence of legal authority to interview an individual or compel the attendance of a witness if counsel does not have such authority. ABA Standards for Criminal Justice: Prosecution Function 3-3.2(e); *See United States v. Villa-Chaparro*, 115 F.3d 797 (10th Cir. 1997) (U.S. Attorney's Office improperly used Rule 17 subpoenas to bring witness in for pre-trial interviews).

C. Confidentiality

Defense counsel in particular must remember not to violate their duty of confidentiality to their client when interviewing witnesses. *See* AR 27-26, Rule 1.6. For example, counsel may want to reveal the client's account of an event to a witness to assist in the interview. Such a disclosure may be exempt from confidentiality as "impliedly authorized in order to carry out the representation." However, the better practice is to discuss the possibility of such disclosures with the client and obtain the client's consent beforehand.

D. Presence of Third Parties

1. When interviewing or preparing witnesses, it is best practice to be accompanied by another person. That person can, if necessary, serve as a witness to the witness' statements during the interview if impeachment is later necessary. Without the third person's presence, an attorney should be prepared to forgo impeachment of that witness based upon the interview. *See* AR 27-26, Rule 3.7 (Barring rare exceptions, a "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness."); *see also* ABA Standards for Criminal Justice: Prosecution Function 3-3.1(g); ABA Standards for Criminal Justice: Defense Function 4-4.3(e). The ability to impeach a witness on the basis of statements at the interview can also be addressed by requesting the witness sign a statement of material facts after the interview is complete. *See* ABA Standards for Criminal Justice: Prosecution Function 3-3.1, Comment; ABA Standards for Criminal Justice: Prosecution Function 4-4.3, Comment.

2. Counsel should consider themselves responsible for the actions of any third party who is conducting the interview with them. If the lawyer is aware of conduct which would be a violation of the ethical rules were it performed by the lawyer, the lawyer should stop and correct the conduct. *See* AR 27-26, Rule 8.4(a) ("It is professional misconduct for a lawyer to . . . violate these Rules . . ., knowingly assist or induce another to do so, or do so through the acts of another.").

E. Compensation

1. "A lawyer shall not . . . offer an inducement to a witness which is prohibited by law." AR 27-26, Rule 3.4(b). As stated in the Comment, "it is not improper to pay witness' expenses or to compensate as expert witness on terms permitted by law. [However, the] common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee." AR 27-26, Rule 3.4, Comment; s*ee also* ABA Standards for Criminal Justice: Prosecution Function 3-3.2(a).

2. *De minimus* "gifts," such as providing snacks during a long interview session, would not generally fall afoul of this prohibition. However, if the witnesses are cooperators and/or inmates, such small luxuries designed to encourage cooperation could be problematic. Even if such items would not constitute "inducements" under this rule, trial counsel may have to advise defense counsel that the cooperators received special treatment under *Giglio v. United States*, 405 U.S. 150 (1972). *See United States v.* Boyd, 55 F.3d 239 (7th Cir. 1995) (extreme case where prosecutors allowed cooperating witnesses unlimited and unsupervised telephone privileges, conjugal visits and other special treatment during witness preparation sessions).

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WITNESS INTERVIEWING TECHNIQUES

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WITNESS INTERVIEWING TECHNIQUES

Outline of Instruction

I. INTRODUCTION

A. The key to witness interviews is to have a game plan before you start the interview. Don't just walk in with a copy of the sworn statement and run down the sworn statement. Sworn statements are just starting points for you to start thinking about your case (they are also important later on, for impeachment). For witness interviews, you should have a list of things that you think this witness can help (or hurt) you with. You generated this list when you did your case analysis. Cover these items in your interview.

B. Be efficient. When you interview the company commander, find out what she knows about the offense; what she knows about the search and seizure issue; what she knows about the accused's military character; what she knows about the impact on the unit; etc. Do it all at once. Don't keep calling back because only later did you realize how else this witness impacted your case.

C. A witness statement is not a Shakespearean play. It is not a script, and witnesses will invariably suffer memory loss, alter their testimony (intentionally or unintentionally), or fail to report important information at some point in every case. Wise counsel therefore view prior written statements as merely the starting point for an interview; and then try to memorialize what they learn in the interview in a way that locks-in the witness to those facts.

D. The goal of CID and MPI is to close a case. The standard to opine probable cause is, by definition, lower than that of a contested criminal case. For that reason, counsel should never assume that investigators probed facts to a sufficient level of detail.

II. RESOURCES

A. David A. Binder, et al., *Lawyers as Counselors: A Client Centered Approach* (2d ed. 1991).

B. Francis Lee Bailey and Henry B. Rothblatt, *Investigation and Preparation of Criminal Cases* (2d ed.1985).

III. TIMING OF THE INTERVIEW

A. Counsel should always interview witnesses as early in the case as possible. Every minute, hour, or day that passes results in a loss of memory, a loss of investigative opportunities, and/or the potential loss of witnesses.

B. Trial counsel in particular should cultivate a relationship with CID and MPI that provides for a continuous channel of communications, so that trial counsel, without making themselves a witness, can be present as early during (not after) the official investigation as possible.

IV. WHERE TO FIND PEOPLE WORTH INTERVIEWING

A. Within the case file;

B. At the unit;

C. By asking witnesses at the Article 32 who else might know certain facts and who else should be interviewed;

D. From asking questions of the escorts, bailiffs, and enlisted personnel associated with the processing of a case;

E. From asking people familiar with the crime or crime scene; and

F. From asking people familiar with the primary witnesses.

V. SETTING THE CONDITIONS FOR AN EFFECTIVE INTERVIEW

A. Conduct the interview at the crime scene whenever practicable;

B. Make sure a reliable witness is present; and

C. Have a means to document the interview (see Outline on Preparing Witnesses for Trial for a discussion of the pros and cons of various means of documenting the interview).

VI. OBSTACLES TO A GOOD INTERVIEW

A. Situational:

1. Try to avoid situations in which either party will feel rushed during the interview process. *Lawyers as Counselors*, at 44.

2. Avoid group interviews. At best, they are a poor means to obtain evidence (one witness will always assert themselves), and it will create the appearance that you are attempting to improperly sync testimony. Matthew Rosengart, *Preparing Witnesses for Trial: A Post Moussaoui Primer for Federal Litigators*, Fed. L., Nov/Dec 2007, at 36.

3. Carefully consider whether or not to interview a person alone, or with others from their family, friends, or unit present.

a) Advantages: Sometimes witnesses will be more forthcoming with a spouse, NCO, or commander present.

b) Disadvantages: Most people are far less likely to speak candidly if they are distracted by concerns about the effects their statement will produce on other listeners. This effect is particularly true with more sensitive crimes.

B. Personal:

1. *Most conversations are simply monologues delivered in the presence of a witness* -Margaret Miller. Put another way, you have to close your mouth in order to listen.

2. Performance Distracters. *Lawyers as Counselors*, at 44.

a) You are focused on preparing for the next question when you should be listening to the answer of the question you just asked.

b) You believe you already know the salient issues, so you steer the conversation too soon and too much, thereby missing important facts.

c) You disclose too much information, thereby alerting the witness to your thoughts on the case. This is a particular danger for hostile witnesses.

C. Structural:

1. The "tell me everything" approach to interviewing provides very poor structure, and very little memory stimulation to the interview process. It is a poor way to develop a coherent narrative of events. If you use this format, you must also expect disjointed and confusing answers to questions, that skip back and forth chronologically. *Lawyers as Counselors*, at 117.

2. The "element by element" questioning approach exposes counsel to a serious danger of "'premature diagnosis' of the case and may prevent you from learning about significant events that are not encompassed by your initial theory." Id.

VII. TWO-PHASE INTERVIEWING

A. Phase I: The Time Line.

1. Why do we want a Time Line?

a) "One common feature of persuasive litigation stories is that they have a narrative structure...Think back to 'Jack and the Beanstalk'... Chronological narratives such as 'Jack and Beanstalk' are...the typical medium of human communication..."The importance of time line questioning...is that it helps you develop understandable and meaningful narrative structures." *Lawyers as Counselors*, at 113-114.

b) "In court, you typically elicit testimony in chronological order. Time lines are thus a preview of testimony." *Lawyers as Counselors*, at 117.

2. When do we want a Time Line?

a) At the start. Your contact with the witness should begin by developing a timeline from which you and the witness can explore particular events, in sequence. This timeline is the first phase of the interview.

3. What are the three parts of the Time Line?

a) They consist of discrete events;

b) As much as possible, they are ordered chronologically;

c) The events are substantially free of specific details. *Lawyers as Counselors*, at 113-114.

d) Example: "We got to the club that night and had a couple of drinks. A while later, we kind of got into it with this big biker guy and the bouncer broke it up. Later that night, as the bar closed down, we left, and *that* is when the fight happened and he assaulted me."

4. How to do it.

a) 1st Step - Orient the Witness to the Interview Process.

(1) Greet the witness - engage in sufficient small talk for both parties to relax.

(2) Explain why you are there, and the interview structure you will use. Explain: "My job is to find out the facts, and that means that to start, You will do most of the talking. I will mainly listen, take notes, and ask a few questions."

(3) If the witness is potentially hostile, you may have to familiarize them with our system - that it is okay, and even expected for witnesses to talk to all lawyers in the case.

(4) Have them create the time line: "Let's start by you telling me, from start to finish, how you are tied to this case. Start wherever you think the story starts. "Include all the events you can remember, whether you think they are important or not."

b) 2nd Step: Elicit Events.

(1) Use open-ended time line questions, of which there are three types, to build the initial time line:

(a) Advancing questions: e.g. "What happened next?"

(b) Reversing questions: e.g. "What, if anything happened between your argument that night, and the phone call you just mentioned at 9 a.m. the next morning?"

(c) Time Neutral Questions: "Did anything else important happen that morning?"

c) Summarize periodically.

d) Listen more than you talk.

(1) “Park” new information.

(a) "As questions produce data, either in the upper or lower portion of a "T", you will often be sorely tempted to ask about that new data before exhausting the initial event or topic...If you follow that temptation, you may become sidetracked and neglect to return to the initial event. Instead, resist the temptation and 'park' new data until you complete the initial 'T'." Id. at 173.

(2) If information comes out about a new event, do not get sidetracked.

(3) Note the information, then steer the conversation back to the event in question. Example: "We should definitely talk about that later, but for now, let's talk some more about the phone call."

e) Go back to the "parked" information only after you complete the ongoing "T."

B. Phase II: Theory Development Questioning.

1. Why do we need "Theory Development Questioning?"

a) Although the simple narrative above might satisfy your witness' battle-buddy, the level of detail is woefully insufficient for trial. It would never

satisfy the elements of a charge, counter adversaries' versions of events, support your witness' credibility, etc.

b) We need to use the timeline as the reference point for questions that help us explore the specific events and details that will explain why things happen, and why the witness' story is credible.

c) Stories that emerge through time line questioning should be viewed as tentative until you have explored the specific details that elicit the fullest level of memory, and resolve potential chronology errors. *Lawyers as Counselors*, at 120.

2. When do we use "Theory Development Questioning?"

a) Once we have a reasonably well-developed time line from which to explore specific events and details.

b) Develop the timeline and then unpack events in that timeline that you are interested in. You should have a list of information that you want to explore with this witness that you developed during your case analysis.

3. What are the Characteristics of "Theory Development Questioning?" *Id*. at 150.

a) Pursuing helpful evidence. Asking questions that connect concrete time line story events to the legal elements, defenses, and rules of the case.

b) Seeking to bolster credibility. Discovering facts that tend to support helpful evidence and witnesses.

c) Exploring potentially damaging evidence. Asking questions to fully appreciate the existence and scope of bad facts, and then explore avenues that minimize the impact.

d) Seeking to undermine adversaries' legal contentions. Fleshing-out portions of the time line that reveal evidence tending to support your arguments and refute the relevant legal contentions of your opponent.

4. How to do it.

a) At this point, you will need to take a more active, directing role in the interview. The idea is to gradually narrow in on smaller and smaller details in a way that maximizes the memory of the witness. *Lawyers as Counselors*, at 149.

b) Use the "T-Funnel." *Id.* at 168-169.

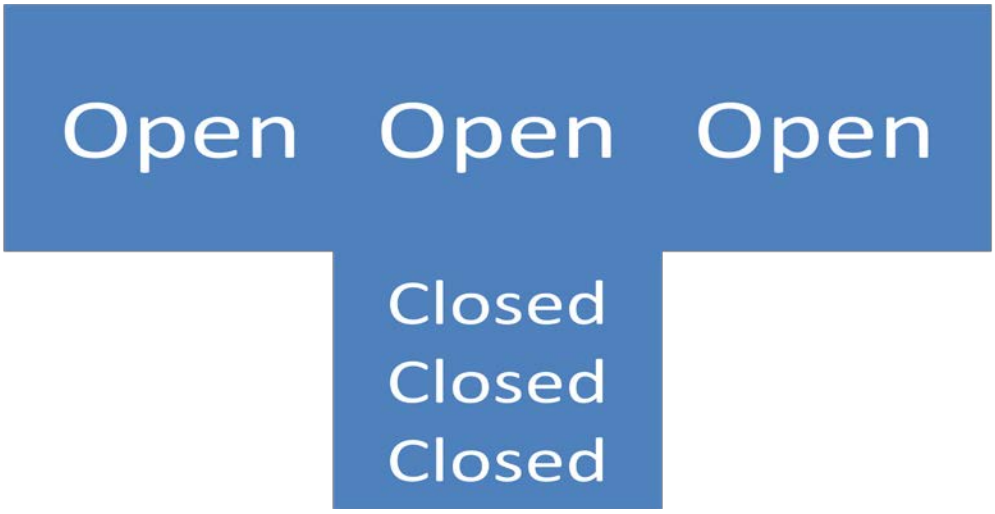
(1) The "T-Funnel" is a visual description of how you can structure questions to elicit the most detailed memories from a witness.

(2) In practice, you begin with more open questions that set the parameters of an event. e.g. "tell me about the beginning of the fight. Now, tell me what you remember about the end of the fight."

(3) As you funnel the witness down into the specifics, you gradually use more and more closed/direct questions to probe memory until you reach the "deepest" point of the exact moment, in which the witness cannot remember any additional facts, no matter what you ask them to "focus" their memory upon. e.g. "So, as you saw

his fist about to hit your face, do you remember if you saw any rings on his fingers?"

c) The "T Funnel" looks like this:



d) Procedure for T-Funneling:

(1) Identify one event from the timeline you developed.

(2) Continue to ask sufficient open-ended questions until the witness runs-out of spontaneous memory.

(3) If the client is struggling, ask them to imagine it all happening as a video, and they are narrating what they watch happening for a blind person. *Id.* at 176.

(4) Focus the witness with increasingly specific questions for them to consider.

(5) At the conclusion of any funneled interrogatory, always ask an open-ended question. e.g. "Now, let's back-up. Is there anything else you remember about the fight?"

e) Examine "Clumped" Events.

(1) Remember the story of the bar fight from above. The point in time where everyone "kind of got into it" is a "clumped" event. We know logically that there were many mini-events at this point of the story. For example, what series of events led the bouncer to break-up the squabble, and how did that happen? We may, or may not, want to break the clumped events into a mini-timeline based upon our analysis of the case. If we want to explore a clumped event, we need to:

(2) Elicit a mini-timeline.

(3) Find out what events gave rise to that clump (similar to the exploration of conclusory details - see below).

f) Explore conclusory details.

(1) Find out what gave rise to a conclusion.

(2) Example: A Marine was standing there.

(3) Basis: I saw a guy, about twenty years old. He had a high and tight haircut. He was also wearing a Marine camouflage uniform, and carrying a duffle bag with Marine Corps stickers all over it.

g) Probe Gaps:

(1) Look for where logic or your gut tells you an event may have occurred, or where you posses independent knowledge of an event, explore the event.

(2) Use forward, reverse (bookend), or neutral open questions.

(3) Look for what would have happened in the normal course of events. Probe if important information is "housed" there (dislodge with closed questions).

h) Explore Conditions and Behaviors:

(1) Sometimes witnesses describe a clumped event due to an ongoing condition or behavior. For example: "Every day I think about how much I miss my son."

(2) Explore specific memorable moments of that time period. Q: "Ma'am do you remember a specific moment when it really hit home that he was gone for good?" A: "I remember standing at the funeral home, realizing that the last choice I could ever make for my son was to bury him with a white pillow, or a gray pillow."

(3) As you develop several concrete events, it may help you uncover additional helpful evidence or events. Alternatively, as shown above, the details elicited may, in and of themselves, prove to be far more powerful evidence than the generally described condition.

i) Bolster Credibility. *Id* at 186-191.

(1) Now explore facts that may or may not be tied directly to the events of the case, but which affect witness credibility, including:

(2) Ability to Perceive, (how good is their memory of the event).

(3) Reasons to Recall, (why is their memory so good?).

(4) Ability to Provide Surrounding Details, (can they provide details that are not legally significant, per se, but which show that clearly recall the circumstances of the event?).

(5) Consistent Actions, (Do the details of their story sync with events before and after the relevant timeline).

(6) Reasons/Motive to Engage in Conduct, (Will the panel accept their explanation of why they acted as they did, and is their explanation consistent with common sense?).

(7) Corroboration, (Does anyone or anything corroborate their statements. For example, do they have phone records they can provide you?).

(8) Neutrality/Bias.

VIII. CONCLUDING THE INTERVIEW

A. Presume that you will need this witness again, so get their contact info, email, cell phone, etc.

B. Explain where the case will go from here.

C. Make sure they understand to contact you before they take any leave, move, go off to school, etc.

D. Ask them to contact you if they speak to anyone else about the case, or if your conversation jogs any memory.

E. If you have identified follow-up issues (for example, phone records) to collect, set a specific time and date for the meeting.

IX. DRILLS

A. All of these drills have some air of artificiality because they are detached from case analysis, and all good witness interviews are the direct result of good case analysis. Here, the point of the drills is to have the counsel understand the two-phase interview process. The counsel are not going to have ready-made theory-development questions – you may have to provide some. Or, just have the counsel work on getting a full timeline, have them park new information, and then explore the information they have parked after they complete the timeline.

1. During phase one, ensure that during the counsel orients the witness, uses open-ended questions to elicit the timeline, and parks new information.

2. During phase two, ensure the counsel un-packages interesting events, develops the theory of his or her case, and asks credibility questions.

B. The video drill. Have the "witness" watch a short video-clip of something memorable. They will then become a witness of that memorable event. Have the counsel who is going to practice the interviewing skills then conduct a two-phase interview of what the witness saw.

C. The "what happened yesterday" drill. Have the counsel partner up with a potential witness. The counsel will conduct an interview of what the witness actually did the day prior. For Basic Course students, have them identify memorable events from the Fort Lee phase (the obstacle course or the gas chamber) and then have them interview the witnesses about those memorable events.

D. The "interview the instructor" drill. Assume the role of an accident victim or witness to a crime. Have the counsel take turns interviewing you as they develop a timeline. At the end of the interview, let the counsel know what parts of the story they missed, particularly if they used closed questions.

E. As a variation of those drills, after the counsel conducts the interview, have the counsel who did the interview turn over his or her notes. Then have the counsel tell the story that he or she just heard the witness tell without referencing any notes. Point out how much

the counsel was able to remember without "memorizing" anything. Work with the counsel to have him or her tell the story in present tense, foreshadowing techniques that will be used in the opening story.

APPENDIX

WITNESS WORKSHEET

Name: Date:

Rank/MOS: Witness:

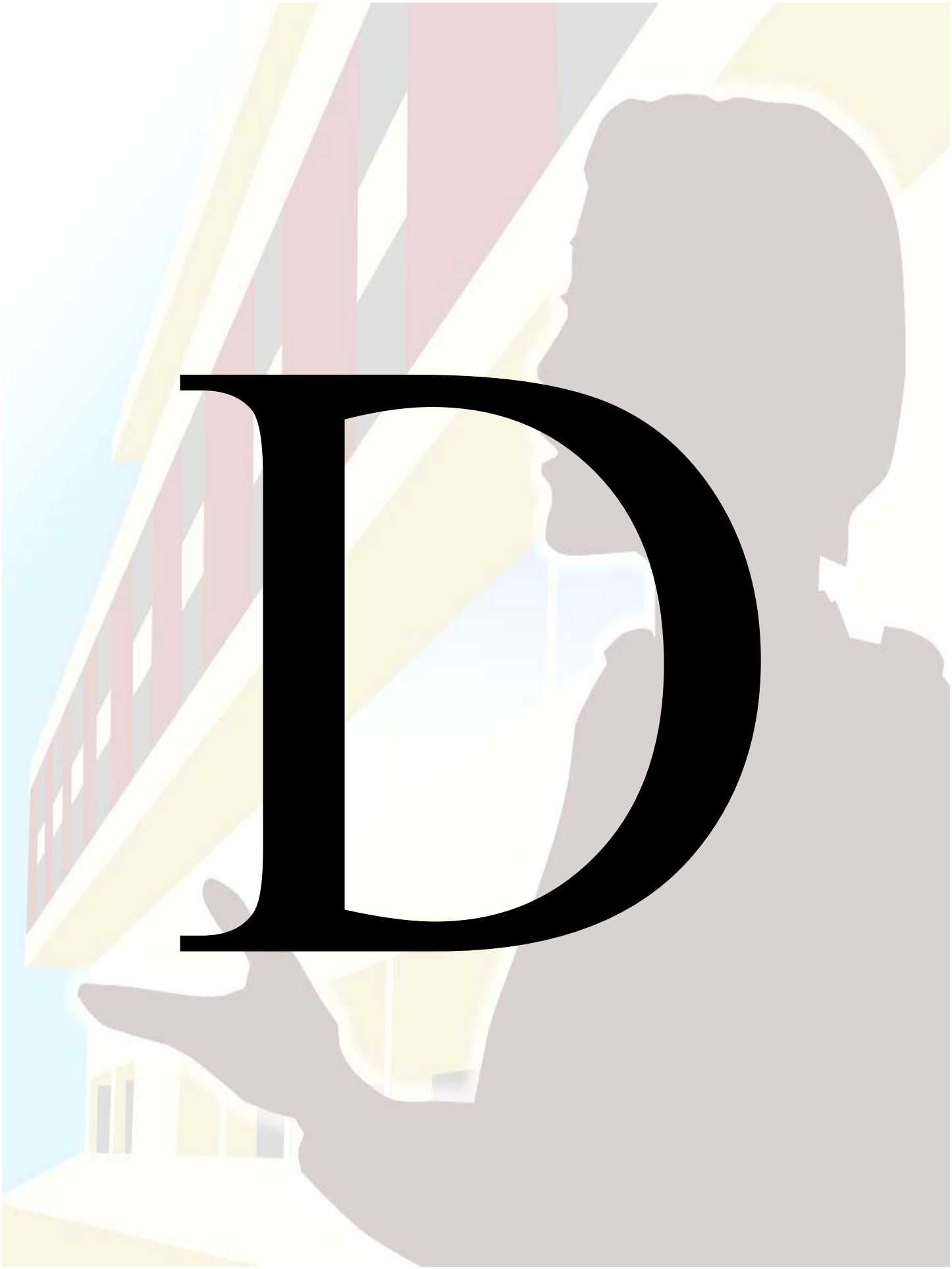
Unit: Dates Unavailable:

Service History:

Interview:

CREDIBILITY CHECKLIST

KNOWLEDGE	
Intelligence	
Ability to observe	
Ability to accurately record	
Authority to engage in the observing conduct	
Reason to engage in the observing conduct	
BIAS (can be proved by extrinsic evidence)	
Friendships	
Prejudices	
Relationship to other side of case	
Manner in which witness might be affected by the verdict	
Motive to misrepresent	
RELATIONSHIP TO OTHER EVIDENCE	
Consistent with what evidence?	
Inconsistent with what evidence?	
Important inconsistency?	
OTHER	
Sincerity	
Character for truthfulness (Can anyone attack it with specific instances on cross? If adverse, who can I call to attack it?)	
Conduct in court	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PREPARING THE WITNESS FOR TRIAL

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MAJ Sean Mangan

August 2012

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PREPARING THE WITNESS FOR TRIAL

Outline of Instruction

I. INTRODUCTION

A. "Contested military trials are won or lost on the testimony of witnesses, whether elicited by direct examination, cross-examination, or examination by the Military Judge or court members." Captain Alan K. Hahn, *Preparing Witnesses for Trial: A Methodology for New Judge Advocates*, Army Law., July 1982 at 1.

B. This outline is focused on the basics of preparing a witness for trial, whether they are friendly or hostile. Preparation for trial presupposes that counsel has already thoroughly investigated the case, and has previously interviewed the witness.

C. "It is the usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to his giving testimony..." but counsel "also has moral and ethical obligations to the court, embodied in the cannons of ethics of the profession..." Mathew Rosengart, *Preparing Witnesses for Trial: A Post Moussaoui Primer for Federal Litigators,* Fed. L., Nov/Dec 2007, at 36. *See* Outline on Ethics of Investigations and Interviews.

II. RESOURCES

A. Captain Alan K. Hahn, *Preparing Witnesses for Trial: A Methodology for New Judge Advocates*, Army Law., July 1982, at 1.

B. Mathew Rosengart, *Preparing Witnesses for Trial: A Post Moussaoui Primer for Federal Litigators*, Fed. L. Nov/Dec 2007, at 34.

III. ETHICAL CONSIDERATIONS

A. Broadly stated, the objective of witness preparation is to maximize the value of a given witness' appearance and testimony. As such, it supports the lawyer's duty of zealous representation.

B. Of course, no one would dispute that a "lawyer shall not . . . counsel or assist a witness to testify falsely . . .." AR 27-26, Rule 3.4(b). Under such a rule, "subornation of perjury is clearly unacceptable. There remains, however, a vast realm of conduct that could potentially be characterized as improperly seeking to influence a witness' testimony. Within this area, there are very few guideposts to assist the attorney in maximizing his effectiveness as advocate while still remaining within the recognized limits of professional responsibility." *Professional Conduct and the Preparation of Witness for Trial*, 1 Geo. J. Legal Ethics 389 (1987); *see also Geders v. United States* 425 U.S. 80, 90 n.3 (1976) ("An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.").

C. A lawyer may, and probably should, do the following in witness preparation:

1. Explain the mechanics of direct and cross-examination and objections;

2. Describe courtroom decorum, appropriate dress, and proper conduct;

3. Advise witness to answer truthfully;

4. Instruct witness to only answer the question asked;

5. Tell witness to refrain from volunteering information;

6. Inform witness to testify only from personal knowledge;

7. Explain that witness should avoid memorization and testify spontaneously;

8. Advise witness to pause after the question before answering;

9. Instruct witness to admit lack of knowledge where appropriate; and

10. Tell witness to ask for clarification of any unclear questions.

11. *See* R. Aron & J. Rosner, *How to Prepare Witnesses for Trial* 184-94 (1985); T. Mauet, *Fundamentals of Trial Techniques* 11-14 (1980); Schrag, *Preparing Witnesses for Trial*, in *Preparing Witnesses for Deposition and Trial*, 53-59 (1980); F.L. Bailey & H. Rothblatt, *Investigation and Preparation of Criminal Cases* § 138 (1970).

D. Altering witness' words.

1. The oft-seen general rule is that attorneys should "not advise the witness on what to say or the words to use," but rather they should explain "how to answer questions and how to tell the finder of fact what the witness knows about the case." R. Aron & J. Rosner, *supra* at 90. However, this rule can be both over- and under-inclusive. There are two circumstances when an attorney clearly may advise a witness to change specific words:

   a) Discouraging use of prefatory phrases such as "I suppose she said" or "To tell the truth."

   b) Discouraging use of technical jargon, overly formal speech or colloquial expressions.

2. What about changing substance of words?

   a) Where a witness uses language loosely, for example by referring to a small truck as a "car," an attorney can properly recommend use of the more precise term.

   b) Where a witness uses the word "piece" to refer to a firearm, an attorney may encourage use of the word "firearm" because it does not change the witness' intended meaning.

   c) Key question should be whether the change is an attempt to influence the meaning of the word. For example, recommending a change from "beat" to "hit" may run afoul of the rule because there may be a factual difference in the meaning of the words.

3. Implying acceptability of false testimony

   a) Attorneys have been known to suggest that the witness' duty is to help ensure "justice is done" rather than telling the truth. This type of advice can have the effect of influencing the witness to shade their testimony in a particular direction.

   b) Such advice would likely violate the rule against counseling a witness to testify falsely.

E. Alteration of Demeanor

1. Demeanor is usually construed as a catchall term that describes everything about a witness' appearance, excluding the actual substance of the testimony as it would appear on a written transcript.

2. Advising a witness to alter their demeanor is often perfectly ethical. However, certain tactics can go over the line. For this analysis, it is useful to divide "demeanor" into three categories. *Professional Conduct and the Preparation of Witness for Trial*, 1 Geo. J. Legal Ethics 389, 406 (1987).

3. Behavior not intended to be communicative. Conduct in this category, such as a yawn, is involuntary and spontaneous and is not capable of being falsified or misrepresented.

4. Behavior intended to convey a general message. The class of conduct is exemplified by the use of polite mannerisms or by wearing a suit to court. Due to the very general nature of the message, it would be difficult to say that an attorney's advice to alter this type of demeanor would be improper.

5. Behavior intended to communicate a specific message. Examples of this type would include vocal inflections, emphasis on certain words, gestures and a display of surprise or emotion. An attorney who advises a witness to appear "surprised" if opposing counsel mentioned a particular event could be in violation of the rule if the expression of surprise is misrepresentative or deceitful.

F. Other considerations regarding witness preparation

1. Prior conversations with opposing counsel are proper grist for cross-examination. *See Geders v. United States*, 425 U.S. 80, 89 (1976).

2. "If attorney discloses the strategy of the case to a nonparty witness, that information is discoverable, so the attorney should be wary of what he or she communicates to a nonparty witness." Watson, *supra* at 21.

IV. WHY PREPARE THE WITNESS?

A. Favorable Witnesses: "The goal of witness preparation is enhanced credibility. It is generally true that how you see a witness in your first interview is the way the court is going to see him. Preparation however, can enhance your witness' credibility and effectiveness by clarifying his testimony, reducing his fear, and smoothing his rough edges." *Hahn* at 3.

B. Adverse Witnesses: "The goal of witness preparation for the opponent is pinning the witness down and preparing for cross-examination. The focus is on limiting unfavorable facts, discovering bias, and eliciting favorable information." *Id.*

C. Expert Witnesses: In addition to the factors listed above, preparation of expert witnesses enables counsel, at trial, to fluidly use exhibits and offer testimony in a way that will be readily understood by the members.

V. PREPARING TO PREPARE YOUR WITNESS

A. Review Your Case

1. Analyze the Law: Open DA Pamphlet 27-9, the Military Judge's Benchbook, and review the instructions for each charged offenses, any lesser-included offenses,

any anticipated defenses, and any predictable secondary instructions (e.g. circumstantial evidence). Hahn, *supra*, at 4.

2. Analyze the Facts:

   a) Conduct a Proof Analysis: Make a detailed and objective checklist detailing the facts that support or test each element of the offense, any defenses, lesser included offenses, etc. ***Id.***

   b) Consider the "Real" Issues of the Case: Why is this case at trial? "Is the real issue the failure of one element of the offense or is it an affirmative defense? Or, does the case have a theme that does not amount to a legal defense, but presents extenuating and mitigating factors so that jury nullification or light punishment is reasonably expected? ***Id.***

3. Outline Closings: Using your analysis of the facts and law:

   a) "Frame your argument, use the military judge's instructions verbatim for the law, and marshal the facts in a persuasive way to prove the point." *Id*. at 5.

   b) Prepare the opposite side's closing (or rebuttal) argument using the same method.

   c) After these two exercises, sit back and consider possible ways in which you could effectively bolster your case.

B. Analyze Your Witness. ***Hahn, supra*** at 5

1. Prepare a Checklist using the Benchbook Instruction on Witnesses. *See* U.S. Dep't of Army, PAM. 27-9, ***Military Judge's Benchbook***, para 7-7-1 (1 Jan. 2010) (hereinafter DA Pam, 27-9). Consider, based upon your previous interviews, and your knowledge of the case, how the panel will view your witness using the following criteria:.

2. Knowledge Factors:

   a) Intelligence,

   b) Ability to observe,

   c) Ability to accurately recall.

3. Bias Factors:

   a) "Lawyers hold that there are two kinds of particularly bad witnesses - a reluctant witness, and a too-willing witness." Charles Dickens

   b) Sincerity,

   c) Conduct in court, Friendships and prejudices,

   d) Character for truthfulness,

   e) Relationship with either side of the case,

   f) How the witness might be affected by the verdict,

   g) Probability of their statement.

4. Objective Evaluation Criteria:

   a) Is their testimony supported or contradicted by other evidence,

b) If contradicted, whether it is attributable to an innocent mistake or a deliberate lie,

c) If contradicted, is it a matter of importance, or an unimportant detail?

C. Using these Criteria, Choose Areas to Review with the Witness

1. Do you need to polish your witness' dress or courtroom demeanor?

2. If the witness has flaws, are there objective, reliable ways to buttress or attack their testimony?

a) Example 1: What would the platoon sergeant say about the accused's character for truthfulness?

b) Example 2: Although no one was present at the time of the alleged rape, are there other details you corroborate or refute from the witness' testimony? If you corroborate a series of minor details from earlier, the panel is more likely to believe the accuracy and truthfulness of the witness on a later detail.

c) Example 3: Does your witness wear contacts/glasses, or is he notorious in the unit for having "eagle" vision?

VI. LET THE PREPPING BEGIN (FAVORABLE WITNESSES)

A. Refresh Their Memory. Hahn, supra at 7.

1. Let them read copies of their previous statements, summarized Article 32 testimony, etc.

2. Explain that the purpose is to refresh their memory of what they said earlier, so you can explore any differences. Stress that they are not to required to testify the same way, only to tell the truth as best they can. "After reflection, the most honest witness may recall...details that he previously overlooked." Rosengart, *supra*, at 35.

3. Identify any errors, inaccuracies, or oversights.

4. Regardless of whether there are any issues, explain to them how impeachment, rehabilitation, and refreshing recollection work. This will help to reassure the witness.

B. Revisit the Scene. Hahn, *supra* at 7.

1. Conduct a "walk-through" of the testimony. Frequently, this walk-through will trigger additional memories, provide opportunities to identify potential issues, will clarify testimony for you, and will crystallize memories for your witness.

2. Have the physical evidence, or a demonstrative aid, in hand.

3. Document (e.g. photograph) anything that might have affected their ability to observe (for good or bad), or that might have affected the accuracy of their testimony. Remember the photos of all those "bushy things" in the movie "My Cousin Vinny."

4. Measure distances. Step-off or measure distances.

C. Prep Their Direct

1. Warn the witness (other than an expert), that rehearsal is a generalized opportunity to become comfortable with court, not development of a script. Scripted exchanges appear contrived (because they are), and do not produce good results. Over-practicing also saps any emotion from the testimony.

2. Orienting your witness. Hahn, *supra*, at 7-9. Most witnesses find the idea of testifying quite frightening. You can alleviate fears, and improve testimony, if you review with the witness:

   a) How to take the stand, and the mechanics of the courtroom,

   b) How to swear the oath,

   c) How to dress and groom themselves. Check the clothes or uniform they will wear to court to make sure they are appropriate. If the witness is military, check their haircut, that all awards and badges are correctly displayed on their uniform, and that their uniform is properly tailored.

   d) Explain how you will begin their examination. Demonstrate some softball questions you will give them (e.g. What is your name? What is your rank? etc.).

   e) Explain that you want them to listen carefully to all questions, and ask for clarification of anything they don't understand.

   f) Explain that they should look at the person asking the questions, and talk to the person asking the questions. This is the natural way we speak, and anything else appears contrived. (Note: You can position yourself so it appears the witness is looking at the panel).

   g) Explain that in the event of an objection, their job is to be silent and wait.

   h) Don't give answers you think I want to hear, and don't try to anticipate questions.

   i) Explain that they should answer only the question asked, not volunteer additional information.

   j) Generally explain the ideas of personal knowledge, conclusions, and leading questions.

      (1) Example 1: "He was angry" is a conclusion, while "his face turned red and he slammed his fist into the wall, so I figured he must be pretty angry" is personal knowledge.

      (2) Example 2: "He was drunk" is conclusory (and less helpful) than explaining WHY the witness reached the conclusion. It is better (if true) to say, "He was kind of slurring/singing a country tune, as he kept falling over sideways on the sidewalk and laughing. That, combined with the bottle in his hand, convinced me he was drunk."

   k) Explain that they need to testify only from personal knowledge.

   l) Explain that it is totally ok to make a mistake, so long as they correct it as quickly as possible.

   m) Explain that they must not exaggerate.

n) Make sure they understand that no one expects them to know or remember everything. It is totally okay to be human, and even to use estimates, so long as they say it is an estimate.

(1) Example 1: Q: Was he more or less than 20 feet away? A: Well, It was about the length of a pickup away from me.

(2) Example 2: Q: So you claim that it took him five seconds to cross the room? A: I am not sure how long it was on the clock, but that is how it seemed.

(3) Example 3: "I can't remember the exact date, but I know it was the Monday of that training holiday in March."

o) Explain that if they don't know an answer, they can and should simply say "I don't remember," or "I don't know."

p) Practice speaking in paragraphs - Practice pausing as they would if they were talking to a friend on the phone. The ideal answer is neither a long narrative nor an over-controlled yes/no. It is an answer that directly addresses a specific question, and then allows the questioner to ask a logical follow-up.

q) Explain the theory of the case, and where they fit-in.

r) Let them handle any exhibits, and show them the step-by-step how you will use the exhibit.

s) If you are using a visual aid, practice having them testify to the exhibit (e.g. "this big red 1 in the upper left shows where I was standing when I saw the gun").

t) Explain why their behavior outside the courtroom is crucial. For example, if the panel members see them laughing in the hallway, right after giving teary-eyed testimony, the panel may conclude the witness was lying.

u) The last, and absolute rule, is that they simply do their best to tell the truth at all times.

D. NOW, do a Dry-Run of their Direct. Always ask "Is there anything I haven't asked you about that you think I ought to know?"

E. Next, teach them the rules of cross-examination: Hahn, *supra* at 9.

1. Be firm but polite,
2. Don't get flustered,
3. No sarcasm,
4. Don't try to outwit or play games with the attorney,
5. Don't be bullied, especially not into a yes/no answer,
6. If they were mistaken in the past, freely admit it.
7. If they feel they must explain, fine, but *don't volunteer information*
8. Tell the truth - it is the best defense.
9. Explain that you will object or redirect as necessary, so the witness can just relax.

10. If an answer is incorrect, correct it immediately.

F. Cross them, or better yet, have someone else cross them.

1. Don't pull punches, be tough.

2. Tell them that you will be harder on them than opposing counsel will be at trial, then do that.

3. Stop when necessary (for example, if you can tell they are becoming emotional), and practice "winning" techniques with them. For example "See how you were getting angry there? Just remember, every time you keep your cool and answer professionally, you win because the lawyer trying to make you look bad just failed."

G. Wrap-up.

1. Remind them that all that matters is doing their best to tell the truth;

2. Remind them that you will handle all the other details;

3. Remind them that if they have any questions or issues, to just let you know;

4. Remind them of where they need to be, when; and

5. Give them a realistic expectation of timelines. Warn them to bring a book, a video game, or a computer. A tired, frustrated witness who has been waiting 14 hours to testify, bored, will be a much less effective witness.

VII. PREPPING HOSTILE WITNESSES

A. Can you win them over? (Works best for unit witnesses or ancillary witnesses)

1. Explain to them that it is okay for them to speak to you, as no witness really "belongs" to either side, they are all just there to tell the truth about what they know.

2. If you are the first attorney to explain the process, provide realistic timelines, tell them what the trial issues are, etc., you may win them over, or at least soften their testimony. On the other hand, be careful of disclosing too much of your theory, as your opponent will surely ask them about the discussion.

B. Ask about their discussions with opposing counsel

1. Explain that our system not only allows, but expects, that they will truthfully relate what they talked about with opposing counsel. Let the witness know that you totally expect them to also answer any questions opposing counsel has about *this* interview.

2. Now, ask questions to see what the other side is thinking.

3. At the end of the interview, always ask "is there anything you talked about with CPT ___ that we did not talk about today, even a minor detail?"

C. Pin them down on their version of events. Hahn, *supra* at 11.

1. When interviewing or preparing witnesses, it is best practice to be accompanied by another person. That person can, if necessary, serve as a witness to the witness' statements during the interview if impeachment is later necessary. Without the third person's presence, an attorney should be prepared to forgo

impeachment of that witness based upon the interview. *See* AR 27-26, Rule 3.7 (Barring rare exceptions, a "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness."); *see also* ABA Standards for Criminal Justice: Prosecution Function 3-3.1(g); ABA Standards for Criminal Justice: Defense Function 4-4.3(e). The ability to impeach a witness on the basis of statements at the interview can also be addressed by requesting the witness sign a statement of material facts after the interview is complete. *See* ABA Standards for Criminal Justice: Prosecution Function 3-3.1, Comment; ABA Standards for Criminal Justice: Prosecution Function 4-4.3, Comment (Taken Verbatim from *Ethics of Interviewing Witnesses Outline*)

2. Option 1: Have a 3rd part takes notes

   a) Advantage: Can be done easily.

   b) Disadvantages:

      (1) Easier to quibble over accuracy.

      (2) Discoverable by the other side?

      (3) To impeach orally, the impeaching lawyer will have to wait for the other party to rest, and then call the rebuttal witness. This greatly dilutes the effectiveness of the testimony.

3. Option 2: Produce a written record. Hahn, *supra* at 11-12.

   a) Inducement: "This way we both have a clear record of what was asked and said, which gives you the protection against anyone trying to twist your words, or against any of us not recording exactly what words you used, or what you meant to say."

   b) Advantages:

      (1) The witness will take the enterprise very seriously, making them "more careful when testifying," and "less prone to exaggerate and be conclusory in a way that harms you." Hahn, *supra* at 11.

      (2) If a witness contradicts their own signed, sworn statement, they will discredit themselves.

      (3) Easy to use at trial.

   c) Disadvantages:

      (1) Labor intensive to produce.

      (2) May scare the witness and reduce their willingness to cooperate.

   d) Procedure: Use a DA Form 2823. Have the witness write out the relevant facts in a narrative form, then ask questions and have them write down the questions and answers on the form. Make the last question "Do you wish to add anything, are there any details we have not discussed, or are there any corrections we need to make to what we've recorded?"

4. Option 3: Secure the witness' consent to tape the meeting (all persons present must agree).

a) Inducement: "Since I am not a great not taker, this gives me the chance to review what you said, and gives you the security of knowing that no one can twist your words later on."

b) Good practice is to tape the consent too.

c) Advantages:

(1) Great for lengthy interviews,

(2) Freedom from note taking can lead to a looser, more natural conversation.

(3) Playing an audio recording of a contradictory statement at trial is simply devastating.

d) Disadvantages:

(1) Having to log when various statements are made, and practicing the ability to quickly play and present those statements, takes a great deal of pretrial preparation.

(2) Works best for counsel who are thoroughly prepared.

VIII. ADDED PREP FOR FOREIGN WITNESSES

A. Explain how our system works.

B. Review why our system uses oaths, and make sure the witness is comfortable with our oath taking process.

C. Practice using the translator. Practice asking and answering questions in readily translated chunks.

D. Practice, with the witness and the translator, speaking as if the translator was not there.

Good Example: "So, then I went to the back of the truck."

Bad Example: "He says that he went to the back of the truck"

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E

NEGOTIATIONS

TAB E

Is Currently Under Construction


F

MOTIONS – LAW

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MAJ Sean Mangan

August 2012

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MOTIONS – LAW

Outline of Instruction

I. REFERENCES.

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C. R.C.M. 907. Motions to dismiss.

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J. Appendix: Motions Waiver Checklist.

II. MOTIONS GENERALLY. R.C.M. 905.

A. Definition.

1. A motion is a request to the judge for *particular relief*.

2. Based on *specific grounds* (rule or case law).

3. *Notice* should be given to the judge and opposing counsel.

4. Litigated at an *Article 39(a) session*, usually after arraignment, before a plea is entered. RCM 905(h).

a) Other than with respect to privileges, the military judge is not bound by the rules of evidence at an Article 39(a) motions hearing. MRE 104(a), *see also* MRE 1101(b) ("The rules with respect to privileges in Section III and V apply at all stages of all actions, cases, and proceedings."); RCM 909(e)(2) (applying the MRE 104(a) privileges rule to mental capacity hearings).

B. Preparation - Offer of proof.

1. *United States v. Hodge*, 26 M.J. 596 (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.

2. *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1987), *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." 23 M.J. at 195.

3. *United States v. Alexander*, 32 M.J. 664, (A.F.C.M.R. 1991), *aff'd*, 34 M.J. 121 (C.M.A. 1992). Court notes that "counsel based much of their argument 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. 32 M. J. at 667 n.3.

4. Notice.

a) Emphasis on prior notice to counsel and the military judge.

b) R.C.M. 905(i). Written motions shall be served on all parties. When? Exceptions?

c) Local judiciary rules. *United States v. Williams*, 23 M.J. 362 (C.M.A. 1987). A local rule is invalid if it conflicts with the Manual for Courts-Martial.

C. Timeliness.

1. Motions which must be made prior to the plea (or else they are waived). R.C.M. 905(b).

a) Defects in the charges and specifications.

b) Defects in preferral, forwarding, and referral.

c) Suppression of evidence.

d) Discovery and witness production.

e) Severance of charges, specifications, or accused.

f) Individual Military Counsel (IMC) requests.

2. Motions which should be made before final adjournment (or else waived).

a) Continuance. R.C.M. 906(b)(1).

b) Speedy trial. R.C.M. 907(b)(2)(A). Note: If speedy trial right alleges an Article 10 violation, a 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) Release from pretrial confinement. R.C.M. 906(b)(8).

d) Statute of limitations. R.C.M. 907(b)(2)(B).

e) Former jeopardy. R.C.M. 907(b)(2)(C).

f) Grant of immunity. R.C.M. 907(b)(2)(D).

3. Motions which may be made at any time, including appellate review.

a) Lack of jurisdiction over accused or offense. R.C.M. 905(e).

b) Failure to allege an offense. R.C.M. 905(e).

c) Improperly convened court.

d) Unlawful command influence. *But see 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.

D. Waiver – R.C.M. 905(e)

1. Failure to comply with timeliness requirements is generally considered a waiver *unless* the military judge finds *good cause* to consider the untimely motion.

2. *United States v. Coffin*, 25 M.J. 32, 34 (C.M.A. 1987) (finding that M.R.E. 311(d)(2) "should be liberally construed in favor of permitting an accused the right to be heard *fully* in his defense").

E. 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.

a) 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).

b) 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 (*U.S. 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).

F. Appeal of Rulings.

1. Defense: extraordinary writs.

2. Government appeals: R.C.M. 908.

G. 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.

b) Pretrial processing defects.

2. *Not* waived by guilty plea:

a) Jurisdiction. *United States v. Conklan*, 41 M.J. 800, 805 (Army 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. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005).

c) Failure to allege an offense.

d) Unlawful command influence. *But see United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995) (condition in PTA waiving command influence motion, originating from defense, does not violate public policy).

e) Post-trial defects.

3. Another Exception. *United States v. Lippoldt*, 34 M.J. 523 (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.

4. **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 (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 (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 (N.M.C.M.R. 1989) (After military judge denied request for delay, defense counsel went "on strike" and refused to participate in case. Held: Accused denied assistance of counsel.)

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 (1995).

M. Miscellaneous. *See*, *e.g.*, *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1986), *cert. denied*, 484 U.S. 846 (1987). 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. Discussion to R.C.M. 906(b)(13). 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 United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005) (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.

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 (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 (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 (C.M.A. 1988). A motion for a mistrial based on an inattentive or sleeping court member.

c) *United States v. Knight*, 41 M.J. 867 (Army 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) *United States v. Burnett*, 27 M.J. 99 (C.M.A. 1988). "From early in the trial the relations between the military judge and the civilian defense counsel had been less than harmonious." Defense counsel held in contempt. Trial proceeded. Motion for mistrial 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 (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 (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. 2004), 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." 27 M.J. 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 caffeine. *United States v. Washington*, 23 M.J. 679 (A.C.M.R. 1986), *rev. denied*, 25 M.J. 197 (C.M.A. 1987). Cocaine was caffeine. 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 (N.M.C.M.R. 1985), *rev. 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 (C.A.A.F. 1995) (MJ applied incorrect legal standard in denying accused opportunity to reopen case to present newly discovered evidence).

IX. APPENDIX - 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 MRE 304(d)(1)], except for good cause shown, as permitted by the military judge. MRE 304(d)(2)(A)]. 2. Plea of guilty regardless of whether the motion was raised prior to plea, unless conditional plea. MRE 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. MRE 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 MRE 311(d)(1)], except for good cause shown, as permitted by the military judge. MRE 311(d)(2). 2. Plea of guilty, regardless of whether the motion was raised prior to plea. MRE. 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. MRE 311(e)(3).
Suppression of Eyewitness ID.	1. Failure to raise before submission of plea [after proper disclosure by trial counsel under MRE 321(c)(1)], except for good cause shown, as permitted by the military judge. MRE 321(c)(2)(A). 2. Plea of guilty, regardless of whether the motion was raised prior to plea. MRE 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. MRE 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 (RCM 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 *U.S. v. Weasler*, 43 M.J. 15 (1995). (Defense initiated waiver of UCI in accusatory phase for favorable PTA is permissible), and *U.S. v. Drayton*, 45 M.J. 180 (1996). (Failure to raise accusatory UCI constitutes waiver.)
Failure to State Offense	Not Waivable. RCM 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. MRE 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: RCM 910(j) provides that [except for a conditional guilty plea under RCM 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.

RCM 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.

MOTIONS – ART

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MAJ SEAN MANGAN

AUGUST 2012

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MOTIONS – ART

Outline of Instruction

I. THEME MATTERS

A. Your judge is a human being. When you write, prove, and argue your motions, you need to remember that your judge, like most people, wants to right a wrong. Your job is to show her what is wrong with this particular issue and get her to not only fix it, but want to fix it. So, you need to find an appropriate theme for this motion. That theme may not be exactly the same as the theme of your case at large, but still needs to give the judge a reason to do what you want her to do. Show the actual harm that will come to this victim if the evidence of prior sexual behavior is admitted. Show how this command has not taken this court-martial – and the accused's rights – seriously. This issue is part of a dramatic story, so tell that story.

B. In a complex case, you may have a theme that runs through several motions – that the accused is not getting a fair trial, etc. Don't hesitate in this motion to reference other motions that have that same theme. Let the military judge and appellate judges know that the problem is bigger than just this one issue.

II. PICK THE RIGHT FIGHT

A. According to James McElhaney, you need to pick the right fight. James McElhaney, *McElhaney's Trial Notebook* 11 (4th ed. 2005). Concede the obvious. You damage your credibility when you don't. If your command has done something wrong, concede that wrong and see if you can settle on a remedy. If you can't, litigate the remedy.

B. Don't file frivolous motions. This is an ethical rule (AR 27-26, Rule 3.1) but also makes good trial sense. The rules don't provide a good definition of frivolous, other than to say that an action is frivolous "if the client desires to have the action taken solely for the purpose of harassing or maliciously injuring a person or if the lawyer is unable to either make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for the extension, modification or reversal of existing law." AR 27-26, Rule 3.1 Comment.

III. WATCH YOUR TONE

A. In adversarial settings, when a party sees the other party do something, he or she is likely to immediately jump to a negative inference about that action. Most of the time, however, the other party is just doing their job and has no sinister intent. Keep your cool. Keep personal accusations and negative inferences about the other party's intentions out of your motion. When you write nasty things in your motion, only one person looks bad.

IV. WRITING THE MOTION

A. To start, you should write each of your motions. Don't just rely on what is in the motions bank. Often, you will have no knowledge about the person who wrote that motion. She could have been the greatest lawyer ever – or something short of the greatest. Use old motions as idea generators. See what issues other people have spotted. See what cases they have cited. Look at those cases. Then, look at your facts and see what works. The key is to start from scratch for each motion. You will get efficient at these soon enough.

B. Keep some basic rules in mind. Keep your motion short, and keep your motion simple. You are balancing the interests of two audiences: the military judge, and the appellate judges. The military judge will read your motion but it really serves as a read-ahead for the motions hearing. None of it really matters until you prove your facts at the hearing. Your job is to familiarize her with the issue without causing her to fall asleep at her desk. At the same time, you need to develop your argument enough so that if you forget to make the *legal* point at the hearing, the issue is still preserved for appeal. (If you forget to prove the *factual* issue, generally speaking you will be out of luck).

C. See the attached motions shell for a good method for writing your motions. This motion is in the format found in the United States Army Trial Judiciary Rules of Practice before an Army Court-Martial. You don't need all of that hyper-formal stuff ("Here comes the Government, by and with counsel . . . ." You also don't need to put the judicial circuit. The judicial circuits represent the way that the Army Trial Judiciary has organized their judges for administrative purposes. Your court-martial stands alone.

D. You can use the IRAC formula (issue, rule, analysis, conclusion) – and your judges will probably appreciate it if you do. You want to have a clean, clear argument, and that formula helps you to accomplish that goal.

E. Just like with the trial in general, you want to start by writing your argument first. You do not need to write a law review article. Most of the time, the nature of the law is not at issue. The problem is the application of fact to law. Brief statements followed by the source of law are generally good enough. You don't have to be a Bluebook geek, but you should have citations that generally follow the inside back cover of the Bluebook (use the Court Documents and Legal Memoranda format, not the Law Review format). If your judge is a Bluebook geek, then you don't want to blow your credibility by not even making an effort.

F. After you state the law, state which facts apply to the immediate problem, and then tell the military judge how those facts either do or do not satisfy the law. Explicitly state the inferences that you want her to draw. Then, tell the judge how you want her to solve the problem (your conclusion).

G. Once you have written your argument, cut and paste it to the "Statement of Facts" section. Then, go through what you just pasted and delete out all of the statements of law and all of the inferences. The facts that are left are called "determinative facts." They are the facts that determine or directly inform the issue before the military judge. Now, go through and add any other facts that are needed for the story to flow and that are needed to support the theme *that is specific to this motion*. Don't put in a bunch of irrelevant facts just because you think they will make the judge get angry at, or sympathetic toward, the accused. The judge will be neutral, and all you will have done is hidden the facts that matter.

H. When you are done with that, go to the "Witnesses/Evidence" section. You need to prove every determinative fact. Putting them in your statement of facts is not enough. Prove it.

1. Just stapling a document to the motion may not be enough. The Military Rules of Evidence (MRE) might apply to your issue. According to MRE 1101, the MREs apply to Art. 39(a) sessions unless some other rule says the rules don't apply. One of those rules is MRE 104, which says the MREs don't apply (other than the rules related to privileges) in motions about the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness. In addition, the MREs don't apply to competence hearings (see RCM 909(e)(2)). The key is to know that the rules apply unless you find an exception somewhere.

2. List all of the evidence you intend to admit and the witnesses you intend to call. For the defense, if you want the Government to produce the witness or evidence, then you will also need to comply with RCM 703. If the witness' credibility is not at issue or what they say will not be at issue, then consider entering into a stipulation of expected testimony. (If calling the witness live will help you, then don't enter the stipulation). And, if you can agree on certain facts, consider entering into a stipulation of fact.

I. Then, file the motion and get ready to call witnesses, do direct and cross-examinations, and present argument.

J. Consider filing a proposal for what you want the military judge to write – a proposed findings of fact, proposed conclusions of law, or even a proposed ruling.

K. If things change after you file your motion, file a supplemental. You may learn things through discovery, investigation, or even from litigating other motions that might impact your argument. Adjust if you need to.

V. ARGUING THE MOTION

A. Motions hearings are a great opportunity to hone your trial skills in an environment that is somewhat safer than when the panel members are in the room. Prepare your direct, cross, and argument with the same rigor that you would if the members were in the room.

B. Remember, the law will not likely be the issue. This is not a law school moot court competition. Your job in argument is to tell the military judge why she should believe the facts that you presented in the hearing (credibility); what those facts mean (inferences); and why the facts satisfy or don't satisfy the law. Don't waste your time doing case briefs. You may need to state the legal factors to provide the military judge a framework for solving the problem, and might want to point to cases that have similar facts where the military judge or appellate judges solved the problem in your favor, but that is about as far as you need to go.

C. Don't resort to characterizing what the other party has done. If you think their argument is weak, show why it is weak by pointing to the facts. Do you think you help the military judge to solve the problem when you say, "Their argument is smoke and mirrors"? You don't. You do help the military judge if you say, "Their argument is weak because of X, Y, and Z."

VI. GET 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

MOTIONS SHELL

UNITED STATES OF AMERICA	)	
	)	(Defense) Motion
v.	)	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 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). (**This should work for most motions. If the motion is out of MRE Section III, see the particular rule – generally, the government will have the burden and may have a higher standard. See also RCM 905(c)(2)(B) for other occasions where the government has the burden**).

FACTS

(**Do this section last. Include the facts that are needed to support the argument (determinative facts), and other facts *only* if they are needed for the judge to make sense of the determinative facts. After you write the argument section, you should be able to cut and paste it here, and then massage the facts into a chronological narrative**).

(If the parties can agree to undisputed facts, include, "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. Kossman, 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

(**Just copy the relief requested paragraph here.**)

SIGNATURE BLOCK
CPT, JA
Defense Counsel

(**Note: No certificate of service is required.)**


G

VOIR DIRE AND CHALLENGES – LAW

Table of Contents

MAJ SEAN MANGAN

AUGUST 2012

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VOIR DIRE AND CHALLENGES – LAW

Outline of Instruction

I. INTRODUCTION

A. **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).

1. 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.

2. "Part of the process due is the right to challenge for cause and challenge peremptorily the members detailed by the convening authority." *United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997)

3. "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).

4. "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).

5. 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).

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**: Depending on the military judge the 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 28 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. Trial counsel can use a peremptory challenge and then defense counsel can use a peremptory challenge.

13. Finally, challenged members are excused and the trial proceeds.

II. 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,"[1] 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. ***Waiver***. Failure to make a timely motion under this section waives 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

[1] See BLACK'S LAW DICTIONARY 1694 (9th ed. 2009) ("venire" is a "panel of persons selected for jury duty and from among whom the jurors are to be chosen").

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); *United States v. Roland*, 50 M.J. 66, 68-69 (C.A.A.F. 1999).

D. **ATTACKING SELECTION – EXCLUSION OF NOMINEES BY RANK**.

1. ***General rule***. Convening authority cannot systematically exclude personnel from panel selection based on rank. *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004) ("[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)).

2. ***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).

3. ***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 (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. Nixon*, 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).

4. ***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."

5. ***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).

E. **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.

F. **DIFFICULT TO MOUNT CHALLENGES: HARD TO FIND EVIDENCE OF IMPROPRIETY**.

1. ***Composition of panel is not enough to show impropriety.*** *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).

2. ***Paperwork errors may not be enough to show impropriety.*** *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); *United States v. Upshaw*, 49 M.J. 111 (C.A.A.F. 1998) (good faith administrative error resulting in exclusion of otherwise eligible members (E-6s) was not error).

3. ***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.

III. INVESTIGATION OF 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***. *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 Equipment, Inc. 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."

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, 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. v. Greenwood*, 464 U.S. 548, 556 (1984)). In this case, the court held the member did 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 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."

IV. 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."); *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008) ("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.

See also 2 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. Challenge of selection of members; examination and challenges of members.

. . . .

(d) *Examination 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.

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1. ***Rule***. "Generally, the procedures for voir dire are within the discretion of the trial judge." *United States v. Jefferson*, 44 M.J. 312, 318 (C.A.A.F. 1996). *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***. *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.

5. ***Military judge may restrict method of voir dire.*** *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996). 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.*** *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 7 days before trial); *United States v. Torres*, 25 M.J. 555 (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 United States v. Dowty,* 60 M.J. 163 (C.A.A.F. 2004) (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. 369 (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.[2] 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 (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 (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 (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.

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[2] CAAF provided several exchanges between trial counsel and individual members during voir dire. This fact-intensive exchange was typical:

> TC: And so it wouldn't necessarily be per se invalid if the coordinator didn't put his initials on the bottle[,] let's say. If it came back to the coordinator [and] the accused brought it back to the table, but the coordinator didn't put his initials on the bottle before it went back into the box. Would that be a violation that you couldn't over look [sic]? No matter what[,] that is an invalid test in your mind?
>
> MBR (CWO2 [C]): In that case with the initials, no.

Nieto, 66 M.J. at 148 (alterations in original).

b) *United States v. Rood*, NMCCA 200700186, 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 *United States v. Jefferson*, 44 M.J. 312 (C.A.A.F. 1996), 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 (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***.

United States v. Belflower, 50 M.J. 306, 310-11 (C.A.A.F. 1999) (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 <u>no</u> 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."

V. 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***." *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008).

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." *United States v. James,* 61 M.J. 132, 139 (C.A.A.F. 2005). 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." *Id.*

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 (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.").

VI. 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).

VII. 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 did not address the liberal grant mandate or implied bias. On appeal, using the implied bias theory, CAAF found 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 (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***. *United States v. Bragg*, 66 M.J. 325 (C.A.A.F. 2008). Accused was a Marine recruiter charged with rape and other offenses involving two female high 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 (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 inquires were so through 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. Nigro*, 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.*** *United States v. Daulton*, 45 M.J. 212 (C.A.A.F. 1996). 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 (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*, 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]."[3] 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

[3] Note, under the current RCM 912(f)(4), this "but for" peremptory challenge would *not* preserve the issue for appeal. Under the current rule, the causal challenge is waived if the challenged member is excused with a peremptory challenge.

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 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); *United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988) (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 (A.C.M.R. 1988) (rating relationship merits inquiry and appropriate action based on members' responses). *Cf. United States v. DeNoyer*, 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***. *United States v. Terry,* 64 M.J. 295 (C.A.A.F. 2007). 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.

a) ***Practice Point*:** "Where a particularly traumatic similar crime was involved . . . we have found that denial of a challenge for cause violated the liberal-grant mandate." This is ultimately a fact-specific inquiry.

b) *Cf. United States v. Denier*, 43 M.J. 693 (A.F. Ct. Crim. App. 1995) (in drug case, member stated he would be fair even though his daughter was a recovering cocaine addict, though he would be affected "some" but not intellectually; no abuse of discretion to deny challenge for cause).

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, it may not." *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985). 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 Hunley 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. Hudson*, 37 M.J. 968 (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 <u>not</u> disqualified***. *United States v. Smith*, 25 M.J. 785 (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 (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 (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 (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 <u>consider</u> 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 *United States v. Jefferson*, 44 MJ 312, 319 (C.A.A.F. 1996); *United States v. Tippit*, 9 MJ 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." *Id.*

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, supra*, 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 COUNSEL**.

1. ***Negative bias against specific counsel.*** *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;

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).*** *United States v. Townsend*, 65 M.J. 460 (C.A.A.F. 2008). 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.

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.[4] 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.

VIII. 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.

[4] The member said, "I kind of have malice toward [the soldier] because he was guilty and I think he knew in his heart he was guilty but he made his 10-year-old daughter get on the stand and [recount] what he did to her and I didn't appreciate that very much." He added: "[I]t was very evident that the [s]oldier was guilty and he was proven to be guilty. And yes[,] you're innocent until proven guilty, but pretty much everybody knew that the guy was guilty—I mean, for lack of a better term he was a scum bag. And for him to put that little girl through the trauma was unacceptable. I just don't have any respect for a man who would put a little girl through that." (alterations in original).

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 CAAF provided the following chart as to the progression of the panel's composition:

Panel Composition	***Total***	***Officer***	***Enlisted***
Initial	10	6	4
After 1st causal challenges	7	5	2 (No 25 quorum)
After 1st peremptory challenge	**5**	**4**	**1**
After 1st additions	10	6 *(added 2)*	4 *(added 3)*
After 2d causal challenges	8	6	2 (No 25 quorum)
After 2d peremptory	**7**	**5**	**2**
After 2d additions	10	5 *(added 0)*	5 *(added 3)*
After 3d causal challenges	9	5	4
Final (after 3d peremptory)	8	5	3

The issue on appeal was whether the MJ erred by granting the parties' PCs (**bolded above**) after the ⅓ enlisted quorum, as required by Article 25, UCMJ, was busted after the 1st and 2nd CfCs (underlined above) 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 preemptory 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. Oklahoma*, 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 (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. Humphreys*, 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, MRE 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**. 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*, NMCCA 20061218, 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.

IX. PEREMPTORY CHALLENGES – GENERALLY

A. **IN GENERAL.** One per side, unless new members are detailed. *See* Article 41(b)(1), UCMJ.

1. ***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.").

a) No Sixth Amendment right to a peremptory challenge. *Ross* v. *Oklahoma*, 487 U.S. 81(1988).

b) No Fifth Amendment due process right to peremptory challenge. *United States v. Martinez-Salazar*, 528 U.S. 504 (2000).

c) *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.

2. ***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. 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 objection, ultimately sat on the case.

3. ***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. *United States v. Owens*, No. 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," 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.

X. 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 an 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. Alabama*, 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 v. Collins*, 546 U.S. 333 (2006). 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 v. Elem*, 514 U.S. 765 (1995), 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 v. New York*, 500 U.S. 352 (1991) ("[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. *United States v. Tulloch*, 47 M.J. 283 (C.A.A.F. 1997). *Tulloch* is a departure from Supreme Court precedent, which requires only that counsel's reason be "genuine." *Purkett v. Elem*, 514 U.S. 765 (1995).

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. 289.

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 (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 (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 (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 Georgia v. McCollum*, 505 U.S. 42, 54 (1992) (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. State*, 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 State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (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."[5]

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 wife recently had a hysterectomy so he was taking care of his children. He added, "[S]o 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

[5] Under Louisiana law in effect at the time, a capital jury would deliberate on findings and then only deliberate on sentence if the defendant was found guilty of an offense for which the death penalty was authorized. In this case, if the jury had found the defendant guilty of unpremeditated murder, the jurors would have been excused and the judge would decide the sentence.

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. Downing*, 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 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*, 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.

XI. CONCLUSION

XII. APPENDIX - VOIR DIRE AND CHALLENGES SUMMARY

MAJOR POINT	*SUMMARY*
MILITARY JUDGE'S CONTROL OF VOIR DIRE	• RCM 912 grants a MJ broad authority to control the conduct of voir dire. A MJ may deny a request for individual voir dire, may limit the amount of counsel who participate in voir dire, and restrict the type of questions asked. A MJ, however, should be cautious in placing extreme limits on counsel. While the MJ may foreclose or limit counsel during voir dire, the appellate courts will review whether the MJ abused his/her discretion.
CAUSAL CHALLENGES: STANDARDS FOR EVALUATION	• MJs are to liberally grant challenges for cause (*Moyar* mandate) for the defense only (*James*). • A causal challenge based on actual bias is one of credibility and is reviewed for an abuse of discretion. MJs have significant latitude in making this subjective determination because of the opportunity to observe the demeanor of the court member. Great deference is given to MJ determination. • The bases for causal challenges include inelastic attitude on sentencing, an unfavorable inclination toward a particular offense, being a victim of a offense similar to the one being prosecuted, rating chain challenges, knowledge of the case, and/or expertise in the issues to be litigated. A member is disqualified only after a showing that the basis for a challenge will prohibit the performance of duties as a member.
THE IMPLIED BIAS DOCTRINE	• RCM 912(f)(1)(N) also embodies the implied bias doctrine. A MJ must determine whether a member should be disqualified for implied bias based on an objective standard. The question to ask is "would a reasonable member of the public have substantial doubt as to the legality, fairness, and impartiality of the proceedings?" Implied bias occurs when the member's position, experience, or situation indicates that he/she should not sit, even though the member disavows any adverse impact on their ability to perform member duties. • Impact of *Wiesen* – grant challenge if greater that 2/3 "work" for senior member.
PROCEDURAL ISSUES ASSOCIATED WITH CHALLENGES	• Article 41 provides the procedure for challenges. The underlying intent of Article 41 is to ensure that each party gets one and only one peremptory challenge, and that causal challenges are liberally granted but for defense only. • When a causal challenge reduces a court below Article 16, as opposed to Article 25, quorum, the parties must exercise all causal challenges then apparent. Peremptory challenges will not be exercised until the CA details additional members to the court and then after causal challenges. • When a peremptory challenge reduces a court below Article 16 quorum, the parties must use or waive any remaining peremptory challenges against remaining members before additional members are detailed to the court. When additional members are detailed, causal challenges are done and the parties get peremptory challenges against the new members.
***BATSON* AND PEREMPTORY CHALLENGES**	• *Batson v. Kentucky* prohibits the use of unlawful discrimination in the exercise of a peremptory challenge. Military case law applies *Batson* to courts-martial. A MJ, upon receiving a *Batson* objection, must ask the party making the peremptory challenge to provide a supporting race and/or gender neutral reason, and then determine whether that reason is in fact race and/or gender neutral. A *trial counsel* may not base a peremptory challenge on a reason that is implausible, unreasonable, or otherwise makes no sense. *Tulloch*. • *Batson* is applicable to the defense. See *Witham*. • The MJ does not have a *sua sponte* duty to raise a *Batson* challenge. In addition, an MJ is not required to conduct individual voir dire in a peremptory challenge situation. • The Supreme Court has not ruled on whether *Batson* prohibits peremptory challenges based on religion. Two federal circuits have held that it does. Civilian cases support that *Batson* does not prohibit peremptory challenges based on age. There is no military case on age.

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VOIR DIRE – ART

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MAJ SEAN MANGAN

AUGUST 2012

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VOIR DIRE – ART

I. BASICS

A. *Voir dire* is a terrible name for this phase of the trial. No one even knows how to pronounce it. It is a French phrase that literally means "to speak the truth." Well, that applies to everyone that takes an oath to tell the truth at trial. Generally speaking, though, it means a preliminary examination to test the suitability of a potential juror or the competence of a potential witness.

B. So, we could call this phase, "Preliminary Panel-Member Examination." And for part of this phase of the trial – the written phase – that is an appropriate title. But for the other part of this phase of the trial – the in-court, oral exchange – that is not a good title. That part of *voir dire* should be called "Conversations with Panel Members" because that is what you want to achieve: a conversation with your panel members.

C. Note that the oral exchange has two parts – individual and group. So, we really have three parts of *voir dire* to deal with: written individual, oral individual and oral group. For simplicity's sake, we will use the term *voir dire* during this instruction, but we will distinguish between individual written *voir dire*, individual oral *voir dire*, and group oral *voir dire*.

D. Once we understand the overall goals of *voir dire*, we will see that some of these goals should be accomplished in written *voir dire* plus individual spoken *voir dire*, and some in group spoken *voir dire*.

E. At the end of this instruction, you will have a simple system that you can use to approach *voir dire*. This framework is derived from Lin S. Lilley's excellent article, *Techniques for Targeting Juror Bias*, Trial, November 1994, at 74.

F. WARNING: If you are going to defend a capital case, then you need to learn a particular form of *voir dire* called the Colorado method.

II. GOALS AND HOW TO REACH THEM

A. We need to understand the goals of *voir dire* if we are to understand the best way to approach our panel members. As we go through this, remember the meaning of goal-centered trial advocacy: if you don't have a reason for doing it, don't do it.

B. *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 (RCM 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)."

            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?)

3) 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. This leads to the use of **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.

C. 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. These inferences draw from a person's lifelong experiences. A simple instruction 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 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.

D. 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.

III. SUMMARY: THE THREE PARTS OF *VOIR DIRE* AND HOW TO USE THEM

	WRITTEN *VOIR DIRE*	INDIVIDUAL SPOKEN *VOIR DIRE*	GROUP SPOKEN *VOIR DIRE*
PURPOSE	Gather information for challenges	Follow-up on written voir dire; gather information for challenges	Educate on counter-intuitive aspects of the case – this is not the place to gather information for challenges!
METHOD	Written questions; reinforce semi-anonymous nature of questions; provide the panel member with "outs"	Open-ended questions; listen more than you talk; build case for challenge	Open-ended questions; listen more than you talk; develop the counter-intuitive belief; then "kill the elephant"
FOR ALL OF THEM, ASK: DO I HAVE A GOOD REASON FOR DOING THIS?			

IV. DON'T RELY ON STEREOTYPES

A. For the most part, do not make decisions about panel member selection based on the person's demographic profile. First, most of the data on how certain groups tends to vote shows only weak correlations between the profile and the voting pattern, if there are any correlations. Second, you don't know if this particular person will vote consistent with that pattern. You need to know what this person thinks. Otherwise, you might kick a favorable person off your panel because you relied on a demographic profile.

B. That said, here are some findings:

1. There are no correlations between the race of the panel, the race of the defendant, and the verdict.
2. Single panel members tend to be better for the prosecution.
3. Panel members with traditional sex-role expectations, especially women with traditional sex-role expectations, tend to follow assumption of risk belief patterns in acquaintance sex-assault cases.
4. Women panel members tend to be better for the defendant when the defendant is the breadwinner.
5. Young panel members (21-35) tend to side with the prosecution; middle-aged panel members (36-55) tend to side with the defense; and older panel members (55+) tend to side with the prosecution.

V. QUESTIONING TECHNIQUES

A. Remember, this is a conversation. In fact, this is the only two-way conversation you get to have with the panel members during the whole trial. Don't waste it by talking the whole time. You should be asking simple, open-ended questions, and then allowing the panel members to talk about their beliefs or experiences. Have your co-counsel give you a cue if you are doing what lawyers love to do – monopolizing the conversation.

B. Be comfortable with silence. Three, four, or five seconds may go by – or even more – before someone answers. That is okay. Wait for them to talk.

C. Make eye contact.

D. Listen to and observe the verbal and non-verbal responses of panel members. Watch for changes in facial expressions, body movements, avoidance of eye contact, hesitancy to respond, and other indications that a member is uncomfortable or insincere in his or her response.

E. Direct your questions to every panel member, not just the president.

F. Ask questions in a conversational tone.

G. Use simple language; avoid legalese.

H. Don't say things like, "Affirmative response from all members." Instead, say, "Everyone raised their hands."

I. Each time you speak to someone, use his or her name: "SFC Jones, your hand is up. What do you think?" That will keep the record straight as to who is saying what.

VI. KNOW YOUR JUDGE

A. Know your Judge. The nature and scope of voir dire is within the discretion of the military judge, but most military judges will allow you to ask questions. Some military judges may require you to submit questions before hand. This is a response to having seen many bad voir dire sessions – particularly ones with unabashed theme and theory testing.

B. Be prepared to tell your judge why your client (either the government or the accused) may not be able to get a fair trial without your having the ability to ask the question. You need to be able to explain why what you are asking directly relates to the panel member's ability to sit fairly and impartially.

C. The judge will likely ask several preliminary questions similar to the questions set out in the Military Judge's Bench Book. Listen to the member's responses to these questions. Don't repeat those questions. Note that most of these questions can only be answered with the socially acceptable response and so you might not learn the panel member's true beliefs. If you need to explore these areas, be prepared to tell the judge why you need to ask additional questions.

VII. SOME FINAL TIPS AND POINTERS

A. Always review questionnaires, ORBs, and the 2A/2-1s of prospective panel members. These documents will prompt narrowly tailored questions, give counsel a better picture of the panel, and prevent counsel from asking repetitive questions.

B. Sit in on other trials to observe counsel and members in the voir dire process.

C. If a standing panel is used, ask counsel who have tried cases before the same panel about the panel members.

D. Practice by asking non-lawyers who don't know the case to listen to your questions.

E. Put a member's nonverbal actions and expressions on the record. (e.g. "Major X looked down and was shaking his head from side to side").

F. Know the *Batson* Requirements. See the "*Voir Dire* – Law" outline for more.

VIII. GET BETTER BY READING AND WATCHING:

A. Jeffrey T. Frederick, MASTERING VOIR DIRE AND JURY SELECTION (3d ed. 2011).

B. Harry Kalven and Hans Zeisel, THE AMERICAN JURY (1966).

C. Gary LaFree, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989).

D. MAJ Rebecca Dyer, *Psychological Considerations for Jury Selection and Trial Consulting*, available as streaming video on the Criminal Law Video Library.

E. James McElhaney, *Making Limited Time for Voir Dire Count*, A.B.A. J., Dec. 1998, at 66.

F. James McElhaney, *Listen, Don't Talk*, ABA J., Nov. 2009, at 20.

G. Amy Singer, *Selecting Jurors: What to Do About Bias*, Trial, Apr. 1996, at 29.

H. Lin S. Lilley, *Techniques for Targeting Juror Bias*, Trial, Nov. 1994, at 74.

I. James McElhaney, *Rejiggering Jury Selection*, ABA J., Apr. 2008, at 30.

J. http://www.trialtheater.com/jury-selection/

IX. DRILLS

A. Step 1: In your case, or in United States v. Archie, identify what information you want to learn about our panel members in order to effectively use your peremptory and to challenge for cause. Create a written supplemental questionnaire that will allow you to gather than information.

B. Step 2: If time allows, gather two or three mock panel members. Anyone will do, provided they do not have a legal background. Give them the questionnaires and ask them to fill them out ahead of time. Retrieve the responses and distribute to the counsel. Have the counsel develop questions for the individual spoken *voir dire*, bring the mock panel members in, and then have the counsel conduct individual spoken *voir dire* with the mock panel members.

C. In your case, or in United States v. Archie, identify system bias (generally, works against the accused) or other beliefs or biases that work against your case. Bring in a mock panel of five or more people who do not have a legal background. Practice describing the 800-pound gorilla.

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H

THE OPENING STORY

I. ART.

A. Introduction.

1. Opening statements should really be called something else. They should be called, "opening stories." That is what we will call them here.

2. You may have heard that 80% of jurors make up their minds after the opening statement. Well, it turns out that that is a myth – no evidence exists that supports that claim. *See* William Lewis Burke et al., *Fact or Fiction: The Effect on the Opening Statement*, 18 J. CONTEMP. L. 195 (1992). We don't know whether panel members make up their minds based on the opening story. However, we do know that jurors get their first information about the case during opening statements, and they are likely to view all subsequent evidence, information, and arguments in light of this first information. In doing so, it is likely that a juror will "take a side."

   a. They will choose a team and from that point on, they will look at the evidence from the perspective of the members of that team. They may eventually change teams, but it is harder to make people change their minds than to persuade them in the first place.

   b. If you are familiar with the concept of "confirmation bias," which is the tendency of people to pay attention to the facts that support their preconceptions and disregard or minimize facts that don't, then you will see that the panel members may very well follow that observation of human psychology. After they choose sides, they will likely pay more attention to the facts that support the team they have chosen and pay less attention to the facts that work against their team. Because of this, counsel should *never* waive opening statement. And defense counsel should *rarely* reserve an opening statement. You want the panel members to join your team – right now.

3. We ask panel members to do something extraordinarily difficult. We bring them in cold and then order them to solve a problem that the lawyers couldn't solve (the lawyers weren't able to get a plea agreement for whatever reasons, right?). Then, we ask them to solve this problem by hitting them with a firehose of facts and unfamiliar legal concepts.

4. In your opening statement, you need to help them. Tell them what the problem is and then tell them a story that will show them how they can solve that problem. Your theme (what makes you angry about this case) will motivate them to solve the problem in your client's favor. Your theory (the story) gives them a framework on which they can begin to organize the information they are about to receive.

B. The relationship between closing argument and the opening story.

1. In this deskbook, the instruction on opening stories comes before the section on how to deliver arguments for no better reason than that is how it is always done in trial advocacy books. In reality, you will polish your opening statement *last*. The *first* thing you do is construct your arguments and themes. You then find the evidence that supports those arguments and themes. A few days before trial, you will finalize your closing argument. Your sub-arguments will have a claim, some facts, and inferences that connect those facts to your claim. One argument might look like this:

Claim: The accused thought the victim consented to sex.
Most probative evidence: The Accused watched a porn movie with the Victim before the intercourse.
Generalization: A man who watches a porno movie with a woman often thinks that woman wants to have sex with him
Especially when: She did not leave when he turned on the movie; she never said turn off the movie; she watched the movie for twenty minutes; she leaned against the Accused while watching the movie; the movie has scenes of a particular sex act; she says she might do that if "relaxed;" she later says she was "relaxed;" and the alleged sex act is the same as it was in the movie.

2. In closing argument, you would pretty much read down that argument, to include stating the claim and the generalization. You would say, "The accused thought the victim consented to sex. The Accused watched a porn movie with the Victim before the intercourse. She admits to that. Now, a man who watches a porno movie with a woman often thinks that woman wants to have sex with him. Especially when she does not leave when he turns on the movie; she never says, "Turn off the movie;" she watches the movie for twenty minutes while, the whole time, she is leaning against the accused. And, the has scenes of a particular sex act. She says she might do that if she were "relaxed," and later she says she is relaxed – and they then have the same kind of sex that was in the movie."

3. For the opening story, you just drop out the claim, the generalization, and don't say, "especially when." Your facts are now organized persuasively. In your opening, for the scene described above, you would say, "The Accused watched a porn movie with the Victim before the intercourse. She does not leave when he turns on the movie. She never says, "Turn off the movie." She watches the movie for twenty minutes. She is leaning against the accused the whole time. The movie has a scene of a particular sex act. She says she might do that if she were "relaxed," and later she says she is relaxed. They then have the same kind of sex that was in the movie."

4. When the facts are organized persuasively, you don't have to state the inferences or the conclusion during your opening story (that would be arguing, which you are not allowed to do in the opening story). You don't need to because the panel members can see the inferences and reach the conclusion without you stating them overtly.

5. So, write your argument first. Drop out the inferences and claims and you will have a persuasively constructed opening story.

C. Organization.

1. Your opening should have an introduction, a story, and then a conclusion. The introduction will only be a few sentences. The story might be pretty long. The conclusion will also only be a few sentences. You should have your introduction and conclusion down cold (as in, memorized.) You don't need to memorize the story – you just need to tell it.

2. The introduction.

   a. For the introduction, don't be boring. Don't start with platitudes and an explanation of what the panel is expected to do and what your role in the case is and what the law is and what the procedures are. That stuff is boring. Let the military judge do that. Start with a simple, "President of the panel, members," and then:

   BANG!

   Hit them with one sentence that tells them what is so terrible about this case. This is your theme. (See the Constructing Arguments and Theme Development Outline for how to develop your theme).

   b. For your next couple of sentences, *tell them what the problem is that they have to solve*. This is whatever one or two key issues exist in the case and maybe a brief statement of the test (law) that they will need to use to solve the problem. Service members are used to getting a BLUF (bottom line up front). Give them the BLUF. Do this in plain English.

   c. Then, tell them what you want them to do.

   d. Your intro, then, is: theme, problem, action. And that is it. Be clear. Get the theme, problem, and action out there, and that is it.

3. Story.

   a. Now, tell your story. Before you do, you might pause and say in your mind, "Once upon a time," and then start story-telling.

   b. The story has a beginning and a middle. The middle will be the end of the action taken by the actors in the case.

   c. However, the end of the story has not occurred yet. The end of the story is what the panel does when they return the verdict. The end of the story is when the panel rights the wrong or fixes the injustice that you revealed in your first sentence.

4. Conclusion. Your conclusion might sound a lot like your introduction. You will tell them what you want them to do – find the accused guilty or not guilty. Tell them to right a wrong. Tell them how to finish this story.

INTRODUCTION • Theme • Problem • Action
STORY

• Beginning • Middle (that ends at the end of the action taken by the actors in the case)c
CONCLUSION • Theme • Problem • Action – then end of the story. The panel members' action is the end of the story

D. Story-telling.

1. Story telling is critical through every phase of trial, and here is paramount. According to James McElhaney, "Stories go deeper than just the law. They are at the heart of how we think and act. Stories have been used since the beginning of time to make sense of the world." James W. McElhaney, *McElaney's Trial Notebook* 183 (4th ed. 2005).

   a. When Urgh the Caveman returned from the hunt without any meat, he needed to be able to tell a good story (through paintings, on a cave wall if needed) to explain to his family why the family was going to go hungry – or else he would suffer the consequences.

2. Lawyers like to think that the law solves the problem, but it doesn't. The story solves the problem. Again, McElhaney: "The law is just the structure. It gives minimum requirements for an adequate story, but it says very little about how you tell it. And it is the story – not the structure – that decides the case." *Id.*

3. McElhaney describes four elements of the stories.

   a. First, stories have beginnings and endings. You get to choose where to start, and ultimately the panel will decide the ending.

   b. Second, the story is set in time and place. You need to describe the scene and the backdrop for all of the action.

   c. Third, there are characters: "actors who make things happen or fail to keep them from happening. They respond to the forces that act on them and participate in the unfolding events. Your job is to make those characters come alive and to show that they are – or are not – responsible for the events." *Id*. at 184.

   d. Fourth, something happens.

4. Organize your story by scenes.

   a. You will usually (but not always) use a chronological narrative, organizing your story into a series of scenes. Sometimes your story will need flashbacks or foreshadowing or parallel action. If so, use those. The key thing is don't organize your story around legal principles. You don't do that when you tell stories in real life.

   b. You need to paint the scenes. Give some of the most important details. Pick two or three of the most important events, and paint colorful, lasting snapshots of those moments.

5. Be interesting. If your panel member tunes out and starts thinking about what he has to get done, that he has to get little Johnnie to soccer practice by 1800 and the grass needs mowed and the boss wants that appendix to the OPORD by Wednesday and – well, then you might as well have not been talking.

6. The good news is that you tell stories every day. Pay attention to how often you tell stories. Once you recognize that telling stories is one of the primary ways in life that you convey information, you'll see that opening stories are not that intimidating. When you get to trial, you will know your facts cold. The hard part is preparing for the trial. The easy part is telling the story.

E. Addressing your weaknesses.

1. It is what it is. You weren't responsible for the facts. You are just stuck with them. You will have bad facts in your case. Get over it.

2. Don't bypass the bad facts. The panel members will find them. Organize the other facts that help to diffuse them. Using the same argument from above, if you are the trial counsel, you are stuck with the fact that the victim watched a porn movie with the accused. And that is bad, except when: she didn't choose the movie; he didn't tell her he was going to put on a porno before he brought her to his room; she didn't have a car and had no way to get to the other side of post if she did decide to leave; the accused was her supervisor and he had earlier threatened to cancel her leave if she didn't go on a date with him; she was really drunk and trying to do everything she could at that moment not to vomit; etc.

3. You will have to counter-argue those bad facts in the closing statement, so might as well put the facts that support your counter-argument right there in your opening story.

F. Using visual aids.

1. When you tell a story, you are activating the listener's imagination. You need to use visual aids to help the factfinder imagine the scene accurately.

2. You need to identify places where the factfinder will natural imagine the story in a way that will be different than the way things were in reality.

a. If you are defending someone who had sex with a fifteen-year old in a church, when the panel members hear, "church," they will probably imagine a grand, brick cathedral with stained glass windows and spires. If the church was in reality a converted Taco Bell building, you will need to correct their imagination.

b. Or, if you are prosecuting a case of child neglect, if you state that the house was in squalor, you will probably not be able to convey the actual filth and disrepair that the child was living in.

c. Get the pictures and show them early. Make sure they are imagining the right thing.

3. You can use anything that you have believe in good faith will be admitted. The best practice is to pre-admit whatever you want to use in your opening story , but the law does not require that.

G. Delivery.

1. Tone. The tone of your presentation should be conversational. You want to sound like a *teacher*, not lawyer. Avoid over emotional presentation or theatrics. The panel will think you are a used car salesperson.

2. Tense. When telling your opening story, think not only about what you're describing, but also what perspective you are describing things from.

   a. Use present tense to tell your story from a favorable perspective (such as the victim's or your client's). Your verbs should end with "s" and "ing," not "ed." Telling as story this way invites the listener to stand in the shoes of the person from whose perspective the story is being told. The events are described as if they are happening right now, and the listener will be inclined to feel a degree of sympathy for that person.

   b. When describing the actions of an adverse party, use the past tense. This method encourages the listener to treat the facts and details as final, closed, and in the past. It does not encourage any sympathy towards the "bad actor" in your story, and does not invite the listener to question the motivation of the character you're talking about.

3. Honesty. Be the person you are every day. Don't try to be someone you aren't – the panel will see through that and you'll lose credibility. Stand the way you normally stand. Use your hands the way you normally do. Do not "talk like a lawyer." Avoid "legalese."

4. Remove barriers. Don't put a podium between you and the people you are trying to talk to. If you use notes (and there is nothing wrong with using notes), put them on a low table or hold them.

5. Believe in your case. If you have done the hard work ahead of time in theme development, you will believe in what you are saying, and that will show.

6. Deliver one complete sentence to each panel member. Don't scan with your eyes -- connect with your eyes. Tell someone a complete sentence, and then move to someone else. By doing that, you will deliver a key fact to one person. If you are looking them in the eyes when you say that one fact, then that person will remember that fact when he or she goes back to the deliberation room. You need that person to carry that fact for you. Otherwise, it might get lost. Put them in charge of that fact.

7. If you read, it's a script. And that is boring. Don't do that.

8. Use pauses effectively. Silence is golden. Silence is not your enemy.

II. GET BETTER BY READING OR WATCHING:

A. James W. McElhaney, *Persuasive Organization*, A.B.A. J., Dec. 2006, at 24.

B. James W. McElhaney, *That's a Good One: Effective Trial Lawyers Know How to Tell a Good Story*, A.B.A. J., Apr. 2011, at 22.

C. Trial Theater, http://www.trialtheater.com/opening-statement/

D. Stetson University College of Law's Advocacy Resource Center, http://www.law.stetson.edu/ARC

III. DRILLS.

A. In daily life. Practicing opening statements is easy. You tell stories every day. That is how you communicate, to your spouse or significant other, your friends, your parents, your children. After you have told a story, catch yourself. Check whether you spoke in present tense. Check how you were standing and how you were using your hands. The person you were when you told that story is the person you want to be in court.

B. The chauffer drill. Get a handheld mirror or use a wall mirror. Sit in a chair and turn your back to the group. Tell the story like you were driving your mom to the airport, looking at the group through the "rear-view mirror."

C. 30-second drill. Keep doing the intro paragraph until you get it under 30 seconds. This forces you to reduce the phrases to their core action words.

D. The Haiku. Use some variation of a haiku – five words, seven words, five words; seventeen syllables spread over three lines, etc. Reduce your theme to a haiku.

E. The Twitter drill. Tweet your theme. Reduce it to 140 characters, ensuring that you tell the person receiving the tweet what you want them to do.

F. Group Story Telling:

1. To prepare for this drill, each member of the group needs to come with a short (3-4 min) story that they can tell the group. The story doesn't need to be about a case, or even a crime, but should involve some kind of "bad" thing done by someone—it could be the guy who cut you off in traffic, the co-worker who steals from the office fridge, or maybe the customer service rep who made you wait… whatever. The important thing is that you need to identify a "bad act" and a "bad actor."

2. First, a student will stand and tell their story. This part of the drill is all about not becoming "the lawyer version of yourself." Students may not use traditional introductory phrases, like "ladies and gentlemen of the panel. . . ." Students should try to tell the story in a way that's brief, interesting, and clear

3. After the short (3-4min!) story ends, the group should offer suggestions about how to improve the story. For example, feedback might include which characters or facts were interesting or memorable (or weren't!). This is not a "style session" that focuses on tone of voice or mannerisms. This part of the drill makes students think about how to improve their story without changing the underlying facts.

4. After a few comments about improving the story, the group should offer ideas about an overture or opening. The student making the suggestion should stand and try to deliver their idea to the group.

5. Repeat the process with another student and story. Where helpful, the storyteller may speak as if talking to a particular audience: a superior, parents, a group of junior Soldiers, or strangers, etc..

G. The hands-up drill. Give an opening statement before several people. Everyone raises their right hand. You point to one person and everyone else puts their hands down. You speak one complete sentence to that person. That person puts her hand down; everyone raises their hands, and you find someone new, point to them, and then speak one complete sentence to that person; then repeat. As an alternative, instead of pointing, actually take the person's hand in a handshake grip and hold their hand until you deliver the complete sentence. They are instructed not to let go until you get the whole sentence out.

H. The co-pilot, or, what comes next drill. If you have a co-counsel on an upcoming case, both of you will participate in this drill. You fully describe one scene in the story. Turn to your co-counsel and ask, "What comes next?" Your co-counsel then describes the next scene in the story. Repeat.

I. The red-light, green-light drill. Give your panel members a piece of red card stock paper and a piece of green card stock paper. Tell the panel members that when they recognize that they have tuned out of the opening statement, to hold the red card in front of their chest. The attorney should scan for those people and then re-engage them. Another option is to have the panel members hold up a green card when they feel like they haven't been talked to in a while. The attorney will then scan, find the person with the green card, and connect with that person.

J. The "Talk to me" drill. If a counsel is having a problem breaking out of her "lawyery" persona, have her stop. Have her sit down. Ask her, "Where does the story start?" Then, "Okay, talk to me. Tell me in simple terms what happened." What follows will probably be a good opening statement.

K. Dissect trial records. Pull an opening from a record of trial. Photocopy it and have counsel draw a line at the point at which the statement *starts* to have anything to do with the case at hand. Frequently counsel "wheel spin" through a paragraph or two or three in which they issue generalities about what an opening statement is, who has what burden, who they are, etc. Now look at the first sentence that relates to this case or client. Was there a theme? Was there an emotional pull? End strong, too. Draw a line at the end of opening statements when counsel diverge from the case at hand and go into closing generalities about the burden, keeping an open mind, paying attention to all of the evidence, listening to the judge, paying attention to cross, etc. Look at the last line during which counsel actually talked about the case. Now make that punchier and more dramatic. Then stop.

IV. LAW

A. Timing. Each party may make one opening statement to the court-martial before presentation of evidence has begun. The defense may elect to make its statement after the prosecution has rested, before the presentation of evidence for the defense. The military judge may, as a matter of discretion, permit the parties to address the court-martial at other times. RCM 913(b).

B. Content.

1. Counsel should confine their remarks to evidence they expect to be offered which they believe in good faith will be available and admissible and a brief statement of the issues of the case. RCM 913(b) discussion.

2. "An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict." *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (C.J. Burger, concurring).

C. Remedying Improper Statements. Discussion RCM 915(a).

1. "The Power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons. As examples, a mistrial may be appropriate when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members…" Discussion RCM 915(a).

2. "The preferred remedy for curing error by members hearing an improper opening statement is a curative instruction, so long as the instruction negates any prejudice to the accused." *United States v. Castonguay*, No. ACM 28678, 1992 WL 42933 (A.F.C.M.R. Feb. 27, 1992) (*citing United States v. Nixon*, 30 M.J. 501 (A.F.C.M.R. 1989)).

3. *United States v. Ashby,* 68 M.J. 108 (C.A.A.F. 2009) (military judge's curative instruction, after the trial counsel mentioned appellant's invocation of his right to silence in her opening statement, was sufficient to cure any prejudice).

D. Types of Improper Statements.

1. Comments that implicate a fundamental right of the accused. (*See also* the Arguments Outline)

a. The accused's possible failure to testify. A curative instruction given by the military judge after trial counsel stated during opening statement, "We anticipate you will hear the accused testify" was appropriate. *United States v. Castonguay*, No. ACM 28678, 1992 WL 42933 (A.F.C.M.R. Feb. 27, 1992).

b. The right to remain silent.

(1) The trial counsel's description in opening statement of accused's demeanor when confronted by Air Force OSI agent constituted a comment on Appellant's silent in response to law enforcement post-apprehension, pre-advisement accusation of criminal conduct, in violation of M.R.E. 304(h)(3) and the Fifth Amendment. While error was plain, error was nevertheless harmless beyond a reasonable doubt. *United States v. Clark*, 69 M.J. 438, 445-48 (C.A.A.F. 2011).

(2) Trial counsel's comment during opening statement that Accused invoked his right to remain silent was improper, but error was harmless when entire record was considered including military judge's immediate corrective action and curative instruction. *United States v. Ashby,* 68 M.J. 108, 121-23 (C.A.A.F. 2009).

c. Personal belief or opinion. *United States v. Horn*, 9 M.J. 429 (C.M.A. 1980) (trial counsel improperly remarked "I think" fifteen times during opening statement).

d. Argument.

(1) Argument is when the counsel states what the evidence means or whether the fact finder should believe certain evidence exists. If the counsel starts to state inferences or mention credibility, then the counsel is probably arguing.

(2) "During the ATC's opening statement, the military judge sustained two objections from the defense counsel based on the argumentative nature of the comments. On two other occasions, the military judge sua sponte interrupted the ATC and instructed him not to make "conclusions" or "characterizations" of the evidence. The military judge also gave a cautionary instruction to the panel that an opening statement is not evidence, improper argument had been presented to the panel, and panel members were to listen carefully to the evidence." *United States v. Thompkins*, No. A.C.M. 33630, 2001 WL 1525319 (A.F.C.C.A., Nov. 16, 2001)

e. Reference to inadmissible evidence.

(1) *See generally* ABA Standards for Criminal Justice, 5.5 (The Prosecution Function) and 7.4 (The Defense Function) (1980) ("It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence.").

(2) *United States v. Matthews*, 13 M.J. 501, 515 (A.C.M.R. 1982), *rev'd on other grounds*, 16 M.J. 354 (C.M.A. 1983) (in an opening statement, trial counsel must avoid including or suggesting matters as to which no admissible evidence is available or intended to be offered; opening statement should be limited to matters which prosecutor believes in good faith will be available and admissible).

(3) *United States v. Evilsizer*, 1991 WL 120217 (A.F.C.M.R., 1991) (assistant trial counsel's comment during opening statement on the refusal of the accused to consent to a search of his apartment was improper and a "gross error" where military judge had granted a defense motion in limine to preclude trial counsel from referring to that fact, but error was not prejudicial in light of military judge's curative instruction).

f. Opening the Door in Opening Statement. "[I]f a defense counsel contends in an opening statement that the evidence will show [something] and then the evidence in fact is not forthcoming, that remark is fair game for appropriate comment in the prosecutor's closing argument." *United States v. Turner*, 39 M.J. 259, 263 (C.M.A.1994).

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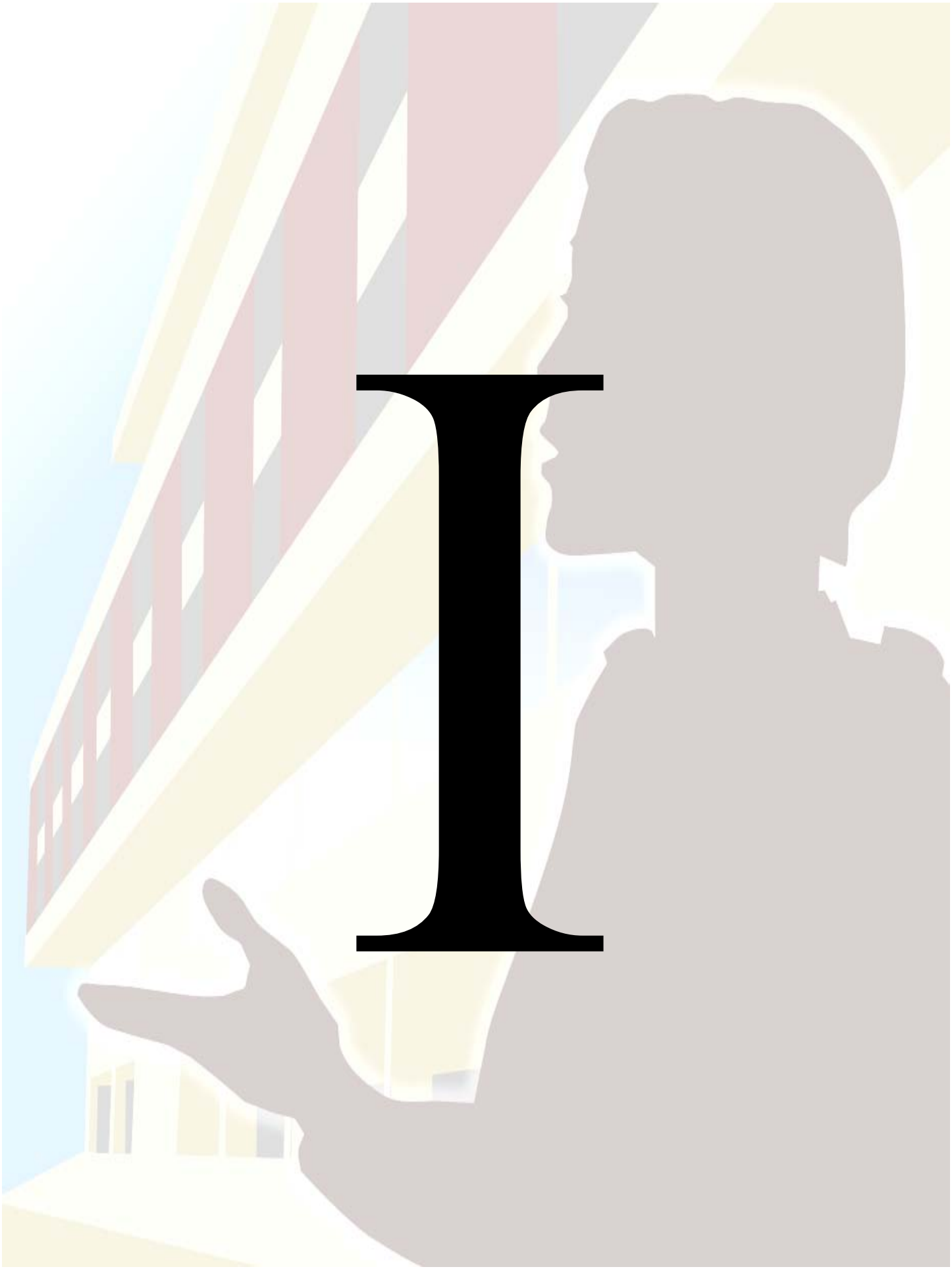

I

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DIRECT EXAMINATION

I. INTRODUCTION

A. Direct examinations are often boring. The witness is probably boring. The lawyer asking the questions is probably using legalese and hyper-formalism. The lawyer asking the questions already knows what the answers are going to be and so is only half-listening to the answers. The witness has been through so many interviews and preparations that she is on autopilot. Even the name of this event falls victim to those criticisms. Look at it: direct examination. Do you ever do "direct examinations" in real life? No. You ask people questions. You figure out what they know.

B. Remember back to when you first interviewed the witness. You had no idea what the answers were going to be. You followed an intuitive path to get to the information you needed. You naturally asked open-ended questions and used upward inflection. The interview was probably really interesting. If we re-branded "direct examination" as "asking questions" or "witness interview," many lawyers would immediately become better at this event.

C. The challenge for the good trial advocate is finding a way to make direct examinations interesting and even entertaining. Your job is to get the witness to tell an interesting story and to serve as the narrator in the background. Always ask yourself, "How can I make this more interesting?"

D. There are not many specific direct exam rules. (MRE 611 states that the Military Judge (hereinafter MJ) controls mode and order of interrogating witnesses and presenting evidence). However, all of the rules of evidence apply to what you do during direct exam – when you can introduce hearsay, what you need to do to authenticate something, etc.

II. GOAL-ORIENTED DIRECT EXAM

A. Direct examination must be goal-oriented. Your presumption should be, "I am not going to call this witness or put on this evidence." By having that as your presumption, you force yourself to think through why you are putting on this witness or evidence. Will this witness or evidence directly advance your theory of the case? Will this witness or evidence directly advance your theme? If not, don't call the witness or put on the evidence.

B. If you put on witnesses or evidence just because you know they exist, you will likely clutter up your case and make it harder for the panel to solve the problem the way you want them to solve it. *See* James McElhaney, *Clean Up Your Mess: A Case Full of Clutter Won't Look Very Good to the Jury*, A.B.A. J., Apr. 2005, at 26. When you do this, you have fallen into the Curse of Knowledge that is described by the Heath brothers in *Made to Stick*. Because you know it, you think everyone else needs to know it. After all, you went through all of that work to learn it, right? And you don't want that to go to waste. Well, let it go. Focus on what is necessary. Cut to the core message.

C. If you have done proper case analysis, by this point, you should have already constructed your basic arguments. So, you know how this witness relates to your case and how what you are going to get from this witness is relevant. If you have constructed your argument first, the following should be music to your ears: "Objection, relevance." When you hear that, you know that you can now make a mini-closing argument. You get to tell everyone in that room how that fact advances your argument *right now*. You don't have to wait until closing argument to do that. In fact, you should later thank the opposing counsel for alerting you to the fact that you were confusing people with this witness and for giving you the opportunity right then and there to clear up any confusion.

III. ORGANIZING AND PRESENTING YOUR EXAM USING STORY-TELLING TECHNIQUES

A. Once you know what you need from a witness, organize that information into scenes.

1. A useful way to do this is to make a storyboard. Go to PowerPoint and print out some handout (x6) slides. Now, go through and draw a quick sketch of the main things that your witness will testify about.

2. If you have too much action for one box, you know you need to create another scene.

3. Put in the details that matter – whatever you need to get from that witness.

B. When you talk to the witness, you can use that storyboard instead of notes. Or, you can reduce those scenes into bullets – print out the blank PowerPoint handout in (x3) mode so you get the lines on the side. Reduce that information into short bullets and put those bullets under the title of that scene.

C. Now, when you ask the witness questions, you take on the role of director or narrator. Your job is to get them to describe those scenes.

1. Ask questions that will help the witness paint that scene.

2. Who, What, When, Where, Why? Explore their motivations, too.

3. What did you See, Hear, Smell, Taste, Feel?

D. Have the witness speak in the present tense. Their verbs should end in "s" and "ing" and not in "ed." Good stories are told in the present tense, and your witness should be telling a compelling story.

E. Use "brackets" to orient the witness and the panel to the scene you are going to deal with. Use words to draw borders around your scene. Ask the witness, "I'd like to ask you some questions about what happened after you left the bar but before you arrived at the barracks, okay?"

F. When you are done with that scene, let everyone know. Simply ask, "Now that we have talked about the walk back to the barracks, I'd like to ask you some questions about what happened from the time you arrived at the barracks until the time you arrived at your room, okay?"

G. Most importantly, *you need to listen to the answers*. Look at your witness while they are talking, not at your notes. Don't worry about the next question. Ask follow up questions based on how well that witness described the scene that you have in your mind. After the witness is done talking, it is okay to look down at your storyboard or notes before you move on from that scene to make sure you have captured the details you want. Cross them off. It is okay to pause for a few seconds to do this. But don't look down when they are talking. Would you do that if you were having a conversation with someone you just met? No. That would be rude. Instead, use active listening techniques. And pay attention.

H. To avoid the "facts not in evidence" objection – and to just make things clear for everyone – you should have your witness walk through the entire story once, quickly, at the very beginning of the interview. Then, go back and look at each scene in detail.

IV. TIPS ON ASKING QUESTIONS

A. Use single fact, non-leading, open-ended questions. Allow the witness to tell the story. Minimize your presence.

B. Use an upward inflection. This signals that you don't know the answer and will shift attention to the witness. Notice the difference between, "I did that?" versus "I did that."

C. Make sure the witness' vocal cone and body is facing the panel. An easy way to do this is to position yourself behind the panel box or near the panel member who is the furthest away. The added benefit of doing this is it takes you out of the picture. Remember, the witness is the center of attention, not you.

D. John Lowe talks about turning thunderclaps into thunderstorms. When your witness describes a moment of fast action, have them stop and then unpackage that moment. Have them get out of the witness box and demonstrate the action. Pull out a diagram and have them go over that moment again, this time on the diagram. Don't let that moment pass without fully developing it.

E. Tone, Pitch and Speed.

1. "Shoot!" can mean many things in many contexts. It also provides an easy-to-understand illustration of how tone, pitch and speed can alter its meaning to the listener.

    a. "Shoot!" shouted quickly after missing a nail with a hammer and instead hitting a finger clearly shows anger, frustration and that one is upset.

    b. "Shoot!" spoken slowly and softly after receiving a compliment can project a slight embarrassment at having received the compliment in a homey kind of "Aw, shucks," way.

    c. "Shoot!" shouted loudly and quickly during exercises can mean that it is time to open fire on a target.

    d. "Shoot!" yelled loudly and in a drawn out fashion on a movie set would indicate that it is time to roll film.

2. As demonstrated above, the same phrase can have a number of meanings based upon what emphasis is put on the words in the context in which they are spoken.

F. Vary the hooks.

1. Listeners do not want to hear the same thing over and over again—which goes for witnesses and fact finders alike. Since much of direct examination involves prompting witnesses to walk baby steps through a series of events, mixing up these hooks to prompt the story-telling is a must. Some examples are:

   a. "And what happened next?"

   b. "Then what?"

   c. "And afterwards you did what?"

   d. "Please continue."

   e. "What happened after that?"

   f. "What did you do next?"

   g. "What did you do after that?"

   h. "Can you break that down for me a little more?"

2. The above list is certainly not all of the hooks that may be used in direct examination to facilitate the telling of the story but is illustrative of the types of non-leading questions that may be used to accomplish getting the witness to tell his or her story in an appropriate, non-narrative format.

G. Try looping. Use a portion of the witness' answer to form the basis of the next question: "After you passed Sergeant Archie in the hallway, what happened next?"

H. Make use of the principles of primacy and recency.

I. Avoid legalese.

1. Use simple language and avoid legalese. See Footnotes 1 & 2 in *U.S. v. Marshall*, 488 F.2d 1169 (9th Cir. 1973).

   a. The motor vehicle was occupied 4 times = 4 people were in the car

   b. The recovered evidence from the crime scene, collected and submitted through proper channels, was subjected to appropriate scientific testing by a qualified laboratory technician who, after conducting the gas chromatograph, mass spectrometer examination, determined to a reasonable degree of scientific certainty that the evidence's composition and weight were that of marijuana and 4.2 oz., respectively = the crime lab tech tested the evidence taken from the accused's home and found it to be 4.2 ounces of pot.

2. Not only will the fact finder more easily follow you and not be bored to tears by how smart you are trying to make yourself sound, the court reporter will love you and might not make as many typos on your part of the transcript.

V. EXHIBITS

A. After you have done a storyboard, figure out what you can do to help the panel members visualize each scene. Go out at take photos. You should ask yourself, "Can I display some pictures that will help the witness to tell the story and to trigger the panel member's imagination? Do I need to show pictures because the panel member will likely imagine something that is different from reality?" Be creative. Don't be boring.

B. Work through each foundation ahead of time.

C. Practice with the witness in the courtroom! However, don't overdo it to the point where your once emotional witness, now appears cold and unaffected.

D. Make the exhibits accurate and "panel friendly."

E. Use the evidence. Do you want to hear about the murder weapon or see it? Do you want them to imagine the scene or see it?

VI. THE CONFRONTATIONAL DIRECT EXAM

A. If you have a witness that you know is going to face a rigorous, damaging cross-examination (the accused, for example), you might consider doing a confrontational direct exam.

B. In a confrontational direct exam, you are essentially going to conduct a tough cross-exam of your witness and then give him or her a chance to explain that unreasonable or illogical behavior.

1. First, in your very first questions, you confront the witness with the ultimate question: "Did you kill Jones?" "Did you rape Smith?" "Did you go miss the flight to Iraq because you wanted to avoid hazardous duty?"

2. Then, you do a cross-examination, in a stern tone of voice. "You didn't kill Jones, but you did do X? You did do Y? You did do Z?"

3. But then, at the end of the line of questioning, you ask, "Well, why did you do that?" Or, "Well, why should they believe you after you did something like that?" Or, "That doesn't make any sense, does it? Can you explain that?" You give the witness a chance to explain away the main points of the other party's cross-examination questions before the other party even gets to ask them.

C. To do this technique, you need to develop the entire line of cross-examination that the other party is going to use.

D. You can use a confrontational direct exam with victims, too, but you need to explain this technique to the victim before doing it, and you should not use a confrontational tone. Take the victim through the counter-intuitive behaviors, and then have the victim explain why he or she took those counter-intuitive actions.

VII. LEADING QUESTIONS

A. MRE 611(c) states, "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness."

B. However, leading questions may be used on direct examination, "[w]hen a party calls a hostile witness or a witness identified with an adverse party."

C. What is a leading question? "[O]ne which suggests the answer it is desired that the witness give. Generally, a question that is susceptible to being answered by 'yes' or 'no' is a leading question." MRE 611 analysis.

D. Leading questions may and should be used during routine, introductory-type questions to get the fact finder to "know" the witness prior to the "meat" of the testimony being elicited. Ask introductory leading questions to save time such as, "You are a military police officer assigned to the 1st Military Police Company, 716th Military Police Battalion at Ft. Riley, Kansas?" and "Drawing your attention to Sunday, 1 June 2004, at approximately 1800, what contact if any did you have with the accused, Private John Doe?"

E. If a witness has limited understanding / intellect / politeness, the MJ may allow counsel to lead his or her witness due to the inherent problems questioning such a witness (young child, mentally challenged individual, hostile witness, etc.

F. Lastly, leading questions may be used to further develop testimony. In other words, if a witness' answer after an open-ended question could have more than one meaning or is somewhat confusing—alone or in context with other answers—leading questions may be asked to clarify the previous answers.

G. All of the above is subject to the discretion of the MJ hearing the case.

VIII. GET BETTER BY READING AND WATCHING

A. James McElhaney, *Clean Up Your Mess: A Case Full of Clutter Won't Look Very Good to the Jury*, A.B.A. J., Apr. 2005, at 26.

B. James McElhaney, *Persuasive Direct: The Less You Sound Like a Lawyer, the Better Off You'll Be*, A.B.A. J., Jan. 2009, at 22.

C. Video: *Evidentiary Tactics: Making the Most of Your Evidence with Prof. David Schlueter* (TJAGLCS 2000) (available in streaming video on the Criminal Law Department webpage).

D. DVD: *Less Boring Direct Exam by Terence MacCarthy* (American Bar Association 1996) (available for loan at the TJAGS Law Library).

E. Video: *Zingers, Ringers, and Sandbags: Winning Trial Techniques with John Lowe* (TJAGLCS 1990) (available in streaming video on the Criminal Law Department webpage).

IX. DRILLS

A. Drill 1: Form of question.

1. Each counsel conducts a direct examination of a witness using the character from a fair tail or Star Wars movie or some other story that everyone knows. Do a direct exam of Snow White and how she found the Dwarves hut in the forest. Do a direct exam of Goldilocks or one of the three bears. Do a direct exam of Cinderella. Or of when Luke Skywalker found that his aunt and uncle's house had been burned down.

2. The counsel must ask simple, open-ended, nonleading questions to develop the facts. If the counsel asks a compound, confusing question, the witness will just stare back at the counsel until the counsel gets it right. The supervisor should write on the board or provide a handout with the classic list of questions for direct examination: who, what, where, when, why, and how.

B. Drill 2: The story board.

1. Build a story board on a common fable, like Goldilocks or the three little pigs. Each counsel will do a direct exam of one of those scenes, taking turns as they go around the table.

2. The counsel should focus on using brackets to keep the witness and the panel members focused on that scene. Once that scene is fully developed, have the next counsel use a bracket to end that scene and then use brackets to contain the next scene.

C. Drill 3: The tennis ball.

1. Do a direct exam as outlined in Drill 1. Give the counsel a tennis ball. After the counsel asks the question, have her toss the ball to the witness. This represents the shift in attention from the lawyer to the witness.

2. If the counsel quits paying attention to the witness, the witness can toss the ball back at the counsel. Toss, not beam.

D. Drill 4: Inflection.

1. Have counsel stand in front of the group. Choose a short phrase, one listed below or one you make up. Have the counsel repeat the sentence and each time, have the student emphasize a different word. Each time counsel repeats the statement, the inflection is placed on a different word. Very quickly counsel will see how the meaning of the sentence changes. Discuss with counsel how it is not the inflection alone but related conduct - e.g., pace of the speech and facial expression - that make the inflection even more powerful.

   a. This is a really stupid idea.

   b. I never said I'd give you money.

   c. Show me the money.

   d. What did you see?

   e. You never saw him leave the bank?

E. Drill 5: Listening and Looping.

1. Read the section on "looping" covered above. Looping involves incorporating part of the answer to one question into the next question. Have the counsel do a direct exam as listed in Drill 1, but now have them incorporate looping into the drill.

F. Drill 6: The who-what-when-where.

1. In this drill, the supervisor or instructor will be the witness. The witness will pick a real-life event and give tell the counsel just a few facts about that even – that you did something on this date in that city, for example. The students each get two questions. Have them rotate through "who, what, when, where, why, describe, explain" questions until the entire scene has been described. Note the inflection the counsel use – it will probably be upward, because they do not know the answer to the question they are asking.

2. As the counsel get better, have them incorporate the answer to the last counsel's question into the form of their question.

G. Drill 7: The thunder clap to thunderstorm.

1. Tell the students to pay close attention to you. Then, do something like take a book from a table and then drop it on the ground. Or, take your wallet from your pocket and slam it on the table. Then, have a counsel do a direct examination of another one of the counsel, who is now a witness. Have them elicit what happened in one or two questions, and then have them take the witness through each little detail of the event. Have the witness demonstrate what he or she saw.

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The 412 Statements:

Vance Statement: "I danced with SGT Archie for a couple of tracks and he was very physical. I know a lot of people dance like that, so I just went with it. When a slow song came on he pulled me in real close and put his hands on my butt. I felt that he was going too far, so I told him that I needed to leave."

Taylor statement: "'She cheated on him with another guy in the unit. That guy talked it up to everyone and made her look pretty bad. . . . Her boyfriend found out and got pissed off, but they got back together again.

Fredrickson statement: (1) "I don't know PV2 Vance personally, but I know who she is. I have heard some rumors about her hooking up with a few different guys in the unit. Sgt. Archie knew about these rumors too.
. . .
(2) "I saw them dancing later. It looked like they were both into it. She said something into his ear and then left with her friend."
. . .
(3) "I heard that her having a boyfriend isn't really a factor when it comes to her hooking up with guys.''

Archie statement #1: "We talked a little bit and we danced. She would grind on me pretty hard."
Archie statement #2: "She was concerned about her boyfriend finding out that she was hooking up with other guys."

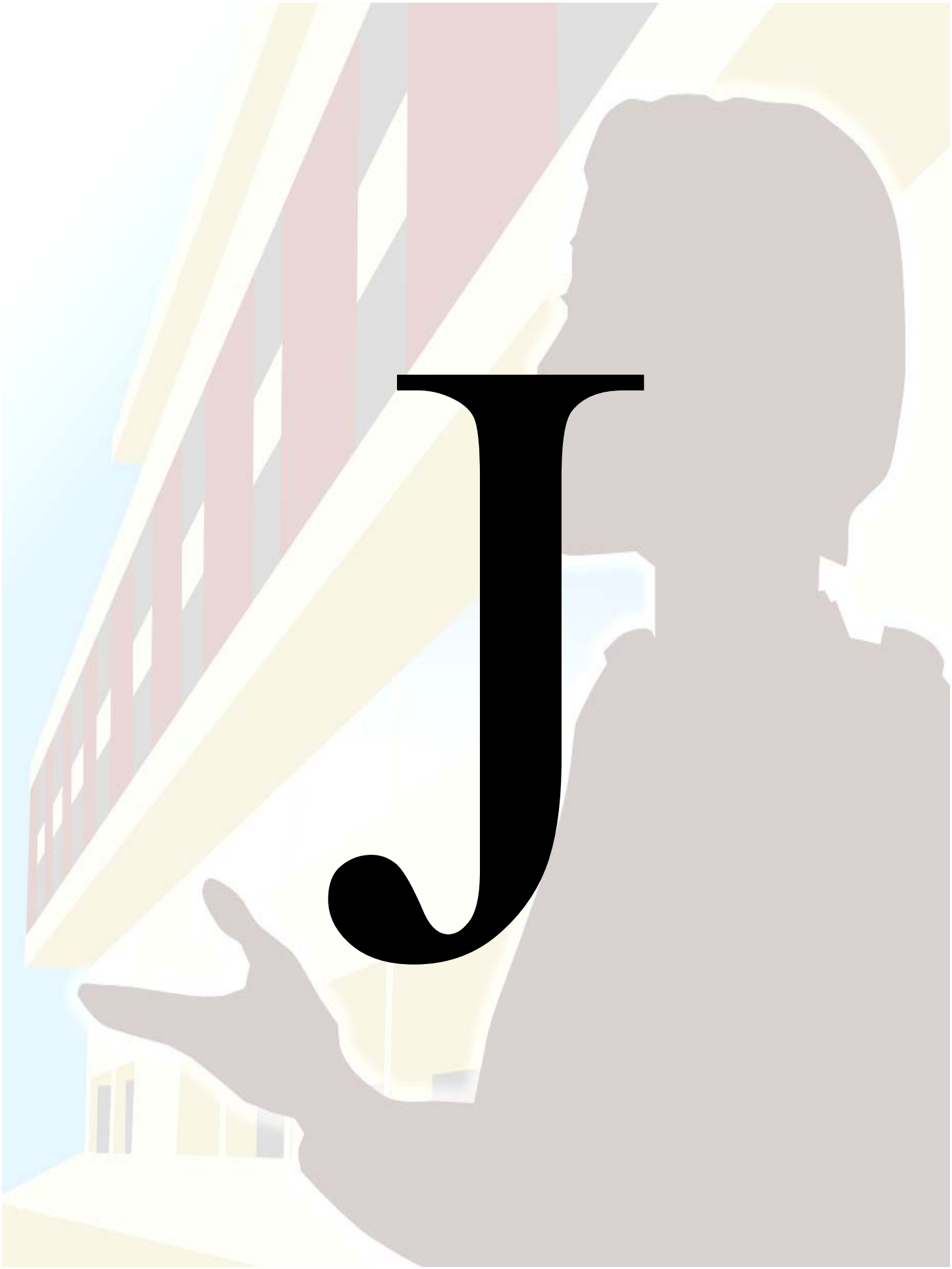
The 412 RULING:

1. Taylor statement about boyfriend is admissible under MRE 412(b)(1)(C), constitutional rights.

2. Fredrickson statements (1) & (3) are subject to MRE 412, and are inadmissible under MRE 412(a)(2), sexual predisposition. Statement (2) is either not covered by MRE 412 at all (not sexual predisposition), OR it is admissible under MRE 412(b)(1)(B), activity between the accused and the victim.

3. Both Archie statements are admissible: boyfriend under MRE 412(b)(1)(C), and "grinding" under MRE 412(b)(1)(B).

4. Vance statements don't invoke MRE 412.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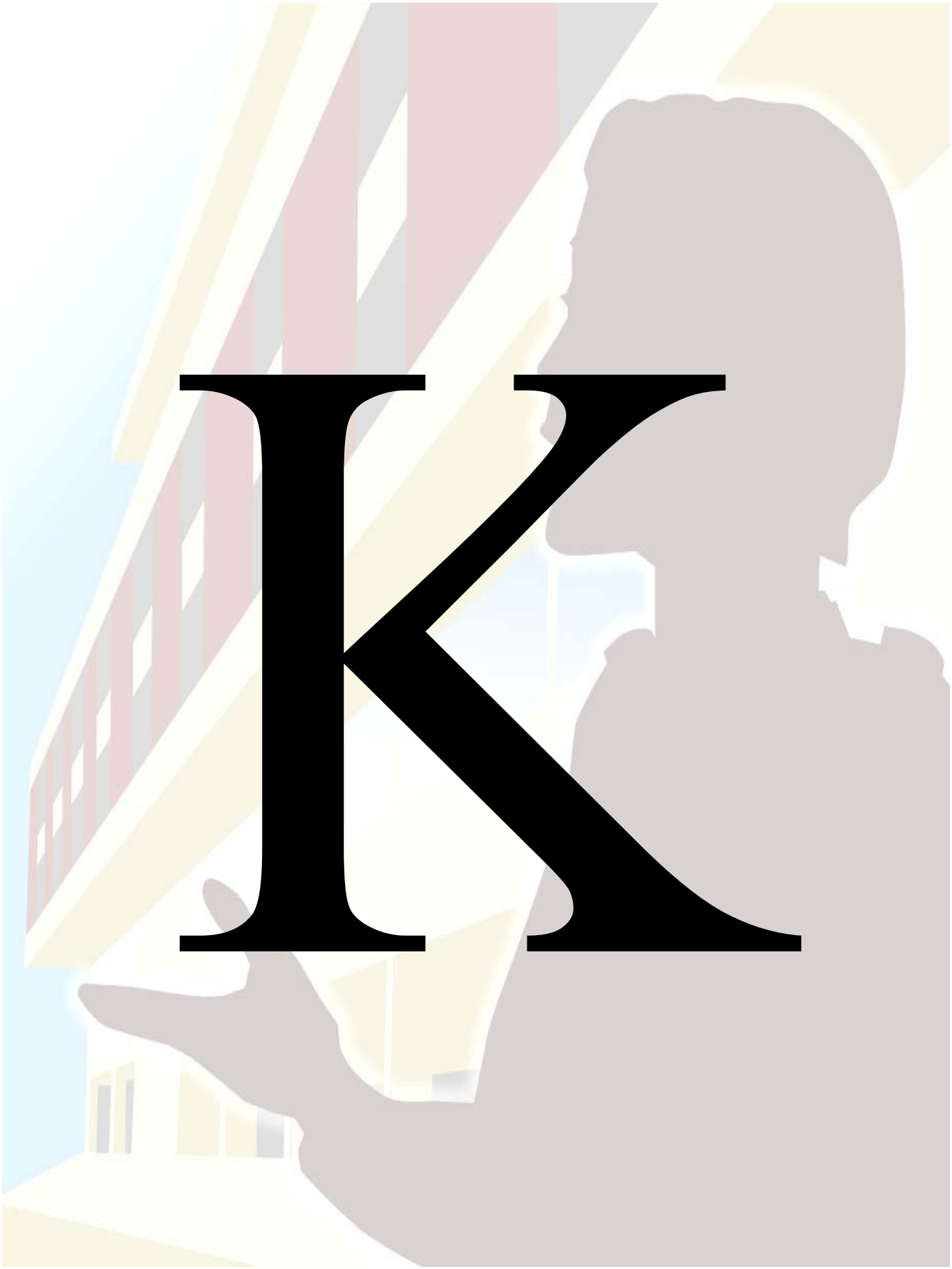
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CROSS EXAMINATION

Be mild with the mild; shrewd with the crafty; confiding with the honest; merciful to the young, the frail or the fearful; rough to the ruffian; and a thunderbolt to the liar.
–Francis L. Wellman

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CROSS-EXAMINATION

I. INTRODUCTION

A. "Cross-examination" is not a good title for this part of the trial. Rather, we should call this part of the trial, "My turn to testify." *See* James W. McElhaney, *The Power of the Proper Mindset: During Cross-Examination, the Real Witness Is You*, A.B.A. J. Apr. 2007, at 30. Cross-examination is your turn to testify directly to the jury or panel.

B. Once you realize that cross-examination is not an examination at all, then things will start to click. This is your chance to testify directly to the jury or panel, and the role of the witness is to *validate* your testimony. You are not there to get information from the witness. You are there to have the witness confirm the information you already know.

C. The witness should play very little role while you are testifying. If you are doing this right, the witness might as well not be there. You are telling a story (testifying) and the witness is just along for the ride. You could can even look directly at the panel while you are testifying, with the witness just be making "yes," "no," or "I don't know" sounds in the background.

II. GOAL-ORIENTED CROSS-EXAMINATION

A. Your presumption about cross-examination is that *you should not do it*. That forces you to think through why you are going to ask this particular witness questions. And you need to have a good reason. You may be entering hostile territory, and you should be conducting a raid, not an invasion. *See* Major Sitler, *An Approach to Cross-Examination: "It's a Commando Raid, not the Invasion of Europe"*, Army Law., July 1998, at 80.

B. First ask, should I cross this witness?

1. Did the witness significantly damage my case?
2. Is this witness important?
3. What are my goals?
4. Can I conduct an effective cross?
5. Can I conduct a safe cross?
6. Can I get the information I need from another witness?
7. Is the issue that she testified about in dispute?

C. Then, examine your goals for conducting this cross-examination.

1. Damage this witness' credibility.
    a) You could destroy the witness' entire credibility, through story inconsistencies, by exposing bias or a reason that this witness is lying, or through prior convictions.
    b) You might attack just a limited subset of credibility, like the ability to perceive or remember. You are not saying that his witness is a liar; rather, you are saying this witness is mistaken.
2. Elicit facts that are helpful to my case.

a) Here, you have to balance the risk that you are entering hostile territory with the value that comes by getting concessions from a witness that was called by the other side.

b) Under concession-based cross-examination, you elicit facts from an opposing witness because those facts carry greater weight with the jury since the jury knows the witness was not called to assist the other side.

c) When eliciting concessions, the lawyer seeks agreement by an opposing witness of relevant areas of the lawyer's own "story."

3. Elicit facts that damage the other party's story.

a) The lawyer is not attempting to tell a story, but rather attempting to unravel the one told by the opponent.

D. In order to identify what your goals are (and therefore, whether you should cross-examine this witness), you need to do a thorough case analysis early in the process. See the Case Analysis outline. If you have constructed your arguments in advance using the method found in that outline, then you will see that your "especially whens" and "except whens" form the titles of your cross-examination chapters, which we will discuss below.

III. ORGANIZING YOUR CROSS-EXAMINATION

A. Use a logical progression to reach a specific goal.

1. A logical progression is the optimal approach to educate the jury. Identify your goal (your main point), and then progress through your questions until your goal becomes logically true. The progression reduces the witness's ability to evade.

2. Use this planned, logical progression to walk the witness to the edge of a cliff. Use the goal question to force the witness to step back, or to fall off that cliff. That is, progress to the point where the witness either must concede your goal fact, or will look foolish denying it.

3. You do not have to know the answer to this goal question. If you have walked the witness to the edge of that cliff, ***you don't care what the answer is to the goal question.*** The witness will concede (you win) or look like a liar or a fool (you win). This victory will not occur unless you prepare ahead of time.

B. Analyze what cross-exam can accomplish and then organize the examination before the witness testifies. Create theme-based "chapters" for the examination.

1. A chapter is a *controlled* inquiry into a specific area. A chapter is a sequence of questions designed to establish a ***goal question.*** A chapter advances your theory of the case one goal at a time.

a) Identify your goal question.

b) Review all materials to see how many different ways that you can prove the goal question. Select the witness.

c) Move backwards to a more general point where the witness will agree with your question.

d) Draft a series of questions leading to the goal. Start general, and use increasingly more specific questions until you reach your goal question.

e) The more difficult the witness, the more general your starting point should be.

2. Each chapter has one main point that you will use to directly support your primary argument. If you have more than one main point, you have more than one goal question. Create separate chapters for each goal question.

C. The progression creates context and makes the goal fact more persuasive. By using a series of questions you support the goal fact with as much detail and as many supporting facts as you can to ensure the goal fact is believed and understood. *One question is not a chapter.*

D. Example. The goal is a concession that the car was blue.

1. Less persuasive: a single fact, leading question: "The car was blue?"

2. More persuasive: A chapter:

a) You were standing on the corner.

b) The car drove past you.

c) The car drove within five feet of you.

d) Nothing blocked your view from just five feet.

e) It was about 1500 hours.

f) It was light out.

g) You got a good look at the car.

h) Goal question: The car was blue.

E. Chapter bundles. A proper explanation of an event may require several goal questions. Use one goal per chapter and then bundle the related chapters together. Start with the most general chapter first and work toward the most specific.

1. Example:

a) PVT Jones, you've been convicted of a felony.

b) You were convicted of robbery.

c) You pled guilty in exchange for a five-year deal.

d) As part of the deal you agreed to testify against PFC Sitler.

2. Better:

a) Goal Questions:

(1) You are an armed robber.

(2) You got caught red handed.

(3) You admitted to <one fact of the robbery>.

(4) You admitted to <second fact of the robbery>.

(5) [Note: this is relevant, b/c it supports how guilty Jones was, and how much Jones needed the deal.]

(6) You were facing 15 years confinement.

(7) You cut a deal.

(8) After the deal, you were looking at no more than 5 years confinement.

(9) You became a cooperating witness (or "snitch").

(10) That was part of the deal.

(11) You agreed to testify against the accused.

(12) You know the government will be happier with you if the accused is convicted.

b) Chapter 1: Goal question: You are an armed robber.

(1) On July 15th you needed some money.

(2) So you picked up your gun.

(3) Your gun is a .44 magnum revolver.

(4) Your .44 was loaded.

(5) You went to the shoppette.

(6) You pointed your loaded .44 at the clerk.

(7) You told her to give you the money.

(8) You told her you'd kill her if she didn't.

(9) She was pregnant.

(10) She looked very scared.

(11) She gave you the money.

(12) So you didn't kill her.

(13) You ran out of the shoppette.

(14) You are an armed robber.

c) Chapter 2: goal question: you got caught red handed.

(1) The police caught you while you were running away from the shoppette.

(2) They caught you with the .44 magnum.

(3) They caught you with the shoppette's money.

(4) The pregnant clerk got a good look at you.

(5) She could identify you.

(6) You were caught red handed.

d) Chapter 3: goal question: you were facing 15 years confinement.

(1) (1) After being caught red handed, you saw an attorney.

(2) (2) You were charged with armed robbery.

(3) (3) You knew you were in a lot of trouble.

(4) (4) You knew you were facing 15 years confinement.

F. Be flexible.

1. Write down something that organizes your cross-exam in a way you can follow while questioning the witness.

2. You might put each of your chapters on its own piece of paper. As you close a chapter, line out that paper, then move to the next sheet. If the examination starts to flow in another direction, feel free to go out of order on your sheets.

IV. SEQUENCE OF CROSS-EXAMINATION.

A. Here is a suggested sequence for your cross-examination.

1. Gain concessions. Gain concessions before attacking, If the witness concedes every point you want from the witness. *Sit down*. Do not impeach.

2. Show impossibility or improbability.

3. Show poor perceptive skills.

a) [Note that these first three approaches neither *confront* nor *impeach* the witness.]

4. Impeach with Bias or Prejudice.

5. Impeach for lack of qualifications

6. Impeach with conflicting statements.

7. Impeach with convictions.

8. Impeach by demonstrating lies on a *material* point.

B. Other considerations.

1. Start strong. End strong. "Primacy/recency." Close cross-examination with a theme chapter.

2. Generally, avoid chronological order. It allows the witness to predict the cross-exam and become comfortable.

3. Develop risky areas only after establishing control of the witness through safe chapters.

4. If you have more than one impeachment chapter, use the cleanest chapter first.

5. Reference your theme early and often.

V. HOW TO ASK THE QUESTIONS

A. Short statements = control.

1. The shorter your question, the better. If you can ask a one-word question, then you have mastered cross-examination.

2. Break down questions into the shortest possible question. A series of short questions provide little opportunity to equivocate or avoid the answer.

3. Simplicity leaves no escape route for the witness. Simplicity builds precision.

B. Only one new fact per question.

1. If your question has multiple new facts in it, you lose control of your witness. You witness now has room to wiggle. If you inquire into more than one area in a question, which part of the question is the witness answering? The first part? The second? Both? Use of compound questions impedes an effective cross.

C. Only use leading questions.

1. The attorney asking the questions controls the witness by not allowing him/ her to elaborate on his/her answers to the fact finder.

2. The attorney is testifying, rather than the witness.

3. The questions may come in more "rapid-fire" fashion, giving the witness less time to think through the answer before making it and thus increasing the likelihood of a mistake (or honesty) in answering.

D. Occasionally break that rule by using an open-ended question

1. A counsel may ask open-ended questions on cross examination at any time. Doing so, of course, means a loss of control over the witness. This should almost never be used by inexperienced counsel or those not knowing the answers to their propounded questions.

2. Mix in open-ended questions to break up the pace of the cross-examination. For example, after a series of rapid-fire leading questions that concern a written statement, you might ask, "Where in that statement did you say X?" when you know that the witness never said X in the statement. By using that open-ended question, you create a pause in the action where everyone now has to look at the witness as the witness fumbles through the statement, only to reply, "It isn't in the statement."

E. Listen to the answers. Often those answers are helpful. They may be unexpected concessions, or contain powerful language you did not anticipate.

F. Use descriptive words to create a picture in the jury's mind.

1. Leading Question: You saw a man lying on the side of the road?

2. A better sequence using short, simple leading questions, descriptive statements, adding one new fact at a time:

a) You saw a man *thrown* from the car.

b) He was thrown from a *Jeep Cherokee*.

c) The man was lying on the ground.

d) In the *dirt*.

e) He was lying on the side of the road.

G. Do not use *danger* words.

1. *Danger* words are any words that are not facts (nouns). Danger words are words that are really conclusions based on other facts (drunk, hot, mad, happy). Beware of words like, "angry," as in, "So you were angry." Using that word gives the witness wriggle room. The witness can answer, "Well, I was a little mad, I wouldn't say I was angry." Rather, get the person to describe all of the *facts* that would lead a reasonable person to get angry (she stepped on your toe; poked you in the eye; slapped the side of your face; called you a loser), and then save the conclusion ("this witness was angry") for your argument.

2. Just the facts, ma'am. Just the facts. Beware of adverbs and adjectives. Focus on nouns.

H. Ask safe questions – ones you know the answer to, or ones that you know the witness can only answer one way.

I. Vary your pitch.

J. Vary your tone.

K. Vary the speed at which you speak.

L. Use downward or neutral inflection.

1. When someone speaks with a downward inflection, the listener is cued in that the speaker is making a statement. The listener is being told something. Not asked. Told. Notice how this sounds: "You went to the park." There is no room to argue or answer. The listener is being told, "You went to the park." Downward inflection = control.

2. When someone speaks with a neutral inflection, the listener is cued in that the speaker has not given up control of the conversation. Notice how this sounds: "You went to the park . . . and the store . . . and the library . . . and the theater . . ." The speaker still owns the conversation. Neutral inflection = control.

3. Compare that to how this sounds: "You went to the park?" You should have naturally heard an upward inflection. That was a question. The upward inflection cues the listener in that the speaker does not know the answer, and the listener should therefore respond to the speaker. The listener is given control of the conversation. Upward inflection = loss of control.

M. Vary or eliminate your "hooks" or "tags" while conducting cross examination.

1. Leading questions may be asked in a number of ways. Usually they are declarations with a hook or tag at either end of them to signal that it is a question and not a statement (although we know better!). Sometimes inflection alone allows these hooks or tags to be discarded completely.

2. Some examples are:

a) "Isn't it true that…?"

b) "…right?"

c) "...isn't that correct?"

d) "…correct?"

e) "…isn't that right?"

f) "It's true that…"

3. Often, there is neither hook nor question mark in a leading question. Ex: "You ate cereal for breakfast" Is not actually a question, but with inflection, it works just fine, and emphasizes that the lawyer is the focus of cross-exam, not the witness. If the opponent objects, repeat the "statement" exactly, and add a hook. "You ate cereal for breakfast, didn't you?" The objection will look petty, because everyone knows what the "statement" meant.

4. Your goal should be to condition the witness to the point where you don't need to use hooks or tags. You may need to use hooks or tags at the beginning of the examination to help establish control and rhythm, and once the witness understands that you are in control, you can drop the tags.

N. Avoid legalese.

1. Use simple language and avoid legalese.

2. If the fact finder does not understand the jargon, the witness may not, either. Do you really want to mess up a good cross examination's rhythm with a dictionary lesson? Talk about losing your momentum, and maybe a good cross examination.

O. Looping.

1. A loop begins with a single fact, leading question. The next question contains one additional fact but includes an important fact from the previous question.

2. Technique.

a) Listen to any answer that's not yes or no. Lift any useful word or phrase. Loop the useful word or phrase into the next question. Move to safety.

b) Example:

(1) The car was *speeding*?

(2) The *speeding car* drove *past the formation*?

(3) The *speeding car* passed *the formation* and hit the road guard?

3. The double loop. Establish two desired facts using two separate single-fact, leading questions. Then combine both desired facts into one question.

a) Double Loops can be use to link two facts together or to contrast one fact against another.

b) Example.

(1) Establish fact 1: PFC Sitler is *six-foot-four*?

(2) Establish fact 2: SGT Saunders is *five-foot-six*?

(3) Loop fact 1 and fact 2 into a question for contrast: Six-foot-four PFC Sitler *beat* five-foot-six SGT Saunders?

(4) Six-foot-four PFC Sitler *beat* five-foot-six SGT Saunders *with his fists*?

(5) Six-foot-four PFC Sitler *beat* five-foot-six SGT Saunders *with his fists* until *he was unconscious*?

c) Contrast Inconsistent Facts.

(1) Establish fact 1: PFC Turney *is your friend*?

(2) Establish fact 2: PFC Turney *stole $100 from you*?

(3) Contrast: PFC Turney *is your friend*, but *he stole $100 from you*?

P. Asking the "ultimate question."

1. The "ultimate question" is not the same thing as "the one question too many." The "ultimate question" is the inference that you seek to draw from your line of questioning. Don't ask the witness to agree with your inference because the witness most likely won't. Save the "ultimate question" or that inference for when you make your argument. Run down the list of facts that you elicited from the witness, and then, in the safety of the closing argument, tell the panel what those facts mean.

a) Example: through a series of short, one-fact questions, you establish that the witness is a close friend of the accused. Do NOT ask, "So you would do anything to help him out, right?" The answer will always be "I would never lie for anyone in court!"

2. The "one question too many" is something else entirely. You should never ask the "one question too many." The "one question too many" is the question that blows apart the entire line of questioning you just pursued.

   a) Terence MacCarthy, in *MacCarthy on Cross-Examination*, page 52, recounts this story. "You will recall the infamous 'nose bite' case. No less than Abraham Lincoln was the criminal defense lawyer. Initially he brought out that the witness was birdwatching. A good theme, but again, a relatively weak criminal defense theme. He was using what he had. Then Lincoln suggested to the witness that, in fact, he, the witness, had not seen the defendant bite off the poor fellow's nose. The witness agreed. We are told by Younger that Lincoln should then have stopped and sat down. But he continued and violated the commandment against asking the one question too many. Lincoln's last question to the witness, the one question too many, was: 'So if you did not see him bite the nose off, how do you know he bit it off?' The witness answer sticks with us: 'I saw him spit it out.'"

   b) In fact, you should not even ask the line of questioning that leads to the "one question too many." Because even if you don't ask the "one question too many," and you walk away from the witness in triumph because you did not ask the "one question too many," what do you think will be the first question that the other side asks when she approaches the witness? Only she won't call it the "one question too many." She will call it "the greatest question ever." She will ask, "How do you know he bit it off?"

VI. WITNESS CONTROL

A. Leading questions are designed to keep the witness under control. Sometimes witnesses (especially experts) try to take control of the examination by answering with a narrative.

B. When this happens, don't argue with the witness or plead with him or her to answer your questions with a yes or no answer. And don't go to the judge for help. Instead, let everyone in the room know who the jerk in the room is – this witness that just won't answer questions. The panel members or jurors want the same thing that you want – for this witness to answer the question and to not waste their time. The more the witness

C. If the witness is rambling, try this:

   1. Use a hand signal. Make a simple "stop" sign with your outstretched palm.

   2. Go back to your table, look at your notes, confer with your co-counsel – anything that lets this witness know that you are going to make better use of your time than listening to her rambling. Once they are done rambling, look up and say, "You answered a different question. Here is the question that I asked you."

D. If the witness won't stay in control, try this technique.

   1. Repeat the question. "The house was empty?"

   2. Repeat the question again, but this time, use the person's name: "Mr. Jones, the house was empty?"

   3. If that does not work, ask the question in the inverse: "Mr. Jones, the house was full of people?"

E. Here are some other techniques.

1. "My question may have confused you. My question was not X, my question was Y." Or, "perhaps I wasn't clear."

2. "Let me repeat the question since that is not what I asked," and then repeat your previous question.

F. If the witness says, "I don't remember," try asking these questions (*see* Jim McElhaney, *Evasion: Why Witnesses Do It, and How to Make Them Stop*, A.B.A. J., Mar. 2010, at 26):

1. Did you once know the answer to my question?

2. Who did you tell?

3. Who might you have talked to about this?

4. Where would it be?

5. What other documents might have that information?

6. Where would they be?

7. Who might know the information?

8. Where would they be?

9. If your life depended on finding this information tomorrow morning, where would you look?

10. Do you understand that if you find the answer to this question or remember what it is, you should promptly bring that to our attention?

G. The Evasive Witness : "I don't remember." "I might have . . ."

1. Don't try to get better answers if the witness' demeanor is dramatically different than on direct. If he cannot remember things on cross, but could on direct, seek as many "I can't remember"s as possible, to areas temporally similar to areas he could remember on direct. Eventually, you can ask:

a) "When Major DC was asking questions about the traffic, you could remember the colors of each car in the area of the intersection, couldn't you?" Yes.

b) "But now that I am asking questions, you *claim* you can't remember how close the red car was to the blue car?"

2. Or, after the witness evades for a while, simply ask, "Mr. Witness, is there a reason why you don't want the jury to know the answer to that question?"

VII. USING EXHIBITS

A. Demonstratives are helpful in direct examination *and* cross examination. If you prepare well you can use your own charts/photos with an expert. If you prepare well, you can have the expert fill in the missing information in his own chart. If you are prepared, you can use contradictory theses, books, illustrations in a leading manner, after locking the witness in to their authenticity and authority.

B. If a witness is adverse enough to your position that you are asking leading questions, the demonstrative should also be used in a leading fashion. Great care must be taken to avoid the temptation of then asking, "So how was this used?" or something of the kind.

VIII. THE LAW OF CROSS-EXAMINATION

A. U.S. Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." For more, see the Confrontation outline.

B. MRE 611 grants the Military Judge (hereinafter MJ) control over mode and order of interrogating witnesses and presenting evidence.

1. MRE 611(a)(3) allows the military judge to protect witnesses from harassment or undue embarrassment.

2. The scope of cross-examination is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. However, if the attorney wants to ask the witness questions that are beyond that scope, the attorney can – but must now ask questions in the direct exam (non-leading) mode. MRE 611(b).

C. The inquiring attorney "Must have good faith basis for questions," *United States v. Pruitt*, 46 M.J. 148 (C.A.A.F. 1997).

IX. GET BETTER BY READING AND WATCHING

A. Major Sitler, *An Approach to Cross-Examination: "It's a Commando Raid, not the Invasion of Europe"*, Army Law., July 1998, at 80.

B. Jim McElhaney, *Evasion: Why Witnesses Do It, and How to Make Them Stop*, A.B.A. J., Mar. 2010, at 26.

C. James W. McElhaney, *The Power of the Proper Mindset: During Cross-Examination, the Real Witness Is You*, A.B.A. J. Apr. 2007, at 30.

D. Jim McElhaney, *The Point of Cross: It's Another Change to Tell the Jury Your Side of the Case*, A.B.A. J., Jul. 2008, at 24.

E. James W. McElhaney, *Speaking of Liars: Showing That a Witness Is Untruthful Carries More Power Than Just Saying It*, A.B.A. J., Mar. 2006, at 26.

F. Alan C. Kohn, *The Gentle Art of Cross-Examination*, J. Miss. Bar, Mar.-Apr. 2008, at 82.

G. Steven C. Day, *Of Atticus Finch, Abraham Lincoln, and the Art of Setting the Trap*, Litigation, Winter 2011, at 28.

H. Video: *Cross-Examination with Terence MacCarthy* (TJAGLCS 2000), available in streaming video on the Criminal Law Department's website.

I. Video: *My Cousin Vinny*.

J. Ronald H. Clark, et al., *Cross-examination Handbook* (2010)

K. Larry S. Pozner and Roger J. Dodd, *Cross-Examination: Science and Techniques* (2d ed. 2004).

L. Thomas A. Mauet, *Trial Techniques* (6th ed. 2002).

X. DRILLS

A. For the first three drills, instruct the witness to not be a jerk. Have them answer "yes" or "no." If they can't answer a question "yes" or "no" because the attorney asked them a confusing question, tell the witness to just sit there until the attorney gets it right. The focus on these drills is for the attorney to get the rhythm, pace, and feel of cross-

examination, not to tangle with uncooperative witnesses. Consider having the instructor serve as the witness.

B. Drill 1: Short statements.

1. Find any object that is in your workspace. Have the attorney describe the object, say, a coffee mug. The attorney can only use one new fact per question and needs to use a falling inflection. For the coffee mug, the attorney would say, "You are a cup. A coffee cup. White. With a handle. And you have a logo on the side. A green logo. The symbol of a coffee company, etc." Rotate through the attorneys, finding a new object to describe for each attorney. Have the attorneys ask at least one or two one-word questions.

2. As a progression, have the attorneys start with using tags, and then after two or three questions, have them work out of using tags.

C. Drill 2: Describe the action.

1. Have half of the class shut their eyes. Then have the witness do some physical activity – some jumping jacks, some push-ups, walk a square that is four paces on each side, do a cart-wheel (space permitting). The attorney will then cross-examine the witness on that physical activity using short statements, one new fact per question, with a falling inflection. For a witness that ran in place, the cross might be, "You pushed off with your foot. Your right foot. And brought it into the air. At the same time, you move your arm. Your left arm. You made a fist with your left hand. And pushed that fist forward. At the same time, you brought your left foot down. From the air. Onto the ground, etc."

2. As a progression, have the attorneys start with using tags, and then after two or three questions, have them work out of using tags.

D. Drill 3: Describe the scene.

1. Have the attorney describe the room that he or she is in (or another room that they are familiar with, like a local restaurant), to include sound levels, light levels, temperature, and smell. The attorney needs to use short statements, downward inflection, and only one new fact per question. Have other attorneys describe their favorite bar at the time they usually attend it, or their church when they usually attend it, or the coffee shop they usually go to.

E. Drill 4: The runaway witness.

1. Modify one of the drills above. This time, instruct the witness to take a question and start rambling ("well, that depends on . . .). Have the attorney run through some witness control techniques (repeat the question, repeat the question using the witness' name, state the inverse of the question).

F. Drill 5: Identifying danger words.

1. Modify one of the drills above. Instruct the witness that anytime the attorney uses a danger word (a word that is really a conclusion based on other underlying facts), the witness will stand up and say, "Gotcha!"

G. Drill 6: Case specific.

1. If the counsel have the basics down, have the counsel break out into teams to come up with a cross examination, based on one chapter, of one of the witnesses in US v. Archie. Bring an arguments worksheet for the counsel to use when developing the chapter.

XI. APPENDIX. EXAMPLE OF A LEADING, CONCESSION-BASED CROSS-EXAMINATION

[Case: non-stranger sexual assault in accused's barracks room on July 1]

A. This cross-examination has four goals:

1. Accused and Victim were only casual acquaintances.
2. Accused initiated contact.
3. Accused purchased the drinks.
4. Accused isolated the victim.

B. First chapter: Accused and Victim were only casual acquaintances.

1. You know Victim. Yes.
2. You don't work together. No.
3. You live in the different barracks. Yes.
4. You never had breakfast at the same table. No.
5. You never had lunch at the same table. No.
6. You never had dinner at the same table. No.
7. You had both been to the club at the same time before. Yes.
8. You had been to the club, but you had never had drinks with Victim before July 1. No.
9. She never told you where she was raised. No.
10. She never told you her brother's name. (Especially good if she doesn't have a brother). No.
11. You didn't really know each other, did you. No.

C. Second chapter: Accused initiated contact.

1. On July 1, Victim came to the club separately from you, didn't she. Yes.
2. She came to the club separately, and she sat down with friends of hers. Yes.
3. They were not friends of yours, though, were they? *Well, I knew a few of them.*
4. You claim *you knew a few of them*, but you had never had drinks with any of them before, had you. No.
5. And you had never had drinks with the victim before either. No.
6. You did not approach any of her friends, who you claim you knew. No.
7. You approached Victim, didn't you. Yes.
8. *You didn't really know each other*, but you approached her. Yes.
9. She did not approach you. No.
10. You didn't approach one of the people you knew. No.
11. You asked her to dance. Yes.
12. She did not approach you or your friends. No.
13. She did not suggest dancing. No.

D. Chapter 3: Accused purchased the drinks.

1. You bought her a drink. Yes.
2. You did not buy anyone else a drink. Yes.
3. *You didn't really know each other*, but you bought her a drink. Yes.
4. You bought her another drink before you had finished your first drink. Yes.
5. You bought her a third drink. Yes.
6. She told you she had enough. Yes.
7. You urged her to drink the third drink. *No, I didn't urge her to do anything. I just bought it.*
8. You claim *you didn't urge her to drink*, but you still gave the third drink to her.
9. And you suggested she drink it. Yes.
10. You gave it to her even though she said she'd had enough.
11. You bought all her drinks that night. Yes.
12. She did not buy any drinks, did she.
13. You supplied her with more drinks than you had yourself, didn't you.
14. She started to slur her words.
15. She had some trouble with balance.
16. She was slurring her words and having trouble with balance, but you bought her another drink, didn't you.
17. [Etc. --- by now, his answers hardly matter.]

E. Chapter 4: Accused isolated the victim.

1. Victim was slurring her words and having trouble with her balance.
2. Her friends said she should go home, didn't they.
3. Her friends offered to take her home, didn't they.
4. You claim that you were concerned about her, right.
5. You offered to take her home.
6. You offered to take her home, *because you were concerned for her*.
7. You told her friends you would 'take care of her.'
8. You told them they should stay at the club.
9. Her friends made it clear that Victim should go home, right.
10. She needed to go home, but you did not take her home, did you.
11. She needed to go home, but you took her to *your* room, didn't you.

F. [Chapter 5 can be "*You were concerned for her*, but you . . . (details of his actions during sexual assault, based on his testimony & hers);" or "You said you would 'take care of her,' but . . . ."]

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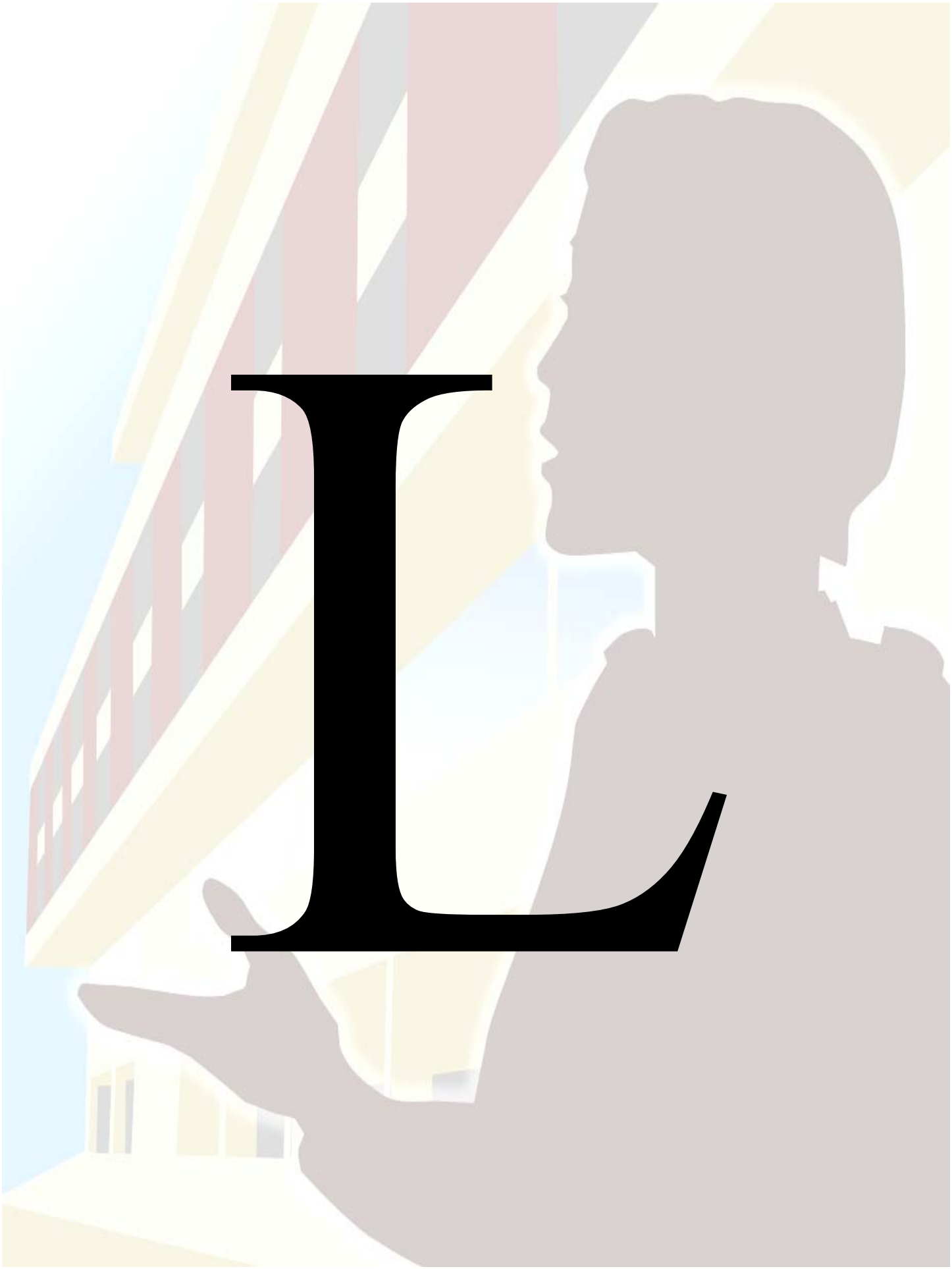
L

OBJECTIONS

Outline of Instruction

I. GOAL-ORIENTED OBJECTIONS

A. Rethink how you approach objections. As James McElhaney explains, "[O]ne of the problems with modern legal education [is that w]ithout even trying, we somehow train lawyers to think they're evidence cops – people who are supposed to guard against improper information beign admitted in trial. But that's not our job. A trial is not an evidence exam . . . The point of objecting is to shape the case." James W. McElhaney, *Persuasive Objections*, A.B.A. J., Jan. 1999, at 70.

B. It turns out, not surprisingly, that jurors don't like it when lawyers object: "[J]urors don't like testimony to be interrupted by multiple objections. They want to hear both sides of the story, and a lawyer who repeatedly objects can leave the jury with the impression that his client has something to hide." Margaret Graham Tebo, *Duty Calls*, A.B.A. J., Apr. 2005, at 35, 37.

C. Rather, your presumption should be, "I am not going to object." That forces you to think through why you are making an objection and whether you are going to be persuasive when you make that objection.

D. Here is a very simple system and is really all you need to remember at the counsel's table: don't make the objection unless: 1) you will likely win, AND 2) you have a good reason for making the objection.

E. That system is a simplified version of one advanced by Professor David Schlueter. Here is his system. Object when:

1. The objection is plausible, AND
2. The judge will probably sustain the objection, AND
3. You have a strategic or tactical reason for making the objection.
    a. Strategic objectives include:
        (1) Excludes evidence that will rebut my theory of the case.
        (2) Excludes evidence that might significantly corroborate the opponent's case.
        (3) Forces the opponent to rely on less persuasive evidence.
        (4) Note that you should be able to spot these objectives early and so can litigate the issue with a *motion in limine*. You should know what hearsay is going to hurt and which doesn't matter. You should know what evidence cannot be authenticated. Take care of that before trial.
    b. Tactical objectives include:
        (1) Break the flow of a great exam.
        (2) Fluster another attorney.
        (3) Fluster a witness.
        (4) Give your witness time to think.

(5) Give yourself time to think.

(6) Note that it is not unethical to do this. Look back to Prof. Schlueter's first two points. If you made the objection, then the objection is plausible and you will likely win. Therefore, the objection you are making is not frivolous or baseless under AR 27-26, Rule 3.1 – in fact, you will likely *win* the objection. And, you are not making the objection *solely* for the purpose of harassing or maliciously injuring someone. You are taking the action primarily to exclude improper evidence or questioning.

II. WAIVING OBJECTIONS

A. In addition to the system above, Prof. Schlueter gives the following reasons for waiving objections:

1. The witness' answer will help you.
2. Objecting would decrease the chance to offer similar evidence later at trial.
3. The witness' answer opens the door to certain evidence.
4. The objection would force the opponent to use more persuasive forms of evidence.
5. The objection will force the opponent to lay a more persuasive objection. Think through the "foundation" objection before you make it. Unless the other party really cannot meet the foundational requirements (and if they can't, you should have taken care of that in a *motion in limine*), then the military judge will likely complete the basic foundation to keep the trial moving along. If the evidence is going to come it, it is better that it comes in with a weak foundation than a great, persuasive foundation.
6. The evidence doesn't hurt that much.

III. ADDITIONAL TIPS

A. Don't make running objections ("Objection, your honor, that is hearsay because it is not an excited utterance, in fact, over two hours passed before he made the statement.") Rather, say, "Objection, your honor. Hearsay." And then stop and see if the judge wants to hear anything else.

B. If you are overruled without giving an argument, ask to be heard.

C. State the prejudice that will occur to your client if the judge does not sustain the objection.

D. Ask for the remedy that you want.

E. If you win the objection, quit talking.

F. Don't argue *with* the judge. Argue *to* the judge.

IV. RESPONDING TO OBJECTIONS

A. The following is adapted from Elliott Wilcox, *How to Successfully Make and Meet Objections*, available at www.trialtheater.com.

B. Pause. Don't panic.

C. Think. Why should the judge admit your evidence? Tell the judge why your evidence is relevant, reliable, and right (or fair). If you can't think of the hyper-legalistic response to an objection at that moment, if you can answer why it is relevant, reliable, and right (fair), then you will get most of the way to the right answer.

D. Wait. Don't change your line of questioning until you get a ruling from the judge.

E. Receive. Get a ruling from the judge. If the judge says, "Move along, counsel," then the judge has not ruled. If that happens, ask the judge, "Your honor, so that means the objection sustained?"

F. Regroup. If the judge sustains the objection, take a moment to gather your thoughts. Figure out what you need to do to continue in the direction you wanted to go. Then, start talking again.

V. GET BETTER BY READING AND WATCHING

A. James W. McElhaney, *Persuasive Objections*, A.B.A. J., Jan. 1999, at 70.

B. Elliott Wilcox, *How to Successfully Make and Meet Objections*, available at www.trialtheater.com.

C. VIDEO: Objections with Prof. David Schlueter (TJAGLCS 2000) (available in streaming video on the Criminal Law Department website).

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Prepared by U.S. Army Trial Defense Service Defense Counsel Assistance Program DCAP@conus.army.mil	Objections Checklist Version 1, 1 Dec 10

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BARPH

Best Evidence (MRE 1001)
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M

EXPERTS

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Is Currently Under Construction

Please See TAB R, “Evidence”


N

INSTRUCTIONS

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INSTRUCTIONS

I. GENERAL

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.

II. 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." RCM 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 chose. 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 IVC below.

2. Waiver of error (R.C.M. 920(f)) does not really apply. Here, the defense counsel is active.

III. 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 (1 Jan. 2010) [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)(5) and (6).

1. The accused is presumed innocent.

2. If there is reasonable doubt, the accused must be acquitted.

3. 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.

4. The burden of proof is on the government (except for certain defenses).

5. Instructions on deliberations and voting.

IV. 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).

(1) 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) 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.

(a) *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).

(3) 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. Rodwell*, 20 M.J. 264 (C.M.A. 1985).

(4) A lesser-included-offense is reasonably raised when the greater offense requires members to find a *disputed* factual element not required for conviction of the lesser included offense. *United States v. Miergrimando*, 66 M.J.34 (C.A.A.F. 2008); *United States v Griffin*, 50 M.J. 480 (1999); *United States v. Arviso*, 32 M.J. 616 (A.C.M.R. 1991). This rule might not have any application post-*United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

b) The defense may affirmatively waive instruction on lesser included offenses. *United States v. Strachan*, 35 M.J. 362 (C.M.A. 1992).

c) 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 court reasoned that 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 defense planned to use an "all or nothing" strategy, was surprised when the military judge said he was going to read the lesser included offense instruction, but military judge gave the defense an option to continue the case to remedy that mistaken strategy).

d) 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).

e) 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).

f) 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, and 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).

g) Statute of limitations.

(1) *United States v. Thompson*, 59 M.J. 432 (C.A.A.F. 2004). 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.

C. Standard of review for required instructions.

1. The test for error is *de novo*. "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. Prejudice.

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).

V. 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. 2003 (C.A.A.F. 2003) (applying thorough analysis to this problem, 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) 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). *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 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 affirmative 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 offenses. R.C.M. 916(a) discussion.

a) The Benchbook does contain 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, *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 IVC, above.

3. Failure of proof defenses fall under R.C.M. 920(e)(7) so are subject to the waiver rules of R.C.M. 920(f).

VI. 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. Effect of failure to object to an erroneous instruction or to request an omitted (non-mandatory) instruction constitutes waiver. 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 201A.

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(g).

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 "upon 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).

VII. 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.

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. R.C.M. 1005(e)(5).

a) 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).

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 II 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 waiver 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).

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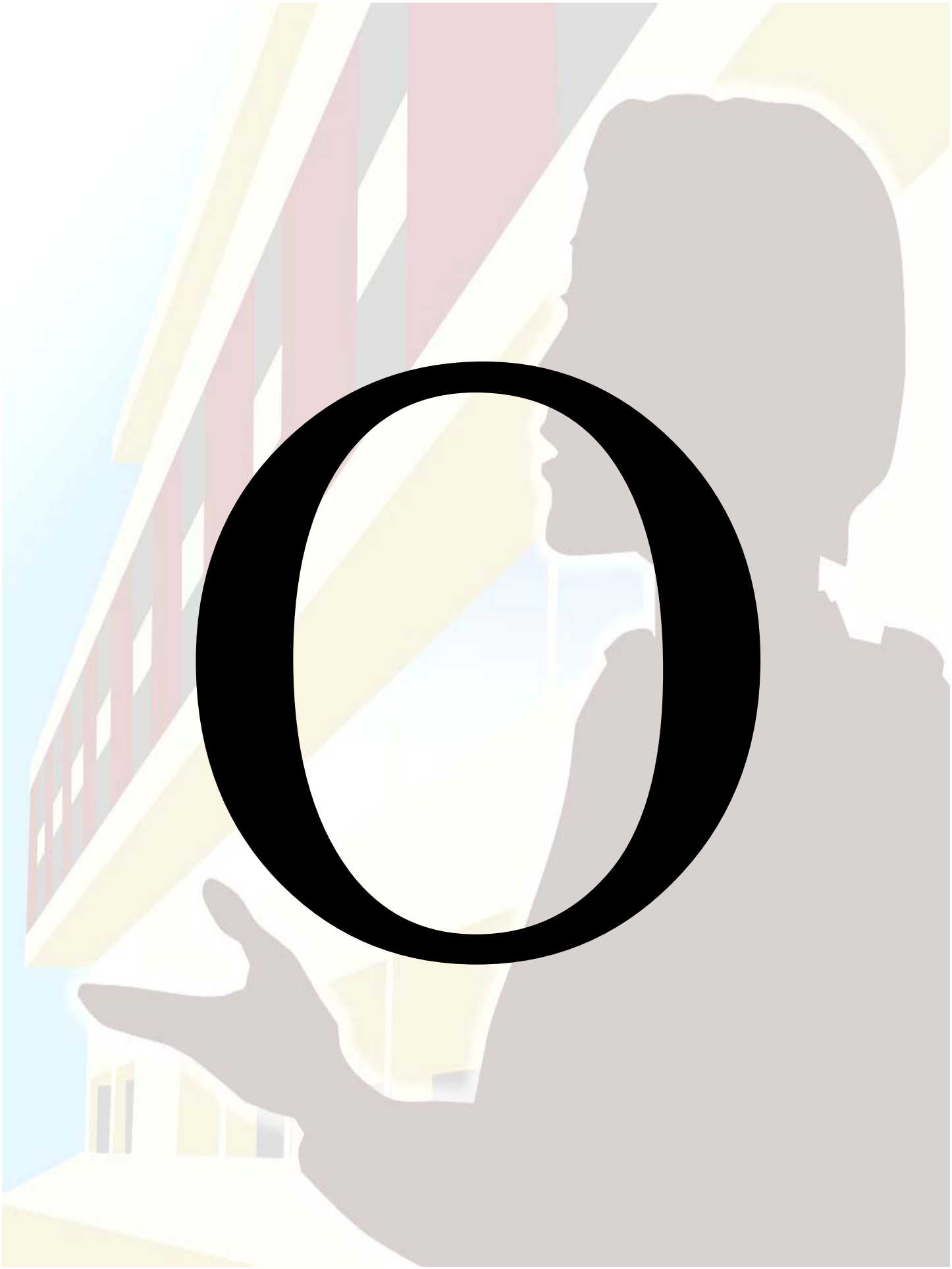
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FINDINGS

Table of Contents

MAJ Sean Mangan

August 2012

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I. GENERAL FINDINGS IN THE MILITARY – RCM 918(A)

A. Guilty;

B. Not Guilty;

C. Guilty by Exceptions (with or without substitutions);

D. Guilty of Lesser Included Offense (LIO). **RCM 918(a)(1) Discussion.**

This rule permits a plea of "not guilty to an offense as charged, but guilty of a named lesser included offense."

When plea to an LIO is entered, defense counsel should provide a written revised specification. Revised specification should be an appellate exhibit.

Related amendment to RCM 918(a)(1) allows findings of guilty to be entered to named LIO. This applies to both contested and guilty plea cases.

There is no Manual provision for alternative or conjunctive findings, and it was error for military judge to find accused guilty of two different UCMJ articles for single specification. *United States v. Rhodes*, 47 M.J. 790 (Army Ct. Crim. App. 1998). *(Finding: "Of the Specification of Charge III: Guilty, as well as guilty of a violation of Article 134 with respect to that specification.")*

E. Not Guilty Only by Reason of Lack of Mental Responsibility.

II. WHAT MAY / MAY NOT BE CONSIDERED IN REACHING FINDINGS? RCM 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 "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.

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.

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.

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.

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). MJ erred by advising panel members, prior to their deliberations on findings, that the accused previously plead guilty to two specifications of violating a command policy and two specifications of adultery. Accused plead not guilty to the following: two specifications of violating the same command policy to which he previously plead guilty, three specifications of maltreatment of a subordinate, two specifications of consensual sodomy, one specification of indecent assault and one specification of adultery. He was convicted, contrary to his pleas, of an additional command policy violation and adultery; findings as to contested offenses and sentence were set aside.

F. Use of providence inquiry statements in mixed plea cases.

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).

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).

United States v. Grijalva, 55 M.J. 223 (2001). 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.

G. Matters taken into the deliberation room may be considered. **RCM 921(b)**.

Notes of the court members.

Exhibits admitted into evidence.

Stipulations of fact are taken into the deliberation room. (Note however, CAAF found material prejudice to the accused's substantial rights occurred when the military judge (in a judge alone case) failed to sufficiently ensure that the accused understood the effect of the stipulation of fact entered into with the Government. CAAF stated that the record did not provide a sufficient basis to determine that the accused knowingly consented to the use of the stipulation and the adjoining exhibits in the Government's case on the merits of the greater charge, *US v. Resch*, 65 MJ 233 (2007)).

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). 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 (2001).

I. Findings worksheet is used to assist members in putting findings in order. *See* Appendix 10, Manual for Courts-Martial, Forms of Findings.

III. DELIBERATIONS AND VOTING ON FINDINGS. RCM 921.

A. Basic rules and procedures.

Deliberations. **RCM 921(a) and (b)**.

Only members present. RCM 921(a).

No superiority in rank used to influence other members. RCM 921(a).

May request reopening of court to have record read back or for introduction of additional evidence. RCM 921(b).

Voting. **RCM 921(c)**.

By secret written ballot, with all members voting.

Guilty only if at least 2/3 vote for guilty.

Fewer than 2/3 vote for guilty, then finding of not guilty results.

Special procedure to find accused not guilty by reason of lack of mental responsibility.

Procedure. **RCM 921(c)(6)**.

B. Straw polls.

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.

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.

IV. INSTRUCTIONS ON FINDINGS. RCM 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 one through three 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." *US v Lewis,* 65 M.J. 85, __ (2007) citing *United States v. Wolford*, 62 M.J. 418, 420 (2006).

V. ANNOUNCEMENT OF FINDINGS. RCM 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 RCM 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 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. Court notes that a proceeding in revision under RCM 1102 would have been an appropriate course of action had the MJ or SJA caught the mistake.

VI. RECONSIDERATION OF FINDINGS. UCMJ ART. 52, RCM 924.

A. Members may reconsider any finding before such finding is announced in open session. RCM 924(a).

> *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.

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. RCM 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. RCM 924(c).

VII. DEFECTIVE FINDINGS.

A. Concerns: Sufficient basis for court to base its judgment and protect against double prosecution.

B. Issue – Charging "divers" occasions

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.

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 even have the authority to review the cases 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.

United States v. Trew, 68 M.J. 364 (C.A.A.F. 2010). Appellant charged with indecent acts on diverse 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.

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.

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.

C. Issue – Variance

United States v. Teffeau, 58 M.J. 62 (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 can not change the nature of the offense or increase the seriousness of the offense or its maximum punishment.

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.

D. Issue – Bill of particulars

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.

E. Issue – Announcing findings

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.

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.

VIII. IMPEACHMENT OF FINDINGS. RCM 923.

A. Strong policy against the impeachment of verdicts.

Promotes finality in court-martial proceedings.

Encourages members to fully and freely deliberate.

B. General rule: Deliberative privilege – court deliberations are privileged (MRE 509).

C. Exceptions: Court members' testimony and affidavits cannot be used after the court-martial to impeach the verdict except in three limited situations. RCM 923; MRE 606. *See United States v. Loving*, 41 M.J. 213 (C.M.A. 1994).

Outside influence (*e.g.*, bribery, jury tampering).

Extraneous prejudicial information.

United States v. Witherspoon, 16 M.J. 252 (C.M.A. 1983). Improper court member visit to crime scene.

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.

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.

Unlawful command influence.

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.

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.

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.

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.

Polling of court members is prohibited. RCM 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). MRE 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.

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 MRE 606(b) to impeach findings of court-martial.

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).

IX. SPECIAL FINDINGS

A. What are they used for? 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. RCM 918(b).

"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).

"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)).

"Viewed together, special findings can make a record for appellant, or protect it for the government." *Schinasi* at 121.

Analogues (Specifically Mandated Occasions for Special Findings)

RCM 905(d) - Motions: "Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record."

MRE 304(d)(4) - 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."

MRE 311(d)(4) - 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."

MRE 312(f) - 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

WHO may request special findings:

Any party to the proceeding. RCM 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)).

The military judge acting sua sponte. *Schinasi* at 81 (discussing *United States v. Figueroa*, 377 F.Supp. 645 (S.D.N.Y. 1970)).

WHAT may the party 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. RCM 918(b).

WHEN may they make such a request: At any time before general findings are announced. RCM 918(b).

HOW do you 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. RCM 918(b).

WHAT issues merit special findings:

YES - "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."

NO - Issues which are irrelevant, immaterial, or so remote as to have no effect on the trial's outcome. *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)).

HOW must the military judge issue special findings: Verbally on the record, or in writing. RCM 918(b).

WHEN must the military judge enter findings: During or after the court-martial, but in any event before authentication of the record, as they must be included with the record of trial. RCM 918(b); RCM 1103(b)(3)(A)(iv).

C. Use by Defense Counsel

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)).

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).

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

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.

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.*

"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

The military judge must make all “essential findings of fact,” even if not requested. *See* MRE 304(d)(4), MRE 311(d)(4), MRE 321(f).

"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

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.

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).

"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.

"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. Pople*, 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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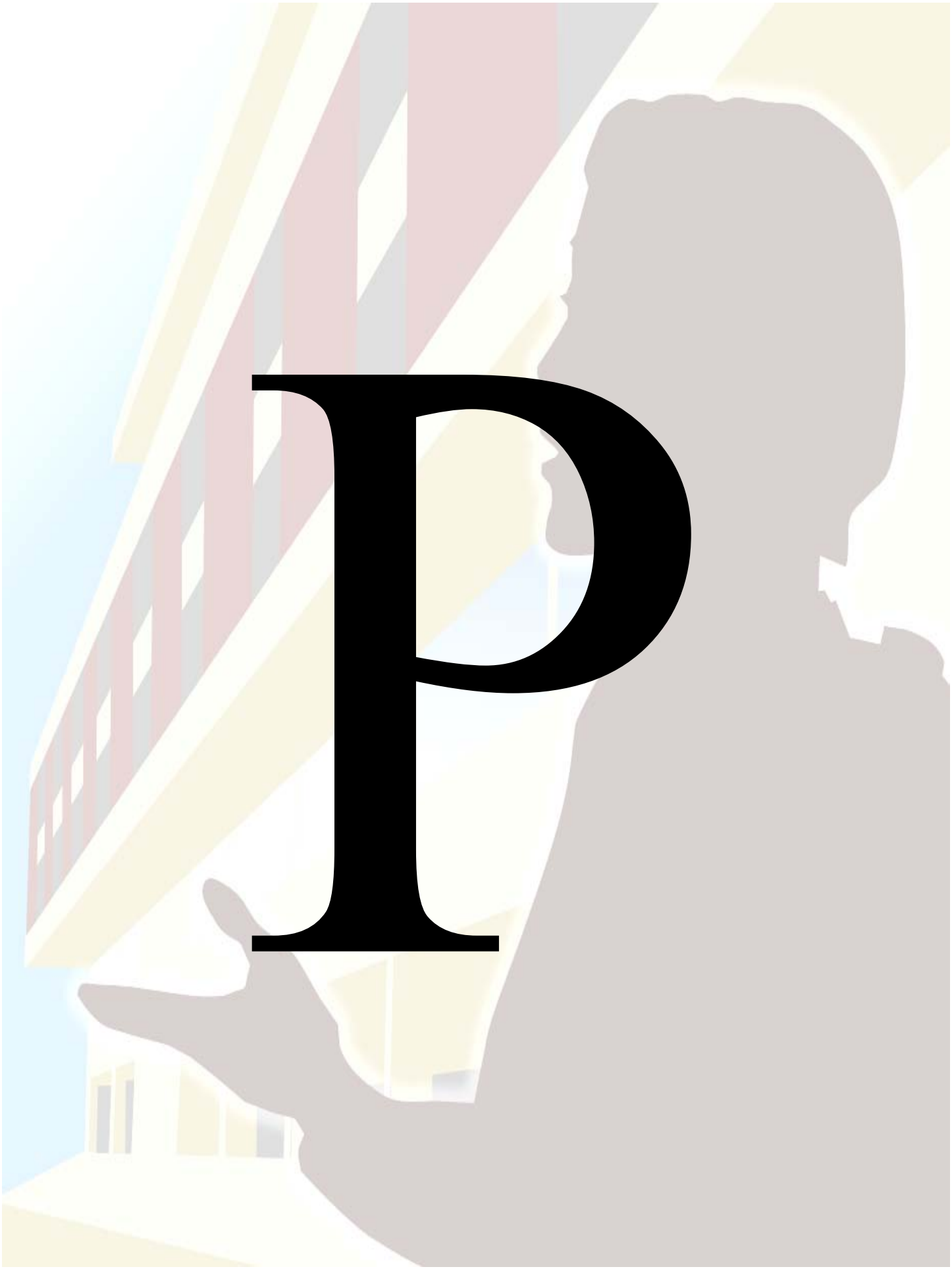
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PRESENTENCING

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MAJ Sean Mangan

August 2012

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II. MATTERS PRESENTED BY THE PROSECUTION. RCM 1001(B).

A. Service data relating to the accused taken from the charge sheet. **RCM 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 the Trial 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. **RCM 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* implements RCM 1001(b)(2).

2. AR 27-10, para. 5-29*a* illustrates, in a non-exclusive manner, those items qualifying for admissibility under RCM 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*. The rule of *United States v. Weatherspoon*, 39 M.J. 762 (A.C.M.R. 1994) (holding that personnel records are only those records in the OMPF, MPRJ, and CMIF) is no longer good law. The key is whether the record is maintained IAW applicable departmental regulations.

a) *United States v. Davis*, 44 M.J. 13 (1996). By failing to object at trial, appellant waived any objection to the admissibility of a Discipline and Adjustment (D&A) report created and maintained by the United States Disciplinary Barracks in accordance with a local regulation. The Court of Appeals for the Armed Forces (CAAF) did *not* decide whether the report was admissible under RCM 1001(b)(2).

b) *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 RCM 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.

c) *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 RCM 1001(b)(2), where it did not meet admission criteria under RCM 1001(b)(3) [prior conviction].

d) *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 RCM 1001(b)(2) *not* RCM 1001(b)(3) as part of a personnel record.

e) *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 RCM 1001(b)(2).

f) *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.

a) Ordinarily, to be admissible in sentencing, the proponent must show that that the accused had opportunity to consult with counsel and that accused waived the right to demand trial by court-martial. *United States v. Booker*, 5 M.J. 238 (C.M.A. 1978); *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980). Absent objection by defense counsel, however, Military Rule of Evidence (MRE) 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). Absent objection, a military judge's ruling admitting evidence is subject plain error analysis. *See United States v. Kahmann*, 59 M.J. 309, 313 (2004). *See also United States v. Dyke*, 16 M.J. 426 (C.M.A. 1983) (suggesting without holding that MRE 103 applies to MJ's determination of admissibility of NJP records).

b) *United States v. Edwards*, 46 M.J. 41 (1997). Whether a vessel is operational affects the validity of an Article 15 for its subsequent use at a court-martial. If the vessel is not operational, for a record of prior NJP to be admissible, the accused must have had a right to consult with counsel regarding the Article 15.

c) *United States v. Dire*, 46 M.J. 804 (C.G. Ct. Crim. App. 1997). Accused was awarded Captain's Mast (NJP) for wrongful use of marijuana and lysergic acid diethylamide. He was later charged for several drug offenses, including the two that were the subject of the earlier NJP. He was convicted of several of the charged offenses, including one specification covering the same offense subject to the NJP. Defense counsel failed to object to personnel records with references to a prior NJP. That failure to object waived any objection.

d) *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.

e) *United States v. Godden*, 44 M.J. 716 (A.F. Ct. Crim. App. 1996). Accused objected to the admission of a prior record of NJP based on government's failure to properly complete the form (absence of the typed signature block of the reviewing attorney and the dates the form was forwarded to other administrative offices for processing). The Air Force Court concluded that the omissions were "administrative trivia" and did not affect any procedural due process rights.

f) *United States v. Gammons*, 51 M.J. 169 (1999). The accused was court-martialed for various offenses involving the use of illegal drugs. The accused had already received an Article 15 for one of those offenses. At the outset of the trial, the trial counsel offered a record of NJP. Defense counsel had no objection and, in fact, intended to use the Article 15 themselves. The court pointed out that under Article 15(f) and *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989), the defense had a gate keeping role regarding the Article 15. If defense says the Article 15 is going to stay out, it stays out.

g) *United States v. LePage*, 59 M.J. 659 (N-M. Ct. Crim. App. 2003). Military judge erred by admitting PE 3, an NJP action which was stale by § 0141 of the JAGMAN because it predated any offenses on the charge sheet by more than two years. After noting that "plain error leaps from the pages of this record," the court determined that the MJ would not have imposed a BCD but for his consideration of the prior NJP.

h) *United States v. Cary*, 62 M.J. 277 (2006). Trial counsel introduced personal data sheet of the accused erroneously indicating that the accused had received one prior Article 15. Without an objection from defense counsel, CAAF proceeded under a plain error standard. Although there may have been error and it may have been plain, the accused's rights were not materially prejudiced.

5. Letters of Reprimand.

a) *United States v. Zakaria,* 38 M.J. 280 (C.M.A. 1993). Applying MRE 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. Williams*, 47 M.J. 142 (1997). Pursuant to a pretrial agreement, the prosecution withdrew a previously referred additional charge and specification alleging similar misconduct to original charge. The accused's commander then issued a memorandum of reprimand for the same misconduct as contained in the withdrawn charge. The CAAF held lack of objection at trial constituted waiver absent plain error, and found none "given the other evidence presented in aggravation." Court notes matter in letter of reprimand became uncharged misconduct on basis of mutual agreement, *i.e.,* pretrial agreement, and does not address the propriety of trying to "back door" evidence of uncharged misconduct.

c) *United States v. Clemente,* 50 M.J. 36 (1999). Two letters of reprimand in accused's personnel file properly admitted pursuant to RCM 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 MRE 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* analysis to RCM 1001(b)(2).

b) RCM 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 RCM 1001(b)(2)).

c) *United States v. Vasquez*, 54 M.J. 303 (2001). Plea-bargaining statements are not admissible (MRE 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 evidence on the document or attached thereto 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 MRE 403 to RCM 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 and military. **RCM 1001(b)(3).**

1. There is a "conviction" in a court-martial case when a sentence has been adjudged. RCM 1001(b)(3)(A). **2002 Amendment to RCM 1001(b)(3)(A):** "In a civilian case, a 'conviction' includes any disposition following an initial judicial determination or assumption of guilt, 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 RCM 1001(b)(3)(A).

b) Juvenile adjudications are not convictions within the meaning of RCM 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 (MRE 403).

b) Military judge must apply the MRE 403 balancing test. *United States v. Glover*, 53 M.J. 366 (2000).

c) *United States v. White*, 47 M.J. 139 (1997). Accused who testified during sentencing about prior bad check convictions waived issue of proper form of admission of such prior convictions under RCM 1001(b)(3). TC offered in aggravation four warrants for bad checks that indicated plea in civilian court of "*nolo*" by accused. Accused then testified she had paid the required fines for the offenses shown on the warrants. There was also no indication by the defense that accused would not have testified to such information if the MJ had sustained the original defense objection to the warrants when offered by the TC.

d) *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.

3. Pendency of appeal. RCM 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 MRE required.

5. "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).

6. 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 (RCM 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 MRE.

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:

(1) MRE 803(6), records of regularly conducted activity; or

(2) MRE 801(d)(2), admission by party opponent.

7. 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) A trial judge may, in his discretion, allow both parties to present evidence that explains a previous conviction, including the stipulation of fact from the record of trial of the accused's prior court-martial. United States v. Nellum, 24 M.J. 693 (A.C.M.R. 1987).

c) United States v. Kelly, 45 M.J. 259 (1996) (holding that it was 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) United States v. Prophete, 29 M.J. 925 (A.F.C.M.R. 1989). Properly authenticated computer print-out of calendar (reflecting guilty plea by accused) can provide proof of a civilian conviction for purposes of RCM 1001(b)(3)(A).

e) United States v. Mahaney, 33 M.J. 846 (A.C.M.R. 1991). Civilian conviction is not self-authenticating because not under seal.

D. Aggravation Evidence. **RCM 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. 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).

4. *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 where the expert did not expressly testify that 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).

5. *United States v. Maynard*, 66 M.J. 242 (C.A.A.F. 2008). Absent defense objection, the court will apply the plain error test to determine if a military judge erred in admitting aggravation evidence.

6. *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004). The court affirmed the MJ's decision to permit the TC to introduce portions of a Senate report detailing its findings related to child pornography (appellant convicted of various offenses related to child pornography). The excerpt specifically addressed the impact of child pornography on the children involved, particularly the physical and psychological harm they experience. The court observed that the children depicted are victims for RCM 1001(b)(4) purposes and the information in the report was sufficiently direct to qualify for admission as impact evidence under the same rule. "The increased predictable risk that child pornography victims may develop psychological or behavioral problems is precisely the kind of information the sentencing authority needs to fulfill" its function of discerning a proper sentence.

7. *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.

8. *United States v. Cameron*, 54 M.J. 618 (A.F. Ct. Crim. App. 2000). Uncharged false statements about charged offenses, as a general rule, are not proper evidence in aggravation. *But see United States v. Driver*, 57 M.J. 760 (N-M. Ct. Crim. App. 2002). False official statement to NCIS agent relating to conspiracy to commit arson and arson charge admissible in aggravation despite appellant's acquittal of the Article 107 offense provided: there is sufficient evidence that the act (i.e., false official statement occurred); the MJ properly does an MRE 403 balancing; and the sentencing authority is fully aware of the acquittal on the charged offense.

9. *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.

10. *United States v. Sanchez*, 47 M.J. 794 (N-M. Ct. Crim. App. 1998). Victim's testimony about assault, extent of injuries suffered, hospitalization, and general adverse effects of assault admissible against accused found guilty of misprision of offense. TC also offered pictures of wounds and record of medical treatment of victim. Navy-Marine Court noted this evidence in aggravation under RCM 1001(b)(4) did not *result from* misprision conviction, but did *directly relate* to the offense and was therefore admissible.

11. *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.

12. *United States v. Jones*, 44 M.J. 103 (1996). HIV-positive accused charged with aggravated assault and adultery; convicted only of latter in judge alone trial and sentenced to the maximum punishment. In imposing his sentence, the MJ criticized the accused's "disregard for the health and safety of an unknown victim and this purposeful conduct committed immediately after being made aware of the circumstances . . . ." The CAAF held medical condition was a fact directly related to the offense under RCM 1001(b)(4) and essential to understanding the circumstances surrounding the offense.

13. *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.

14. *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.

15. *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.

16. *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.

17. *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." RCM 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."

18. *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.

19. *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.

20. *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.

21. *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."

22. *United States v. Pertelle*, No. 9700689 (Army Ct. Crim. App., Jun. 30, 1998) (unpub.). Testimony of accused's company commander that he intended to publicize results of court-martial in company did not constitute proper evidence in aggravation. Such evidence related only to prospective application of sentence, and did not "directly relate to or result from the accused's offense."

23. *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 RCM 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 RCM 1001(b)(4) . . . ." *Id*. at 640.

24. *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 MRE 403's balancing test.

25. *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 RCM 1001(b)(4) or as evidence regarding accused's rehabilitative potential under RCM 1001(b)(5).

26. *United States v. Lowe*, 56 M.J. 914 (N-M. Ct. Crim. App. 2002). During the sentencing phase of trial, the MJ relaxed the rules of evidence for defense admitting DE A, a letter from a Navy psychologist which assessed appellant, concluding "'in my professional opinion, he does not present a serious threat to society.'" In rebuttal, the MJ admitted over defense objection PE 3, a seventeen-page incident report with twenty-eight pages of attached statements alleging that appellant harassed and assaulted various women, only one of whom was the victim of an offense for which appellant was convicted. The MJ also admitted the evidence as aggravation evidence. Held – admission of PE 3 by the MJ was an abuse of discretion since the evidence did not directly relate to or result from the offenses. It involved different victims and did not involve a continuing course of conduct with the same victim. The court also found that despite the MJ's relaxation of the rules of evidence, the introduction of PE 3 was not proper rebuttal evidence. "Inadmissible aggravation evidence cannot be introduced through the rebuttal 'backdoor' after the military judge relaxed the rules of evidence for sentencing." *Id*. at 917. Specific instances of conduct are admissible on cross-examination to test an opinion, however, extrinsic evidence as to the specific instances is not.

27. *United States v. Pope*, 63 M.J. 68 (2006). Air Force recruiters who received training at "Recruiter Technical School" received a letter signed by the Commander of the Air Force Recruiting Service, stating that if they failed to treat applicants respectfully and professionally, they "should not be surprised when, once you are caught, harsh adverse action follows." During the sentencing phase of appellant's trial, the military judge allowed the Government to admit the letter in aggravation, over defense objection. The sentence was set aside and a rehearing on sentence was authorized. The CAAF reviews a military judge's decision to admit evidence on sentencing for a clear abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (2004). In the present case, CAAF was not convinced beyond reasonable doubt that the members were not influenced by the letter.

28. *United States v. Bungert*, 62 M.J. 346 (2006). After appellant's misdeeds of drug use and distribution were discovered, he offered to identify other drug users with whom he worked in exchange for "a deal." Appellant implicated eleven individuals, and in doing so, launched an extensive investigation by the Coast Guard Investigative Service that uncovered no evidence. During presentencing, two witnesses testified primarily about the nature and scope of the investigation brought about as a result of Appellant's allegations. Defense counsel made no objection. Applying a plain error standard, CAAF found that Appellant offered no evidence that he was prejudiced in any substantial way by the testimony of the Government's sentencing witnesses.

29. *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.

30. *United States v. Palomares*, 2007 WL 2405293 (N-M. Ct. Crim. App. 2007) (unpublished): While serving in Afghanistan and engaged in combat operations, accused purchased and used valium. During sentencing, the CO talked about the nature of the unit's combat operations, how the accused's and other's use complicated relief in place and required a unit urinalysis and search upon redeployment. No defense objection. Even though the accused was not the only Marine who used Valium, his offense had an unnecessary and harmful impact on the mission, discipline, and efficiency.

31. *United States v. Chapman*, 2007 WL 2059743 (NMCCA 2006) (unpublished): In missing movement case, sentencing witness allowed to testify about: (1) how accused's absence caused another Marine to deploy with little notice and one year ahead of scheduled deployment, and (2) injuries witness received on deployment. Military judge did not abuse his discretion because he limited his consideration of the injury testimony to the nature of the environment to which the accused was suppose to go and the type of danger. Military judge also performed MRE 403 balancing.

32. *United States v. McKeague*, 2007 WL 2791701 (AFCCA 2007) (unpublished): No error when judicial notice taken that fatigue is a withdrawal symptom of methamphetamine. Supervisor testified, without objection, about how the accused was observed sleeping seven times in a two- person shop, thereby increasing the workload. It was a reasonable inference that Accused's chronic sleepiness was caused by unlawful drug use.

E. Opinion evidence regarding past duty performance and rehabilitative potential. **RCM 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*." **RCM 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 RCM 1001(b)(5).

c) *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 was not admissible as evidence of accused's rehabilitative potential under RCM 1001(b)(5).

2. Foundation for opinion testimony. **RCM 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. **RCM 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.

d) *United States v. Sylvester*, 38 M.J. 720 (A.C.M.R. 1994). Opinion evidence regarding rehabilitative potential is not *per se* inadmissible merely because defense counsel establishes on cross-examination that witness's assessment goes only to potential for military service. Once proper foundation for opinion has been established, such cross examination goes to weight to be given evidence, not to its admissibility.

e) *United States v. McElhaney*, 54 M.J. 120 (2000). Error for the military judge to allow testimony of psychiatrist regarding future dangerousness of the accused as related to pedophilia, where witness had not examined the accused or reviewed his records, and had testified that he was unable to diagnose the accused as a pedophile. *Compare with United States v. Patterson*, 54 M.J. 74 (2000).

3. What's a proper basis of opinion testimony? **RCM 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. RCM 1001(b)(5)(C); *United States v. Horner*, 22 M.J. 294 (C.M.A. 1986).

b) *United States v. Armon,* 51 M.J. 83 (1999). Accused wrongfully wore SF tab, SF combat patch, CIB, and combat parachutist badge. COL answered negatively the question, "based upon what you've seen of the accused, if you were jumping into combat tomorrow, would you want him around?" COL did not know accused and was not familiar with his service record. The CAAF held testimony may have violated 1001(b)(5) but was not plain error and would be permissible in this context (to show the detrimental effect this misconduct had on other soldiers) under 1001(b)(4).

4. What's the proper scope of opinion testimony? **RCM 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." RCM 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).

(1) *United States v. Aurich*, 31 M.J. 95 (C.M.A. 1990). The commander's opinion that he does not want the accused back in his unit "proves absolutely nothing."

(2) *United States v. Yerich*, 47 M.J. 615 (Army Ct. Crim. App. 1997). Senior NCO testified that he could "form [an opinion] as to his military rehabilitation," and that accused did not have any such rehabilitative potential. The Army Court noted difficulty of grappling with claimed "euphemisms." Whether the words used by a witness constitute a euphemism depends on the circumstantial context. The court also noted that a noncommissioned officer is normally incapable of exerting improper command influence over an officer panel.

(3) *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.

(4) "There can be a thin line between an opinion that an accused should be returned to duty and the expression of an opinion regarding the appropriateness of a punitive discharge. Obviously, an accused cannot return to serve in his unit if he receives a punitive discharge. But an explicit declaration that an accused should not receive a punitive discharge or that any such discharge should be of a certain severity is disallowed for the defense not because of RCM 1001(b)(5)(D), but because such evidence invades the province of the member to decide alone on punishment." *United States v. Griggs*, 61 M.J. 402, 409 (C.A.A.F. 2005). *But see United States v. Eslinger*, 70 M.J. 193 (C.A.A.F. 2011)(finding no error (3-2 decision) when defense witnesses said the accused should stay in the Army, the government did not object, and the government's rebuttal witnesses said the accused should not stay in the Army).

5. Same rules may apply to the defense? "The mirror image might reasonably be that an opinion that an accused could 'continue to serve and contribute to the United States Army' simply is a euphemism for, 'I do not believe you should give him a punitive discharge.'" *United States v. Ramos*, 42 M.J. 392, 396 (1995).

a) *United States v. Hoyt*, No. ACM 33145, 2000 CCA LEXIS 180 (A.F. Ct. Crim. App. July 5, 2000), *pet. denied,* 54 M.J. 365 (2000), held that defense witnesses cannot comment on the inappropriateness of a punitive discharge. *But see United States v. Bish*, 54 M.J. 860 (A.F. Ct. Crim. App. 2001) (noting that since the rule prohibiting euphemism falls under prosecution evidence (RCM 1001(b)(5)(D)), "it does not appear to prohibit the defense from offering evidence that a member of the accused's unit wants him back."

b) *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 RCM 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.

c) *United States v. Hill*, 62 M.J. 271 (2006). During the defense sentencing case, the appellant's battalion commander was called to testify about his rehabilitative potential. Before a military judge alone, he testified that he did not think he could come back to the unit as a physician's assistant. He further testified, "[i]f I was sitting in that panel over there as a juror would I allow him [Appellant] to remain in the Army? No-." The military judge promptly stated that the battalion commander's remarks were "not responsive" and consisted of testimony "that a witness is not allowed to make." However, following trial during a "Bridge the Gap" session, the military judge commented, "I was thinking of keeping him until his commander said he didn't want him back," or words to that effect. The CAAF determined from the record that the military judge was referring to back as a "physician's assistant" as opposed to "back in the Army."

6. Specific acts? RCM 1001(b)(5)(E) and (F).

a) 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).

b) 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) (RCM 1001(b)(5) witness cannot testify about specific instance of misconduct as basis for opinion until cross-examined on specific good acts).

7. Future Dangerousness.

a) *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 RCM 1001(b)(5).

b) *United States v. Scott,* 51 M.J. 326 (1999). During the presentencing phase of trial, the government offered an expert to testify about the accused's future dangerousness. Defense objected to the witness on the basis that the witness had never interviewed his client so he lacked an adequate basis to form an opinion. The judge overruled the objection. Defense's failure to object at trial that there was a violation of the accused's Fifth and Sixth Amendment rights at trial forfeited those objections, absent plain error. Although there was no evidence to indicate that the government witness had examined the full sanity report regarding the accused, the court concluded there was no plain error in this case where the doctor testified that based on the twenty offenses the accused had committed in the last two years, he was likely to re-offend.

c) *United States v. George,* 52 M.J. 259 (2000). A social worker testified that the "accused's prognosis for rehabilitation was 'guarded' and 'questionable.'" The CAAF noted that evidence of future dangerousness is a proper matter under RCM 1001(b)(5).

8. 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).

9. 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. **RCM 1001(f)**.

1. **RCM 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.

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.

c) *United States v. Irwin*, 39 M.J. 1062 (A.C.M.R. 1994). The accused must be given notice of what matters are going to be considered and an opportunity to object to all or part of the providence inquiry. Tapes of the inquiry are admissible.

d) *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988). Sworn testimony given by the accused during providence inquiry may be received as admission at sentencing hearing.

e) 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 RCM 1001.

G. "Aggravation evidence" in stipulations of fact.

1. *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988).

a) Inadmissible evidence may be stipulated to (subject to RCM 811(b) "interests of justice" and no government overreaching).

b) 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 RCM 1001(b):

1. Does the evidence fit one of the enumerated categories of RCM 1001(b)?

a) 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? MRE 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 CASE IN EXTENUATION AND MITIGATION. RCM 1001(C).

A. Matters in extenuation. **RCM 1001(c)(1)(A).**

1. Explains circumstances surrounding commission of the offense, including those reasons that do not constitute a legal justification or excuse.

2. *United States v. Loya*, 49 M.J. 104 (1998). Evidence of quality of medical care was relevant evidence in extenuation and mitigation for an accused convicted of negligent killing, inasmuch as such evidence might reduce the appellant's blame.

B. Matters in mitigation. **RCM 1001(c)(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. Perry*, 48 M.J. 197 (1998). The CAAF upheld military judge's decision not to instruct panel that accused stood to be found liable for $80,000 recoupment by USNA of accused's education expenses, when separated from service prior to completion of five year commitment due to misconduct, as too collateral in this case.

4. *United States v. Simmons*, 48 M.J. 193 (1998). The military judge's prohibition on the accused from offering evidence of a civilian court sentence for the same offenses that were the basis of his court-martial was error. Civilian conviction and sentence for same misconduct may be aggravating or mitigating, but defense counsel is in the best position to decide.

5. *United States v. Bray*, 49 M.J. 300 (1998). Proper mitigation evidence under RCM 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.

6. 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. Luster*, 55 M.J. 67 (2001). The military judge erred when she prevented defense from introducing evidence that would show the financial impact of lost retirement resulting from a punitive discharge. The accused had eighteen years and three months of active service. The court cautioned against using the time left until retirement as the basis for deciding whether such evidence should be admitted. The probability of retirement was not remote and the financial loss was substantial. *Compare with United States v. Henderson*, 29 M.J. 221 (C.M.A. 1989). The military judge correctly denied defense introduction of financial impact data about accused's loss of retirement benefits if reduced in rank or discharged (accused was 3+ years and a reenlistment away from retirement eligibility). "[T]he impact upon appellant's retirement benefits was not 'a direct and proximate consequence' of the bad-conduct discharge."

d) *United States v. Becker*, 46 M.J. 141 (1997). The MJ erred when he refused to allow accused with 19 years and 8-1/2 months active duty service at time of court-martial to present evidence in mitigation of loss in retired pay if discharged. "The relevance of evidence of potential loss of retirement benefits depends upon the facts and circumstances of the individual accused's case."

e) *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. Accused was nine weeks away from retirement eligibility and did not have to reenlist.

f) *United States v. Sumrall*, 45 M.J. 207 (1996). The CAAF recognized right of retirement-eligible accused to introduce evidence that punitive discharge will deny retirement benefits, and with proper foundation, evidence of potential dollar amount subject to loss.

g) *United States v. Polk*, 47 M.J. 116 (1997). No Fifth Amendment due process violation where Master Sergeant lost substantial retired pay as result of bad-conduct discharge. Accused with twenty-three years of service proffered no other evidence of loss of retirement benefits, but in unsworn statement addressed loss if discharged. DC multiplied half of base pay times thirty years to argue severe penalty.

C. Statement by the accused. **RCM 1001(c)(2).**

1. Sworn statement. RCM 1001(c)(2)(B).

a) Subject to cross-examination by trial counsel, military judge, and members.

b) Rebuttable by:

(1) Opinion and reputation evidence of character for untruthfulness. RCM 608(a).

(2) Evidence of bias, prejudice, or any motive to misrepresent. RCM 608(c).

(3) Extrinsic evidence of prior inconsistent statements. RCM 613.

2. Unsworn statement by accused. **RCM 1001(c)(2)(C).**

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. Tschip*, 58 M.J. 275 (2003). Appellant, in his unsworn, told the panel "I know my commander can discharge me even if I do not receive a bad conduct discharge today." The military judge advised the panel that an unsworn was an authorized means of conveying information; they were to give the appellant's comments regarding an administrative discharge the consideration they believed it was due, to include none; administrative discharge information is generally not admissible at trial; and they were free to disregard any reference to the appellants comment made by counsel. The court held that the instruction was appropriate because the judge placed the appellant's comments "in context" for the decision makers. The court noted that the instruction was proper in light of appellant's "unfocused, incidental reference to an administrative discharge." The court left for another day whether it would be proper if the unsworn was specific and focused.

(5) *United States v. Sowell*, 62 M.J. 150 (2005). A military judge's decision to restrict an accused's sentencing statement is reviewed for abuse of discretion. In following *United States v. Grill*, 48 M.J. 132, although the right of allocution is "*generally* considered unrestricted," it is not "*wholly* unrestricted." However, CAAF distinguished this case, citing the Government's argument on findings opened the door to proper rebuttal during Appellant's unsworn statement on sentencing. The Court focused on the fact that trial counsel was aware of FC3 Elliott's acquittal the previous week. Her references to FC3 Elliott as a co-conspirator, implying criminal liability, during her findings argument indicated that FC3 Elliott was guilty of the same offense as Appellant, and therefore had a motive to lie.

(6) *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).

(7) *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) When the accused makes an unsworn statement, he does not become a witness:

(1) Not subject to cross-examination. *See United States v. Grady*, 30 M.J. 911 (A.C.M.R. 1990) (noting that it was improper for MJ to question the unsworn accused).

(2) *United States v. Martinsmith*, 42 M.J. 343 (1995). No prejudicial error where MJ did not permit accused in unsworn statement to respond to member's question concerning whereabouts of money which accused admitted stealing. Further, the judge did not abuse discretion in denying defense request at that point to reopen its case, to introduce a "sworn statement" of the accused.

(3) *United States v. Satterley*, 55 M.J. 168 (2001). Defense counsel requested to reopen the defense case to answer a court member's question via an unsworn statement by the accused. The military judge denied the request but stated he would allow the defense to work out a stipulation of fact, or allow the accused to testify under oath. The court concluded that the military judge did NOT abuse his discretion in refusing to allow accused to make an additional, unsworn statement. The court did note, however, that "there may be other circumstances beyond legitimate surrebuttal which may warrant an additional unsworn statement . . . . Nevertheless, whether such circumstances exist in a particular case is a matter properly imparted to the sound discretion of the trial judge."

(4) *United States v. Adame*, 57 M.J. 812 (N-M. Ct. Crim. App. 2003). Error for military judge to conduct extensive inquiry regarding accused's desire for a punitive discharge in his unsworn where inquiry got into attorney-client communications. The court described the MJ's inquiry as "invasive," however, found no prejudice.

e) *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. **RCM 1001(c)(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. A relaxation of the rules, however, goes more 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).

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 RCM 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 RCM 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. **RCM 1001(d)**. 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. *United States v. Reveles*, 41 M.J. 388 (C.A.A.F. 1994). Accused is not entitled to present his sentencing case free from the chilling effect of legitimate government evidence (if DC introduces too much evidence of the accused's life then military judge might allow government to introduce victim life video).

3. *United States v. Edwards*, 39 M.J. 528 (A.F.C.M.R. 1994). Air Force Regulation 111-1 prohibits admission of records of NJP at courts-martial if the record is over five years old as of the date the charges were referred. Accordingly, admission of a five year-old NJP was error, even though it properly rebutted matter submitted by the defense.

4. *United States v. Dudding*, 37 M.J. 429 (C.M.A. 1993). A Licensed Clinical Social Worker (LCSW) testified that accused was good candidate for group therapy and recommended eighteen months of group treatment. A government witness, from USDB, testified that accused would be exposed to more treatment groups if sentenced to ten years versus five years. The defense interposed no objection. The court held not plain error.

5. *United States v. Roth*, 52 M.J. 187 (C.A.A.F. 1999). The defense sought to call a witness to testify that there was no gang problem in the housing area discussed by the CID agent. The witness had been in the courtroom during the testimony of the CID agent. The judge held that the defense had violated the sequestration rule and refused to let the witness testify. The CAAF held that the military judge abused her discretion. The court noted that the ultimate sanction of excluding a witness should ordinarily be used to punish intentional or willful disobedience of a military judge's sequestration order.

6. *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; RCM 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).

7. 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.

8. *United States v. Henson*, 58 M.J. 529 (Army Ct. Crim. App. 2003). During the presentencing case, the defense presented good military character evidence which the government rebutted by offering extrinsic evidence of bad acts: evidence of the wrongful taking and pawning of a microwave; evidence of racially insensitive acts by appellant in the barracks; evidence of substandard performance and appearance; evidence of uniform violations; and evidence of an unkempt room. The military judge abused his discretion when, over defense's objection, he allowed extrinsic evidence to rebut the good character and reputation evidence presented by the defense. The Army Court found, however, that the error did not prejudice a material right of the appellant especially in light of the clemency recommendation made by the military judge and the convening authority's following that recommendation. The court did, however, reduce the appellant's period of confinement by one month to "moot any claim of possible prejudice." *Id*. at 533.

9. *United States v. Saferite*, 59 M.J. 270 (C.A.A.F. 2004). The appellant was charged and convicted of various offenses including larceny, and faced over 230 years confinement. After arraignment but before trial, the appellant escaped from confinement and was tried *in absentia*. The defense called the appellant's spouse to talk about him as a husband and father. In rebuttal, the government offered two sworn statements that implied that the appellant's spouse was complicit in the appellant's escape, an escape already known to the panel and for which the military judge gave an instruction on sentencing that the appellant was NOT to be sentenced for the escape. The government offered the two statements to show the witness' bias. The court held that the judge abused his discretion, under MRE 403, in admitting the statements. The court found that the government's theory of complicity was "tenuous at best" and the government improperly focused its argument on the two statements and the spouse's alleged complicity in the escape.

10. *United States v. Bridges*, 66 M.J. 246 (C.A.A.F. 2008). Under Article 59(a) UCMJ an error of law regarding the sentence does not provide a basis for relief unless the error materially prejudiced the substantial rights of the accused.

G. Surrebuttal. **RCM 1001(d)**. *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. **RCM 1001(e)**.

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. ARGUMENT. RCM 1001(G).

A. See the "Arguments" Outline for a discussion of proper and improper sentencing arguments.

V. PERMISSIBLE PUNISHMENTS. RCM 1003.

A. Reprimand. **RCM 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. **RCM 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. Automatic Forfeitures (**Art. 58b, UCMJ**). Confined soldiers from GCMs shall, subject to conditions below, forfeit all pay and allowances due them during confinement or parole. Soldiers confined as a result of SPCMs, subject to conditions below, shall forfeit 2/3 pay during confinement. Sentences covered are those which include:

a) Confinement of MORE THAN 6 months, or death, or

b) ANY confinement **AND** a punitive discharge.

3. Art. 58b, UCMJ, waiver. If an accused has dependents, the convening authority may ***waive*** any/all AUTOMATIC (i.e., Art. 58b, UCMJ) forfeitures for a period not to exceed six (6) months, with money waived to be paid to the dependents of the accused. Adjudged forfeitures may NOT be waived. See also, RCM 1101(d).

4. Effective date of forfeitures (**Art. 57(a), UCMJ**). ANY forfeiture of pay or allowances (or *adjudged* reduction) in a court-martial sentence takes effect on the earlier of:

a) fourteen (14) days after sentencing, or

b) the date on which the CA approves the sentence.

5. Deferment of forfeitures. On application of accused, CA may ***defer*** forfeiture (and reduction and confinement) until approval of sentence; but CA may rescind such deferral at any time. Deferment ceases automatically at action, unless sooner rescinded. Rescission prior to action entitles accused to minimal due process. See RCM 1101(c).

6. *United States v. Short*, 48 M.J. 892 (A.F. Ct. Crim. App. 1998). The court finds ineffective assistance of counsel when DC failed to make timely request for deferment or waiver of automatic forfeitures, notwithstanding recommendation of military judge that convening authority waive such forfeitures. Defense counsel relied on SJA office to process action for deferment and waiver.

7. *United States v. Clemente*, 46 M.J. 715, 719 (A.F. Ct. Crim. App. 1997). The CA has broad discretion in deciding to waive forfeitures, and need not explain his decision to an accused. Unlike a request for deferment of confinement, an accused does not have standing to challenge the CA's decision as to waiver of forfeitures.

8. *United States v. Zimmer*, 56 M.J. 869 (Army Ct. Crim. App. 2002). Error for the CA to deny the defense deferment request in a one-sentence action without providing reasons for the denial. Court set aside four months of confinement and the adjudged forfeitures.

9. *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* RCM 1107(d)(2), discussion.

10. 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. RCM 1003(b)(2).

11. 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* RCM 1003(b)(2).

12. *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. RCM 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 RCM 1003(b)(3) reflects this holding.

2. *United States v. Williams*, 18 M.J. 186 (C.M.A. 1984). Other than limits on cruel and unusual punishment, there are no limits on the amount of fine. Provision that fines are "normally for unjust enrichment" is directory rather than mandatory. Unless there is some evidence the accused was aware that a fine could be imposed, a fine cannot be imposed in a guilty plea case.

3. *United States v. Morales-Santana*, 32 M.J. 557 (A.C.M.R. 1990). "Because a fine was not specifically mentioned in the pretrial agreement and the military judge failed to advise the accused that a fine might be imposed, the accused may have entered a plea of guilty while under a misconception as to the punishment he might receive." The court disapproved the fine.

4. *United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992). The military judge's failure to mention fine in oral instructions did not preclude court-martial from imposing fine, where sentence worksheet submitted to court members with agreement of counsel addressed the issue.

5. *United States v. Smith*, 44 M.J. 720 (Army Ct. Crim. App. 1996). Accused pled guilty to kidnapping, rape and felony murder of child. Sentenced by MJ to DD, confinement for life, total forfeitures, reduction to E-1, and fine of $100,000.00. The military judge included a fine enforcement provision as follows: "In the event the fine has not been paid by the time the accused is considered for parole, sometime in the next century, that the accused be further confined for 50 years, beginning on that date, or until the fine is paid, or until he dies, whichever comes first." The Army Court found fine permissible punishment, but found the fine enforcement provision not "legal, appropriate and adequate." Fine enforcement provision void as matter of public policy, so court approved sentence, including fine, but without enforcement provision.

6. *United States v. Phillips*, 64 M.J. 410 (2007). Accused found guilty of various charges and was sentenced to a reprimand, 5 years, dismissal, and $400,000 fine. The military judge included a contingent confinement provision that if the fine was not paid, Phillips would serve an additional 5 year confinement. The Convening Authority reduced the fine to $300,000 and suspended for 24 months execution of the sentence adjudging a fine in excess of $200,000. Upon Phillips failure to pay the fine, the commanding general ordered a fine enforcement hearing. After the hearing, Phillips was ordered to serve an additional 5 years for willful failure to pay the unsuspended fine. CAAF held that the CG who executed the contingent confinement provision was authorized to do so and he was not required to consider alternatives to contingent confinement after concluding that Phillips was not indigent. Fine is due on the date that the Convening Authority takes action on the sentence.

D. Reduction in grade. RCM 1003(b)(4); UCMJ art. 58a.

1. "Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, that includes

a) a dishonorable or bad conduct discharge;

b) confinement; or

c) hard labor without confinement,

(1) reduces that member to pay grade E-1."

2. ARMY. The automatic reduction to pay grade E-1 mandated by Article 58a applies only to enlisted soldiers with an approved sentence, whether or not suspended, that includes EITHER a punitive discharge OR confinement of more than 180 days (if adjudged in days) or six months (if adjudged in months). AR 27-10, para. 5-29*e*.

3. NAVY. The Navy and Marine Corps' implementing regulation provides for automatic reduction to the grade of E-1 when sentence, whether suspended or not, includes EITHER a punitive discharge OR confinement in excess of ninety days or three months. JAGMAN, 0152c(1).

4. AIR FORCE. Requires, as part of the approved sentence, a reduction AND either confinement, a punitive discharge, or hard labor without confinement before an airman is "automatically reduced" HOWEVER only reduced to the grade approved as part of the adjudged sentence (i.e., there is no automatic reduction to the grade of E-1). AFI 151-201, para. 9.10 (26 Nov 03).

5. COAST GUARD. As a matter of policy does NOT permit an automatic reduction. Military Justice Manual, Commandant Instruction M5810.1D, Chapter 4, Para. 4.E.1.

a) *United States v. Combs*, 47 M.J. 330 (1997). Punishment to reduction in rank, when unlawfully imposed, warrants sentence relief. The accused's court-martial sentence included reduction to the grade of E-1, but was subsequently set aside. Pending rehearing on sentence, the accused's chain of command ordered that he wear E-1 rank on his uniform and that he get a new identification card showing his grade as E-1. The court awarded the accused twenty months sentence credit, equal to the period of time he was ordered to wear reduced rank pending a rehearing.

b) Rank of retiree, in Army, may not be reduced by court-martial, or by operation of law. *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

E. Restriction. **RCM 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. **RCM 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. **RCM 1003(b)(7)**.

1. FY98 DOD Authorization Act created new U.C.M.J. Article 56a, creating new sentence of "confinement for life without eligibility for parole." Applicable to any offense occurring after 18 Nov 97 that carries possible punishment of life. *United States v. Ronghi*, 60 M.J. 83 (2004) (holding that confinement for life without eligibility for parole was authorized punishment for accused who committed premeditated murder on January 13, 2000, which was before the President amended the MCM to incorporate Executive Order dated April 11, 2002). Sentence subject to modification only by the convening authority, or the military appellate courts, the President, or the Supreme Court.

2. *United States v. Andrade*, 32 M.J. 520 (A.C.M.R. 1990). Consecutive and concurrent sentences ("life plus five years") have never been part of military law.

3. Instruction on *Allen* Credit. *United States v. Balboa*, 33 M.J. 304 (C.M.A. 1991). Proper for military judge to instruct panel that accused would get sixty-eight days *Allen* credit. Panel adjudged a BCD, confinement for twelve months *and sixty-eight days*.

4. Contingent Confinement. *United States v. Palmer*, 59 M.J. 362 (2004). Appellant convicted of larceny of government property valued in excess of $100,000 and was sentenced to a BCD, thirty months confinement, total forfeitures, reduction to E-1, a $30,000 fine, and an additional twelve months confinement if the fine was not paid. The court held that the evidence sported a finding of "no indigency," that the appellant was afforded the process due under RCM 1113, and that the appellant's "untimely unilateral efforts to make partial payments" after the time for said payments expired did not create any obligation on the part of the CA to accept the payment or amend his action remitting the outstanding balance of the fine and ordering the appellant into confinement.

H. Punitive Separation. **RCM 1003(b)(8)**.

1. Dismissal.

a) 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 to non-commissioned warrant officers or enlisted.

3. BCD is available only to enlisted.

I. Death. RCM 1003(b)(9).

1. Death may be adjudged in accordance with RCM 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.

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 RCM 1004(c), (3) extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including aggravating factors, and (4) sentence of death.

4. *Loving v. Hart,* 47 M.J. 438, 444 (1998). In denying extraordinary writ to set aside death penalty, the CAAF held "that the aggravating factor in RCM 1004(c)(8) – that appellant was the 'actual perpetrator of the killing' – is constitutionally valid on its face, provided that it is understood to be limited to a person who kills intentionally or acts with reckless indifference to human life."

5. *United States v. Simoy*, 50 M.J. 1 (1998). Lower court approved sentence of death where accused convicted of felony murder, notwithstanding accused did not actually commit murder. On appeal, the CAAF set aside the sentence and ordered a rehearing because the military judge committed plain error in advising the panel to vote on death before life. On rehearing, accused sentenced to DD, life, and reduction to E-1. *United States v. Simoy, ACM 30496, 2000 CCA LEXIS 183 (unpub. op, July 7, 2000).*

6. Panel Membership. UCMJ art. 25a. For offenses committed after 31 December 2002 – no less than twelve members for a death sentence. "In a case in which the accused may be sentenced to a penalty of death, the number of members shall be not less than 12, unless 12 members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five, and the court may be assembled and the trial held with not less than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available."

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. **RCM 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.

1. *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.

2. *United States v. Redlinski*, 56 M.J. 508 (C.G. Ct .Crim. App. 2001), *rev'd on other grounds*, 58 M.J. 177 (C.A.A.F. 2003). Explaining how credit can be "administrative"/confinement credit applied to the approved sentence, or can be "judicial"/punishment credit applied to the adjudged sentence.

3. *United States v. Edwards*, 42 M.J. 381 (1995). When accused has received NJP for same offense, the military judge may, on defense request, give *Pierce* credit, obviating need for CA to do so.

4. *United States v. Flynn*, 39 M.J. 774 (A.C.M.R. 1994). When military judge is the sentencing authority, he is to announce the sentence and then state on the record the specific credit given for prior nonjudicial punishment in arriving at the sentence.

5. *United States v. Zamberlan*, 45 M.J. 491 (1997). Accused tested positive for THC, causing commander to vacate suspended Art. 15 punishment and also to prefer court-martial charge. Defense counsel requested instruction to panel that they must consider punishment already imposed by virtue of vacation action taken by commander with regard to suspended Art. 15 punishment. The court noted, "vacation of a suspension of nonjudicial punishment is not itself nonjudicial punishment."

6. *United States v. Bracey*, 56 M.J. 387 (2002). Appellant convicted at a special court-martial of, among other offenses, disrespect to a superior commissioned officer and was sentenced to forfeiture of $630.00 pay per month for six months, reduction to E-1, confinement for six months and a BCD. Appellant argued, for the first time on appeal, that the disobedience handled at the Article 15 and the disrespect charge arose out of the same incident thus entitling him to *Pierce* credit. The CAAF held that the 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). *See also United States v. Anastacio*, 56 M.J. 830 (C.G. Ct. Crim. App. 2002).

7. *United States v. Minyen*, 57 M.J. 804 (C.G. Ct. Crim. App. 2002). The appellant was convicted of unauthorized absence and missing movement; sentenced to eighty days confinement and a bad conduct discharge. One of the two unauthorized absence specifications was for a four and a half month absence for which the accused previously received nonjudicial punishment, specifically thirty days restriction, thirty days extra duty, and reduction to E-1. At trial, the military judge awarded the appellant thirty-three days of *Allen* credit (pretrial confinement credit) and thirty days of *Pierce* credit (prior nonjudicial punishment credit). The military judge advised the appellant that the sixty-three days credit would be deducted from the adjudged eighty day sentence. On appeal, the court noted that although the judge failed to follow the CAAF's "guidance" in *United States v. Gammons*, 51 M.J. 169, 184 (1999), by failing to state on the record how he arrived at the specific *Pierce* credit awarded, *Gammons* was nonetheless satisfied by the award of the thirty days of *Pierce* credit (fifteen days for the restriction and fifteen for the extra duty). As for the action's failure to specify the credit awarded, the court found no error, finding that the action complied with RCM 1107(f). The court did go on, however, to again recommend that a Convening Authority expressly state all applicable credits in his or her action.

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.

VI. INSTRUCTIONS. RCM 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. Hopkins,* 55 M.J. 546 (A.F. Ct. Crim. App. 2001), *aff'd*, 56 M.J. 393 (2002). The military judge sustained government's objection to the defense counsel's request that the judge instruct the members that they should consider the accused's expression of remorse as a matter in mitigation. The Air Force Court held that RCM 1005(e) lists the required instructions that must be given on sentencing and that case law "does not require the military judge to list each and every possible mitigating factor for the court members to consider."

C. *United States v. Rush,* 54 M.J. 313 (2001). Following the sentencing instructions to the members that included the standard bad-conduct discharge instruction, the defense counsel requested the ineradicable stigma instruction. The judge, without explanation as to why, refused to give the requested instruction. The CAAF held that while the military judge abused his discretion when he failed to explain why he refused to give the standard sentencing instruction after a timely request by the defense, there was no prejudice.

D. *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).

E. *United States v. Friedmann,* 53 M.J. 800 (A.F. Ct. Crim. App. 2000), *review denied*, 54 M.J. 425 (2001). During his unsworn statement, the accused told the members that others received Article 15s and general discharges for the same misconduct and to permit his commander to administratively discharge him. The military judge provided a sentencing instruction seeking to clarify for the members the administrative discharge process and the irrelevance of using sentencing comparisons to adjudge an appropriate sentence. It was not error for the judge to give the instruction.

F. *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.

G. *United States v. Perry*, 48 M.J. 197 (1998). The court upheld the military judge's decision not to instruct the panel that the accused stood to be found liable for an $80,000 recoupment by the U.S. Naval Academy for educational costs. The defense requested an instruction at sentencing, based on evidence of the practice of recoupment of the cost of education when separated prior to completion of a five year commitment due to misconduct. The defense did not, however, offer any evidence of likelihood of such recoupment in this case.

H. *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.

I. *United States v. Hall*, 46 M.J. 145 (1997). Failure of defense to object at trial to military judge's instruction regarding collateral benefits constitutes waiver. Accused captain was dependent of Air Force retiree. At sentencing phase of her court-martial, panel asked effect of dismissal on her benefits as dependent. The judge answered that neither conviction nor sentence would have any effect on benefits she would receive as a dependent. No objection by the defense to this correct instruction by the MJ.

J. *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.

K. *United States v. Burt*, 56 M.J. 261 (2002). Accused, at time of trial, was retirement eligible (i.e., 225 mos. of active service). The military judge asked the defense if they wanted an instruction, which covered the Service Secretary's authority to allow the accused to retire even if a punitive discharge was awarded. The defense objected to the instruction. The panel ultimately adjudged a BCD, which the CA approved. The CAAF rejected an IAC attack noting that the decision to object to the instruction was a reasoned tactical decision.

L. *United States v. Blough*, 57 M.J. 528 (A.F. Ct. Crim. App. 2002). Defense counsel requested a specific, detailed instruction that focused the panel on the appellant's age, performance report, lack of prior disciplinary actions, his character as reflected in several defense, the testimony of the defense witnesses, and the appellant's expressed desire to remain in the Air Force. The military judge denied the defense request and gave the panel general guidance on what they should consider on sentencing consistent with *United States v. Hopkins*, 55 M.J. 546 (A.F. Ct. Crim. App. 2001), *aff'd*, 56 M.J. 393 (2002). The military judge did NOT instruct the panel that a guilty plea (mixed plea case) was a matter in mitigation. A military judge is not required to detail each piece of evidence that may be considered by the panel in arriving at a sentencing. Rather, the judge need only give general guidelines to the members on the matters they should consider on sentencing (e.g., extenuation and mitigation such as good character, good service record, pretrial restraint, mental impairment, etc.). Also, absent plain error, failure to request an instruction or to object to an instruction as given waives any issue. The court noted that perhaps counsel had a valid tactical reason for not requesting the instruction. Finally, the court noted that even if there were error, any error was harmless.

M. *U.S. v Rasnick*, 58 M.J. 9 (2003). The military judge did not err in failing to give the "punitive discharge is an 'ineradicable' stigma" instruction despite a specific request by defense counsel when the instruction advised the members that a punitive discharge was severe punishment, that it would entail specific adverse consequences, and that it would affect appellant's future with regard to his legal rights, economic opportunities, and social acceptability. The instructions were sufficient to require the members to consider the enduring stigma of a punitive discharge." *See also United States v. Greszler,* 56 M.J. 745 (A.F. Ct. Crim. App. 2002) (observing that judge's decision to use other terms to describe a punitive discharge other than "ineradicable" not error; instruction must convey that a punitive discharge is severe punishment and other terminology may be used).

N. *United States v. Miller*, 58 M.J. 266 (2003). The military judge erred by failing to advise panel to consider appellant's pretrial confinement (three days) in arriving at an appropriate sentence. It is a mandatory instruction, therefore, waiver did not apply. The judge also failed to give a defense requested pretrial confinement sentence credit instruction. This failure was not error because although the requested instruction was correct and not covered by the other instructions, it was not on so vital a point as to deprive the appellant of a defense or seriously impair its presentation.

VII. 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. Rosendahl*, 53 M.J. 344 (2000). The accused's original approved sentence included a BCD, four months confinement, and suspended forfeitures of $150 per month for four months and suspended reduction below the grade of E-4 for six months. On rehearing, he was sentenced to a BCD and reduction to the lowest enlisted grade. The convening authority approved this sentence, again suspending reduction below the grade of E-4 for six months. The accused argued he was entitled to credit (in the form of disapproval of his BCD) for the 120 days confinement he served as a result of his first sentence. The CAAF disagreed stating that reduction and punitive separations are qualitatively different from confinement and, therefore, credit for excess confinement has no "readily measurable equivalence" in terms of reductions and separations. NOTE: The CAAF declined to address whether a case involving lengthy confinement might warrant a different result. It also distinguished this situation from the "unrelated issue of a convening authority's clemency power to commute a BCD to a term of confinement."

C. *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.

D. *United States v. Chapa III*, 57 M.J. 140 (2002). Failure to raise RCM 305(k) credit waives the issue, absent plain error.

E. *United States v. King*, 58 M.J. 110 (2003). Failure to raise *Mason* credit (i.e., pretrial restriction tantamount to confinement) waives the issue, absent plain error.

F. *United States v. Coreteguera*, 56 M.J. 330 (2002). When placed into PTC, the appellant was forced to run to several windows yelling he "couldn't get it right," was made to sing the Air Force song or "song of choice," and was asked by a cadre member whether he wanted to pawn "this" jewelry while being shown a pair of shackles. The appellant was in pretrial confinement for, in part, pawning government computers. Additionally, appellant was made to perform duties similar to post-trial inmates BUT not with the inmates. The military judge denied the defense's motion for additional credit under Article 13. The judge found no intent to punish on the part of the cadre, the conditions of confinement were not unduly harsh or rigorous, and the actions of AF personnel were not excessively demeaning or of a punitive nature. The CAAF held that discomforting administrative measures and "de minimis" imposition on detainees, even if unreasonable, do not warrant credit under Article 13. As for the work, the court looked to the nature, duration, and purpose of the work to determine whether it was punitive in nature – it was not, therefore, no credit. The court noted that although the judge did not err in denying the credit, the court did not "condone" the actions of the AF personnel.

G. *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.

H. *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."

I. *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 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, as further reduced by any clemency granted by the convening authority, unless the pretrial agreement provides otherwise.*

J. *United States v. Josey*, 58 M.J. 105 (2003). Service member spent thirty months and twenty-eight days in post-trial confinement before the findings in his case was partially set aside. On reassessment, the CA only approved forfeiture of $600 pay/month for four months and reduction from E-8 to E-6. Appellant argued he was entitled to sentence credit against both forfeitures and the reduction. The CAAF disagreed, finding that "reprimands, reductions in rank, and punitive separations are so qualitatively different from other punishment that conversion is not required as a matter of law." *See also United States v. Stirewalt*, 58 M.J. 552 (C.G. Ct. Crim. App. 2003); *United States v. Rosendahl*, 53 M.J. 344 (2000).

K. *United States v. Rendon*, 58 M.J. 221 (2003). RCM 305(k) credit for non-compliance with RCM 305(f), (h), (i), or (j) does NOT apply to restriction tantamount to confinement UNLESS restriction rises to the level of physical restraint depriving appellant of his or her freedom (i.e., equivalent of actual confinement) (abrogating *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)).

L. *United States v. Oliver*, 56 M.J. 779 (A.F. Ct. Crim. App. 2002). A day of pretrial confinement warrants *Allen* credit unless that day is the day the accused is sentenced, then the day counts as post-trial confinement.

M. *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).

N. *United States v. Inong*, 58 M.J. 460 (2003). "[F]ailure at trial to raise the issue of illegal pretrial punishment waives that issue for purposes of appellate review absent plain error," overruling *United States v. Huffman*, 40 M.J. 225 (C.M.A. 1994). Additionally, *United States v. Southwick*, 53 M.J. 412 (2000) and *United States v. Tanksley*, 54 M.J. 169 (2000) were overruled to the extent that they establish a "'tantamount to affirmative waiver rule' in the Article 13 arena."

O. *United States v. Regan*, 62 M.J. 299 (2006). After the third positive test, Regan's commander gave her the choice of voluntarily admitting herself for inpatient treatment or going into pretrial confinement. The military judge concluded that appellant was really given no choice at all and based on the "totality of the conditions imposed" and "the facts and circumstances" of the case, the time appellant was in the treatment facility (twenty-one days) amounted to restriction tantamount to confinement and determined that appellant was entitled to *Mason* credit. However, the military judge denied the defense motion for additional credit under R.C.M. 305(k) for failure to comply with the requirements of R.C.M. 305. Affirmed.

VIII. DELIBERATIONS AND VOTING. RCM 1006.

A. What May be Considered. **RCM 1006.**

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.

a) RCM 705(e). Except in a court-martial without an MJ, no member of a court-martial shall be informed of the existence of a PTA.

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. Deliberations and Voting on Sentence. **UCMJ art. 52, RCM 1006.**

1. Number of votes required:

a) Death – unanimous.

b) Confinement for more than ten years – at least three-fourths of the members.

c) All other sentences – at least two-thirds of the members.

2. *Garrett v. Lowe*, 39 M.J. 293 (C.M.A. 1994). Members must vote on sentences in their entirety. Accordingly, it was error for the court to instruct jurors that only two-thirds of the members were required to vote for sentence for felony murder, where that sentence must, by law, include confinement for life.

3. *United States v. Weatherspoon*, 44 M.J. 211 (1996). Court-martial panel asked if must impose confinement for life, or merely vote for life, in premeditated murder conviction. The military judge advised the members that sentence must include confinement for life, but they could, collectively or individually, recommend clemency. The judge made clear individual rights of members to recommend clemency.

4. *United States v. Thomas*, 46 M.J. 311 (1997). In capital sentencing procedures under RCM 1004(b)(7), the President extended to capital cases the right of having a vote on the least severe sentence first. At sentencing phase of accused's capital court-martial, the judge instructed the panel first to vote on a death sentence, and if not unanimous, then to consider a sentence of confinement for life and other types of punishments. The CAAF held RCM 1006(d)(3)(A) required voting on proposed sentences "*beginning with the least severe*." *See also United States v. Simoy*, 50 M.J. 1 (1998) (holding that the military judge committed plain error when he fails to advise a panel to vote on the sentences in order of least severe to most severe).

IX. ANNOUNCEMENT OF SENTENCE. RCM 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.

1. *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.

2. *United States v. Goddard*, 47 M.J. 581 (N-M. Ct. Crim. App. 1997). Upon a rehearing the N-M Ct. Crim. App. set aside appellant's conviction for maltreatment because the evidence was legally and factually insufficient, but affirmed a conviction for the lesser-included offense of a simple disorder, the court then reassessed appellant's sentence. 54 M.J. 763 (N-M Ct. Crim. App. 2000). In case alleging maltreatment and fraternization, judge, in announcing finding of guilty, stated offense against one victim was "tantamount to rape." The court noted comments of judge were mere surplusage on findings, but raised concern that the judge may have based sentence on more serious crime of rape, than maltreatment alleged. The ordered a rehearing on sentence.

3. *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. Polling prohibited (MRE 606; RCM 1007(c)).

X. IMPEACHMENT OF SENTENCE. RCM 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 (MRE 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. RCM 1008; MRE 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. Almeida*, 19 M.J. 874 (A.F.C.M.R. 1985) (finding 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) (holding that blood expert witness who had dinner with the members was not err because extensive *voir dire* established the lack of taint).

d) *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.[1]

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 RCM 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.

[1] *See United States v. Howell*, 16 M.J. 1003 (A.C.M.R. 1983) (Naughton, J. concurring) (finding it improper for the trial counsel to argue that the appellant would not serve the full confinement time adjudged by the members because of "good-time" credit).

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).

E. *United States v. McConnell*, 46 M.J. 501 (A.F. Ct. Crim. App. 1997). To impeach a sentence that is facially proper, the claimant must show that extraneous prejudicial information, outside influence, or command influence had an impact on the deliberations. Accused asserted in post-trial submissions that the panel was confused over how the period of confinement and BCD would affect his retirement. The court noted unique personal knowledge of a court member might constitute extraneous prejudicial information, but "general and common knowledge that a court member brings to deliberations is an intrinsic part of the deliberative process."

F. *United States v. Combs*, 41 M.J. 400 (C.M.A. 1994). Court member's statement that accused would have received a lighter sentence if there had been evidence of cooperation did not reflect consideration of extraneous prejudicial information which could be subject of inquiry into validity of sentence.

XI. RECONSIDERATION OF SENTENCE. RCM 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 unless 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. With a view to increasing sentence – may reconsider only if at least a majority votes for reconsideration.

2. With a view to decreasing sentence – may reconsider if the following vote:

a) For death sentence, only one vote to reconsider required.

b) For sentence of life or more than ten years, more than one-fourth vote for reconsideration.

c) For all other sentences, more than one-third vote for reconsideration.

D. Objections Required. *United States v. Moreno*, 41 M.J. 537 (N-M. Ct. Crim. App. 1994). Rule for Courts-Martial 1109 does not permit members to consider increasing a sentence when a request for reconsideration has been made with a view to decreasing the sentence and accepted by the affirmative vote of less than a majority of the members. The judge erred when he indicated that the members could "start all over again" and consider the full spectrum of authorized punishments once any request for reconsideration had been accepted, without regard to whether it was with a view to increasing or decreasing the sentence.

XII. APPELLATE REVIEW.

1. Under Article 59(a) UCMJ an error of law regarding the sentence does not provide a basis for relief unless the error materially prejudiced the substantial rights of the accused. *United States v. Bridges*, 66 M.J. 246 (C.A.A.F. 2008).


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ARGUMENTS

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MAJ Sean Mangan
Spring 2012

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ARGUMENTS

Outline of Instruction

I. INTRODUCTION.

A. General.

1. At its core, an argument is a claim supported by reasons. JOHN D. RAMAGE & JOHN C. BEAN, WRITING ARGUMENTS, 43 (1989).

2. According to Black's Law Dictionary, arguments are "the remarks of a counsel in analyzing and pointing out or repudiating a desired inference, for the assistance of a decision-maker." Black's Law Dictionary 102 (7th ed. 1999).

3. These definitions are important for understanding the difference between opening statements and arguments. In opening statements, counsel comment on what the evidence *is*. In argument, counsel comment on what the evidence *means* (what inferences should be drawn) and why this evidence is trustworthy or not.

4. The rules reflect that distinction.

a) Argument is not allowed in the opening statement. In opening statement, counsel should confine their remarks to evidence they expect to be offered and a brief statement of the issues in the case. R.C.M. 913(b) discussion.

b) Argument is allowed on motions (R.C.M. 905(h)), findings (R.C.M. 919), and sentencing (R.C.M. 1001(g)).

B. Cross-reference: the Findings and Sentencing Outline and Evidence Outline.

1. See those outlines for a complete discussion of matters that may be introduced by the parties and considered by the factfinder during the merits and presentencing proceedings.

II. PROCEDURE.

A. Control of argument by the military judge.

1. The military judge may exercise reasonable control over argument, R.C.M. 801(a)(3).

2. A military judge may restrict argument to reasonable limits in the exercise of sound discretion. However, the military judge may not arbitrarily limit the defense counsel's argument. *United States v. Dock*, 20 M.J. 556 (A.C.M.R. 1985).

3. Remedies for improper argument.

a) Military judge can sua sponte stop the argument. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975); *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983).

b) Military judge can give a curative instruction. *United States v. Carpenter*, 29 C.M.R. 234 (C.M.A. 1960); *United States v. Horn*, 9 M.J. 429 (C.M.A 1980).

c) Military judge can require a retraction from counsel. *United States v. Lackey*, 25 C.M.R. 222 (C.M.A. 1958).

d) Military judge can declare a mistrial. *United States v. O'Neal*, 36 C.M.R. 189 (C.M.A. 1966); *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986).

e) Counsel must cease argument once military judge rules on issue in question. *United States v. Warnock*, 34 M.J. 567 (A.C.M.R. 1991).

B. Motions argument.

1. Upon request, either party is entitled to an Article 39(a) session to present oral argument. R.C.M. 905(h).

C. Findings argument.

1. Trial counsel argues first, then defense counsel shall be permitted to reply, and then the trial counsel shall then be permitted to present rebuttal. R.C.M. 919(a).

2. The trial counsel's rebuttal argument is generally limited to matters argued by the defense. If trial counsel introduces new matter in rebuttal, then the defense counsel should be allowed to reply in rebuttal. However, the trial counsel will be allowed to make the final argument. R.C.M. 919(b) discussion.

D. Sentencing Argument.

1. Trial counsel argues first, then defense counsel. R.C.M. 1001(a)(1), (g).

2. The military judge has the discretion to permit rebuttal sentencing arguments. R.C.M. 1001(a)(1)(F), (d).

a) As a general rule, there is no right of government counsel to present rebuttal argument because the government does not have a burden of proof during presentencing proceedings in non-capital cases. *United States v. McGee*, 30 M.J. 1086 (N.M.C.M.R. 1989). The propriety of permitting such argument is dependent upon the need to address matters newly raised by the defense in its sentencing argument. *Id*.

3. Absent "good cause" the military judge should not permit departure from the order of argument set forth in R.C.M. 1001(a)(1).

a) *United States v. Budicin*, 32 M.J. 795 (N.M.C.M.R. 1990). Military judge erred by allowing trial counsel to argue last but defense counsel waived error by not objecting.

b) *United States v. Martin*, 36 M.J. 739 (A.F.C.M.R. 1993). Trial counsel should not be routinely permitted to choose whether to argue first or last on sentencing.

E. Waiver of argument.

1. *United States v. McMahan*, 21 C.M.R. 31 (C.M.A. 1956). Defense counsel has a right and duty to argue and should only waive argument in unusual circumstances.

2. Defense counsel are not required to argue but need to have sound reasons for not doing so. *United States v. Sadler*, 16 M.J. 982 (A.C.M.R. 1983) (defense counsel was ineffective when he did not present any favorable matters or argue during the presentencing proceeding).

3. Trial counsel may waive argument. R.C.M. 919(a) analysis, at A21-68.

III. FINDINGS ARGUMENT

A. Counsel may comment on the evidence in the case, including inferences to be drawn from the evidence. R.C.M. 919(b).

1. Counsel may comment on the testimony, conduct, motives, and evidence of malice of witnesses to the extent supported by the evidence. R.C.M. 919(b) discussion.

2. Counsel may argue as though the testimony of their witnesses conclusively established the facts related by them. R.C.M. 919(b) discussion.

3. Counsel may not argue facts not in evidence. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975) (It is error for counsel to include inadmissible hearsay in findings argument).

4. Counsel may not argue irrelevant matters. M.R.E. 401, 402, 403. *But see United States v. Jefferson*, 22 M.J. 315 (C.M.A. 1986) (defense counsel should have been permitted to inform members of mandatory minimum life sentence to impress seriousness of offense upon them).

5. Counsel may not argue evidence beyond its limited purpose. *United States v. Sterling*, 34 M.J. 1248 (A.C.M.R. 1992). Accused was charged with two specifications of use of cocaine based on two positive urinalysis tests. Trial counsel improperly argued that one test corroborated the other.

B. Counsel may comment generally on contemporary history or other matters of common knowledge.

1. *United States v. Jones*, 11 M.J. 829 (A.F.C.M.R. 1981); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005) (references to public figures must be generic and not specific details of sensationalized topics).

C. 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; however, the guilty plea inquiry and stipulation of fact may be used to satisfy the common elements of a greater offense if the pled to charge is LIO of the contested charge. *United States v. Abdullah*, 37 M.J. 692 (A.C.M.R. 1993); *United States v. Rivera*, 23 M.J. 89, 95 (C.M.A. 1986); *United States v. Flores*, 69 M.J. 651 (A.F. Ct. Crim. App. 2010).

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. *United States v. Grijalva,* 55 M.J. 223 (C.A.A.F. 2001). 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.

D. Counsel may not make inaccurate reference to law or cite legal authority to the members.

1. *United States v. McCauley*, 25 C.M.R. 327 (C.M.A. 1958) (it was error for trial counsel to read from case in the Court-Martial Reports); *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983) (citing Wigmore before the panel).

E. Counsel should not argue the nonexistence of evidence after a successful suppression motion.

1. *ABA Standards for Criminal Justice*, Standard 4-7.8 and its Commentary: "A lawyer who has successfully urged the court to exclude evidence should not be allowed to point to the absence of that evidence to create an inference that it does not exist." The few reported cases on this issue take the position that such an argument misrepresents the facts to the tribunal.

2. Counsel may not mention evidence that has been suppressed or suggest that other evidence exists. *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983).

3. *State v. McNeely*, 664 P.2d 277 (Idaho Ct. App. 1983). After the defense successfully suppressed currency and cocaine, the prosecution filed a motion in limine to prevent the defense from arguing that the state produced no evidence because it had no evidence. The trial court granted the motion, and the Idaho Court of Appeals affirmed, citing treatises and commentary for the proposition that it is a form of misrepresentation for counsel to argue the absence of evidence when it is absent only because it was suppressed.

4. *Pritchard v. State*, 673 P.2d 291 (Alaska Ct. App. 1983) ("Defense counsel clearly has the right to argue in support of a Scotch verdict, *i.e.*, that the prosecution has failed to sustain its burden of proof. . . . He may not, however, state to be true something he knows to be false. Thus, for example, he may not base his argument on the nonexistence of evidence which in fact was present but was suppressed on motion by the defense.")

5. *State v. Provost*, 741 A.2d 295 (Conn. 1999). The defense claimed the prosecutor had committed misconduct by suppressing the statements of several witnesses and then arguing that the defense produced no evidence that a witness had an improper motivation for identifying the defendant. Citing, *inter alia*, the *McNeely* case for the proposition that it is improper to argue the nonexistence of suppressed evidence, the court nevertheless held under the facts of the instant case, the prosecutor had not argued improperly.

F. Trial counsel may not comment on the probable effect of the court-martial's findings on relations between the military and civilian community. R.C.M. 919(b) discussion.

IV. SENTENCING ARGUMENT

A. Counsel may refer to generally accepted sentencing philosophies. R.C.M. 1001(g).

1. These include rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. R.C.M. 1001(g).

2. General deterrence is a proper subject of argument. *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980).

B. Counsel may recommend a specific lawful sentence. R.C.M. 1001(g).

1. Counsel need to remember that the sentence is not about whether the accused stays in the service or not, but whether the accused deserves a *punitive* discharge.

a) *United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992). Trial counsel improperly blurred distinction between a punitive discharge and administrative separation by arguing "would you really want this individual working for you? I don't think so. . . . Is this really the individual . . . that we need in the United States Air Force?."

b) *See also United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

2. Trial counsel may inform members of maximum penalty which court-martial may impose. *United States v. Capps*, 1 M.J. 1184 (A.F.C.M.R. 1976).

a) However, trial counsel may not comment on "the average sentence." *United States v. Simmons*, 31 M.J. 884 (A.F.C.M.R. 1990). Trial counsel improperly explained that "average" sentence was mathematical average between no punishment and the possible maximum punishment.

3. Defense counsel may argue for a specific sentence. *See generally United States v. Goodman*, 33 M.J. 84 (C.M.A. 1991).

4. Counsel may generally argue for any legal sentence regardless of limitations contained in a pretrial agreement. *United States v. Rivera*, 49 C.M.R. 838 (A.C.M.R. 1975); *United States v. Rich*, 12 M.J. 661 (A.C.M.R. 1981).

a) However, counsel may not make misleading arguments. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992) (finding error in government's disingenuous argument for leniency as to confinement which was designed to enhance punishment by operation of the pretrial agreement). Trial counsel may not argue for a quantum of punishment greater than that court-martial may adjudge. R.C.M. 1001(g).

C. Counsel may comment on any evidence properly introduced on the merits.

1. This includes evidence of other offenses or acts of misconduct, even if introduced for a limited purpose, and evidence relating to any mental impairment or deficiency of the accused. R.C.M. 1001(f).

D. Counsel may comment on matters that arise during the providence inquiry.

1. This includes uncharged misconduct, if the evidence otherwise satisfies R.C.M. 1001(b)(4) and M.R.E. 403. *United States v. Arceneaux*, 21 M.J. 571 (A.C.M.R. 1985); *United States v. Holt*, 22 M.J. 553 (A.C.M.R. 1986).

2. See the "Findings and Sentencing Outline" for a discussion of the procedures required for using the providence inquiry.

E. Counsel may comment on matters introduced pursuant to R.C.M. 1001(b).

1. Counsel may not argue facts not in evidence or introduced for a limited purpose.

a) *United States v. Shoup*, 31 M.J. 819 (A.F.C.M.R. 1990). Trial counsel improperly mentioned facts not in evidence by arguing to the military judge "This is the third drug case you have heard this week; there were many before and there will be many more in the future...Over twenty people died in Panama a few weeks ago trying to stop drugs from coming into this country."

b) Trial counsel may not comment on uncharged misconduct that comes up as impeachment evidence during the presentencing proceeding. *United States v. White*, 36 M.J. 306 (C.M.A. 1993). In trial for drug use based on positive urinalysis, the trial counsel cross-examined a defense character witness regarding uncharged second positive urinalysis. Trial counsel erred by arguing that "we are not just talking about one use of Cocaine."

2. Trial counsel cannot take proper rehabilitation testimony and then state that the inference to draw from that testimony is that the accused should not be in the service.

a) *United States v. Hampton*, 40 M.J. 457 (C.M.A. 1994). A stipulation of expected testimony admitted during presentencing stated that in the witness' opinion, the accused did not have any rehabilitative potential. During sentencing argument, trial counsel stated that the expected

testimony was that accused "doesn't have rehabilitative potential, doesn't deserve to be in the Army." The court held that even if trial counsel's misstatement is characterized as a reasonable inference drawn from the expected testimony, such argument is still improper.

3. Counsel may argue impact on unit or service if there is evidence that the accused's crimes affected the unit.

a) *United States v. Simmons*, 31 M.J. 884 (A.F.C.M.R. 1990). Trial counsel's argument in drug case that "[w]e're going to find out who uses drugs when a plane crashes" was improper where the accused's duty was to clean airplanes and there was no evidence that appellant's use of amphetamines affected his duty.

b) *United States v. Spears*, 32 M.J. 934 (A.F.C.M.R. 1991). Trial counsel's argument that an inspection which revealed a missing meal card had an impact on the entire unit was not a reasonable inference. If trial counsel want to make an argument that the crime affected the unit, the trial counsel need to introduce proper sentence evidence under R.C.M. 1001(b)(4).

F. Counsel may comment generally on contemporary history or other matters of common knowledge.

a) *United States v. Barrazamartinez*, 58 M.J. 173 (C.A.A.F. 2003). The war on drugs is common knowledge and so permissible for comment.

b) *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005) (references to public figures must be generic and not specific details of sensationalized topics).

G. Counsel may comment on the accused's status as officer or NCO, but not duty position.

1. Counsel may mention accused's status as officer or NCO. *United States v. Everett*, 33 M.J. 534 (A.F.C.M.R. 1991). NCO status of accused was appropriate aggravating factor in drug use case.

2. However, counsel may not argue that an accused should receive greater punishment because of their *duty position*, unless their position was integral to the commission of the offense. *United States v. Rhodes*, 64 M.J. 630, 632 (A.F. Ct. Crim. App. 2007), *United States v. Skidmore*, 64 M.J. 655, 661 (C.G. Ct. Crim. App. 2007).

H. Commenting on collateral consequences.

1. Generally, the collateral consequences of a sentence are not relevant to the sentencing decision and are not allowed to be argued in sentencing. *United States v. Griffin*, 25 M.J. 423 (C.M.A. 1988).

2. Loss of VA benefits is a relevant consideration on sentencing. *United States v. Stargell*, 49 M.J. 92 (C.A.A.F. 1998).

3. Effect of sentence on retirement benefits is relevant.

a) Defense counsel may introduce evidence of the effect of a punitive discharge on retirement benefits. *See* Military Judges' Benchbook para. 2-5-22. The instruction must be given if requested and:

(1) The accused has sufficient time in service to retire;

(2) For an enlisted accused, the accused has sufficient time left on his current term of enlistment to retire without having to reenlist;

(3) For an accused that is a commissioned or warrant officer, it is reasonable that the accused would be permitted to retire but for a punitive discharge.

b) *See also United States v. Washington*, 55 M.J. 441 (C.A.A.F. 2001); *United States v. Boyd*, 55 M.J. 217 (C.A.A.F. 2001); *United States v. Luster*, 55 M.J. 67 (C.A.A.F. 2001); *United States v. Becker*, 46 M.J. 141 (C.A.A.F. 1997); *United States v. Greaves*, 46 M.J. 133 (C.A.A.F. 1997); *United States v. Sumrall*, 45 M.J. 207 (C.A.A.F. 1996); *United States v. Polk*, 47 M.J. 116 (C.A.A.F. 1997).

c) *United States v. Stargell,* 49 M.J. 92 (C.A.A.F. 1998). Trial counsel argued the accused, with nineteen and a half years, will get an honorable retirement unless the panel gave him a BCD. Military judge provided curative instruction to panel.

4. The availability of a subsequent administrative discharge is not relevant. *United States v. Briggs*, 69 M.J. 648 (A.F. Ct. Crim. App. 2010).

I. Defense counsel may comment that a plea of guilty is a mitigating factor. R.C.M. 1001(f).

J. Defense counsel may argue for a punitive discharge if the accused consents.

1. The accused's consent must be indicated on record. *United States v. Holcomb*, 43 C.M.R. 149 (C.M.A. 1971); *United States v. Williams*, 21 M.J. 524 (A.C.M.R. 1985) (argument urging discharge presumed prejudicial unless accused consents); *United States v. Robinson*, 25 M.J. 43 (C.M.A. 1987) (erroneous argument urging military judge to adjudge a suspended discharge, despite accused's desire to remain in the service, held not to be prejudicial).

2. The standard for reversal when a defense counsel concedes a punitive discharge without consent is whether it is reasonably likely that the concession affected the sentence. *United States v. Quick*, 59 M.J. 383, 387 (C.A.A.F. 2004).

3. The military judge should question the accused to determine whether he concurs with defense counsel's argument for a discharge. *United States v. McNally*, 16 M.J. 32, 35 (C.M.A. 1983) (Cooke, J. concurring). The Military Judges' Benchbook contains a colloquy at para. 2-7-27.

4. The military judge need not question the accused if a discharge is highly likely. *United States v. Volmar*, 15 M.J. 339 (C.M.A. 1983).

5. *See also United States v. Bolkan*, 55 M.J. 425 (C.A.A.F. 2001); *United States v. Pineda,* 54 M.J. 298 (C.A.A.F. 2001); *United States v. Adame*, 57 M.J. 812 (N-M. Ct. Crim. App. 2003).

6. Defense counsel may argue only for a bad-conduct discharge in lieu of confinement but not a dishonorable discharge or "a punitive discharge." *United States v. Dotson*, 9 M.J. 542 (C.G.C.M.R. 1980); *United States v. McMillan*, 42 C.M.R. 601 (A.C.M.R. 1970).

K. Defense counsel cannot argue irrelevant matters that are raised in the unsworn statement.

1. If the accused, in the unsworn statement, mentions irrelevant matters, the military judge may issue a *Friedmann* instruction. This typically arises when the accused mentions the punishments that other co-accused in the case have received. This

instruction comes from *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000). The instruction tells the panel that those comments are irrelevant.

2. *See also United States v. Barrier*, 61 M.J. 482 (C.A.A.F. 2005) (the right to allocution is broad, and largely unfettered, but it is not without limits); *United States v. Sowell*, 62 M.J. 150 (C.A.A.F. 2005).

3. For more discussion on what matters may be covered in an unsworn statement, see the "Findings and Sentencing" Outline.

L. Defense counsel cannot argue for reconsideration of the findings.

1. Defense counsel may not argue during the sentencing argument that the panel should reconsider their findings on the merits. *United States v. Vanderslip*, 28 M.J. 1070 (N.M.C.M.R. 1989). The fact that members may reconsider findings does not authorize a request for reconsideration.

V. COMMENTS THAT IMPLICATE FUNDAMENTAL RIGHTS.

A. Trial counsel may not comment on the accused's exercise of a fundamental right.

1. *Griffin v. California*, 380 U.S. 609 (1965); R.C.M. 919(b) discussion.

B. Right to remain silent at trial.

1. The basic rule is that if the accused does not speak (sworn or unsworn) at trial and his counsel does not otherwise open the door, then the trial counsel cannot make any comments to the panel that suggest that they should draw a negative inference from that failure to speak.

2. If the accused remains silent at trial, the trial counsel cannot comment on that election.

a) The fact that a witness has asserted the right against self-incrimination cannot be considered as raising any inference unfavorable to either the accused or the government. M.R.E. 301(f)(1).

b) Trial counsel may not argue that the prosecution's evidence is unrebutted if the only rebuttal could come from the accused or if the members would naturally and necessarily interpret the summation as comment on the failure of the accused to testify. R.C.M. 919(b) discussion; *United States v. Paige*, 67 M.J. 442 (C.A.A.F. 2009); *United States v. Flores*, 69 M.J. 366 (C.A.A.F. 2011).

(1) To make sense of this statement, note that it applies when the defense presents its own evidence at trial. If the defense puts on some evidence, the government can generally say that the parts of its case that the defense did not respond to are unrebutted – unless the only way the defense could respond to the government's case would be for the accused to testify, and the accused elected not to testify. *United States v. Carter*, 61 M.J. 30 (C.A.A.F. 2005); *United States v. Paige*, 67 M.J. 442, 454 (C.A.A.F. 2009) (Stucky, J., dissenting).

(2) Note that even if an argument does not comment on the right to remain silent, the same comment may improperly imply that the accused has the burden of proof (see paragraph 5 below).

c) *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Trial counsel's use of rhetorical questions in argument which focused on "unanswered

questions" was improper indirect comment on accused's failure to testify and failure to produce witnesses. These comments essentially amounted to a rhetorical cross-examination of a mute accused.

d) *United States v. Harris*, 14 M.J. 728 (A.F.C.M.R. 1982). Trial counsel's comment that case before court was "one-on-one" and that government case was uncontroverted was impermissible comment on accused's election not to testify.

e) *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). Military judge ruled that trial counsel's comments in opening improperly referenced the accused's election of rights. The military judge issued curative instructions and polled the members. These corrective actions kept error harmless beyond a reasonable doubt.

3. If the accused does speak at trial, then the trial counsel can make certain comments.

a) Accused elects to testify on the merits.

(1) If the accused elects to testify on the merits regarding an offense charged, and during that testimony, the accused does not deny or explain specific incrimination facts introduced by the government, the trial counsel may comment on that failure to explain those facts during closing argument on the findings. R.C.M. 919(b) discussion.

(2) The "mendacious accused."

(a) If the accused elects to testify, the trial counsel may comment on the fact that the accused's merits testimony differed from the ultimate findings. Here, the accused has testified on his own behalf on the merits and then the factfinder has found him guilty contrary to that testimony. Can the trial counsel state that the accused's testimony was a lie and that he should get a greater sentence for lying?

(b) Courts have held that the answer is yes, but only as an indication of the accused's rehabilitative potential and with a limiting instruction. Any over-emphasis by the trial counsel may be inflammatory argument. *United States v. Warren*, 13 M.J. 278 (C.M.A. 1982).

(c) The "mendacious accused" instruction is found in the Military Judge's Benchbook in paras. 2-5-23 and 2-6-1, and for capital cases at para. 8-3-38.

(d) Military judges should act with caution when giving this instruction *sua sponte* over defense objection, but to do so is not error. *United States v. Ryan*, 21 M.J. 627 (A.C.M.R. 1985)

(e) Trial counsel may should avoid language like "hasn't accepted responsibility for his actions" and "hasn't' faced up to what he did" because that comes dangerously close to improper comment on accused's exercise of fundamental rights. *United States v. Standifer*, 31 M.J.

742 (A.F.C.M.R. 1990). *See also United States v. Jenkins*, 54 M.J. 12 (C.A.A.F. 2000).

b) Accused makes an unsworn statement.

(1) If the accused elects to make an unsworn statement during the presentencing proceeding, trial counsel may comment on the *nature* of an accused's unsworn statement. Trial counsel can point out that the unsworn statement has less evidentiary value than a sworn statement but cannot ask the court to draw an adverse inference against the accused for making an unsworn rather than a sworn statement. *United States v. Breese*, 11 M.J. 17 (C.M.A. 1981). *See also United States v. Marsh*, __ M.J. __ (C.A.A.F. 2011).

4. In-court demeanor and lack of remorse.

a) If the accused elects to speak at trial, trial counsel may comment on the accused's demeanor and lack of remorse.

(1) Don't confuse this type of demeanor (in-court physical responses to questioning) with the type of demeanor (out-of-court physical responses to questioning) described in *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011).

(2) Trial counsel may comment on the accused's lack of remorse provided the trial counsel can do so without commenting on the accused's exercise of a fundamental right. The argument must come from evidence that is before the court-martial and not arise because the accused did not do something while exercising a fundamental right. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992). *See also United States v. Garren,* 53 M.J. 142 (C.A.A.F. 2000).

(3) The proper foundation for commenting on an accused's lack of remorse is: the accused has either testified or made an unsworn statement, and has either expressed no remorse or his expressions of remorse can be arguably construed to be shallow, artificial, or contrived. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992).

(4) *United States v. Toro*, 37 M.J. 313 (C.M.A. 1993). Trial counsel's comment that the accused did not "acknowledge [the] finding of guilty" in his unsworn statement was not plain error. Such argument may be a proper comment on the accused's lack of remorse.

(5) *United States v. Carroll*, 34 M.J. 843 (A.C.M.R. 1992). Demeanor of an accused who does testify is evidence.

b) However, the demeanor of non-testifying accused is not evidence.

(1) *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Trial counsel improperly referred to accused as the "iceman." Commenting on the demeanor of a non-testifying accused can violate the rules against arguing facts not in evidence, the rules against using character evidence, and the rules against commenting on a fundamental right. Defense counsel should object on all grounds.

(2) *See also United States v. Paxton,* 64 M.J. 484 (C.A.A.F. 2007) (when the accused does not testify or give an unsworn statement, a lack of remorse argument must be based on other evidence in the record); *see generally United States v. Cook*, 48 M.J. 64 (C.A.A.F. 1998).

C. Right to remain silent during the investigation.

1. Trial counsel (or a government witness) cannot comment that an accused affirmatively invoked his rights during the investigation

a) The fact that the accused during official questioning and in the exercise of rights under the Fifth Amendment or Article 31 remained silent, refused to answer certain questions, or requested counsel is inadmissible against the accused. M.R.E. 301(f)(3); *United States v. Frentz*, 21 M.J. 813 (N.M.C.M.R. 1985); *United States v. Palumbo*, 27 M.J. 565 (A.C.M.R. 1988).

2. Non-verbal communication and silence.

a) Trial counsel may not comment on pre-trial silence and physical responses to official questioning. Trial counsel may comment on out-of-court, non-verbal communication that is not in response to official questioning.

b) The primary case in this area is *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011). Clark established this framework:

(1) Decide what type of "demeanor" is at issue. (Don't confuse this with "in-court demeanor," which is the response to questioning in the courtroom. That is discussed above.)

(a) "Testimonial demeanor" is essentially pre-trial silence and physical responses to official questioning. This type of "demeanor" may not be commented on.

(i) A person's failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation. M.R.E. 304(h)(3).

(ii) "A lack of response or reaction to an accusation is not 'demeanor' evidence, but a failure to speak." *United States v. Alameda*, 57 M.J. 190 (C.A.A.F. 2002). After an investigator informed the accused that he was going to be apprehended, the accused did not say anything and stared straight ahead. The investigator testified about that at trial and the trial counsel argued that this lack of response reflected his consciousness of guilt. The admission of the testimony and the argument was error. *But see United States v. Pope*, 69 M.J. 328 (C.A.A.F. 2011).

(b) "Non-testimonial demeanor" is essentially out-of-court, non-verbal communication that is not in response to official questioning. Provided this evidence is otherwise admissible, trial counsel may comment on it.

c) *See also United States v. Moran*, 65 M.J. 178 (C.A.A.F. 2007) (without deciding error, the court found that comments on the accused's invocation of rights was harmless beyond a reasonable doubt); *United States v. Flores*, 69 M.J. 366 (C.A.A.F. 2011) (commenting that an accused has not been forthcoming of her version of the facts during the investigation, when the accused does not testify, is fraught with danger); *see generally* Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little, Reassessing the Probative Value of Silence*, U. Louisville L. Rev. 21 (2008).

3. Trial counsel may not comment on the failure of the defense to call witnesses or testify at the Article 32. R.C.M. 919(b) discussion.

4. Trial counsel can comment on whether the accused makes inconsistent statements to investigators.

a) If the accused makes inconsistent statements to investigators, the trial counsel may be able to argue that those statements show that the accused has not accepted responsibility for his actions. *United States v. Garren,* 53 M.J. 142 (2000).

D. Right to silence before the investigation.

1. A defendant's silence before an arrest and rights warning does not violation the Constitution when used to impeach the defendant's testimony. *Jenkins v. Anderson*, 447 U.S. 231 (1980).

E. Comments that shift the burden of proof.

1. An improper implication that the accused carries the burden of proof on an issue of guilt violates due process. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004).

2. Use of the words "uncontradicted," "uncontroverted," and "unrebutted."

a) These words can improperly imply that the accused has an obligation to produce evidence and witnesses to contradict the government's case. These types of comments improperly imply that the burden has shifted to the defense. *United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005).

3. Pointing out that the defense did not call witnesses or produce evidence.

a) Counsel cannot comment on the an accused's failure to call witnesses. *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990); *United States v. Swoape*, 21 M.J. 414 (C.M.A. 1986).

b) *United States v. Turner*, 30 M.J. 1183 (A.F.C.M.R. 1990). During argument trial counsel presented a list of facts court would have to find before the panel could find the accused innocent. This was erroneous statement that shifted the burden of proof to the accused but was not prejudicial.

4. Counsel may want to look to the framework for commenting on the right not to testify before making these types of comments. If the defense has not presented *any* evidence (similar to not speaking at trial), then the trial counsel should not

make any "unrebutted evidence" comments. If the defense has put on *some* evidence (similar to speaking at trial), then the trial counsel can comment on the failure to present other evidence along with any other weaknesses in the defense case. *See generally United States v. Paige*, 67 M.J. 442 (C.A.A.F. 2009).

F. Right to counsel.

1. The fact that the accused during official questioning and in the exercise of rights under the Fifth Amendment or Article 31 remained silent, refused to answer certain questions, or requested counsel is inadmissible against the accused. M.R.E. 301(f)(3).

2. *United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990). Trial counsel improperly commented on accused's invocation of right to counsel.

G. Right to plead not guilty.

1. *United States v. Jones*, 30 M.J. 898 (A.F.C.M.R. 1990). It was impermissible for trial counsel to argue that accused should not be considered for rehabilitation because he had failed to admit his responsibility by pleading not guilty. *See also United States v. Turner*, 30 M.J. 1183 (A.F.C.M.R. 1990).

H. Right to confront witnesses.

1. *United States v. Carr*, 25 M.J. 637 (A.C.M.R. 1987). Trial counsel may not argue the adverse impact flowing from the accused's exercise of his constitutional rights to confront and cross-examine witnesses against him.

2. However, it may be permissible to elicit "a brief reference to the effect of the entire proceeding (including, but not limited to, the trial) on Appellant's victim." *United States v. Stephens*, 67 M.J. 233 (C.A.A.F. 2009).

I. Defense opens the door – the "invited response" or "invited reply."

1. If the defense says in opening statement that the accused will testify or produce certain evidence or call certain witnesses, places the issue before the members, or gives a disingenuous argument, the defense opens the door to government comment. *See generally United States v. Robinson*, 485 U.S. 25 (1988).

2. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). The defense counsel defense counsel brought up the issue of why an interview with investigators ended and argued that it ended because the contents of the written statement were false. In fairness, the government was allowed to argue that the accused never saw the contents of the statement to even know if the contents were false and did not sign the statement because he invoked his right to counsel. The court was still troubled by the government's repeated references to the invocation of rights.

3. *United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992). When defense counsel proffers anticipated testimony of a potential witness and then does not call that witness, the defense opens the door to a proper government response.

4. *United States v. Webb*, 38 M.J. 62 (C.M.A. 1993). Trial counsel properly commented that defense counsel did not live up to the promise he made during his opening statement to present an alibi witness.

5. *United States v. Haney*, 64 M.J. 101 (C.A.A.F. 2006). Not plain error when government commented on accused's invocation of right to silence and failure to seek counsel when those facts were introduced by the defense and integral to the defense theory.

6. *See also United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005); *United States v. Lewis*, 69 M.J. 379 (C.A.A.F. 2011); *see generally United States v. Turner*, 30 M.J. 1183, 1184 (A.F.C.M.R. 1990); *Jenkins v. Anderson*, 447 U.S. 231 (1980).

J. Standard of review. *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011).

1. Whether there has been an improper reference to the exercise of a constitutional right is a question of law that is reviewed *de novo*.

2. If the defense counsel objected at trial, the test for prejudice is harmless beyond a reasonable doubt.

3. If the defense counsel did not object at trial, apply plain error analysis. *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011). To find plain error, the appellant must show:

a) Error;

b) The error was plain or obvious; and

c) The error material prejudiced the accused's substantial rights.

VI. INFLAMING PASSIONS RATHER THAN HARD BUT FAIR BLOWS.

A. Counsel should not make arguments that are calculated to inflame passions.

1. R.C.M. 919(b) discussion. The line between that and hard but fair blows is not always easy to see.

B. Counsel may not refer to accused or witnesses in *unduly* demeaning terms.

1. *United States v. Erickson,* 65 M.J. 221 (C.A.A.F. 2007). Trial counsel erred by comparing the accused with Hitler, Saddam Hussein, and Osama bin Laden, and described the accused as a demon belonging in hell. Defense counsel did not object at trial, however, so the court tested for plain error under prosecutorial misconduct standards and under that high standard found no prejudice.

2. *United States v. Quarles*, 25 M.J. 761 (N.M.C.M.R. 1987). During findings argument, trial counsel characterized the accused as a prurient sex fiend and a deviant pervert. This improperly urged the members to cast aside reason and to impermissibly convict based on the accused alleged deviant character.

3. *United States v. Waldrup*, 30 M.J. 1126 (N.M.C.M.R. 1989). Portraying accused as a "despicable and disgusting" man who took advantage of the "sacred" relationship between a mother and child was improper.

4. *United States v. Barrazamartinez*, 58 M.J. 173 (C.A.A.F. 2003). The appellant pled guilty to wrongfully importing marijuana into the United States across the border from Mexico. At sentencing, the trial counsel argued that the appellant's actions were abhorrent because the United States was engaged in a war on drugs. He also argued that the appellant was "almost a traitor" because he brought drugs into the country when the nation was trying to stop drugs from coming into the country. Although the trial counsel's use of the word "traitor" was a matter of concern, it did not rise to the level of unduly inflaming the passions or prejudices of the panel members.

5. *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986). Trial counsel's argument that accused was a degenerate scum and miserable human being was properly based on evidence in the record.

6. Comparing a defense witness to Hitler was improper. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975).

C. Asking the panel to "imagine" or "Golden Rule" arguments.

1. Counsel may not ask members to place themselves in position of victim's relative when determining punishment. *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976).

2. Counsel may not ask the panel to place themselves in the position of the victim, as in, use the word "imagine." *United States v. Baer,* 53 M.J. 235 (C.A.A.F. 2000). Trial counsel to asked the members to "imagine being [the victim] sitting there as these people are beating him," and "imagine the pain and agony . . . you can't move. You're being taped and bound almost like a mummy. Imagine as you sit there as they start binding." The court stated that such "Golden Rule arguments" are impermissible and improper. The court also warned that "trial counsel who make impermissible Golden Rule arguments and military judges who do not sustain proper objections based upon them are risking reversal." *See also United States v. McClary*, 68 M.J. 606 (C.G. Ct. Crim. App. 2010) (error to ask the panel to imagine what it would be like to have your neck squeezed while being choked). *But see United States v. Edmonds*, 36 M.J. 791 (A.C.M.R. 1993); *United States v. Melbourne*, 58 M.J. 682 (N-M. Ct. Crim. App. 2003).

3. However, counsel can ask the members to *consider* the fear and pain of the victim. *United States v. Baer,* 53 M.J. 235 (C.A.A.F. 2000).

D. Arguing that if the accused stays in the service, then the accused might cause them future, personal harm (potential future victim).

1. Counsel cannot a panel full of aviators to put themselves in an aircraft that might hypothetically be repaired in the future by the accused and then instill the fear in them that that hypothetical aircraft would crash. *United States v. Marsh*, __ M.J. __ (C.A.A.F. 2011).

E. Arguing that an acquittal would have a negative impact on the command.

1. *United States v. Causey*, 37 M.J. 308 (C.M.A. 1993). In urinalysis case, trial counsel argued that if members accepted accused's innocent ingestion defense they would "hear it a million times again" in their units. Court held this improperly inflamed members with fear that urinalysis program would break down.

F. Appealing to personal interests of sentencing authority.

1. *United States v. Nellum*, 21 M.J. 700 (A.C.M.R. 1985). It was improper for trial counsel to ask the military judge if he wanted the accused walking the streets of the judge's neighborhood.

VII. CLEARLY IMPERMISSIBLE ARGUMENT.

A. Counsel may not make racist comments.

1. Counsel should not make arguments that are calculated to inflame prejudices. R.C.M. 919(b) discussion.

2. *United States v. Lawrence*, 47 M.J. 572 (N.M. Ct. Crim. App. 1997). Trial counsel" rebuttal argument referring to testimony by the accused and his "Jamaican brothers" was plain error and was unmistakenly pejorative, even if trial counsel did not intend to evoke racial animus.

3. *United States v. Thompson*, 37 M.J. 1023 (A.C.M.R. 1993). Trial counsel improperly argued that accused dealt drugs because of the "stereotypic view of what the good life is, Boyz in the Hood - drug dealing - sorry to say, the black male and the black population. But nevertheless, it is that look, it is that gold chain, it is that nice car that epitomizes a successful individual."

4. *United States v. Rodriguez*, 60 M.J. 87 (C.A.A.F. 2004). In a case involving a Latino accused, the prosecutor made a passing reference to a "Latin movie" during closing argument. The court declined to adopt a *per se* prejudice test for statements about race, but it did caution that improper racial comments could deny an accused a fair trial.

5. The trial counsel's use of the phrase "chilling with his boy" in describing a defense witness's association with the appellant was at the least insensitive sarcasm and could have been racist. *United States v. Walker*, 50 M.J. 749 (N-M. Ct. Crim. App. 1999).

B. Counsel may not argue a personal opinion or belief.

1. Counsel should not express a personal belief or opinion as to the truth or falsity of any testimony or evidence. R.C.M. 919(b) discussion; *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983).

a) Counsel should not phrase argument in personal terms. *United States v. Horn*, 9 M.J. 429 (C.M.A. 1980) (trial counsel's repeated use of term "I think" during argument was improper); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

b) Telling the panel members that a witness testified truthfully and using the word "clearly" is not improper. *United States v. McClary*, 68 M.J. 606 (C.G. Ct. Crim. App. 2010).

c) Counsel may not express personal opinion as to guilt of accused. *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

d) *United States v. Terlep*, 57 M.J. 344 (C.A.A.F. 2002). Appellant, charged with burglary and rape, pled to LIOs of the unlawful entry and battery. In his argument, trial counsel noted that the victim had to undergo a rape protocol kit at the hospital and suffer the feelings of being "violated" and "contaminated" on the night the appellant entered her home. In rebuttal, the trial counsel stated: "[the victim] has weathered the storm of this whole incident with dignity and with a courageous spirit to get up there and tell you what happened that night, to tell you the truth." On appeal, the court found that the trial counsel's argument did not constitute plain error. The court noted that the argument did not personally vouch for the victim's credibility in general or with respect to her allegation of rape.

2. Expression of personal opinion by defense counsel does not confer license on trial counsel to respond in kind. *United States v. Young*, 470 U.S. 1 (1985).

C. Counsel may not disparage or malign the other counsel.

1. *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005).

D. Trial counsel may not to refer to the convening authority or argue command policies.

1. R.C.M. 1001(g).

2. *United States v. Thomas*, 44 M.J. 667 (N-M. Ct. Crim. App. 1996). Trial counsel argued in drug case that "the CNO . . . has a zero tolerance policy for anyone who uses any kinds of drugs." Court found TC reference improper, and noted, "references to command or departmental policies have no place in the determination of an appropriate sentence in a trial by court-martial." Error for military judge not to give instruction even though defense counsel failed to object.

3. *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983). Military judge had *sua sponte* duty to correct counsel's improper comments on Strategic Air Command policies on drugs.

4. *United States v. Sparrow*, 33 M.J. 139 (C.M.A. 1991). It was improper for the trial counsel to mention the convening authority by name and then to tell the members to "do the right thing."

5. *United States v. Simpson*, 12 M.J. 732 (A.F.C.M.R. 1981). It was error for trial counsel to argue that referral to special court-martial was exercise of clemency by convening authority.

6. *United States v. Fortner,* 48 M.J. 882 (N-M. Ct. Crim. App. 1998). Trial counsel's reference in closing argument to Navy core values did not constitute improper reference to higher authority, as prohibited in RCM 1001(g). Such values are aspirational concepts that do not require specific punishment for failure to comply.

E. Counsel may not make misleading arguments.

1. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992) (finding error in government's disingenuous argument for leniency as to confinement which was designed to enhance punishment by operation of the pretrial agreement). Trial counsel may not argue for a quantum of punishment greater than that court-martial may adjudge. R.C.M. 1001(g).

2. *United States v. Martinez*, 30 M.J. 1194 (A.F.C.M.R. 1990). Where the government allowed an accused to plead guilty as an aider and abettor in providing the gun to actual shooter, it could not then argue that the accused pulled the trigger.

VIII. EFFECT OF FAILURE TO OBJECT TO IMPROPER ARGUMENT

A. The Waiver Rule.

1. Failure to object to improper argument constitutes waiver. *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986).

a) If the defense counsel does not object, appellate courts will infer that the argument is not that offensive; if it was, the defense counsel would have objected. *See United States v. Jenkins*, 54 M.J. 12 (C.A.A.F. 2000).

b) *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Where three possible objections to argument existed and defense counsel only made one, other two were waived.

c) An objection by opposing counsel is the most appropriate response to an erroneous argument. *See United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992).

d) *United States v. Desiderio*, 30 M.J. 894 (A.F.C.M.R. 1990). Defense counsel's failure to object during trial counsel's argument constituted waiver, even though defense counsel stated in his argument, "Now I didn't

say anything during [trial counsel's] argument as he stood up and talked about the impact of drug use on the mission and that kind of thing. It probably was objectionable."

2. Findings. Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection. R.C.M. 919(c).

3. Sentencing. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection. R.C.M. 1001(g).

B. The Plain Error Exception.

1. Failure to object does not waive plain error. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986); *United States v. Williams*, 23 M.J. 776 (A.C.M.R. 1987). *See also United States v. Young*, 470 U.S. 1 (1985).

2. In order to constitute plain error, the error must:

a) Be obvious and substantial; and

b) Have had an unfair prejudicial impact.

3. In some circumstances, prejudice is not necessary. *United States v. Thompson*, 37 M.J. 1023, (A.C.M.R. 1993). Trial counsel's racist sentencing argument was found to be plain error, despite the fact that it did not prejudice the accused's sentence.


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MILITARY RULES OF EVIDENCE

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MAJ Rebecca F. Kliem

Spring 2012

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MILITARY RULES OF EVIDENCE

Outline of Instruction

I. GENERAL PROVISIONS.

A. Rule 101.

1. Scope. The Military Rules of Evidence are applicable to courts-martial, including summary courts-martial, to the extent and exceptions stated in Rule 1101.

2. Rule 1101.

Rule 1101. Applicability of rules

(a) Rules applicable. Except as otherwise provided in this Manual, these 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.

(b) Rules of privilege. The rules with respect to privileges in Section III and V apply to all stages of all actions, cases, and proceedings.

(c) Rules relaxed. The application of these rules may be relaxed in sentencing proceedings as provided under R.C.M. 1001 and otherwise as provided in this manual.

(d) Rules inapplicable. These rules (other than with respect to privileges and MRE 412) do not apply 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 code or this Manual and not listed in subdivision (a).

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3. 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 103. Rulings on Evidence.

1. Rulings on Evidence. This rule imposes significant responsibility on counsel to raise and preserve evidentiary questions for review.

Rule 103. Ruling on Evidence

(a) Effect of Erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record; stating the specific ground of objection, if the specific ground was not apparent from the context;

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United Sates as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard

(d) Plain error. Nothing in these rules precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

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2. Objections to evidence. Rule 103(a)(1): Failure to make specific (correct), timely (meaning at the earliest possible time) objection at trial waives issue for appeal, absent a "plain error;"

3. Preserving Issues. Counsel are not required to cite evidentiary rules by number in order to adequately preserve objections for later appellate review. So long as counsel makes sufficient arguments to make the issue known to the military judge, the issue will be preserved. *United States v. Datz*, 61 M.J. 37 (2005). While MRE 103 does not require the moving party to present every argument in support of an objection, it does require argument sufficient to make the military judge aware of the specific ground for objection. MRE 103 should be applied in a practical rather than a formulaic manner. *United States v. Reynoso*, 66 M.J. 208 (2008).

4. 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).

5. 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).

6. 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).

C. Rule 105. Limited Admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the military judge, upon request, shall 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 rule, 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, the specific language to use. The limiting instruction may be given at the time the evidence is received or as part of the general instructions, or at both times.

D. Rule 106. Remainder of or Related Writings or Recorded Statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

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 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. 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." The military judge erred in not allowing the defense to introduce the first statement.

II. RELEVANCY AND ITS LIMITS

A. Rule 401: Definition of "Relevant Evidence"

Rule 401. Definition of "Relevant Evidence."

"Relevant evidence" means 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.

1. Establishing Relevancy - A basic tenet of American jurisprudence is that finders of fact may consider only relevant evidence. 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. The logical starting place when evaluating any issue at trial is the concept of relevance. Almost every issue in evidence law involves the idea of relevance. In fact, 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.)

2. Requirements of Counsel. When a counsel seeks to have evidence admitted, she must be able to specify what issue it relates to and show how it rationally advances the inquiry about that issue. Counsel should be prepared to articulate why certain requested evidence is relevant 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.

3. Standard of "Any Tendency" – is the lowest possible standard for relevancy. This standard shifts the emphasis from admissibility to weight. The test for logical relevance (as opposed to legal relevance discussed 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.

   a) *United States v. Huet-Vaughn*, 43 M.J. 105 (1995). Army reserve physician's motives and reasons for refusing to support Desert Shield and views about the lawfulness of her deployment orders irrelevant to charge of desertion with intent to avoid hazardous duty.

   b) *United States v. Schlamer*, 52 M.J. 80 (1999). Accused was charged with the premeditated murder of a female. 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.

c) *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.

4. 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.

5. 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 require that evidence be relevant in order to be admitted and that irrelevant evidence be excluded. Finally, Rule 403 allows the military judge to use discretion to avoid admitting otherwise relevant evidence due to concerns about 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 for the Main Relevancy Provisions: 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 will be based on information most people would believe have something to do with the issues at trial.

c) Discussion of Rule 402 and 403: A more detailed discussion of Rules 402 and 403 are contained within this outline.

B. Relationship of Rules 401 and 104.

1. Preliminary Questions. The military judge decides questions of admissibility of evidence under Rule 104. They are determined solely by the military judge, not the "court" and the judge is not bound by the rules of evidence, except those with respect to privileges. Because relevancy is a condition for admissibility, it is one of the issues the military judge is intended to decide.

2. When faced with deciding a relevancy objection, the military judge has four basic choices with respect to ruling on the issue:

   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 Conditioned Upon Proof of a Predicate 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 whether she believes the evidence or she believes the government 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).

   a) The military judge should ask the following questions:

      (1) 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;

      (2) 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.

C. Relationship of Rules 401 and 402.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

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1. Exclusion of relevant evidence:

   a) The Rule states all relevant evidence is admissible except evidence which falls into any one of the following five categories:

(1) evidence that violates the Constitution;

(2) evidence that violates the Uniform Code of Military Justice;

(3) evidence that violates the Manual for Courts-Martial;

(4) evidence that violates the Military Rules of Evidence; and

(5) evidence that violates any Congressional limitation which might specifically concern courts-martial.

b) Other relevant evidence may be excluded under Rule 403.

2. Applying Rule 402. Irrelevant evidence is never admissible. It is not 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.

D. Relationship of Rules 401 and 403.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Although relevant, evidence may be excluded if its probative value is 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.

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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 codifies judicial discretion. It is the rule by which the legal relevance is ascertained. Saltzburg, Schinasi & Schleuter state that while Rule 403 has broad application throughout the Military Rules of Evidence, "its greatest value may be in resolving Rule 404(b) issues" because of the low threshold of proof required to establish extrinsic events. *See* 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 reduced 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 evidence 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.

III. CHARACTER EVIDENCE

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

(a) *Character evidence generally*. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of the accused*. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a pertinent trait of character of the alleged victim of the crime is offered by an accused and admitted under Mil. R. Evid. 404(a)(2), evidence of the same trait of character, if relevant, of the accused offered by the prosecution.

(2) *Character of the alleged victim*. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide or assault case to rebut evidence that the alleged victim was an aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Mil. R. Evid. 607, 608, and 609.

A. Rule 404. Character Evidence.

1. Common Sense: If you wanted to hire someone to clean your house, would you pay attention to information about the person's trustworthiness? If you knew an applicant had a conviction for theft, selling stolen items, or burglary, would that affect your hiring decision?

2. Basic Rule: Evidence of a person's character may NOT be introduced to support an inference that the person acted on a specific occasion in conformity with that character.

3. "Courts that follow the common-law tradition 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).

4. Prohibited Propensity Inference – you cannot use a person's character to suggest that the person did something because of a propensity to do such things. PROHIBITED: SPC Smiffy has sold stolen items in the past — therefore he must have sold stolen items in the current court-martial. Rule 404(a).

B. Permissible Propensity Inference

1. In certain situations you can use propensity evidence to show a person acted in conformity with their character. It is important to master these exceptions in order to avoid confusion.

a) Pertinent Character Traits Offered by the Accused – the accused may offer any pertinent character trait which makes it unlikely that she committed the charged offense (Rule 404(a)(1)). 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.

(1) 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).

(2) The formula could be applied in the following scenarios:

	Pertinent
Offense	**Character Trait**
Larceny	Trustworthiness or Honesty
Drunkenness	Sobriety

(3) An accused's general good military character is a pertinent character trait if there is a nexus, however strained or slight, between the crime circumstances and the military. The defense, in virtually every case, and certainly in every "military" offense prosecution, may attempt 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).

(4) Rebuttal by Government of Good Character of Accused – if an accused introduces good character evidence (or any other pertinent character trait), the government is allowed to rebut this with bad character evidence to suggest that the accused is guilty. 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).

(5) 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). 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.

(6) Accused's Sexual Propensities – proof of an accused's sexual propensities in sex offense courts-martial is specifically allowed. Rules 413 and 414 (treated in greater detail later in this outline).

b) Character of Victim – 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).

(1) Rebuttal by Government of Character of Victim – the government is allowed to rebut with character evidence about the victim in any of the following situations:

(2) In situations where the accused offers a pertinent character trait of the alleged victim, the government may rebut the accused's evidence with their own character evidence of the victim. Rule 404(a)(2).

(3) Additionally, in situations where the accused offers a pertinent character trait of the alleged victim, that opens the door for the government to offer 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). (June 2002 Amendment)

(4) ALSO, in homicide and assault cases, the government may introduce character evidence to prove the peaceful character of the victim in order to rebut a claim made in any way that the victim was an 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).

c) 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 Nonpropensity 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. 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. Rule 404(b) (treated in greater detail later in this outline).

IV. UNCHARGED MISCONDUCT

Rule 404(b). Other crimes, wrongs, or acts

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

A. Rule 404(b). Uncharged Misconduct.

1. Understanding the Rule: Although proof of an individual's character through evidence of other crimes, wrongs, or acts to show action in conformity (propensity) with that character on a specific occasion is not allowed (except in sexual offense cases and certain other limited circumstances), it can be admitted if it is introduced for a nonpropensity purpose. Nonpropensity evidence (uncharged misconduct) is not offered to prove that an individual acted in conformity with that individual's character on a particular occasion. Nonpropensity evidence is offered to prove such things as **K**nowledge, **I**ntent, **P**lan, **P**reparation, **O**pportunity, **M**otive, **I**dentity, and **A**bsence of Mistake (KIPPOMIA). The list in Rule 404(b) is NOT exhaustive: 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. 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. 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 nonpropensity theory of logical relevance for the uncharged misconduct evidence, the military judge will have discretion to admit or exclude the evidence.

4. Some Nonpropensity 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: first, the act(s) must support an inference of some mental state AND 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 casualty. 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. Sweeny*, 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 M.R.E. 404(b).[1] 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

[1] The three-part test of *Reynolds* is: (1) Does the evidence reasonably support a finding by the court members that the appellant committed the prior crimes, wrongs, or acts?; (2) What fact of consequence is made more or less probable by the existence of this evidence?; AND (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice?

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 held that the evidence could have been admitted to evaluate the truthfulness of the witness's claim of memory loss, but not to show appellant's consciousness of guilt. But see *United States v. Staton*, 68 M.J. 569 (A.F. Ct. Crim. App. 2010) (holding that evidence of the accused's attempt to intimidate

a former trial counsel by driving his car at at her at a high rate of speed could be admitted under 404(b) as evidence of his consciousness of guilt in his trial for assault consummated by battery upon a child under 16 years of age).

(2) *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 a carefully tailored instruction appropriately mitigated the dangers that defense articulated, that the evidence would be used for the wrong purpose. The Court used the *Reynolds* test to determine admissibility.

B. *Reynolds* 3-Part Test for Admissibility of Rule 404(b) Evidence.

1. The CAAF follows the 3-pronged test set out in *United States v Reynolds* when reviewing whether a military judge abused her discretion in admitting uncharged acts under Rule 404(b). 29 M.J. 105 (C.M.A. 1989). FIRST: ***Does the evidence reasonably support a finding that the appellant committed the prior crimes, wrongs, or acts?***

a) 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.

b) 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).

2. ***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 necessary link, the past bad act evidence is excluded.

3. ***Is the evidence's probative value substantially outweighed by the danger of unfair prejudice?***

C. The *Reynolds'* Analysis

1. In *United States v. Diaz*, 59 M.J. 79 (2003), the government introduced evidenced 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). In applying the second prong of *Reynolds*, the 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. Hays*, 62 M.J. 158 (2005). The Appellant was convicted possessing child porn and soliciting the rape of a child. The issue on appeal was whether the solicitation conviction was tainted by improper introduction of uncharged misconduct. The evidence at issue 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).

6. *United States v. Harrow*, 62 M.J. 649 (A.F. Ct. Crim. App. 2006). The important aspect of this case is not that the *Reynolds* analysis was done, but the fact it was done in such detail. This fact is explained by the AFCCA in the opinion when they state: "Before leaving this issue, however, we 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 AFCCA opinion contained interesting dicta on the difference between M.R.E. 404(b) and F.R.E. 404(b). However, the CAAF elected to ignore the AFCCA dicta and instead concentrate on the second prong of the Reynolds' test regarding whether the evidence was relevant to show the appellant's intent or absence of mistake. *United States v. Harrow*, 65 M.J. 190 (2007).

7. *United States v. Booker*, 62 M.J. 703 (A.F. Ct. Crim. App. 2006). May evidence be admitted under M.R.E. 404(b) to show an accused's consciousness of guilt? Yes. Evidence may be admitted under M.R.E. 404(b) to show an accused's consciousness of guilt. The relevant evidence need not fit exactly into one of the

pigeon holes described under M.R.E. 404(b) so long as the evidence is offered for a purpose other than to show the accused's predisposition to commit the crime.

8. *United States v. Thompson*, 63 M.J. 228 (2006). The Appellant was convicted of wrongful use, possession and distribution of marijuana. The issue on appeal was whether the military judge erred in admitting evidence of uncharged misconduct. The uncharged misconduct involved two pretrial statements by the Appellant that contained information about his preservice drug use. The appellant maintained the uncharged misconduct served no legitimate purpose and merely painted him as a habitual drug user. The CAAF focused on the second *Reynolds* prong. The Court 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.

D. Limiting the Admissibility of 404(b) Evidence

1. 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).

2. 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).

3. 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).

4. 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 accused alleged error based on the admission of uncharged misconduct which had been the subject of a not guilty finding at a prior court martial. ACMR found the military judge properly applied Rule 404(b) and 403, noting that the COMA in *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987) and the Supreme Court in *Dowling v. United States*, 493 U.S. 342 (1990) already held that "collateral estoppel does not preclude using otherwise admissible evidence even though it was previously introduced on charges of which an accused has been acquitted."

V. METHODS OF PROVING CHARACTER

Rule 405. Methods of proving character

(a) *Reputation or opinion*. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct*. In cases in which character or a trait of character of a person is an essential element of an offense or defense, proof may also be made of specific instances of the person's conduct.

(c) *Affidavits*. 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.

A. Rule 405. Form of proof.

1. Rule 405 is best understood as a rule that governs "how" a proponent may prove character or a character trait, not "whether" they may prove a particular character or character trait. The rule applies in those situations where "character is in issue" (likely only entrapment cases) and in certain instance 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) Nonpropensity purpose under Rule 404(b). If one of the stated purposes of introduction under Rule 404(b) (KIPPOMIA – Knowledge, Intent, Plan, Preparation, Opportunity, Motive, Identity, or Absence 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 victim's traits under Rule 412. This rule allows the government or defense, in specific relatively rare instances, to use character evidence. Rule 405 does not govern the method of proof. Under Rule 412, if character evidence is allowed, it may only be proven by extrinsic specific acts.

   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, the 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. The findings as to premeditated murder and sentence were reversed.

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.

VI. RULE 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS.

(a) In general. Except as otherwise provided in this rule, evidence of the following is not admissible in any court-martial proceeding against the accused who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the Government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) 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, or (ii) in a court-martial proceeding for perjury or false statement if the statement was made by the accused under oath, on the record and in the presence of counsel.

(b) Definitions. A "statement made in the course of 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" include the written statements submitted by the accused in furtherance of such request.

1. Rule 410. 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).

VII. THE "RAPE SHIELD" – RULE 412

Rule 412. Sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition

(a) *Evidence generally inadmissible*. The following evidence is not admissible in any proceedings involving alleged sexual misconduct 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.

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) 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;

(B) 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

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

A. Rule 412. Background History.

1. It was once not that uncommon for an accused to introduce the sexual history of an alleged victim in order to suggest that she was unchaste, and therefore likely not to be telling the truth when she testified or had consented to the sexual contact with the accused. 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. The rule is intended to shield victims from personal questions about their sexual history that have little if any relevance in the court-martial.

2. Understanding the Rule: the logical premise behind the rule is that evidence of a person's past sexual conduct rarely is relevant to the question of how a person acted sexually on a specific occasion. This logical premise is in conflict with that advanced under Rules 413 and 414 (requiring admission of evidence of an accused's past sexual offenses as relevant to the question of an accused's sexual conduct on a specific occasion).

3. Rule 412 makes specific instances of past sexual behavior of an alleged victim generally inadmissible. In specific, relatively rare instances, the government or the accused may offer specific acts of conduct by the alleged victim. However, reputation and opinion evidence of the past sexual behavior of an alleged victim of alleged sexual misconduct **appears**, under the rule, to be inadmissible. Rule 412(a) and (b). The Court of Military Appeals has stated, however, "we have 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).

4. The rule's protections depend on the **status** and **presence** of a victim, rather than whether the offense is consensual. *United States v. Banker*, 60 M.J. 216 (2004).

The 2007 Amendment clarifies 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.

5. Under Rule 412, there are three stated exceptions to the general rule:

a) *Someone else is the source of the evidence*: if the trial counsel has introduced evidence of semen, injury, or other physical evidence, the defense must be allowed to introduce the victim's past sexual behavior if relevant to show another was the source of the evidence. Rule 412(b)(1)(A).

b) *Evidence of past accused-victim sexual behavior on the issue of consent*: this may be offered by the accused to prove consent or by the prosecution to prove lack of consent. Rule 412(b)(1)(B).

(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. The rape shield provisions aim to protect the victim from harassment and humiliation, but those ends are not served by excluding evidence of open, public displays of sexually suggestive conduct. Findings and sentence were set aside.

c) *Evidence constitutionally required to be admitted*: Under Rule 412(b)(1)(C), 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)(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,* 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(b)(1)(c). While the balancing test itself is not per se unconstitutional, it can be applied in an unconstitutional manner. If evidence is constitutionally required, and it survives 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. 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.

(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 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 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 servicemember 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 M.R.E. 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.

B. Rule 412. Requirements for admission.

1. As a foundational matter the proponent must show: The act is relevant for one of the specified purposes in Rule 412(b); where the act occurred; when the act occurred; AND who was present;

2. Proponent (typically the defense) must show that its probative value outweighs the danger of unfair prejudice to the alleged victim's privacy.

   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 members 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 under Rule 403. (Note that the 2007 Amendment to 412 (c) specifically states, "Such evidence is still subject to challenge under Mil. R. Evid. 403.") Hence, evidence admissible under Rule 412 may nevertheless be excluded under Rule 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.

VIII. EVIDENCE OF SIMILAR CRIMES IN SEXUAL ASSAULT CASES AND CHILD MOLESTATION CASES

Rule [413][414]. Evidence of Similar Crimes in [Sexual Assault][Child Molestation Cases]

(a) In a court-martial in which the accused is charged with an offense of [sexual assault][child molestation], evidence of the accused's commission of one or more offense of [sexual assault][child molestation] is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) [definitions of "offenses of sexual assault" and "child molestation"].

A. Rule 413/414.

1. Rule 413 states that "evidence of the accused's commission of one or more offenses of sexual assault is admissible." Rule 414 has similar language for child molestation. The rules were written to overcome perceived restrictive aspects of Rules 404(a) and (b). Rules 413 and 414 represent a rejection of the traditional prohibitions on propensity evidence. This rejection resulted from three main criticisms of Rule 404(b) in sex offense cases: Rule 404(b) requires trial counsel to articulate a nonpropensity purpose; the military judge always has discretion under Rule 403 to exclude the evidence; AND the limiting instruction from the military judge prohibited the government from using the evidence to show a propensity to commit sexual offenses.

2. Congressional Response: Rules 413 and 414 were enacted by Congress on 13 September 1994, 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 Congress' specific intention that the courts "must 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. In order to admit evidence under Rules 413 or 414, three threshold determinations must be made:

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. Once the evidence meets the threshold requirements of Rule 413 or Rule 414, a military judge must apply the balancing test of Rule 403 under which the testimony may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members. A military judge must consider several nonexclusive factors in performing the required balancing of probative value and prejudicial effect. These include: strength of proof of the prior act--conviction versus 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. *United States v. Wright*, 53 M.J. 476, 482 (2000).

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 did not need to be applied. The court stated that a military judge is required to conduct a Rule 403 balancing test prior to admitting evidence under either Rules 413 or 414.

b) *United States v. Wright*, 53 M.J. 476 (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 offense that he pled guilty to under Rule 413 to prove propensity to commit indecent assault against D. The defense claimed that Rule 413 was unconstitutional. The CAAF rejected this argument, following the rationale of the Federal Circuit Courts on both due process and equal protection grounds.

c) *United States v. Henley*, 53 M.J. 488 (2000). Accused convicted of committing oral sodomy on his natural son and daughter. At trial, the government introduced incidents outside the statute of limitations under both Rules 414 and 404(b). The trial court admitted if for both purposes. The Air Force Court admitted it under Rule 404(b) and said that they did not need to address the Rule 414 issue. The CAAF agreed with the Air Force Court's approach and affirmed. The CAAF did go on to say, in light of their opinion in *Wright*, that Rule 414 is constitutional and this evidence would have been admissible under that rule 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. 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. ***ARMY MILITARY JUDGES, AFTER ADMITTING EVIDENCE UNDER RULE 413, HAVE A LIMITED SUA SPONTE DUTY TO INFORM MEMBERS OF THE FOLLOWING:***

   a) The accused is not charged with this other sexual assault offense;

   b) the Rule 413 evidence should have no bearing on their deliberations unless they determine the other offense occurred;

   c) if they make that determination, they may consider the evidence for its bearing on any matter to which it is relevant in relation to the sexual assault offenses charged;

   d) the Rule 413 evidence has no bearing on any other offense charged;

   e) they may not convict the accused solely because they may believe the accused committed other sexual assault offenses or has a propensity or predisposition to commit sexual assault offenses;

   f) they may not use Rule 413 evidence as substitute evidence to support findings of guilty or to overcome a failure of proof in the government's case, if any;

   g) each offense must stand on its own and they must keep the evidence of each offense separate; and

   h) the burden is on the prosecution to prove the accused's guilt beyond a reasonable doubt as to each and every element of the offenses charged. *United States v. Dacosta*, 63 M.J. 575 (Army Ct. Crim. App. 2006).

   i) *United States v. Schroder*, 65 M.J. 49 (2007). This case highlights the need for a *Dacosta*-esque instruction. The military judge properly admitted the uncharged misconduct under M.R.E. 414, but failed to adequately instruct the members on its proper uses. The failure to properly instruct the members was harmless error. The CAAF determined that the military judge's instruction fell short of what was required when M.R.E. 414 evidence is admitted at trial. The 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." Namely that the similarities between the charged and uncharged misconduct could, standing alone, convict the appellant. The CAAF pointed to the Military Judges Benchbook, instruction 7-13-1, and also favorably cited the *Dacosta* opinion and its suggested instruction. While not mandating the *Dacosta* instruction, the CAAF stated the members "must be instructed that the introduction of such propensity evidence [under M.R.E. 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.

6. *United States v. Bare*, 65 M.J. 35 (2007). The appellant, a thirty-four-year-old E-5 with thirteen years of active service, 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 KB, the appellant's sister 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 M.R.E. 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 M.R.E. 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 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 M.R.E. 403 analysis. The CAAF considered, whether, in light of *Berry* and *McDonald*, the military judge error 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, the military judge did not abuse his discretion in admitting evidence of uncharged, but similar molestation. The 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 M.R.E. 414.

7. *United States v. Yammine*, 69 M.J. 70 (C.A.A.F. 2010). Over defense objection, the government admitted 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).

   a) 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). 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)).

   b) 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).[2] 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.

   c) 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

[2] In *Miller*, CAAF held that an accused cannot be convicted of with indecent liberties with a child under Article 134 UCMJ, 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).

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.

d) 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. 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.

8. *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.

a) While the military judge did error 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. PE 18's admission was err and it was not admissible under another section; however, based on the other evidence admitted, the error was harmless.

IX. RULES 501-513. PRIVILEGES.

A. Privileges generally.

1. Schlueter, Salztburg, Schinasi, and Imwinkelried, in Military Evidentiary Foundations, view the privilege analysis in the following manner: in certain proceedings, the holder has a privilege unless it is waived or there is an applicable exception. There are six considerations:

a) The proceedings to which the privileges apply: pursuant to Rule 1101, the Rules respecting privileges apply at all stages in virtually all proceedings conducted pursuant to the UCMJ, i.e., Article 32 hearings, Article 72 vacation proceedings, as well as search and seizure authorizations, and proceedings involving pretrial confinement.

b) The holder of the privilege: The original holder is the intended beneficiary (e.g., the client, the penitent), although in certain cases, the holder's agent will have authority to assert the privilege.

c) The nature of the privilege: 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) What is privileged? The confidential communication between properly related parties made incident to their relation.

(1) "Communication" is broadly defined.

(2) "Confidential" implies physical privacy and intent on the part of the holder to maintain secrecy.

e) Waiver of the privilege: Voluntary disclosure of the privileged matter, in-court or out-of-court, will waive the privilege.

f) 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.

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.

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."

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. Husband-Wife Privilege.

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 adversely. The defendant spouse can only assert 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).

   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).

2. Adultery. *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 M.R.E. 504(c)(2)(A) does not apply to communications involving the adultery.

3. Presumption of Confidentiality. 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.

4. 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. See Schlueter, Salztburg, Schinasi, and Imwinkelried, Military Evidentiary Foundations.

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.

See also Schleuter, Salztburg, Schinasi, and Imwinkelried, Military Evidentiary Foundations.

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.

1. Rule 513 offers a limited privilege for communications to psychotherapists and counselors. The privilege only applies to actions arising under the UCMJ and it is not a broader doctor-patient privilege.

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. *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, however, holding it was ineffective assistance for the defense counsel to tell the accused to talk to a Navy psychologist without first getting the psychologist appointed to the defense team.

2. 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 R.C.M. 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).

X. WITNESSES.

A. Rule 601. Competency.

Rule 601. General rule of competency.

Every person is competent to be a witness except as otherwise provided in these rules.

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.

Rule 602. Lack of personal knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of MRE 703, relating to opinion testimony by expert witnesses.

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.

Rule 605. Competency of military judge as witness

(a) The military judge presiding at the court-martial may not testify in that court-martial as a witness. No objection need be made to preserve the point.

(b) This rule does not preclude the military judge from placing on the record matters concerning docketing of the case.

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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.

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. However, for purposes of impeachment, a witness need not be adverse.

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.

1. Rule 608(a) and (b):

Rule 608. Evidence of character, conduct, and bias of witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instance of conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in MRE 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

2. 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.

3. 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.

G. Rule 608. Bias.

Rule 608. Evidence of character, conduct, and bias of witness

(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.

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.

Amended (2008) Rule 609. Impeachment by evidence of conviction of crime

(a) (a) *General rule.* For the purpose of attacking the credibility character for truthfulness of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Mil. R. Evid. 403, if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness. 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) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

* * *

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The military judge, however, may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the military judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

* * *

(f) Definition. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

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.

Rule 613. Prior statements of witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in MRE 801(d)(2).

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

(a) Control by the military judge. The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, or a witness identified with an adverse party, interrogation may be by leading questions.

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.

Rule 612. Writing used to refresh memory

If a witness uses a writing to refresh his or her memory for the purpose of testifying, either (1) while testifying, or (2) before testifying, if the military judge determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing in camera, excise any privileged information or portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be attached to the record of trial as an appellate exhibit. If a writing is not produced or delivered pursuant to order under this rule, the military judge shall make any order justice requires, except that when the prosecution elects not to comply, the order shall be one striking the testimony or, if in the discretion of the military judge it is determined that the interests of justice so required, declaring a mistrial. This rule does not preclude disclosure of information required to be disclosed under other provisions of these rules or this Manual.

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.

XI. EXPERTS AND SCIENTIFIC EVIDENCE

Rule 702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

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.

Rule 702. Testimony by experts

. . . a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

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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.

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

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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:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

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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.

XII. HEARSAY.

A. The Rule Against Hearsay.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by any Act of Congress applicable in trials by court-martial.

B. The Necessary Definitions.

Rule 801. Definitions

The following definitions apply under this section:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(c) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

1. Under the Rule, a statement may be oral, written, or nonverbal conduct intended as an assertion, not made at trial, offered to prove the truth of the matter asserted.

2. Under Rule 801(b), the declarant is a "person" who makes a statement, not a computer or a bloodhound. 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.

Rule 801(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person;

1. 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.

2. Admissions of a Party-Opponent. Rule 801(d)(2)(A).

Rule 801(d)(2). A statement is not hearsay if . . . [t]he statement is offered against a party and is (A) the party's own statement in either the party's individual or representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

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.

1. Present Sense Impressions and Excited Utterances.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while declarant was perceiving the event or condition or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

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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.

2. Statements for purposes of medical diagnosis or treatment.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

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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.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence, but may not itself by received as an exhibit unless offered by an adverse party.

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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).

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilations normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

a) 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.

b) 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).

c) 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).

d) 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.

e) 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.

5. Public Records and Reports. Rule 803(8).

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(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other personnel acting in a law enforcement capacity, or (C) against the government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. Notwithstanding (B), the following are admissible under this paragraph as a record of a fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record such fact or event: enlistment papers, physical examination papers, outline figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, records of court-martial convictions, logs, unit personnel diaries, individual equipment records, guard reports, daily strength records of prisoners, and rosters of prisoners.

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a) 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).

b) 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.

c) *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 nontestimonal 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.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(18) Learned treatises. To the extent called to the attention of an expert where established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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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". Rule 803(24) and 804(b)(5). **Transferred to rule 807 which reads**

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807. A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

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a) The proponent must demonstrate "equivalent circumstantial guarantees of trustworthiness";

(1) 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 at the time statement made, not through corroborating evidence.)

(2) *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.

b) Establish the evidence is offered to prove a material fact in issue;

c) 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."

d) Demonstrate that admission fosters fairness in the administration of justice; and

e) 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.

f) 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.

Rule 804. Hearsay exceptions; declarant unavailable

(a) Definitions of unavailability. "Unavailability as a witness" includes situations in which the declarant-

(1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means; or

(6) is unavailable within the meaning of Article 49(d)(2).

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

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.

Rule 804(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) Former testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article 32 is admissible under this subdivision if such a record is a verbatim record. This paragraph is subject to the limitations set forth in Articles 49 and 50.

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* R.C.M. 702(a), Discussion), COMA concluded the verbatim Article 32 testimony was <u>not</u> an "exhibit" within the meaning of R.C.M. 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.

Rule 804(b)(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

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.

Rule 804(b)(6) *Forfeiture by wrongdoing*. 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.

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.

XIII. MISCELLANEOUS RULES.

A. Rule 1101. Applicability of Rules.

Rule 1101. Applicability of rules

(a) Rules applicable. Except as otherwise provided in this Manual, these 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.
(b) Rules of privilege. The rules with respect to privileges in Section III and V apply at all stages of all actions, cases, and proceedings.
(c) Rules relaxed. The application of these rules may be relaxed in sentencing proceedings as provided under R.C.M. 1001 and otherwise as provided in this Manual.
(d) Rules inapplicable. These rules (other than with respect to privileges and MRE 412) do not apply 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 code or this Manual and not listed in subdivision (a).

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 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.

1. The Rule provides that "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments unless action to the contrary is taken by the President."

XIV. CONCLUSION

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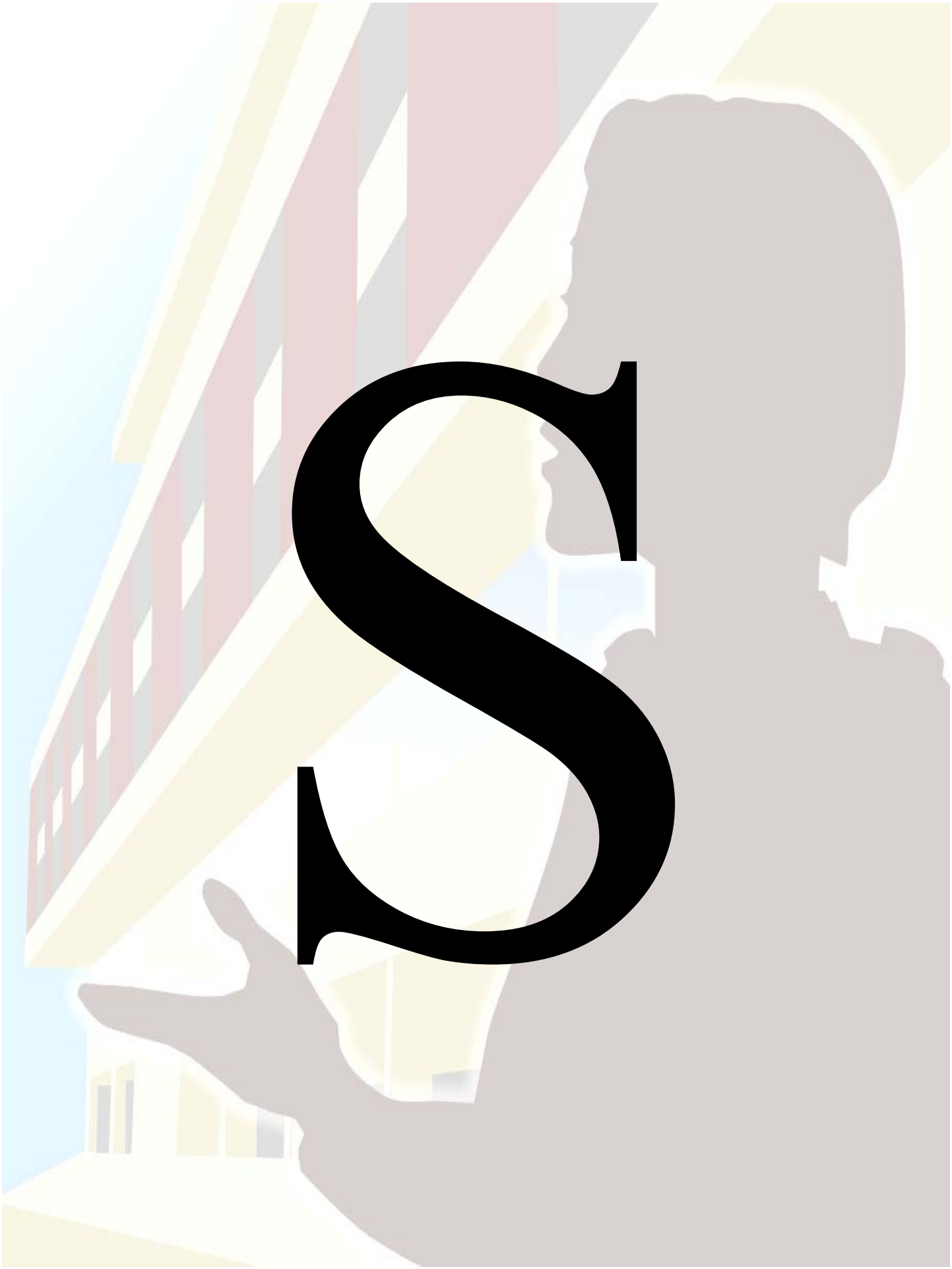
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CLASSIFIED EVIDENCE PROCEDURES

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MAJ Rebecca F. Kliem
Spring 2012

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CLASSIFIED EVIDENCE PROCEDURES

I. ESSENTIAL REFERENCES

A. U.S. Dep't of the Navy, Office of the Judge Advocate General, National Security and Intelligence Law Division (Code 17), The Judge Advocate's Handbook for Litigating National Security Cases: Prosecuting, Defending and Adjudicating National Security Cases (2002) [hereinafter Code 17 Handbook].

B. Primer for Litigating Classified Information Cases: Prosecuting, Defending, and Adjudicating Cases Involving Classified Information, Dec. 2007, U.S. Dep't of the Navy, Office of the Judge Advocate General, National Security and Intelligence Law Division (Code 17).

C. Executive Order (EO) No. 13526, "Classified National Security Information," December 29, 2009, 3 C.F.R. 298 (2009).

D. Order of the President of the United States, dated Oct. 13, 1995, 60 Fed. Reg. 53485, designating original classification authorities, reprinted at 50 U.S.C. § 435 note.

E. DoD Directive 5200.1, DoD Information Security Program, 13 Dec 96.

F. DoD 5200.1-R, DoD Information Security Program Regulation, 14 Jan 97.

G. U.S. Dep't of the Army, Reg. 380-67, Personnel Security Program, 9 Sep 88.

H. U.S. Dep't of the Army, Reg. 27-10, Military Justice, 3 Oct 11.

I. Classified Information Procedures Act (CIPA), 18 U.S.C. appx. III, §§ 1-16 and interpretative caselaw.

J. Military Rule of Evidence (MRE) 505, Classified Information.

II. NATIONAL SECURITY PROSECUTIONS AND GRAYMAIL

A. "Graymail" occurs when a criminal defendant, whether for legitimate reasons or otherwise, threatens to disclose classified information during the course of a trial hoping that the government will forego prosecution rather than see the information disclosed.

B. There are two competing values at play in every prosecution involving classified or national security information:

1. The accused's right to a fair trial;

2. The government's need to protect from disclosure national security information that might be required for the trial.

C. Classified information is potentially relevant at trial under three primary circumstances:

1. The charges are related to the improper handling of classified information. Examples of such charges include the following:

a) Art. 92, Failure to Obey Order or Regulation. This would apply to instances of mishandling classified information. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 380-5, DEPARTMENT OF THE ARMY INFORMATION SECURITY PROGRAM para. 1-21 (29 Sep. 2000).

b) Art. 92, Dereliction of Duty.

c) Art. 106a, Espionage.

d) Art. 134, The General Article. Would pertain to violations of federal statutes not specifically contained in the UCMJ. For examples of these statutes and sample specifications, see U.S. DEP'T OF THE NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL, NATIONAL SECURITY AND INTELLIGENCE LAW DIVISION (CODE 17), THE JUDGE ADVOCATE'S HANDBOOK FOR LITIGATING NATIONAL SECURITY CASES: PROSECUTING, DEFENDING AND ADJUDICATING NATIONAL SECURITY CASES, Chapter 8 (2002) [hereinafter Code 17 Handbook].

e) Art. 104, Aiding the Enemy.

f) Art. 106, Spies.

2. The classified information may be essential in establishing an element of or defense to a charge or specification. For instance, in *United States v. Schmidt*, 60 M.J. 1 (2004), the appellant was charged with dereliction of duty for failing to exercise appropriate flight discipline and to comply with rules of engagement and special instructions in an air-to-ground bombing incident that caused the deaths of several Canadian soldiers in Afghanistan. The appellant was privy to classified information pertaining to his case. The military judge ruled, and the Air Force Court of Criminal Appeals affirmed, that the appellant could not discuss the classified aspects of his case with his civilian defense counsel (who eventually obtained an interim security clearance) without submitting a request through the trial counsel. The CAAF vacated the AFCCA opinion and reversed the ruling of the military judge, holding that MRE 505 does not require an accused to engage in adversarial litigation with the government as a precondition to discussing potentially relevant information pertaining to the case that is already in the appellant's knowledge or possession.

3. Classified evidence is somehow relevant to the discovery process.

III. KEY CONCEPTS AND DEFINITIONS[1]

A. Key Definitions. E.O. 13526, Part 6.

1. National Security. Pertaining to the national defense or foreign relations of the United States. E.O. 13526, § 6.1(cc).

2. Information. Any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.

3. Classified National Security Information (aka Classified Information). Information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form. E.O. 13526, § 6.1(i). Classified information falls into eight main subject-matter categories. E.O. 13526, § 1.4.

a) Military plans, weapons systems, or operations;

b) Foreign government information;

c) Intelligence activities (including special activities), intelligence sources or methods, or cryptology;

[1] Unless otherwise noted, the information in this section comes from EO 13526.

d) Foreign relations or foreign activities of the United States, including confidential sources;

e) Scientific, technological, or economic matters relating to the national security;

f) United States Government programs for safeguarding nuclear materials or facilities;

g) Vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security;

h) The development, production, or use of weapons of mass destruction.

4. Classification. The act or process by which information is determined to be classified information. E.O. 13526 § 1.1(f).

5. Restricted Data. All data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy. *See* Code 17 Handbook, Chapter 1.

6. Original Classification Authority (OCA): An individual authorized in writing, either by the President, or by agency heads or other officials designated by the President, to classify information in the first instance. The only OCAs are the President, agency heads and officials designated by the President in the Federal Register, and certain Government officials. E.O. 13526 § 6.1(gg).

7. Derivative Classification. Incorporating, paraphrasing, restating, or generating in a new form information that is already classified and marking the new material consistently with the classification markings of the source information. Duplication or reproduction of classified information is not derivative classification. E.O. 13526 § 6.1(o).

8. Levels of Classification. E.O. 13526 § 1.2.

a) Top Secret. Information, the unauthorized disclosure of which reasonably could be expected to cause **exceptionally grave damage to the national security** *that the OCA is able to identify or describe*.

b) Secret. Information, the unauthorized disclosure of which reasonably could be expected to cause **serious damage to the national security** *that the OCA is able to identify or describe*.

c) Confidential. Information, the unauthorized disclosure of which reasonably could be expected to cause **damage to the national security** *that the OCA is able to identify or describe*.

9. Compartmented Information. Information within a formal system which strictly controls the dissemination, handling and storage of a specific class of classified information. Another name for compartmented information is "codeword information." *See* Code 17 Handbook, Chapter 2. There are two categories of compartmented information:

a) Special Access Program (SAP). A program established safeguarding and access requirements that exceed those normally required for information at the same classification level. A person must obtain authorized access to SAP information by completing personnel security requirements unique to the SAP and signing a SAP nondisclosure agreement. Furthermore, the person may not disclose SAP information to anyone

without verifying that the other person has access to the SAP and a verified need-to-know the information.

b) Sensitive Compartmented Information (SCI). Classified information concerning or derived from intelligence sources, methods, or analytical processes that is required to be handled exclusively within formal access control systems established by the Director of Central Intelligence.

10. "Need to Know." A determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function. E.O. 13526, § 6.1(dd). In order to gain access to classified information, a person must satisfy two requirements: (1) The appropriate authority must deem the person suitable for receiving classified materials; and (2) the person must have a "need-to-know" the classified material. *See Schmidt v. Boone*, 59 M.J. 841, 852 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds sub nom.*, *United States v. Schmidt*, 60 M.J. 1 (2004).

B. The Classification Process.

1. Scope. Approximately 4,000 federal employees have the authority to classify information, and in 2003, more than 14 million new classified documents were produced. *See* Eileen Sullivan, *Too Much Secrecy: Overclassification Hampers Cooperation*, FEDERAL TIMES, Sep. 13, 2004, at 1.

2. Process.

a) All 4 of the following conditions must be met:

(1) An OCA must classify the information;

(2) Information must be owned by, produced by or for, or be under the control of the United States Government;

(3) Information must fall within one of the 7 categories of national security information; and

(4) OCA must make two determinations:

(a) Unauthorized disclosure of the information reasonably could be expected to result in damage to the national security;

(b) The OCA can identify or describe the potential damage.

b) OCA must determine appropriate classification level. Doubts should be resolved in favor of a lower classification level.

c) When an employee, contractor, licensee, certified holder, or grantee of an agency that does not have OCA originates information believed by that person to require classification, the information will be protected as if it is classified within the meaning of EO 13526. The information will be promptly transmitted to an agency with OCA and subject matter interest. A decision must be made within 30 days.

3. Duration. OCA will attempt to establish a specific date or event for declassification, subject to the following guidelines:

a) If an earlier date or event cannot be identified, the default position is 10 years from date of original decision.

b) OCA may extend duration of classification for successive time periods not to exceed 10 years per period.

c) Under the following circumstances, an OCA can exempt from declassification information beyond the 10-year limit, if release would:

(1) Reveal an intelligence source, method, or activity, or cryptologic system or activity;

(2) Reveal information that would assist in the development or use of WMD;

(3) Reveal information that would impair the development or use of technology within a United States weapon system;

(4) Reveal foreign government information;

(5) Damage relations between the United States and a foreign government, reveal a confidential source, or seriously undermine diplomatic activities that are reasonably expected to be ongoing for longer than 10 years;

(6) Impair the ability of United States government officials to protect the President, Vice President, or other individuals for whom protection services in the interest of national security are authorized;

(7) Violate a statute, treaty, or international agreement.

4. Information Not Subject to Classification.

a) Sec. 1.7 of EO 13526 provides that information shall not be classified in order to:

(1) Conceal violations of law, inefficiency, or administrative error;

(2) Prevent embarrassment to a person, organization, or agency;

(3) Restrain competition; or

(4) Prevent or delay the release of information that does not require classification in the interest of national security

b) Basic scientific information not clearly related to national security may not be classified;

c) Information may not be reclassified after it has been declassified and released to the public under the proper authority.

5. Classification Challenges. Authorized holders of information who believe in good faith that the classification status of information is improper are expected to challenge the status.

a) Agency heads or officials shall establish procedures for challenge.

b) The procedures shall ensure:

(1) Individuals are not subject to retribution for bringing an action;

(2) An impartial official or panel will review the information;

(3) Individuals may appeal agency decisions to an Interagency Security Classification Appeals Panel.

C. Document Marking.

1. The following information is required on classified documents or other classified media:

    a) Classification level;

    b) Identity, by name or personal identifier or position, of the OCA

    c) Agency and office of origin;

    d) Declassification instructions;

    e) Concise reason for classification, unless it would reveal additional classified information.

2. Classification authorities, should, where practicable, use a classified addendum if the classified information forms a small portion of an otherwise unclassified document.

3. Information that has been classified does not become unclassified merely because a document has either been improperly marked or not marked at all.

D. Declassification.

1. Definition. An authorized change in the status of information from classified to unclassified information.

2. Authority. The official who authorized the original classification (if still serving in that position); the official's successor in function; a supervisor of either; or individuals who have been delegated this authority by an agency head or senior agency official.

3. Types:

    a) Automatic. Declassification based solely on the occurrence of a specific date or event as determined by the OCA, or expiration of a maximum time frame for duration of classification.

    b) Systematic. Review for declassification of classified information contained in records that have been determined by the Archivist of the United States to have permanent historical value.

    c) Mandatory. A review for declassification that occurs in response to a request for declassification. Information can be declassified if the public's interest in disclosure outweighs the need to protect the information. Procedures:

        (1) Request for review must describe the document or material specifically enough to enable the agency to locate with reasonable effort;

        (2) Agency heads will develop procedures for handling requests and reviews, appeal procedures, and procedures to notify requestors of their right to appeal a final agency decision to the Interagency Security Classification Appeals Panel.

        (3) When an agency receives a request for review of information in its custody that was originally classified by another agency, it will refer the documents to the original agency for processing. Depending on the type of information in a document, there can be multiple OCAs for the information contained therein.

E. Classification Review.[2]

1. The classification review is a key litigation support function in national security cases.

2. The review should be coordinated with higher technical supervisory channels as soon as possible. The CR should occur prior to action under the UCMJ and/or discovery.

3. What the classification review accomplishes:

a) Verifies the current classification level for the information and its duration;

b) Verifies the classification level of information when subjected to compromise;

c) Determines whether another command requires review of the information; and

d) Provides a general description of the impact on affected operations.

F. Basic Information Security Requirements.

IV. CLASSIFIED EVIDENCE AND PRIVILEGES

A. Common Law Government Secrets Privilege.

1. Nature of the Privilege. An absolute privilege to prohibit the disclosure of information pertaining to military or diplomatic secrets. The Supreme Court discussed the privilege in *United States v. Reynolds*, 345 U.S. 1 (1952). In *Reynolds*, an Air Force B-29 bomber on a mission to test secret electronic equipment caught on fire and crashed. Widows of three of the deceased brought suit against the United States and moved for discovery of the official accident investigation. The Secretary of the Air Force claimed privilege. The Supreme Court recognized a common law privilege protecting military and state secrets. *Id.* at 7-8. This is different from the so-called "executive privilege," a qualified privilege pertaining to the deliberative processes of the executive branch. In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court held that the President does not have an absolute unqualified privilege in a criminal case to protect tape recordings and documents from disclosure. In *Cheney v. United States District Court for the District of Columbia*, 124 S.Ct. 2576 (2004), the Supreme Court held that the D.C. Circuit Court of Appeals read *Nixon* too broadly in requiring the Vice President to make a claim of executive privilege with specificity in a civil case.

2. Claiming the Privilege. The privilege must be claimed formally by the head of a department after personal consideration by that officer. It cannot be claimed or waived by a private party. *Reynolds*, 345 U.S. at 8-9. There is no privilege until a formal claim of privilege has been made.

B. Classified Information Procedures Act.

1. Nature of the "Privilege." CIPA establishes procedures for the protection of classified national security information at all stages of a proceeding, to include discovery. CIPA does not, however, create an evidentiary privilege; indeed, the legislative history of CIPA indicates that it was not intended to alter existing standards for determining relevance and admissibility. *See United States v. Smith*,

[2] The classification review is described in Code 17 Handbook, Chapter 3.

780 F.2d 1102 (4th Cir. 1985) (favorably quoting a lower court for the proposition that CIPA is merely a procedural tool requiring a pretrial court ruling on the admissibility of classified evidence).

a) Much broader than the state secrets privilege.

b) Recognizes the power of the executive branch to determine that public disclosure of classified evidence will not be made in a criminal trial.

c) Outlines procedures to protect against threat of disclosure or unnecessary disclosure.

d) Requires the defendant to give notice of intent to reveal classified information as part of the defense.

e) Gives several options to government:

(1) Seek a ruling that some or all of the information is immaterial.

(2) Move for substitution of non-sensitive summary information.

(3) Move for redaction of sensitive information.

(4) Admit facts sought to be proven.

f) If government is unwilling or unable to disclose, court may dismiss charges or provide appropriate relief.

2. Claiming the Privilege. CIPA contains a number of specific sections for determining whether classified evidence or substitutes are relevant and admissible at trial. If a court concludes under CIPA that classified evidence is relevant at trial, the government may still be able to claim a privilege and withhold the evidence. For example, in *United States v. Smith*, the defendant was charged with several counts of espionage that occurred when he worked for the Army Intelligence Security Command (INSCOM). In his defense, he argued that he had turned material over to the Russians under the direction of two men whom he believed to be CIA agents as part of a double-agent operation. At trial, he wanted to introduce classified evidence to support his claim. The district court found the evidence admissible, but the 4th Circuit reversed, holding that the district court should have applied a qualified privilege similar to the common law informer's privilege recognized in *Roviaro v. United States*, 353 U.S. 53. *Smith*, 780 F.2d at 1106-07. The key is that CIPA now permits the government to claim its privilege prior to trial. *See Smith*, 780 F.2d at 1109.

C. Military Rule of Evidence 505

1. Nature of the Privilege. MRE 505 is based upon CIPA, the common law government secrets privilege discussed in *United States v. Reynolds*, and the executive privilege discussed in *United States v. Nixon*. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 505 analysis, at A22-40 (2002). It establishes a privilege prohibiting disclosure of classified information if disclosure would be detrimental to national security. It applies at all stages of the proceedings. MRE 505(a). In many respects, such as the requirement for the defendant to provide notice of intent to disclose classified information and the evidentiary substitution procedures, MRE 505 essentially mirrors CIPA.

2. Claiming the Privilege. The head of the executive or military department or government agency may claim the privilege based upon a finding that the information is properly classified and that disclosure would be detrimental to the national security. A witness or trial counsel is presumed to have the authority to

claim the privilege on behalf of the holder of the privilege in the absence of evidence to the contrary. MRE 505(c). However, case law makes it clear that trial counsel should not claim the privilege in the absence of direction to do so by the appropriate agency head. In *United States v. Flannigan*, 28 M.J. 988 (AFCMR 1998), the Air Force Court of Military Review dismissed a charge because the trial counsel claimed the privilege at the direction of OSI personnel but did not coordinate with the Secretary of the Air Force.

V. CLASSIFIED INFORMATION PROCEDURES AT COURTS-MARTIAL

A. Pre-preferral. At this stage of the proceeding, the government should comply as closely as possible with the procedures outlined in the Navy Code 17 publication, The Judge Advocate's Handbook for Litigating National Security Cases. In particular, the government should:

1. Notify higher headquarters. AR 27-10, para. 2-7*a* requires an SJA to coordinate with OTJAG, Criminal Law Division and OTJAG, Operational Law Division prior to *preferral* of charges in cases that have national security implications.

2. Request a classification review of the evidence.

3. Contact the OCA (and often, multiple OCAs) for a determination as to what evidence may be disclosed at trial.

4. Establish security procedures, identify security assistance personnel, and plan all aspects of a trial involving classified evidence.

5. Make charging decisions based on OCA willingness to disclose certain information.

6. Note that speedy trial implications still exist in classified information cases. The discussion to RCM 707(c) indicates that a military judge can grant delays in order to give counsel time to prepare for complex cases, to obtain appropriate security clearances or gain time to declassify evidence. However, the reasonableness standard applies, and it is worth noting that the convictions of the accused in the "Yellow Fruit" cases were all overturned on appeal for speedy trial violations. *See United States v. Longhofer*, 29 M.J. 22 (CMA 1989) (rejecting proposed rule that speedy trial clock doesn't start in classified cases until all participants have security clearances and applying instead a reasonableness test for measuring the delay); *United States v. Duncan*, 34 M.J. 1232 (ACMR 1992) (holding that complex prosecution involving coordinated efforts between DOJ and DOD did not render reasonable the 303 days of pretrial delay for one set of charges and 176 days for another); *United States v. Byard*, 29 M.J. 803 (ACMR 1989) (holding that the government did not exercise due diligence in obtaining the accused's financial records and therefore could not exclude the time it took to obtain them).

B. From Preferral through Trial: A Quick Trip Through MRE 505

1. Counsel Security Clearance Requirements and the 6th Amendment.

a) The Sixth Amendment does not promise a defendant his choice of counsel, but rather guarantees that he receive an effective advocate. *United States v. Bin Laden*, 58 F. Supp. 2d 113, 118-19 (S.D.N.Y. 1999) (quoting *Wheat v. United States*, 486 U.S. 153 (1988). Thus, the government may require counsel to obtain a proper security clearance in order to have access to classified information. *Bin Laden*, 58 F. Supp. 2d at 119-20.

b) Under DoD and individual service regulations, counsel must have a proper security clearance in order to have access to classified information. In the alternative, an agency may conduct a streamlined background check and provide specific items of classified evidence to the attorney. *See, e.g.*, 59 M.J. 841, 852 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds sub nom.*, *United States v. Schmidt*, 60 M.J. 1 (2004) (discussing in exhaustive detail the process of obtaining a security clearance for civilian counsel).

2. Article 32 Investigation. As a rule of privilege, MRE 505 applies to proceedings held under Art. 32. MRE 505(d) provides that a convening authority may do any of the following to protect classified information prior to referral of charges:

a) Delete specified items of classified evidence from documents made available to the accused;

b) Substitute a portion or summary of the information for the classified documents;

c) Substitute a statement admitting relevant facts the classified evidence would tend to prove.

d) Provide documents subject to conditions that will guard against compromise of information;

e) Withhold disclosure if necessary to protect national security.

3. Discovery. MRE 505(e) provides for a pretrial Art. 39(a) session any time after referral of charges but before arraignment to settle discovery issues and ensure compliance with the procedures of MRE 505. The normal "open discovery" system provided under UCMJ Art. 46 and RCM 703 simply does not exist for classified information. According to the Navy Code 17 publication, the government must make the following determinations prior to permitting discovery of classified information:

a) The accused has a "need to know" the classified information. Disagreements must be resolved by the convening authority prior to referral under MRE 505(d) or by the military judge after referral under MRE 505(g).

b) Government must obtain permission from the originating agency of the classified information. This requires a classification review.

c) It may be necessary to dismiss some charges rather than permit discovery of classified information.

d) In *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992), the COMA held that under MRE 505, the appellant did not have to know the true identity of an intelligence agent in order to properly prepare for cross-examination. The COMA cited a federal case, *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), in which the Court of Appeals held that the District Court erred in ordering production of transcripts of taped conversations between the appellant and an informant. The Court held that the transcripts were not sufficiently material to the appellant's defense to overcome the classified information privilege.

4. Post-Referral Convening Authority Options. Once a convening authority becomes aware that classified information is relevant and necessary to an element

of the offense or a legally cognizable defense (and is otherwise admissible in evidence), MRE 505(f) provides that the CA may do any of the following:

a) Institute action to obtain the classified information so the military judge can make an appropriate *in camera* determination under MRE 505(i) concerning the proper use of the evidence;

b) Dismiss the charges;

c) Dismiss the charges or specifications or both to which the information relates;

d) Take such other actions as may be required in the interests of justice.

5. Post-Referral Military Judge Options. If, after a reasonable period of time, information is not provided to the military judge and the absence of that information would materially prejudice a substantial right of the accused, the military judge shall dismiss the charges or specifications or both to which the classified information relates. MRE 505(f).

6. Protective Order. If the government agrees to disclose classified information to the accused, the military judge can enter a protective order to guard against improper disclosure of the information. MRE 505(g)(1) provides for a protective order that is quite broad and sweeping in its scope. The protective order may:

a) Prohibit unauthorized disclosure of information;

b) Require storage of material in a manner appropriate to its classification level;

c) Require controlled access to material during business hours and other hours at reasonable notice;

d) Require cooperation of all persons who need security clearances with investigatory personnel;

e) Require maintenance of logs regarding access by authorized personnel to the classified information;

f) Regulate the making and handling of notes taken from classified information;

g) Request the CA to authorize assignment of government security personnel and provision of government storage facilities.

7. Limited Disclosure/Substitutes. MRE 505(g)(2) permits the military judge to authorize the limited disclosure of classified information following an *in camera* review by the military judge, unless the military judge determines that the classified information itself is necessary to enable the accused to prepare for trial. Courts construing substitution issues under CIPA have held that proper substitutes for classified evidence do not hamper the accused's ability to present a defense. *See, e.g.*, *United States v. Rezaq*, 134 F.3d 1121, 1142-43 (D.C. Cir. 1998), *cert. denied* 525 U.S. 384 (1998) (holding that the district court's CIPA substitutions "protected Rezaq's rights very effectively"); *United States v. Collins*, 603 F. Supp. 301, 303 (S.D. Fla. 1985) (ruling that CIPA's substitution provisions do not unconstitutionally interfere with the accused's Sixth Amendment right to the compulsory process of witnesses). Limited disclosure and substitutes include:

a) Deletion of specific items of classified information from documents to be made available to an accused;

b) Substitution of a portion or summary of the information for such documents;

c) Substitution of a statement admitting relevant facts, unless the judge determines that the classified information itself is necessary.

d) In *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), the appellant filed a writ of habeas corpus *ad testificandum* to obtain the trial testimony of enemy combatant witnesses being held overseas by the United States. While agreeing with the appellant that the witnesses were necessary and material to his defense, the court held that it was possible to craft adequate substitutes for their testimony that would balance the government's national security interests with the appellant's constitutional rights. The court recommended a process in which the defense would identify substitutions, the government would object and propose additional information, and the district court would then compile an appropriate set of substitutions.

8. Requirement for Accused to Provide Notice of Intent to Disclose. MRE 505(h) requires the accused to provide notice of his intent to disclose or cause the disclosure in any manner of classified information as follows:

a) Notice must be in writing and shall include a brief description of the classified information;

b) The accused has a continuing duty to notify;

c) The accused may not disclose any information until notice has been given;

d) If the accused fails to comply, the judge may preclude disclosure of the information or may prohibit the examination by the accused of any witness respecting such information.

9. Classified Information and the Attorney-Client Privilege. In *United States v. Schmidt*, 60 M.J. 1 (2004), the CAAF held that MRE 505(h)(1), which requires the accused to give notice to the trial counsel of an intention to disclose classified information, applies only when the defense is *seeking* classified information from the Government or when it reasonably expects to disclose classified information during a proceeding. MRE 505(h)(1) does not require an accused to engage in adversarial litigation with the opposing side as a precondition to discussing with a defense counsel who has a security clearance classified information *already known to the accused* because of previous proper access. The MJ must balance the government's interest in protecting national security information with the accused's right to effective assistance of counsel in preparing a defense and the attorney-client privilege.

10. *In-Camera* Proceedings. MRE 505(i) contains the procedures for an *in-camera* review of classified evidence in an Article 39(a) session closed to the public. Similar procedures have been validated under CIPA. *See United States v. Sarkissian*, 841 F.2d 959, 965-66 (9th Cir. 1988). The following procedures apply:

a) Government must make motion for *in-camera* proceeding;

b) Government must submit classified evidence and an affidavit *ex parte* for the consideration of the military judge only. Affidavit must demonstrate

that disclosure of the information reasonably could be expected to cause damage to the national security.

c) At the *in-camera* proceeding, the Government will provide the accused with notice of the information that will be discussed. If the information has previously been made available to the accused, it will be identified; if not, it will be described in generic form as approved by the military judge.

d) Information will not be disclosed at trial unless it is:

(1) Relevant and necessary to an element of the offense or a legally cognizable defense;

(2) Is otherwise admissible in evidence.

e) The military judge can permit alternatives to full disclosure of the evidence unless the classified information itself is necessary to afford the accused a fair trial.

f) If the MJ determines that the information is necessary for a fair trial but the government continues to object to disclosure, the MJ may employ sanctions as follows:

(1) Striking or precluding the testimony of a witness;

(2) Declaring a mistrial;

(3) Finding against the government on issues to which the evidence is relevant and material to the defense;

(4) Dismissing charges, with or without prejudice;

(5) Dismissing charges or specification or both to which the information pertains.

11. Admitting Classified Information at Trial. MRE 505(j).

a) Evidence may be admitted without change in its classification status;

b) MJ may order admission of only part of a writing, recording, or photograph to prevent unnecessary disclosure of classified information;

c) MJ may permit proof of the contents of a writing, recording, or photograph that contains classified information without requiring admission of the original or a duplicate;

d) During the taking of testimony, MJ will take suitable actions to ensure that questions or lines of inquiry that may require a witness to disclose classified information not previously found relevant and necessary do not result in the improper compromise of classified information.

12. MJ may order closed sessions of the court-martial that discuss classified material.

VI. CHECKLIST FOR CLASSIFIED CASE IN AN IDEAL WORLD[3]

A. The Beginning Stages:

[3] This journey through the stages of handling a classified case in an ideal world is courtesy of LTC Timothy MacDonnell, formerly of the U.S. Army Trial Counsel Assistance Program (TCAP).

1. A Crime regarding Classified Information is discovered.
2. The classified information is protected and the breach in security is closed.
3. Special Security Officer is informed of the possible breach (Navy--notifies Det. 17 and NCIS).
4. Law Enforcement begins to investigate.
5. The suspected classified information is sent to the various "equity holders."
6. The "equity holders" screen the information to determine potential level of classification.
7. The information that is suspected of being classified undergoes a classification review.
8. Once the review is completed the OCA verifies the findings of the review and determines whether release should be permitted.
9. In instances where the privilege under MRE 505 is to be invoked memos from OCAs articulating the danger of release of the classified information are produced.

B. Preferral

1. Charges are preferred.
2. Panel is reviewed for security clearances.
3. Government secures an interim security clearance for accused and clearances for defense counsel.

C. Article 32

1. An investigation security officer (ISO) and subject matter expert (SE) is assigned to the Article 32 IO.
2. Convening Authority issues a protective order to defense.
3. Article 32 begins with a Grunden hearing (to determine whether the Art. 32 should be open or closed).
4. 32 completed.
5. Charges are referred.

D. Trial.

1. Court has Court Security Officer and a Subject Matter Expert regarding classified information assigned. Note: you should consider appointing a security expert to the defense team.
2. Government or defense moves under MRE 505 for a 39a session to address issues regarding classified material.
3. Court Security Officer insures that the courtroom is prepared should a closed session be necessary-Judge, counsel, accused, bailiff, escorts have clearances; courtroom is appropriate for the presentation of evidence; etc. (Court Reporter may want to use a different machine for recording).
4. Trial has a Grunden hearing.
5. The Court makes specific findings regarding classified issues.

E. The Navy Code 17 publication contains extremely thorough and useful checklists for the SJA, trial counsel, and military judge. **Read it!**

VII. CONCLUSION

A. Classified cases are not easy, but early coordination and planning will help you set the conditions for success.

B. Do not be intimidated by MRE 505 or CIPA: they are your (obnoxious) friends.

C. Remember: the OCA controls the information, and if you can't gain release, you may have to dismiss in the interests of justice.

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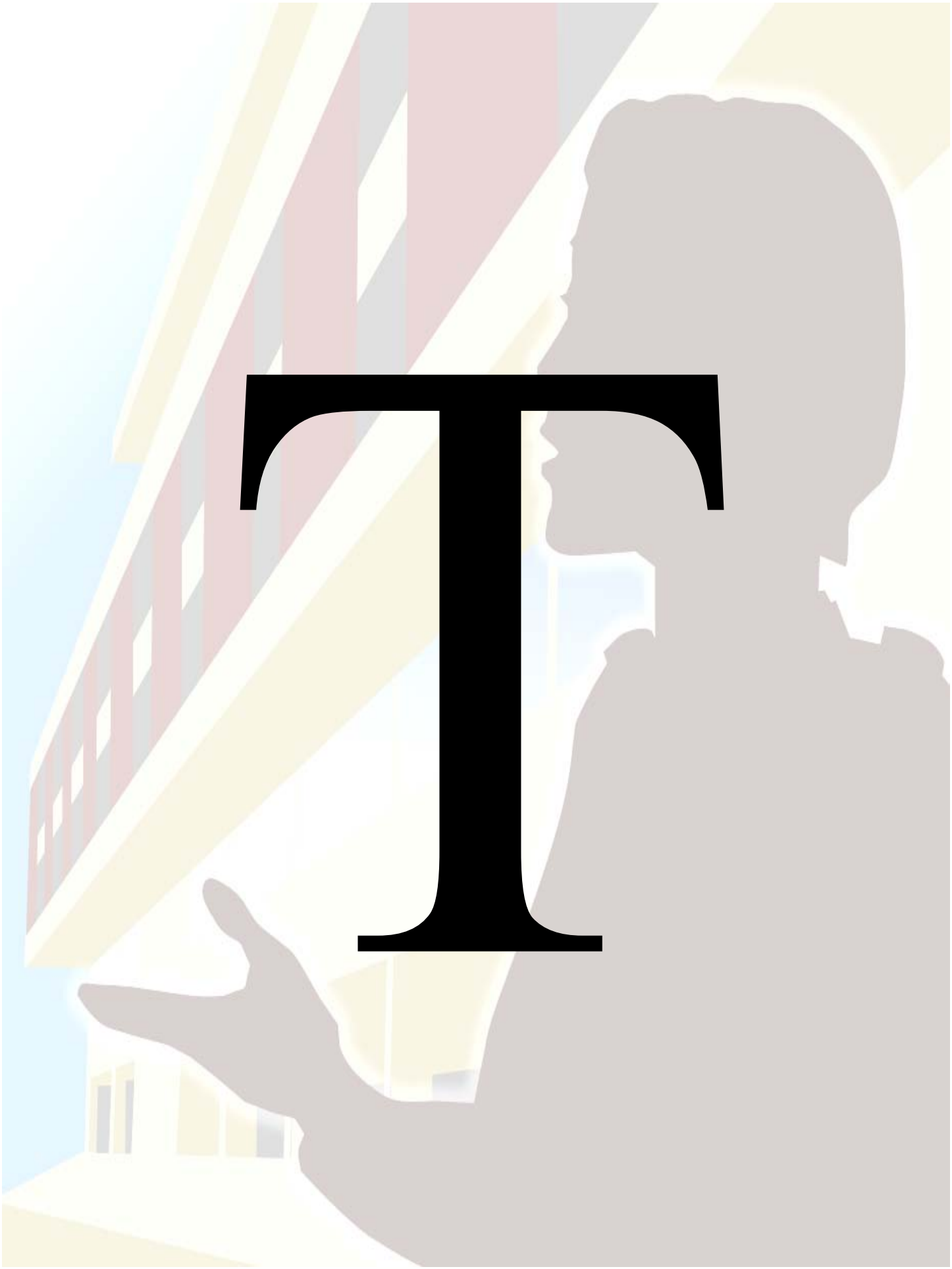
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SIXTH AMENDMENT – CONFRONTATION

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SIXTH AMENDMENT - CONFRONTATION

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. Part VI is a Confrontation Clause analysis chart.

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.

3. *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.

4. *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 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. **M.R.E. 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 Raferty 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 M.R.E. 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 can be applied in an unconstitutional manner. If evidence is constitutionally required, and it survives 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 concerns. The court did not conduct any MRE 403 analysis.

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 to M.R.E. 412(a) is admissible only if the evidence is 1) relevant; 2) material; and 3) favorable to the defense **AND** it is not out weighed 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 the trial judge's exclusion of evidence of an alleged sexual relationship between the Accused's wife and another man did not violate the accused's constitutional right to confrontation. *See also, United States v. Smith*, 68 M.J. 445 (C.A.A.F. 2010)

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 Admissibilty 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 minimus. What does de minimus mean? What's the constitutional minimum required? See *Marx v. Texas*, 987 S.W.2d 577 (Tex.). See also *United States v. McCollum*, 58 M.J. 323 (2003).

(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 effect 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 from the courtroom himself UP R.C.M. 804(c). 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 MIL. R. EVID. 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 MIL. R. EVID. 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. R.C.M. 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 ivestigation. 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 R.C.M. 804(c), voluntarily leave the courtroom to preclude the use of the procedures outlined in R.C.M. 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. Commonwealth*, 291 U.S. 97, 105-6 (1933).

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 3 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. R.C.M. 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).

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. ___, 131 S.Ct. 1143 (2011) (The Emergency Exception Doctrine)

(1) Procedural History: 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) Facts: 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) *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.

e) *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).

f) *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) *Melendiz-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. *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."

Justice Sotomayor writes a concurrence that provides food for thought. While *Blazier II's* general holding stands, she suggest 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 date is still your "key to freedom" where non-declarant experts are concerned in this area of the law.

g) 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 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 Expcetion/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 nontestionial 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 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.

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.***

(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 caselaw 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) Held: 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 M.R.E. 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 nonhearsay 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 preadmitted, 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 *Untied 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. 248 (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 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 HBRD.

(e) Discussion: The newest development in this line of cases is the specimen custody document. The court found it contained testimonial hearsay 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. Such notations could just have easily been found on other pages of the report as well.

In taking on the second issue, the court finally reapproached *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." *Sweeny* 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, 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 *Ohio v. Roberts* reliability test is the controlling law for Confrontation.

(f) 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.

(g) Note: Practitioners should not read *Sweeney* as necessitating the testing official to prove every urinalysis case; however, it should be read as requiring greater scrutiny in what documents are used if you do not have the declarant. 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.*

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 use 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 M.R.E. 804(a), except regarding lack of memory (M.R.E. 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, prudent 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 affor 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. Three years later, however, the Court unambiguously held that the admission of nontestimonial statements do not violate an accused's Sixth Amendment right to confrontation. *Whorton v. Bockting*, 127 S.Ct. 1173 (2007). [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).

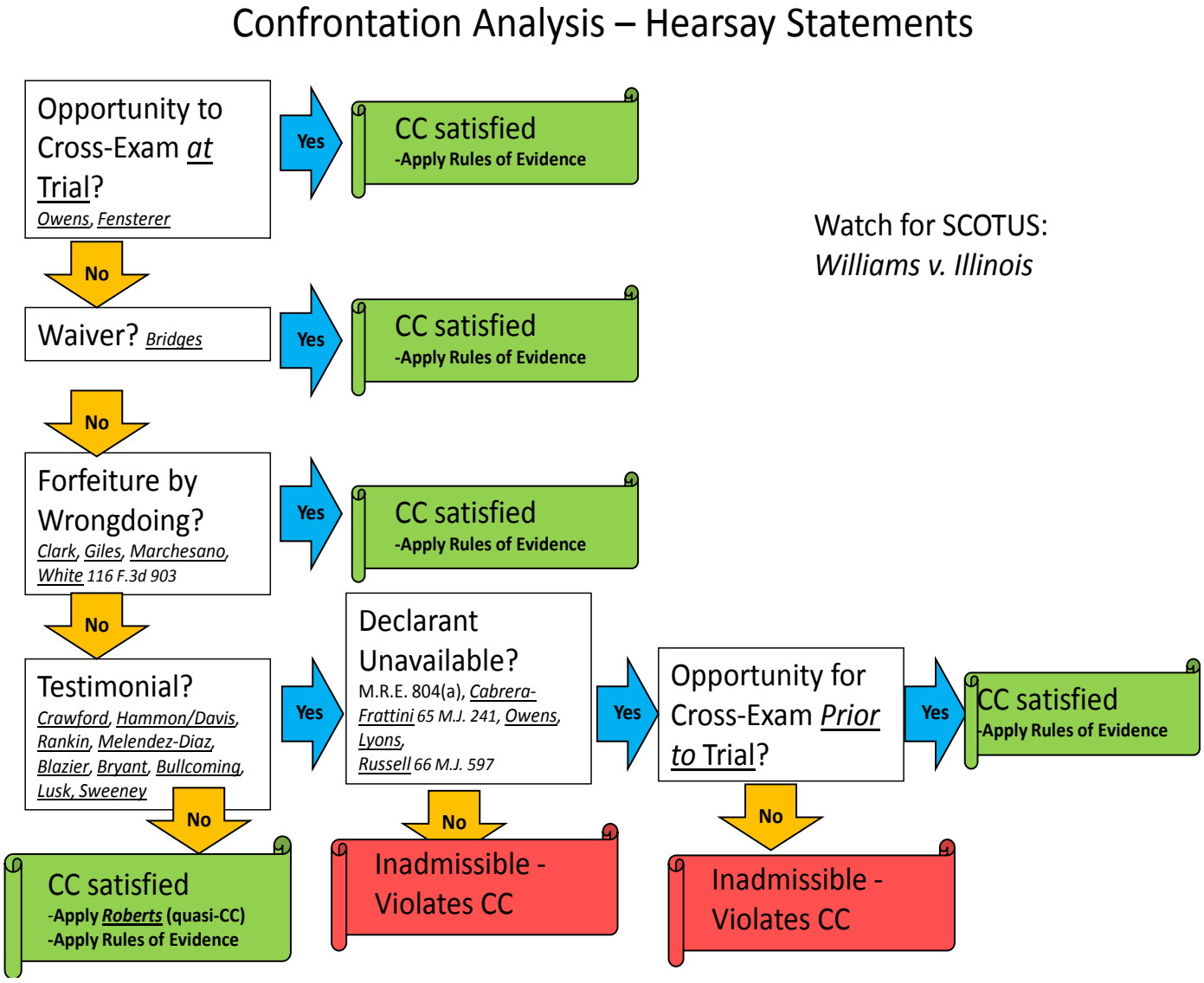
2. *Whorton v. Bockting*, 127 S. Ct. 1173 (2007).

   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).

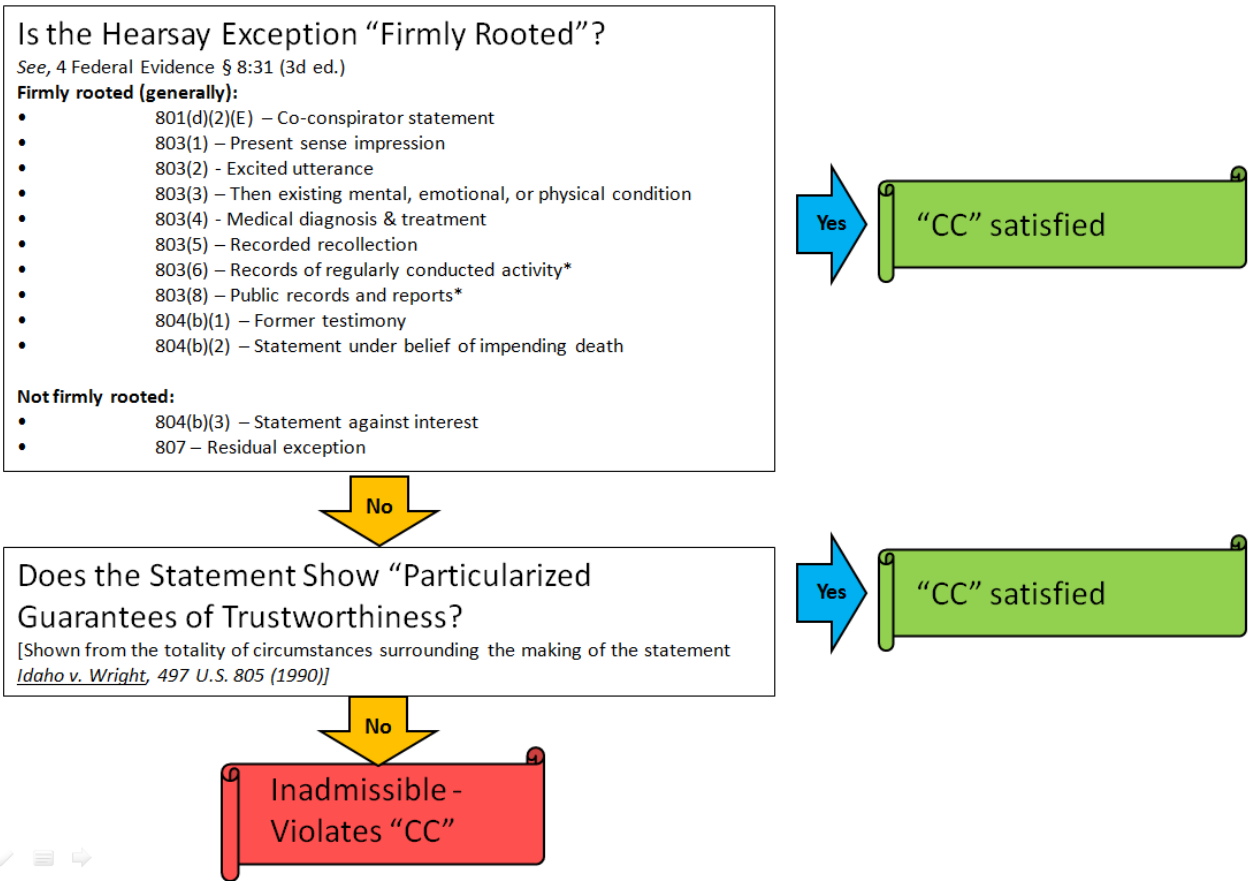
   b) Held: *Crawford* is not retroactive to cases already final on direct review because its impact on criminal procedure is equivocal. *Crawford* results in the admission of fewer testimonial statements, while exempting nontestimonial statements from confrontation analysis entirely. Thus, it is not clear 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.

VI. CONFRONTATION CLAUSE ANALYSIS CHART



Ohio v. Roberts "Quasi-Confrontation" Analysis – **Nontestimonial** Statements



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