TRIAL COUNSEL AND DEFENSE COUNSEL HANDBOOK

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This handbook is prepared by the Criminal Law Division, The Judge Advocate General's School, U.S. Army, to guide trial and defense counsel in all aspects court-martial practice.

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PREFACE

This handbook is prepared by the Criminal Law Division, The Judge Advocate General's School, US Army, to guide trial and defense counsel in all aspects of court-martial practice. It replaces Dep't of Army, Pam. 27-10, Military Justice Handbook for the Trial Counsel and the Defense Counsel (1 Oct. 1982).

Part I provides detailed procedures for trial and defense counsel that will ensure efficient and thorough compliance with counsel's legal and ethical duties.

Part II provides sample forms and formats designed to satisfy requirements of court-martial practice.

Part III provides a trial manual with sample courtroom dialogues designed to demonstrate counsel's role in presenting a case.

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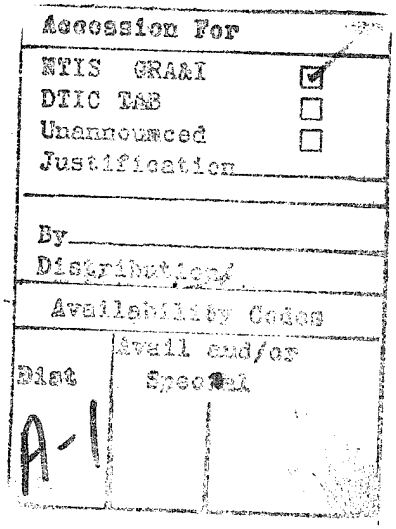


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PART I

DUTIES AND PROCEDURES FOR TRIAL COUNSEL AND DEFENSE COUNSEL

Chapter 1
Duties and Procedures for Trial Counsel

Section I
Initial Action Upon Commission of an Offense

1-1. Organize a case management system

a. Monitor cases from the time of the commission of the offense. Cases may be discovered by a daily review of the Military Police Blotter and close coordination with commanders and law enforcement activities. Monitoring cases from this stage will speed overall processing time, provide more control over the inception of government accountability periods, preclude the loss of evidence, prevent an offense from being inadvertently neglected, and generally enhance the court-martial process. A sample chart to track offenses is provided at Figure 3-1a. Such a format should be used until a decision is made to transfer the transaction to the cases-pending chart (Figures 3-1b and 3-1c). All cases assigned to a particular counsel should be logged on a cases-pending chart. Use this record as a consolidated ready reference for prompt status reporting and to systematically monitor the progress of cases toward final disposition.

b. When assigned a case, start a case file and begin immediately to keep a chronology of conversations, communications, and actions which transpire in preparation for trial.

c. Determine whether government accountability for speedy trial has begun. See R.C.M. 707. If it has begun, determine the 120-day points. Consider specifically whether the command has imposed restraint tantamount to confinement, arrest, or confinement, thereby triggering the UCMJ art. 10 speedy trial clock.

d. Monitor conditions of restraint with the command. Ensure the Commander's review, commander's memorandum, and magistrate's review are done in a timely manner. Consider what credits the accused may be entitled to (for example, Allen credit, Mason credit, R.C.M. 305(k) credit, or Art. 13 credit). See United States v. Allen, 17 M.J. 126 (C.M.A. 1984); United States v. Mason, 19 M.J. 274 (C.M.A. 1985) (summary disposition).

1-2. Coordinate with other government officials

a. Advise the accused's company, battalion, and brigade commanders regarding the proper application of pretrial restraint, should any be necessary.

b. Advise law enforcement officials regarding proper procedures to be used in conducting searches, seizures, line-ups, and witness questioning.

1-3. Determine what to charge

a. Consider which articles of the UCMJ have been violated and draft the specifications which describe the offense using the sample specifications. See Part IV, MCM, 1984.

b. Consider whether any of the specifications may be multiplicious for findings or sentencing. Do not overcharge. See United States v. Teters, 37 M.J. 370 (C.M.A. 1993).

1-4. Prepare a proof analysis sheet

a. Study the elements of proof and the law relating to each charged offense and each lesser included offense.

b. Tentatively plan how each element will be proven by available evidence.

c. Identify weak areas in the case and anticipate which defenses might be raised. Prepare to counteract them if possible.

1-5. Examine the charge sheet and all allied papers

a. Check the completeness and sufficiency of the charges and specifications by comparing them to the pertinent sample specifications in Part IV, MCM, 1984. See R.C.M. 307(c).

b. Compare the name and description of the accused in each specification with the corresponding data on page one of the Charge Sheet (DD Form 458) and with the data contained in the accused's military personnel records.

c. Ensure that the charges have been properly preferred, endorsed, investigated, referred, and served. See R.C.M. 306-407, 601-602.

d. Determine whether any member of the prosecution is disqualified because of prior participation in the same case. See R.C.M. 502(d)(4).

e. Ascertain whether any potential conflicts of interest exist which would impact upon the detailing of defense counsel. Report any possible conflicts to the appropriate Trial Defense Service supervisory counsel. See AR 27-10, Military Justice (8 Aug. 1994), para. 6-9.

1-6. Ensure availability of all potential witnesses and the accused

a. Identify potential government and defense witnesses.

b. Make the proper inquiries to discover any potential unavailability due to leave, illness, temporary duty, change of assignment, or discharge from the

service. Place upon commanders the continuing obligation to provide notice of any expected change in status of potential witnesses. Provide the commander with a list of witnesses and tell him to ensure availability.

c. Initiate necessary command or administrative actions to ensure witness availability (e.g., re-scheduling of leaves or obtaining accurate post-service addresses), or in the alternative, take the steps necessary to preserve the witness' testimony by stipulation or deposition. See R.C.M. 702; see also R.C.M. 405(g)(4) regarding article 32(b) investigations.

d. Ensure that the accused has had favorable personnel actions suspended ("flagged") pursuant to AR 600-31.

1-7. Ensure defense counsel representation

a. Comply with local staff judge advocate and Trial Defense Service procedures to obtain the timely assignment of a military defense counsel. See AR 27-10, para. 6-9 and 6-10.

b. Provide the defense counsel with a copy of the charge sheet and all allied papers. R.C.M. 701.

1-8. Be aware of trial counsel's responsibilities with regard to pretrial publicity

a. Monitor and document any press or media coverage of the case.

b. Ensure that the convening authority is aware of the potential impact that media coverage or command information briefings can have upon the fairness of the trial. Advise the convening authority about the type of information that can be ethically released by the command. See AR 27-26, Rules of Professional Conduct for Lawyers (1 May 1992), Rules 3.6 and 3.8e; ABA Standards

for Criminal Justice Prosecution Function § 3-1.4 (3d ed. 1993).

c. Refrain from any participation in pretrial publicity except to the extent specifically authorized by higher authority and consistent with ethical obligations. See AR 27-26, Rule 3.6, ABA Standards, The Prosecution Function § 3-1.4; ABA Standards, Fair Trial and Free Press § 8-1.1; and AR 340-17.

d. Always coordinate with the Command Public Affairs/Information office.

1-9. Brief lawyer's assistant

If a lawyer's assistant is assigned, brief the assistant on the case and his or her role regarding case preparation. Ensure the lawyer's assistant understands the sensitivity of confidentiality; cases are not discussed in an unofficial forum.

Section II
Duties Involving Case Preparation

1-10. Monitor the Article 32 Investigation*

a. Obtain specific designation to represent the government at the investigation and attend all sessions. See R.C.M. 405(d)(3)(A).

b. Ensure that a neutral judge advocate acts as legal advisor to the investigating officer. Avoid ex parte communications with the article 32 investigating

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* Note: Inapplicable to special and summary courts-martial. Remember also that the art. 32 investigating officer is not allowed to contact witnesses on substantive matters or gather and consider evidence outside the actual art. 32 hearing. See United States v. Rushatz, 30 M.J. 525, 530-33 (A.C.M.R.), aff'd, 31 M.J. 450, 457 (C.M.A. 1990).

officer. See United States v. Payne, 3 M.J. 354 (C.M.A. 1977).

c. Ensure that the investigation is completed in a timely manner and that all delays in processing are thoroughly documented and approved in writing by either the convening authority or the investigating officer.

d. Provide the defense counsel with a copy of the report of investigation.

e. Ensure that any tapes, transcripts, or notes of witness testimony at the Article 32 investigation are maintained and safeguarded until final appellate review. This type of material is subject to discovery under the Jencks Act.

f. Ensure that all charges and specifications have been properly investigated. Report substantial discrepancies in the report of investigation to the convening authority.

1-11. Conduct a thorough case investigation

a. Examine the crime scene. When relevant, have photographs, maps, charts, or diagrams of the scene prepared.

b. Interview all government and defense witnesses except the accused.

(1) If any witness is pending charges and is represented by counsel, obtain the consent of the counsel prior to interviewing the witness. See Mil. R. Evid. 305(e); United States v. McOmber, 1 M.J. 380 (C.M.A. 1976); AR 27-26, Rule 4.2. Do not interview any suspect who has requested counsel unless counsel is present. See Minnick v. Mississippi, 498 U.S. 146 (1990).

(2) If there is any reason to believe that the witness' conduct may be the subject of a criminal proceeding, advise the witness of his or her rights concerning self-incrimination and his or her rights to

counsel. UCMJ Article 31; Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967); Mil. R. Evid. 304 and 305; ABA Standards, The Prosecution Function § 3-3.2(b).

(3) When appropriate, lock witnesses into their testimony by interviewing them in the presence of a neutral third party, by obtaining the witness' consent to a tape recorded interview, or by having the witness verify the content of the interview by reviewing and signing the interviewer's notes. (But consider potential for loss of work product under R.C.M. 701(a)(2)(A)).

(4) If a witness with evidence necessary to the government's case refuses to testify because of possible self-incrimination, consider the relative merits of requesting a grant of immunity. See R.C.M. 704; AR 27-10, para. 2-4; 18 U.S.C. §§ 6001-6005 (1988 and Supp. V 1993).

c. Examine all real evidence such as weapons, the victim's clothing, the stolen goods, and contraband. Ensure that any required laboratory testing or expert analysis has been completed. If relevant real evidence is not yet in the government's possession, coordinate with law enforcement personnel for the collection, processing, and preservation of the evidence. Do not release any evidence until defense has had an opportunity to examine it and consents to the release. See United States v. Mobley, 31 M.J. 273 (C.M.A. 1990).

d. When relevant, examine pertinent medical records of victims or of the accused.

e. Examine any documentary evidence pertaining to the case (e.g., price lists, laboratory reports and regulations) for accuracy and admissibility.

f. If a question arises as to the sanity of the accused, refer the matter to the convening authority. See R.C.M. 706. Strictly comply with the requirements

of Mil. R. Evid. 302 regarding the release of information pertaining to mental examinations.

g. Advise the convening authority if new evidence is discovered which affects the feasibility of proceeding with the trial, or which necessitates the addition, deletion, or substantial modification of any specification. See R.C.M. 603 and 604; see also AR 27-26, Rule 3.8(a). Consider specifically the effect of preferring additional charges on the speedy trial clock for the original charges.

h. Immediately bring to the defense counsel's attention any newly discovered exculpatory evidence. AR 27-26, Rule 3.8(d), R.C.M. 701(d), ABA Standards, The Prosecution Function § 3-3.11(a).

1-12. Investigate the accused's character

a. Interview the chain of command regarding the accused's character, job performance, and prospects for rehabilitation. Examine any documentary evidence pertaining to the accused which is maintained at the unit (e.g., letters of indebtedness, counseling statements, letters of reprimand, and training performance evaluations).

b. Examine the personnel file of the accused and obtain legible authenticated copies of records of prior convictions, records of non-judicial punishment, adverse efficiency reports, letters of reprimand, bars to reenlistment, DA Forms 2A and 2-1, enlistment forms, and any other potentially relevant documents. See R.C.M. 1001(a)-(d); AR 27-10, para. 5-25. If the copies obtained from the accused's local personnel file (MPRJ) are not legible, consider obtaining copies from the accused's permanent file (OMPF) or from the accused's finance records.

c. Examine the finance records of the accused and obtain legible authenticated copies of recent Army/Air Force Leave and Earnings Statements and other pertinent documents to verify or rebut expected defense claims of financial hardship or support obligations.

1-13. Investigate the character of key witnesses

a. Determine whether any key witness can be impeached through the traditional means of attacking credibility, such as evidence of a prior conviction, the existence of any biases or friendships, reputation or opinion evidence regarding truthfulness, or prior inconsistent statements. See Mil. R. Evid. 608, 609, 613.

b. If any key government witness is susceptible to impeachment by the defense, determine whether evidence exists to bolster his or her credibility by opinion and reputation evidence regarding truthfulness.

1-14. Prepare trial notes (trial notebook)

a. Procure and organize the data necessary to present a smooth and professional rendition of boilerplate materials such as accounting for parties to the proceeding, stating the general nature of the charges, and arraignment. DA Pam. 27-9, Military Judges' Benchbook (May 1982) and Trial Judiciary Benchbook Update Memo 11 (19 July 1994)** contain a script that military judges generally follow.

b. Consider whether the defense may make any motions or evidentiary objections and, if so, make the necessary preparation to respond to them. When more than

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one theory can be advanced to support the government position, present all viable arguments. Prepare written briefs as required by the military judge or local rules or when otherwise appropriate.

c. Consider the need for government motions (e.g., motions in limine).

d. Prepare an outline of your opening statement and final argument.

e. Outline the expected testimony of each government witness and the expected cross-examination of each defense witness.

f. Prepare an outline for the cross-examination of the accused in the event he or she elects to take the stand to testify either on the merits or under oath on extenuation and mitigation. See United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983).

g. Prepare proposed instructions or special findings. R.C.M. 918(b) and 920(c); United States v. Gerard, 11 M.J. 440 (C.M.A. 1981); see also R.C.M. 905(d) and United States v. Postle, 20 M.J. 632 (N.M.C.M.R. 1985) (concerning essential findings in motions proceedings). Trial counsel and defense counsel should assist the military judge in making the necessary essential findings by making written requests for findings of essential facts. Proposed findings should be presented to the military judge, prior to trial, anytime requests for findings are made.

1-15. Comply with notice requirements

a. Prior to arraignment, disclose to the defense all evidence seized from the accused or owned by the accused which the government intends to offer at trial. Mil. R. Evid. 311(d)(1).

b. Prior to arraignment, disclose to the defense all evidence of pretrial identifications of the accused

which the government intends to offer at trial. Mil. R. Evid. 321(c)(1).

c. Prior to arraignment, disclose to the defense all statements, oral or written, made by the accused that are relevant to the case and known to trial counsel. This requirement exists regardless of the trial counsel's intentions concerning use of the statements. Mil. R. Evid. 304(d)(1).

d. Comply with the disclosure and notice requirements of R.C.M. 701.

e. Note that the timing of each disclosure or notice may vary and that there is a continuing duty to disclose relevant newly discovered evidence. R.C.M. 701(d).

1-16. Prepare evidence

a. Make advance arrangements to have all real, documentary, and demonstrative evidence available for pretrial examination by defense counsel, and make the evidence available at trial. R.C.M. 701(a)(2).

b. Ensure admissibility of all evidence through adequate foundation, authentication, and/or stipulation. See Mil. R. Evid. 901-03.

c. Determine whether expert testimony would assist in presentation of the evidence. When expert witnesses are to be used, become familiar with the areas of expertise; procure and study relevant publications in the field; select an expert with appropriate qualifications; provide the expert with all relevant facts; and coordinate with the expert on the best ways to make his or her testimony meaningful to the fact finder. Be particularly mindful of the increased impact, clarity, and retainability of demonstrative evidence. See Mil. R. Evid. 701-07. Be sure to check with the SJA before you discuss attendance, fees, or other matters

with any expert witness. Schedule government experts at the earliest possible time as other counsel are competing for their time. Give witnesses from the U.S. Army Criminal Investigation Laboratory a minimum of ten working days notice of a trial date as required by AR 195-2, Criminal Investigation Activities, para. 6-4 (30 Oct 1985).

1-17. Determine necessary witnesses

a. If possible, stipulate with the defense counsel and the accused concerning uncontested matters.

b. By using your trial notes, determine what witnesses for the government are necessary for motion hearings, on the merits, and on sentencing.

c. Ascertain what witnesses the defense counsel desires to be produced at trial. Where disagreement arises as to materiality or availability of a witness, require that the defense counsel comply with the procedural requirements of R.C.M. 703(c)(2).

d. Provide the defense counsel with adequate notice of any government witness testifying pursuant to a grant of immunity or any agreement providing the witness with favorable consideration in the disposition of his or her own case. See United States v. Webster, 1 M.J. 216 (C.M.A. 1975). Note Mil. R. Evid. 301(c)(2) requires that notice be in writing and served on the accused preferably prior to arraignment.

e. Prepare key government witnesses for trial by reviewing their direct examination, posing potential cross-examination questions, and giving them an orientation of the courtroom.

f. Determine if an interpreter is necessary. If so, locate a qualified interpreter who speaks both English and the necessary language fluently. Knowledge of a specific dialect may also be necessary. Notify

defense of the name and location of the interpreter so that defense counsel may interview the interpreter regarding his or her qualifications and may otherwise make use of the interpreter for defense pretrial preparation. Trial counsel and defense counsel should attempt to stipulate to the interpreter's qualifications. Be prepared to administer the interpreter's oath. See R.C.M. 807(b)(1)(A) and Discussion section (E) to R.C.M. 807(b)(2).

g. If defense requests disclosure under R.C.M. 701(a)(2)(A) and (B), trial counsel should request reciprocal discovery under R.C.M. 701(b)(3) and (4). See chap. 3, sec. B, para. 2d, infra.

1-18. Re-interview all witnesses

More than one counsel has been spared embarrassment by asking witnesses on the day of trial, "Has anything changed, or do you have anything to tell me before you testify? If anything changes, tell me or my assistant before you testify." This is especially important in spouse and child abuse cases, where victims sometimes change their testimony on the day of trial.

Section III
Post-Referral Administrative Duties

1-19. Closely examine all court-martial paperwork

a. Ensure that the convening authority has personally detailed all court members and that all court members are senior to the accused. See R.C.M. 503; United States v. Ryan, 5 M.J. 97 (C.M.A. 1978); and that no improper staff assistance was provided to the convening authority. See United States v. Hilow, 32 M.J. 439 (C.M.A. 1991). See also United States v. Marsh, 21 M.J. 445 (C.M.A. 1986).

b. Ensure that all counsel and the military judge have the necessary legal qualifications and that no facts appear which would disqualify any party from acting in the case. Ensure that they have been properly detailed. R.C.M. 503(b) and (c); AR 27-10, paras. 6-9 and 8-6.

c. Check the procedure used to select court members to ensure that there has been no systematic exclusion of any category of otherwise qualified personnel. See United States v. Daigle, 1 M.J. 139 (C.M.A. 1975) (improper exclusion based on rank); United States v. Nixon 33 M.J. 433 (C.M.A. 1991) (no improper exclusion based on rank).

d. Have a sufficient number of court members detailed or available to meet minimum quorum requirements after the exercise of challenges by both sides. See R.C.M. 501(a), 503(a)(2), and 912.

e. Report all discrepancies to the Chief of Military Justice and ensure they are corrected.

1-20. Serve a copy of the charge sheet on the accused

a. If possible, service should be completed by someone other than the trial counsel in the presence of the accused's defense counsel. In any event, a witness should be present when the charges are served.

b. Ensure the certificate of service (bottom of page two) is completed and signed on all copies of the charge sheet (DD Form 458).

c. Ensure that, absent waiver by the accused, service is accomplished at least three days prior to trial by special court-martial and at least five days prior to trial by general court-martial. See UCMJ art. 35; R.C.M. 602 (when computing time, exclude the date of service and date of trial).

1-21. Finalize the forum selection

a. Ascertain from the defense counsel the forum before which the accused desires to have his or her case heard. Do this as early as practicable so that court members can be notified in case of a members trial.

b. If the accused is enlisted and desires enlisted members on the court, ensure that the defense counsel and the accused submit a request in writing or that they are prepared to make the request orally on the record. UCMJ art. 25(c)(1); R.C.M. 903. Advise the convening authority of the request and ensure that sufficient enlisted members are detailed to constitute at least one-third of the total court membership after exercise of challenges. R.C.M. 503(a)(2). Enlisted members should be senior in grade to the accused and not be members of the accused's company-sized unit. UCMJ art. 25(c)(1); see also R.C.M. 912(f)(1) and (f)(4).

c. Review the DA Forms 2, 2A, 2B, and 2-1 pertaining to detailed court members for information which may affect their ability to sit as court members.

d. If you desire, or if defense counsel so requests, submit questionnaires to the members in accordance with R.C.M. 912(a)(1). Use of such questionnaires may expedite voir dire by disclosing reasons for challenge prior to trial, which then allows substitutions to be made in advance by the convening authority.

e. Prepare a voir dire examination to disclose possible grounds for challenge for cause and to assist in the exercise of the peremptory challenge. Also use voir dire to educate the panel about your case.

1-22. Establish a trial date

a. As soon after referral as practicable, and in compliance with local rules of court, notify your

servicing military judge that the case has been referred to trial.

b. Ascertain what motions the defense counsel intends to make and how the accused intends to plead. Evaluate the need for a separate Article 39(a) date and the anticipated length of pretrial sessions and the trial itself.

c. Ascertain the earliest date the defense counsel will be prepared to litigate the motions and/or proceed to trial. If the defense counsel seeks a delay, ensure it is in writing and approved by the convening authority (prior to referral) or the military judge (after referral). R.C.M. 707(c)(1).

d. Coordinate with the military judge regarding available trial dates. This should be done in accordance with local practice for docketing cases. Fix a firm time and date consistent with the needs of the government, speedy trial rules, and, to the extent possible, the desires of the defense.

e. Schedule courtroom availability.

1-23. Conferences

a. After referral and when feasible, hold R.C.M. 802 conferences with the military judge and defense counsel to inform the military judge of anticipated issues and to resolve matters on which the parties agree.

b. Conferences may be used to resolve scheduling difficulties and coordinate trial procedures, which may reduce delays. Conferences may also shorten the record of trial by resolving as many issues as possible off the record. Use telephone conferencing when necessary.

1-24. Ensure the presence of all necessary personnel at trial

a. Ensure that the military judge is aware of the time, date, location, and estimated duration of the trial. Coordinate with the military judge as to the uniform to be worn. Avoid ex parte discussions of the case with the military judge and court members. See AR 27-26, Rule 3.5; ABA Standards, The Prosecution Function §§ 3-2.8(c) and 3-5.4; United States v. Wilkerson, 1 M.J. 56 (C.M.A. 1975).

b. Notify the defense counsel of the time, date, location, and prescribed uniform of the court-martial. Make sure that all requirements to make disclosure and to give notice to defense have been met, including any continuing duties to disclose. Ascertain whether any special arrangements will be required regarding early arrival of the accused or any witnesses. If not already received, request notice of defense motions and witnesses.

c. Arrange for the presence of court members. Attempt to avoid having the members wait unnecessarily during protracted Article 39(a) sessions by realistically estimating the time that their participation will actually be necessary. Check with the military judge regarding when the members should be present.

d. Arrange for the presence of the accused at trial. Special attention should be given to advance planning necessary to secure the attendance of an accused in pretrial confinement. Trial counsel should ensure through the accused's commander that the accused appears at trial in a complete and proper uniform if the defense counsel requests such assistance. See R.C.M. 804(c)(1). Trial counsel should also arrange to have the military police ready to accept the accused if confinement is adjudged.

e. Arrange for the presence of all government and defense witnesses. Be particularly aware of the advance time required to schedule expert witnesses, to arrange for funding and transportation of witnesses outside the immediate trial location, to complete the subpoena process for civilian witnesses (see App. 7, MCM, 1984), and to allow for contingency planning by military units for the loss of mission assets. Special care should be taken in procuring the appearance of local nationals as witnesses in trials overseas. Attempt to reduce hardships by realistically estimating the time each witness' presence will actually be required.

f. Arrange for the presence of the following support personnel as required.

(1) A qualified court reporter. See R.C.M. 501(c) and 502(e).

(2) Escorts for the accused.

(3) A bailiff.

(4) Qualified interpreter(s) for witnesses or the accused. See R.C.M. 501(c); 502(e).

1-25. Prepare documentary aids and exhibits

a. Prepare a proposed seating chart for court members. See R.C.M. 911 discussion, and Figure 3-81, infra.

b. Have "flyers" prepared for each court member. "Flyers" consist of copies of all contested charges and their specifications typed on plain white paper.

c. Provide each member with copies of all convening orders.

d. Prepare proposed findings and sentence worksheets. See DA Pam 27-9, Military Judges' Benchbook, apps. B and C. Where word processing is available, have the master copy available at trial to make last minute changes.

e. Ask defense counsel to verify the personal data regarding the accused contained on page one of the charge sheet. Stipulate with defense counsel about the nature and length of any pretrial restraint.

f. Finalize any written stipulations or pretrial agreement to be used at trial. Where word processing is available, have master copies available to make last minute changes.

g. Have a copy of the current military pay scale available for use by the military judge or court members.

h. Mark all potential exhibits for identification.

1-26. Organize and inspect the trial facilities

a. Inspect the courtroom in advance to ensure that proper furniture is provided (to include sufficient seating for court members and the anticipated audience) and that the furniture is properly arranged. Ensure that the military judge, court members, the court reporter, and all counsel have an unobstructed view of the witnesses.

b. Ensure that the deliberation room is sufficiently sound proof so the deliberations will not be overheard. It should also contain adequate furniture, and be free from unauthorized items such as legal authorities and evidence not received by the military judge.

c. Arrange for witness waiting area(s) outside the hearing of the court. Be particularly sensitive to the requirements of the Victim/Witness Assistance Program, that the victim and certain witnesses have separate waiting areas (for example, the rape victim and co-accused involved in the rape). See AR 27-10, chap. 18.

d. Ensure that the military judge has copies of all convening orders and the original copy of the charge sheet at his immediate disposal. Also, ensure that the military judge has ready access to pertinent legal authorities to include, at a minimum, the Manual for Courts-Martial, DA Pam 27-9, Military Judges' Benchbook, and any legal authority either side intends to rely upon in presenting legal argument. If you have not practiced before the military judge before, inquire about any special administrative needs prior to trial.

e. Ensure that all court members are provided copies of the "flyer". Do not provide court members with copies of the entire charge sheet (DD Form 458).

f. Arrange for the use of a lectern or any visual aid equipment required for the presentation of evidence. Provide the military judge and the members with adequate writing supplies.

g. To the maximum extent possible, arrange for a proper judicial atmosphere, to include temperature control and limitation of outside noise.

Section IV
Duties During Trial

1-27. Zealously represent the government

a. Use Chap. 2, DA Pam 27-9, and MCM app. 8 (1984), as the framework for the presentation of the case. Find out which procedures the military judge prefers.

b. Remain flexible enough to adjust the presentation of the case to meet the exigencies of a fluid courtroom situation.

c. In responding to defense motions and objections to evidence, advance all viable theories to defeat the motion or support admissibility of the

evidence. Be aware of the need to balance the viability of the government's theories with the duty to protect the record and the actual importance of the issue to the outcome of the case.

d. In the opening statement, refer only to evidence which you intend to offer and which you believe in good faith is available and admissible. See the discussion to R.C.M. 913(b); AR 27-26, Rule 3.4(e); ABA Standards, The Prosecution Function § 3-5.5.

e. Ensure all witnesses and parties to the proceeding are properly sworn. See R.C.M. 807(b)(1); AR 27-10, paras. 11-1 through 11-8.

f. Listen to the evidence carefully and assert timely evidentiary objections to exclude inadmissible testimony damaging to the government case. State all objections with specificity. Mil. R. Evid. 103(a)(1).

g. Ensure any cross-examination of defense witnesses is conducted for a specific purpose.

h. Ensure that the closing argument is adjusted to comport with the evidence actually presented in court. Avoid misstatements of fact, inflammatory arguments, assertions of personal opinion, injection of issues broader than the guilt or innocence of this accused, references to evidence not admitted, and comment upon the accused's exercise of constitutional rights. See R.C.M. 919; AR 27-26 Rule 3.4(e); ABA Standards, The Prosecution Function § 3-5.8 and 3-5.9.

i. Never lose sight that the goal of the trial counsel is to seek justice, not merely to convict. AR 27-26 Rule 3.8, Comment; ABA Standards, The Prosecution Function § 3-1.2(c).

1-28. Ensure a complete record

a. Each time the court opens after closing, adjourning, or recessing, immediately account for all the parties to the trial.

b. Describe for the record any gestures made by the witnesses during testimony or any frame of reference, e.g., testimony regarding distance, size, height, which alludes to items in the courtroom that are not part of the record.

c. Avoid ex parte conversations with the military judge or court members regarding the case. Avoid any contact with the military judge or court members which could be interpreted as an attempt to curry favor. AR 27-26 Rule 3.5; ABA Standards, The Prosecution Function § 3-2.8(c), 3-5.4(b).

1-29. Control the real, documentary, and demonstrative evidence

a. Ensure that no tangible evidence is placed in view of the court members until properly offered into evidence. ABA Standards, The Prosecution Function § 3-5.6(c).

b. Have prior statements from all witnesses readily available for impeachment, rehabilitation, or to respond to production requests.

c. Safeguard the evidence during recesses.

d. Ensure that only exhibits properly admitted into evidence are given to the court members to take into deliberation. Be aware that stipulations of fact are given to the court members, but stipulations of expected testimony, even though in writing and properly admitted into evidence, may not be taken into deliberation by the court members. R.C.M. 811(f).

e. Request that the military judge authorize photographs and/or descriptions as substitutes in the

record for tangible evidence and authorize certified true copies or other legitimate reproductions for original documents. See R.C.M. 1103(b)(2)(D)(v).

1-30. Protect the record from error

a. Ensure that all parties are properly sworn. R.C.M. 807(b)(1); AR 27-10, paras. 11-1 through 11-8.

b. Ensure that the military judge fully and properly advises the accused of his or her rights to counsel, rights regarding forum selection, and rights to testify on the merits and on sentencing.

c. Compare all inquiries into guilty pleas and pretrial agreements and all instructions to court members with the applicable provisions in DA Pam 27-9, Military Judges' Benchbook, to ensure accuracy and completeness. Prepare special instructions in advance and mark them as exhibits. Provide case citations to support your instructions.

d. Ensure that potential witnesses are not present in the courtroom during the testimony of other witnesses.

e. Ensure that the military judge advises the accused of his or her appellate rights.

Section V
Duties After Trial

1-31. Arrange for the proper disposition of the accused

a. When necessary, ensure that armed guards are available to control and transport the accused. Brief the guards on the proper treatment and disposition of the accused, including limitations on the use of force.

b. Provide written notice of the outcome of the trial to the accused's commanding officer, the commanding officer of the confinement facility in which the accused

is to be confined, and the convening authority. R.C.M. 1101(a). The notice should be provided by completing a DA Form 4430-R, Report of Result of Trial. AR 27-10, para. 5-27. See Figure 3-89, infra.

c. Advise the commander regarding the disposition of the accused's personal property.

d. When appropriate, prior to transporting the accused, ensure that the accused and defense counsel execute a written statement indicating that the accused has been advised of his or her appellate rights and the elections that are available regarding appellate defense counsel or that the accused waives appellate review. See UCMJ arts. 38(a) (trial counsel responsible for preparing record of trial), 61 (waiver of appeal), 66 (review by Court of Criminal Appeals) and 70 (appellate counsel). Note that a waiver of appellate review must be filed with the convening authority and attached to the record of trial. R.C.M. 1110(e)(1).

1-32. Finalize administrative matters

a. Complete witness vouchers and assist witnesses in securing payment as prescribed by departmental regulations. See AR 37-106, Finance and Accounting for Installations, Travel and Transportation Allowances, chap. 13 (31 Dec 1989).

b. Ensure that the court reporter destroys all miscellaneous notes made by the court members which are left in the courtroom and deliberation room.

c. Supervise the clean up of all facilities used during the course of the trial, to include the courtroom, deliberation room, and witness waiting rooms.

d. If a civilian reporter was employed, after completion of all his or her duties, check the reporter's voucher and sign it if it is correct.

1-33. Arrange for the disposition of all evidence

a. Retrieve all evidence from the court members prior to their departure, including the findings and sentence worksheet.

b. Ensure all evidence is properly safeguarded until returned to the appropriate agency.

c. Prepare the necessary photographs, descriptions, or reproductions authorized by the military judge as substitutes for evidence in the record of trial. Be alert to situations in which a photograph would be more appropriate than a description for appellate purposes (e.g., a hashish pipe which was the subject of an illegal seizure motion).

d. Ensure all evidence is returned to the appropriate agency. Where appropriate, advise the agency what final disposition is to be made of the evidence. See AR 195-5, Evidence Procedures, paras. 2-8 and 2-9 (28 Aug 92) (final disposition may depend on appellate review).

1-34. Supervise the preparation of the record of trial

a. Give all exhibits and allied papers over to the court reporter or clerical assistant for attachment to the record of trial. See UCMJ art. 38(a); R.C.M. 1103.

b. Determine the number of copies of the record of trial to be produced. See R.C.M. 1103(g).

c. Check the progress of the record of trial as it is being transcribed.

d. When the record of trial has been completed, carefully review it to see that it is complete and accurate and that all papers are arranged and bound in the manner prescribed by law. See R.C.M. 1103(i)(1)(A); MCM app. 14 (1984); AR 27-10, paras. 5-37 through 5-44;

see also DD Form 490, Inside of Back Cover of Record of Trial.

e. When appropriate, ensure that the accused's appellate rights statement or waiver of appellate review is attached to the record immediately following the chronology sheet.

f. Note suggested changes to the record of trial on an errata sheet for the military judge's use during authentication of the record.

g. Complete the Court-Martial Data Sheet, DD Form 494.

h. Submit the record of trial to the defense counsel for examination and signature prior to authentication.

i. Submit the record of trial to the military judge (or in a special court-martial without a military judge, to the president of the court) for authentication. R.C.M. 1104(a).

j. Supply the accused with a copy of the record of trial from which any classified material has been deleted. Obtain a receipt from the accused for the copy of the record of trial, or certificate in lieu of receipt, and attach it to the record of trial. R.C.M. 1104(b).

k. If appropriate, include in the record a signed letter containing reasons why declassification of classified matter in the allied papers was not accomplished prior to the dispatch of the record.

l. Ensure that the record of trial is served upon the appropriate defense counsel for preparation of post-trial responses by the defense. See R.C.M. 1105 and 1106(f). If the accused alleges dissatisfaction with the trial defense counsel, arrange for substitute counsel.

m. Forward the record of trial to the convening authority. UCMJ art. 60.

n. Retain all reporter's notes and other records from which the record of trial was prepared. AR 27-10, para. 5-39 contains the retention instructions.

PART II

PRETRIAL, TRIAL, AND POST-TRIAL FUNCTIONS

Chapter 2
Duties and Procedures for Defense Counsel

Section I
Initial Action Upon Receipt of Charges

2-1. Organize a case management system

a. Keep a chart or record reflecting the current status of all assigned cases. Log new cases in immediately. Use this record as a consolidated ready reference for prompt status reporting and to systematically monitor the progress of cases toward final disposition. This record should not be conspicuously displayed under circumstances which will impart to clients the impression that a lack of confidentiality exists regarding their case or that the workload of the attorney will preclude full and effective representation of their case (for example, it should not be openly displayed on the office wall).

b. When assigned a case, start a case file and begin immediately to keep a chronology of conversations, communications, and actions which transpire in preparation for trial.

c. When assigned a new case or when an attorney-client relationship is formed, immediately determine whether the speedy trial clock has started. See R.C.M. 707. Document, in writing, any delays granted. Do not request open-ended delays. Closely monitor all exclusion periods. Raise any speedy trial motions at trial. Failure to raise these issues may result in waiver. See R.C.M. 707(a) and 907(b)2.

2-2. Examine the charge sheet and all allied papers

a. Ensure that the packet provided to the defense is complete. Examine provided documents, police and CID files, and discuss the case in detail with your client. Ensure that the government has complied with discovery, notice, and disclosure requirements of R.C.M. 701 and Mil. R. Evid. 311(d)(1), 321(c)(1), and 304(d)(1). See also Chapter 1, para. 1-5, supra. Be aware that a defense request for disclosure under R.C.M. 701(a)(2)(A) or (B) may require reciprocal disclosure under R.C.M. 701(b)(3) and (4). Do not rely on trial counsel's duty of continuous disclosure. As a matter of practice you should phrase your requests, if any, as continuing requests and put any such requests in writing.

b. Become familiar with the charges and supporting evidence so that the accused can be fully advised regarding the allegations and so that the facts can be intelligently discussed at the initial interview.

c. Check for errors which may be the basis for appropriate relief or dismissal (e.g., failure of the specification to state an offense; failure of the specification to allege jurisdiction; unreasonable multiplication of charges; and defects in the preferral resulting in unsworn charges).

d. Ask each potential witness if he or she plans to PCS, ETS, deploy, take leave, or be on TDY in the next six months. If so, get a forwarding address or, if a forwarding address is not available, get the address of the next of kin. Give each potential witness your card and ask the witness to call you if he or she takes emergency leave, goes TDY, or deploys unexpectedly. In some cases, defense counsel may need to request that the convening authority ensure the presence of favorable

witnesses and/or preserve their testimony by use of a stipulation or deposition.

2-3. Ensure the propriety of representing the accused

a. Begin representation of a client only when it is clear that your assignment as counsel is in accordance with Trial Defense Service policies. Avoid unauthorized solicitation of clients and unsanctioned interference with law enforcement proceedings.

b. Barring unusual circumstances, a military attorney will not undertake or be detailed to represent more than one client involving the same general offense. Where there are multiple accuseds, ensure that co-accused are initially contacted by separate defense counsel. Do not represent a co-accused without an approved request for you as individual counsel and a signed statement from each co-accused reflecting informed consent to multiple representation. See United States v. Breeze, 11 M.J. 17, 23 n.14 (C.M.A. 1981); ABA Standards, The Defense Function § 4-3.5; AR 27-26, Rule 1.7.

c. If you have acted as an accuser or have participated in the case as an investigating officer, military judge, or court member, advise the accused of your prior participation. Should the accused still want you to serve as counsel, have him or her request in writing your representation, acknowledge that he or she is aware of potential conflict, and waive the right to conflict-free counsel. See R.C.M. 502(d)(4).

d. Ensure that there is no reason why it would be necessary for you to testify as a witness in the case.

e. Be particularly careful to avoid potential conflict of interest situations, such as undertaking to represent an accused when you already represent a client who is a potential witness in the case of the accused.

f. If any facts appear which create even the remote possibility of posing one of the above barriers, seek guidance from supervisory authorities within the Trial Defense Service prior to any further representation of the accused.

2-4. Interview the accused

a. Although the length of and matters discussed in the initial interview will vary depending upon the time available, the circumstances of the case, and the style of the attorney, the following list is representative of topics which should be discussed with the accused at some point in the case preparation.

(1) Explain who you are and how you came to be assigned to the case.

(2) Advise the accused that he or she can be represented by detailed military counsel, can request individual military counsel, or can be represented by individual civilian counsel at no expense to the government. If individual military counsel is assigned, the accused has no right to a detailed counsel although retention on the case as associate counsel could be approved by the detailing authority. If individual civilian counsel represents the accused, military counsel can either be released from the case or continue to serve as associate counsel. Art. 38(b), UCMJ.

(3) Explain in detail the allegations and the evidence that the government is relying on to support those allegations, if known.

(4) Describe the court-martial process and the steps that will take place in his or her particular case.

(5) Explain the attorney-client relationship and the confidentiality of your communications. Emphasize the necessity for honesty. See ABA Standards, The Defense Function, § 4-3.1(a); see also AR 27-26, Rule

1.6. Explain that you are assigned to the Trial Defense Service, which is not part of the command, and that the convening authority does not supervise or rate you.

(6) Advise the accused of the maximum punishment that could be adjudged. See R.C.M. 1003; see also Part IV and App. 12, MCM, 1984.

(7) Have the accused tell you about every aspect of his or her involvement or lack of involvement in the charged offenses. Explain to the accused that the prosecution will likely find out all the facts, so the accused should not hold back any information. Obtain full identification of any witness who may be able to corroborate the accused's version of the facts. Explore the details surrounding any apprehension, searches or seizures, interrogations, or lineups.

(8) Have the accused describe any restraints imposed upon him or her. Advise the accused to contact you if any changes occur.

(9) Discuss the role of character witnesses, and at the earliest time possible, obtain a complete list of potential character witnesses.

(10) Inquire into the personal history of the accused, to include such things as family, education, civilian employment, prior military assignments, prior arrests or convictions, reasons for entering the military, participation in off-duty activities, personal problems, financial obligations, and future plans and goals.

(11) Ascertain whether the accused's family situation requires any prior contingency planning in the event of a conviction or discharge (e.g., early return of dependents from overseas).

(12) Emphasize and re-emphasize the need for the accused to stay out of trouble pending trial.

(13) If a co-counsel may be detailed, explain the co-counsel's role in the case. Do likewise if a lawyer's assistant may be used. Explain the role of the assistant in the case.

(14) Emphasize that the accused should talk to no one about the offenses charged, including family members, unless you give prior approval, and should inform you if anyone tries to talk to him or her about the case. Particularly point out the danger in discussing the offense with law enforcement officials, members of the chain of command, cellmates, guards, friends, and other personnel at the legal center not working on the defense of the case.

(15) If appropriate, caution the accused against improperly contacting or influencing witnesses, obstructing justice, or other inappropriate actions.

(16) Ensure the accused knows how to contact you. Provide a card or paper with your name and telephone number.

(17) Avoid discussing guilty pleas or pretrial agreements during the initial interview.

b. Set an appropriate mood for the interview. Attempt to establish a rapport with the client. Before completing a thorough case investigation, it is generally best not to be overly optimistic nor overly pessimistic regarding the accused's prospects.

c. Prior to termination of the interview, make clear to the accused that you are accessible. If possible, schedule the next meeting and provide notice to the accused's chain of command.

2-5. Contact CID/MP

If the client has been questioned or has been notified that there will be questioning by CID/MP, notify

CID/MP that you are the client's lawyer and advise them not to question the client outside of your presence.

2-6. Contact trial counsel

Provide notice to the trial counsel and/or law enforcement officials that you desire to be present at any lineups, service of charges, polygraph examinations, or any other contacts between the accused and law enforcement or prosecutorial personnel.

2-7. Special obligations if the accused is under pretrial restraint

a. Visit the accused at the site of the restraint as soon as possible.

b. Ensure that all procedural steps have been properly complied with, and ensure that substantive grounds exist to initiate restraint. See Arts. 9, 10 and 13, UCMJ; R.C.M. 304-305; United States v. Heard, 3 M.J. 14 (C.M.A. 1977).

c. Attempt to persuade the magistrate or other reviewing authorities to release the accused. See United States v. Malia, 6 M.J. 65 (C.M.A. 1978).

d. Ensure that restraint does not preclude the client from assisting in his or her own defense or in communicating in private with his or her counsel.

e. Ensure that the command complies with their obligations regarding visitations, mail, pay, uniforms, and other items relating to the health, safety, and morale of the accused.

f. If restraint is illegal and all local avenues of relief have been exhausted, consider filing a Writ of Habeas Corpus with military appellate courts.

2-8. Supervise the lawyer's assistant or legal specialist

a. Brief the lawyer's assistant or legal specialist on the case and on his or her role in the preparation and investigation of the case.

b. Ensure that the lawyer's assistant is aware of the ethical standards relating to confidentiality.

c. Avoid any potential conflict of interest involved in having a lawyer's assistant work on co-accuseds' cases.

d. Train the lawyer's assistant to handle urgent situations which may arise while you are unavailable, but ensure that they do not engage in the practice of law by giving legal opinions or advice.

2-9. Be sensitive to pretrial publicity

a. Monitor and document any press or media coverage of the case. Request that the prosecution and the public affairs officer notify you of any command press releases and obtain the text of any command information briefings relating to the offenses.

b. When pretrial publicity is likely, take immediate action to preclude or control the release of information by the government. Possible actions include a request to the military judge for a "gag order" and requests to the convening authority, staff judge advocate, Article 32 investigating officer, and PAO to refrain from certain actions or statements.

c. Refrain from making any public statements without specific authorization from the appropriate authority. See USATDS SOP, para. 1-9. Under no circumstances should you make any statements infringing upon the integrity of the judicial process, abridging confidentiality obligations, or in any way posing a risk

to the fairness of the trial. See AR 27-26, Rule 3.6; ABA Standards, The Defense Function § 4-1.3; ABA Standards, Fair Trial and Free Press § 8-1.1; AR 340-17.

2-10. Begin case preparation

a. Ascertain whether any prospective witnesses will be unavailable in the future. If so, arrange for immediate interviews.

b. Due to the time required to contact potential witnesses located any substantial distance from the trial situs, take early action to procure statements through correspondence or to conduct interviews telephonically. If a military installation is located near the witness' residence, defense counsel or law enforcement officials may be able to provide assistance.

c. Keep in mind that the investigation of the case against the accused is frequently complete prior to preferral of charges, while the defense case frequently has not been investigated at all. Consequently, defense counsel may not be prepared to proceed with the case as early as trial counsel. To support a request for continuance, promptly and continuously document all defense preparation in the case. In addition, defense counsel must balance the advantages to be gained by early exploration of alternate dispositions of the case against ethical obligations not to enter into a pretrial agreement without full investigation of the case. See ABA Standards, The Defense Function § 4-6.1(b).

d. If investigation is required away from your installation, consider requesting detail of a CID agent. If no agent is available, request TDY for your assistant or yourself.

e. Request funding beforehand from the convening authority for expenses identified in para. 6-5b, AR 27-

10, to include: attendance of witnesses, witness interviews, other investigative expenses, etc.

2-11. Consider any sanity/competency issues

Determine whether there is any doubt as to the accused's sanity at the time of the alleged offense, or as to the accused's capacity or competence to participate in his or her own defense.

a. If questions exist regarding the accused's mental condition, request a psychiatric examination or, where appropriate, a sanity board. See R.C.M. 706. Keep in mind there is no doctor-patient privilege unless the convening authority orders a board or examination. Even then, if the issue is raised at trial, the privilege may be overcome.

b. Keep in mind that sanity determinations can generally be more accurate the closer in time to the offense that the client is examined.

c. Consider requesting a psychiatrist to assist the defense under United States v. Toledo, 25 M.J. 270 (C.M.A. 1987), aff'd, 26 M.J. 104 (C.M.A. 1988).

d. Be aware that often mental problems which do not qualify as a defense can be used to seek a nonjudicial or administrative disposition of the case or can be presented on sentencing. In addition, mental problems may be used to negate an element of the offense. See Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988).

2-12. Prepare a proof analysis sheet

a. Study the elements of proof and the law relating to each offense charged and to each lesser included offense. See Chapter 3, para. 3-6, infra.

b. Anticipate how the government will prove each element with available evidence.

c. Identify weak areas in the government case and potential special and other defenses. R.C.M. 916. Plan to fully investigate all possible defense theories of the case.

Section II
Duties Involving Case Preparation

2-13. Represent the accused at the Article 32 Investigation

a. Explain to the accused all aspects of the Article 32 Investigation, including testimonial rights, the right to confront government witnesses, and the right to present evidence on his or her own behalf. Assist the accused in asserting his or her rights in conformity with the defense strategy in the case. See Art. 32, UCMJ; R.C.M. 405.

b. Consider the benefits to the accused of waiving the Article 32(b) Investigation (for example, to obtain a more favorable pretrial agreement). See R.C.M. 405(k) and 705(c)(2)(E).

c. Submit a written request for material witnesses and the production of necessary documents. This request should be made to the Article 32 investigating officer. If witness production is denied, ensure that the reasons for denial are explained for the record and seek alternate forms of testimony. See R.C.M. 405(g). Consider the propriety and benefits of objecting to the alternative evidence sought to be used by the government representative or investigating officer.

d. Attend all sessions of the investigation. Depending upon the desires of the accused and the facts of the case, use the proceeding solely to discover the government's case; to actively defend your client in hopes of having the case dismissed or the level of

disposition reduced; or to present only character evidence.

e. Request in writing that all tapes, transcripts, and/or notes taken of testimony at the investigation be preserved until final disposition of the case. Serve copies of the request upon the investigating officer, the trial counsel, and any clerical assistant involved in the recording of testimony.

f. Obtain a copy of the final report of investigation and review it for errors.

g. Make objections to the report to the commander who directed the investigation within five (5) days of receipt. See R.C.M. 405(j)(4).

2-14. Conduct a thorough case investigation

a. Examine the sites of all important events in the case, to include the site where the offense was committed, the site where the accused was apprehended, the site of any searches and seizures, and the site of any interrogations. When relevant, have photographs, maps, charts, or diagrams of the scenes prepared.

b. Interview all potential government and defense witnesses.

(1) If any witness is pending charges and is represented by counsel, obtain the consent of the counsel prior to the interview. See AR 27-26, Rule 4.2.

(2) If possible, lock all witnesses into their testimony by interviewing them in the presence of a neutral third party, by obtaining the witness' consent to a tape recorded interview, by having the witness execute a written statement, or by having the witness verify the contents of the interview by reviewing and signing the interviewer's notes.

(3) If any problems arise in obtaining an interview with a potential witness, bring the matter to

the attention of the trial counsel or the convening authority.

c. Closely examine all real evidence, such as weapons, victims' clothing, stolen goods, contraband, etc.

(1) Ensure that the description and the condition of all real evidence is consistent with the testimony of witnesses.

(2) When appropriate, request independent testing or analysis of relevant evidence. Note that reciprocal disclosure to the government may be required by R.C.M. 701(b)(4).

(3) Contraband and physical evidence implicating the client in criminal conduct must be dealt with in accordance with AR 27-26, Rule 3.4 and TDS SOP, para. 1-12.

d. When relevant, examine pertinent medical records of alleged victims or of the accused.

e. Examine any documentary evidence pertaining to the case for accuracy, completeness, and admissibility.

2-15. Investigate the accused's character

a. Interview anyone that the accused personally feels would be a good character witness. Potential sources of character evidence that should be explored include family members, teachers, ministers, civilian employers, and members of current and prior military units.

b. Interview the accused's chain of command regarding character, job performance, prospects for rehabilitation, and their recommendations for disposition. Determine whether there was improper command influence. See R.C.M. 104.

c. Interview potential witnesses who may testify concerning the accused's "bad character."

d. Examine any documentary evidence pertaining to the accused which is maintained at the unit (e.g., letters of indebtedness, counselling statements, letters of reprimand, and training performance evaluations).

e. Examine the personnel file of the accused. Review adverse information (e.g., records of prior conviction, records of nonjudicial punishment, and letters of reprimand) for defects which may preclude admissibility. Obtain legible authenticated copies of all favorable information (e.g., efficiency reports, letters of appreciation, etc.).

f. Examine the finance records of the accused, and obtain legible authenticated copies of documents that demonstrate financial obligations, financial hardship, or other relevant financial conditions.

2-16. Investigate the character of key witnesses

a. Determine whether any key witness can be impeached through the traditional means of attacking credibility with evidence of prior convictions, prior inconsistent statements, the existence of any biases or friendships, or opinion and reputation evidence regarding lack of truthfulness. See Mil. R. Evid. 609, 613.

b. If any key defense witness is susceptible to impeachment by the government, determine whether there is evidence to bolster the witness's credibility by opinion and reputation evidence regarding truthfulness.

c. Ask the CID for a files search for the accused and each potential witness. Review the Military Personnel Records Jacket (MPRJ) of each potential witness.

2-17. Consider polygraph or hypnosis

When an accused cannot recall relevant facts in the case, or when the accused's version is at variance

with the government evidence, consider the relative merits of using the polygraph examination or hypnosis as defense tools. Keep in mind that statements made during a polygraph may be admissible against the client. Consider first a civilian polygraph.

2-18. Explore alternate dispositions of the case

a. Advise the accused fully of all possible options in the case, including the following:

(1) Seeking dismissal of all charges by the convening authority.

(2) Attempting to convince the convening authority to take nonjudicial and/or administrative action in lieu of court-martial.

(3) Submitting a request for discharge for the good of the service pursuant to Chapter 10, AR 635-200.

(4) Pleading guilty to some or all charges or lesser included offenses either with or without a negotiated pretrial agreement.

(5) Pleading not guilty and forcing the government to prove guilt beyond a reasonable doubt.

b. After conducting a thorough investigation of the case, candidly estimate the probable success of each option and advise the accused accordingly. Do not intentionally overstate or understate prospects in an effort to induce the accused to plead guilty or not guilty. See ABA Standards, The Defense Function § 4-5.1(b).

c. Attempt to achieve whatever alternate dispositions the accused desires. Pre-plan how much of the defense trial strategy it is prudent to disclose in light of realistic probabilities of success.

2-19. Prepare trial notes

a. Determine what preliminary matters will be raised, including motions to dismiss (R.C.M. 907), motions to suppress evidence (Mil. R. Evid., Sec. III), and evidentiary objections. Prepare written briefs as appropriate.

b. Prepare an outline of any opening statement and final argument to be made at trial. Consider whether to give the opening before or after the government's case-in-chief. Normally the opening statement should be given immediately after trial counsel's opening statement.

c. Outline the expected cross-examination, if any, of each government witness and the expected direct examination of each defense witness. Have all prior statements of potential witnesses available and organized for ready reference.

d. Prepare proposed instructions, special findings, and essential findings. See R.C.M. 905(d), 918(b) and 920(c); United States v. Gerard, 11 M.J. 440 (C.M.A. 1981); United States v. Postle, 20 M.J. 632 (N.M.C.M.R. 1985); see also Chap. 1, para. 1-14(g), supra.

2-20. Prepare real, documentary, and demonstrative evidence

a. Make advance arrangements to have real, documentary, and demonstrative evidence available for trial.

b. Ensure admissibility of all evidence through adequate foundation, authentication, and/or stipulation. See Mil. R. Evid., Sec. IX.

c. Determine whether expert witnesses may be able to assist in the presentation of the evidence. When expert witnesses are to be used, become familiar with

the area of expertise by procuring and studying relevant publications in the field. Select an expert with appropriate qualifications, and provide the expert with all relevant facts. Coordinate with the expert on the best way to make the testimony meaningful to the fact finder. Be particularly mindful of the increased impact, clarity, and retainability of demonstrative evidence when coupled with expert testimony. See Mil. R. Evid., Sec. VII. Note that payment of expert witness fees by the government requires prior compliance with R.C.M. 703(d). See generally Hahn, Voluntary and Involuntary Expert Testimony In Courts-Martial, 106 Mil. L. Rev. 77 (1984).

2-21. Prepare the accused for trial

a. Fully explain to the accused the entire procedure that will take place in the courtroom.

b. Ensure that the client understands the trial strategy that will be employed and that you, as counsel, control tactical decisions such as what witnesses to call and what questions to ask on cross-examination. See AR 27-26, Rule 1.2; ABA Standards, The Defense Function § 4-5.2. Document any significant disagreements on strategy or tactics.

c. Re-advise the accused with regard to his or her rights to counsel (Art. 38(b), UCMJ) and ascertain whether the accused still desires your representation.

d. Advise the accused about the options regarding choice of forum, including the right to request trial by military judge alone (Art. 16, UCMJ) or, if applicable, to request trial by court-martial composed of at least one-third enlisted members senior in grade to the accused. Art. 25(c), UCMJ.

e. Advise the accused fully of his or her testimonial rights on the merits and on sentencing. See

R.C.M. 502(d)(6) discussion, and 1001(c)(2); see also DA Pam 27-9 at 2-21 and 2-37.

f. If the accused is going to plead guilty to any offense, conduct a thorough practice providence inquiry using DA Pam 27-9, §§ II and III. Take special care to ensure that the accused really wants to plead guilty and that the plea will be accepted. Inform the accused that he or she will be placed under oath and asked to tell the military judge in his or her own words how the offense(s) occurred. R.C.M. 910(c)(5). During the practice sessions, listen carefully to the accused's responses to ascertain if the accused unnecessarily reveals any uncharged misconduct or other adverse information. Advise the accused that any such information that surfaces during the providence inquiry might be used against him or her for sentencing purposes. United States v. Holt, 27 M.J. 57 (C.M.A. 1988). Ensure that the accused understands all the terms contained within any pretrial agreement.

g. Discuss the accused's options regarding stipulations of facts or expected testimony. Obtain the accused's informed consent prior to entering into any stipulation. See R.C.M. 811(c).

h. Explain to the accused the meaning of a conviction and the practical meaning of the possible sanctions the court could impose on sentencing.

i. If possible, give the accused an orientation of the courtroom and go over his or her testimony as well as possible areas of cross-examination by the trial counsel.

j. Have the accused verify the accuracy of the personal data on page one of the charge sheet, especially as to pretrial restraint.

k. Emphasize the importance of appearing in a proper uniform with shined brass, shined shoes, and a

proper hair cut. Ensure that the accused wears all authorized awards and badges, and his or her records accurately reflect these matters. Accused and defense counsel are responsible for ensuring that the accused is properly attired, but the accused's commander can be requested to provide reasonable assistance. See R.C.M. 804(c). Emphasize the appropriate demeanor and military courtesies to be used in the courtroom.

2-22. Comply with all notice requirements

Give the trial counsel timely notice of the following:

a. Motions to be raised at trial, including the need for evidentiary hearings and written briefs.

b. The plea to be entered by the accused and the forum election.

c. A complete list of witnesses the defense desires to be produced at trial. See R.C.M. 703(c)(2)(B).

d. The names and addresses of all witnesses other than the accused, the defense intends to call during its case in chief, including any sworn or signed statements they made. R.C.M. 701(b)(1)(A). If requested by trial counsel, the defense must also provide a list of witnesses the defense intends to call during sentencing and allow trial counsel to inspect evidence the defense intends to present during sentencing. See R.C.M. 701(b)(1)(B).

e. The need for any special arrangements such as the early arrival of the accused or witnesses at court, the requirement for an interpreter, the procurement of real evidence, the presence of visual aid material, etc.

f. Alibi, innocent ingestion, and mental responsibility (R.C.M. 701(b)(2)) defenses.

g. Reciprocal discovery disclosures under R.C.M. 701(b)(3) and (b)(4), as necessary.

2-23. Re-interview all witnesses

a. Advise witnesses of the proper uniform, date, time, and place of trial. Ensure that they know what questions will be asked, including anticipated questions on cross-examination. Make sure they know what charges the accused is facing. If they are to be witnesses on sentencing, be sure to tell them that the accused will have been found guilty of some or all of those offenses by the time they testify.

b. Re-interview all witnesses as close in time to actual in-court presentation as possible to ascertain whether there is any change in anticipated testimony.

c. When using a witness not requested through the trial counsel, coordinate with the witness' first sergeant or unit commander to ensure the attendance of the witness.

Section III

Post-Referral Administrative Duties

2-24. Closely examine all court-martial paperwork

a. Ensure that the convening authority has personally selected and detailed all court members. See United States v. Ryan, 5 M.J. 97 (C.M.A. 1978); United States v. Hilow, 32 M.J. 439 (C.M.A. 1991).

b. Check the procedure used to select court members to ensure that there has been no systematic exclusion of any category of otherwise qualified personnel. See United States v. McClain, 22 M.J. 124 (C.M.A. 1986); United States v. Nixon, 33 M.J. 433 (C.M.A. 1991).

c. Check whether the pretrial advice requirements of R.C.M. 406 have been met regarding the contents of the advice.

d. Check for any errors in the referral process which may have violated a substantial right of the accused.

2-25. Prepare for the selection of court members

a. Request the DA Forms 2, 2A, 2B and 2-1 relating to each of the detailed court members. Consider the benefits of requesting that a questionnaire be sent to the members. See R.C.M. 912(a)(1).

b. Conduct an informal inquiry among other counsel to ascertain any previous "track record" of the panel detailed for the case. Consider maintaining an office file of this information for future use.

c. Prepare a voir dire examination to disclose possible grounds for challenge for cause and to assist in the exercise of the peremptory challenge.

d. Interview appropriate administrative personnel to determine how members were nominated and selected.

2-26. Coordinate with the trial counsel

a. Ascertain when the accused will be served a copy of the charges.

b. Coordinate with the trial counsel concerning the setting of a trial date. Delays should be requested in writing for a specific period of time and only when necessary.

c. If not previously provided, re-assert requests for a list of all government witnesses and any outstanding discovery information.

d. Verify the personal data on page one of the charge sheet.

e. Finalize all stipulations, pretrial agreement documents, etc.

f. Review the proposed findings and sentence worksheets.

g. Write out the complete plea as it will be entered in court. This is particularly important when it includes exceptions and substitutions.

h. Consider the relative benefits of a post-referral conference with the military judge and trial counsel to inform the parties of potential issues and to resolve matters upon which both parties agree. See R.C.M. 802.

i. Mark all potential exhibits for identification.

Section IV
Duties During Trial

2-27. Zealously represent the accused

a. Use DA Pam 27-9, Military Judges' Benchbook, chap. 2 as the guide for presentation of the case.

b. Remain flexible; adjust the presentation of the case to meet the exigencies of a fluid courtroom situation.

c. Notwithstanding the nature of the plea entered on behalf of the accused, assert all appropriate motions applicable to the case unless waived pursuant to a pretrial agreement.

d. In the opening statement, only refer to evidence which you intend to offer and which you believe in good faith is available and admissible. See R.C.M. 913(b); ABA Standards, The Defense Function § 4-7.4.

e. Listen to the evidence carefully and assert timely evidentiary objections to exclude inadmissible evidence damaging to the defense case. State all objections with specificity. Mil. R. Evid. 103.

f. Ensure any cross-examination of government witnesses is directed toward a specific purpose.

g. At the conclusion of the government's case, assert any applicable motions for a finding of not guilty. See R.C.M. 917.

h. In the event the client intends to take the witness stand to testify falsely, review the applicable ethical standards and consult with supervisory Trial Defense Service officials before taking any action. See AR 27-26, Rule 3.3; ABA Standards, The Defense Function § 4-7.5(a).

i. Ensure that the closing argument is adjusted to comport with the evidence actually presented in court. Avoid misstatements of fact, inflammatory arguments,

assertions of personal opinion, injection of issues broader than the guilt or innocence of the accused, and references to evidence not admitted. See R.C.M. 919(b) discussion; AR 27-26, Rule 3.4(d); ABA Standards, The Defense Function § 4-7.8.

j. Have available in court any legal authority upon which you rely in argument.

k. Ensure that the accused understands all aspects of the proceeding.

Section V
Duties After Trial

2-28. Duties immediately after trial

a. Explain to the accused the meaning and effect of the findings and sentence. If confinement is adjudged, defense counsel should be aware of and advise the accused of the place of confinement, as well as clemency, parole, and rehabilitation opportunities. See DoD Directive 1325.4; AR 190-47; United States v. Hannan, 17 M.J. 115 (C.M.A. 1984).

b. If the accused is acquitted or the sentence does not include any form of detention, ensure that the accused is released from all forms of pretrial restraint. Ensure that the accused's rank is not removed before any imposed reduction is approved and ordered executed by the convening authority. See R.C.M. 1113.

c. Defense counsel must advise the accused on appellate rights, the powers of the Court of Military Review, Court of Military Appeals, and the United States Supreme Court, as well as the defense counsel's role in the appellate process. See R.C.M. 502(d)(6) discussion, para. (E)(iv); United States v. Palenius, 2 M.J. 86 (C.M.A. 1977).

d. When the accused is sentenced by a general court-martial or receives a bad-conduct discharge from a special court-martial, the defense counsel must ensure that the accused executes a written statement regarding his or her election of rights to appellate counsel. The statement will be attached to the record of trial. Arts. 38(a), 66, and 70, UCMJ. Care should be taken regarding what matters are raised, ensuring that any errors the accused wants raised on appeal are included. See United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

e. Should the accused desire to waive or withdraw from appellate review, defense counsel should fully advise him or her as to the consequences of submitting a waiver/withdrawal. R.C.M. 1110. Written waivers must be submitted to the convening authority within the time limits set by R.C.M. 1110(f)(1). See R.C.M. 1110(d) and (e).

f. Defense counsel must advise the accused of the right to request deferment of a sentence to confinement. See R.C.M. 502(d)(6) discussion, para. (E)(i).

g. Provide post-trial assistance to the client and his or her family.

h. Retain all trial notes and case files pertaining to the case until the time limits for all appellate review under the UCMJ are exhausted. See Arts. 66, 67, 69, 71 and 73, UCMJ. At a minimum, the file of any case not actively pending review should be retained for at least two years after the sentence is approved under Art. 60(c), UCMJ. See Art. 69(b), UCMJ.

2-29. Advise and assist the accused

a. Discuss matters that may be submitted to the convening authority for consideration with respect to the findings and sentence. See Arts. 38(c) and 60(b), UCMJ; R.C.M. 1105.

(1) Allegations of errors affecting the legality of the findings or sentence.

(2) Portions of summaries of the record and copies of documentary evidence offered or introduced at trial.

(3) Matters in mitigation which were not available for consideration at the court-martial.

(4) Clemency recommendations.

b. Matters submitted under R.C.M. 1105 must be within the time periods prescribed in R.C.M. 1105(c), or they will be deemed to be waived. See R.C.M. 1105(d).

c. Thoroughly review the record of trial and SJA recommendations in the case, and prepare post-trial submissions under R.C.M. 1105, 1106(f)(4), 1106(f)(7) and 1112(d)(2). See Effron, Post-Trial Submissions to the Convening Authority Under the Military Justice Act of 1983, The Army Lawyer, July 1984, at 59; see also chap. 3, sec. E2, infra.

d. Consider submission of a petition for a rehearing before action (Art. 60(e)) or a new trial after action (Art. 73). See also R.C.M. 1102, 1107(e) and 1210.

e. Advise the accused of the possibility of excess leave pending appeal. See AR 630-5.

f. Consider advising the accused of the right to seek congressional relief.

g. Consider advising the accused of the right under Article 138, UCMJ, and AR 27-10, Chapter 20, to submit a request for redress of grievances. Note that AR 27-10, para. 20-5, indicates that matters relating to UCMJ actions are generally inappropriate for Art. 138 procedures; however, some conduct surrounding UCMJ action may still be subject to Art. 138 action.

h. Consider initiating action under Article 98, UCMJ (noncompliance with procedural rules).

i. Consider an application for relief from court-martial findings and/or sentence under Art. 69(b), UCMJ. See R.C.M. 1201(b)(3); AR 27-10, Chap. 14; DA Form 3499.

j. Consider an application for relief to the Army Discharge Review Board and Army Board for Correction of Military Records. See AR 15-180; AR 15-185.

k. Consider submission of a "Certificate of Innocence." See 28 U.S.C. § 2513; Forrest v. United States, 3 M.J. 173 (C.M.A. 1977); McDaniel v. Stewart, 7 M.J. 929 (A.C.M.R. 1979).

l. Consider a "Petition for Executive Clemency." See 28 C.F.R. §§ 1.1-1.10.

m. Consider petitioning for extraordinary relief from A.C.M.R. or C.M.A. See R.C.M. 1203(b) discussion; R.C.M. 1204(a) discussion.

2-30. Monitor post-trial processing

a. Defense counsel must thoroughly review the record of trial and become familiar with appellate issues. See United States v. Palenius, 2 M.J. 86 (C.M.A. 1977).

b. Defense counsel must review the post-trial recommendation for errors. See R.C.M. 1106; United States v. Goode, 1 M.J. 3 (C.M.A. 1975).

c. Ensure that the client receives a copy of the record of trial. See United States v. Cruz-Rijos, 1 M.J. 429 (C.M.A. 1975). Note that R.C.M. 1104(b)(1)(C) puts substantial requirements on defense counsel to assist in service of the record of trial on the accused.

d. Cooperate fully with the accused's appellate defense counsel.

2-31. Maintain representation

Defense counsel must maintain the attorney-client relationship until properly relieved of such duty or

until the relationship is severed by the client. See United States v. Polk, 27 M.J. 813 (A.C.M.R. 1988); United States v. Palenius, 2 M.J. 86 (C.M.A. 1977).

Section VI
Duties and Responsibilities of Detailed Defense Counsel

2-32. Advice to accused

a. Detailed defense counsel are required to promptly explain to the accused his or her rights to request individual military counsel (IMC) of the accused's own selection, the effect of such a request, and the right to retain civilian counsel. See R.C.M. 506. Defense counsel should assist in the processing of requests for IMC's pursuant to the requirements of AR 27-10, chapters 5 and 6. Unless the accused directs otherwise, detailed defense counsel shall begin preparation of the defense immediately after being detailed, without waiting for approval of a request for individual military counsel or retention of civilian counsel. See R.C.M. 506.

b. In advising a client on his IMC request, counsel should carefully explain that an accused is entitled to only one military lawyer, and that detailed counsel will ordinarily be excused once the IMC request is approved. Counsel should also explain that the client may request that detailed counsel remain as associate counsel, but the request will not necessarily be granted. Finally, counsel should memorialize the accused's choice in writing, preferably signed by the accused.

c. Presently, AR 27-10, App. C, para. C-2(B)(1) forbids military counsel from recommending any specific civilian counsel. But see AR 27-3, para. 2-7b(2) (legal assistance attorneys may recommend a particular attorney and assist their clients in obtaining the best-qualified

counsel at the most reasonable cost). Counsel may, however, show the accused a list of local attorneys compiled in coordination with the SJA office and representatives of the local bar association. The accused must be advised that this list is not exclusive, that the accused is not limited to the services of a local attorney, and that the listing of an attorney is not necessarily an endorsement of the attorney's capability or character. The accused should be reminded that the responsibility for the choice is solely his or her own.

d. Military defense counsel should explain to the accused the advantages of hiring civilian counsel who practices criminal law and has court-martial experience. Inform the accused that if the client is not explicit in his or her expectations the client may be disappointed. The accused should be warned to be wary of counsel who guarantee results, and should speak with at least two attorneys before hiring one.

e. Military defense counsel should encourage the accused to make a timely election of defense counsel. Explain that indecision cannot unreasonably delay proceedings. United States v. Thomas, 22 M.J. 57 (C.M.A. 1986); United States v. Montoya, 13 M.J. 268 (C.M.A. 1982). Also, keep in mind that as the detailed defense counsel, you must begin preparation immediately after appointment. See R.C.M. 502(d)(6).

2-33. Military detailed counsel and the IMC

a. The detailed counsel's duty to a client does not end upon submitting an IMC request. He must continue to do whatever is necessary to protect the client's rights while the request is pending. Requirements vary. In some cases, no further action by detailed counsel will be necessary. It is nonetheless advisable to keep the

client apprised of what is happening in the case. Detailed counsel must remain alert for matters requiring intervention, and must be prepared to brief the IMC on what has happened in the case.

b. Once the IMC has been briefed, detailed counsel may be excused. The decision to excuse detailed counsel is at the discretion of the detailing authority under provisions of R.C.M. 506(b)(3), and may be reviewed only for abuse of discretion. Detailed counsel may be excused even if he or she has appeared in court on the accused's behalf. Be aware, however, that the military judge may still decide to order detailed counsel to appear in the case. This is most likely to happen if the accused tries to fire his IMC, or if the accused seeks excessive delays in order to hire civilian counsel. In such a case, the military judge may order all the lawyers to appear who have had contact with the accused. If detailed counsel can produce a document, signed by the accused, excusing him or her from the case and setting out the detailing authority's rationale for not continuing him or her as associate counsel, it will assist the military judge in finding that the detailing authority has not abused his or her discretion and that detailed counsel need not participate.

2-34. Military defense counsel and civilian counsel

a. The civilian counsel is expected to treat an associated military attorney as a professional equal, and both are expected to treat each other with the respect and courtesy due their professional status. It is recommended that the military counsel and civilian counsel come to a mutual agreement, up front and preferably in writing, detailing who will be primarily responsible for each aspect of the representation.

b. Normally, a military counsel becomes an associate or co-counsel when the accused hires a civilian counsel, and the military counsel is not excused. See Art. 38(b)(4), UCMJ, and R.C.M. 502(d)(6). The accused may, however, designate military counsel as lead counsel or co-counsel. Unless the accused designates military counsel as lead counsel or co-counsel, civilian counsel is in charge. See R.C.M. 502(d)(6) discussion, para. (F).

c. Where a conflict concerning defense tactics occurs, the military counsel must defer to the civilian counsel if the accused has made the civilian counsel chief counsel. If the military counsel determines that the civilian counsel is conducting himself or herself contrary to AR 27-26, Rules of Professional Conduct for Lawyers, or violating the law, the military counsel should first discuss the problem with the civilian counsel. If the matter cannot be resolved, the military counsel has the duty to inform the accused of the civilian counsel's actions. The military counsel should inform the civilian counsel of his or her intention to discuss the matter with the accused. If the accused approves of the civilian counsel's conduct, the military counsel must inform the accused that he or she will inform the convening authority or request an Art. 39(a), UCMJ, session, whichever is appropriate, and ask to be relieved of his or her responsibilities as counsel. See AR 27-10, App. C, paragraph C-2b(3).

Chapter 3
Suggested Formats

Section I
Initial Preparation

3-1. Case management records

a. Any attorney doing trial work should keep careful records which reflect the current status of all assigned cases and account for the processing time in each case. In addition, any activity, conversation, or problem area involving a case should be documented in the case file.

Charts provide an immediate visual status of all pending cases. Charts can be on notebook size paper or enlarged to wall size. They enable counsel not only to note and avoid unreasonable delays in processing, but also provide prompt status reports of cases. Sample formats are shown at Figures 3-1a, 3-1b, and 3-1c. Some jurisdictions may use similar charts for summary court-martial cases. A chart for tracking post-trial actions is shown at Figure 3-2.

The Legal Automated Army-Wide System's (LAAWS) Criminal Law Module (CRIMLAW) was recently issued to the field to support the processing of disciplinary actions by legal personnel at all levels of the Army. It provides automated management, document production and reduced data input for the various legal offices. It also automates the management of statistics, recording critical events and times for the justice process milestones. An example of the pretrial and post-trial status reports are shown at Figures 3-3 and 3-4.

Chronology sheets should be used with each case file. Counsel can either devise a standard format highlighting the most important aspects of case processing (para. 1f, infra) or maintain a running chronology in free form (para. 1e, infra). Recording events in detail can be valuable in preventing many of the problems that commonly arise during the processing of a case. In addition, a record allows for a smoother transition should another counsel have to take over the case. Finally, it is the only practical way to account for processing time as required by the Court of Military Appeals in United States v. Cole, 3 M.J. 220 (C.M.A. 1977), if a speedy trial motion is raised.

Figure 3-1a

INCIDENTS PENDING ACTION

Name & Grade	Unit	Offenses & Dates	Type of Restraint	Date Discovered	How Discovered	Date Discussed with CDR	Present Status	Remarks
Green, SPC	Co A, 1/11th Inf.	Murder, Robbery - 26 March	PTC - 26 March	26 March	accused surrendered himself to MPs.	26 March	Pending Preferral	

Figure 3-1b

GCM AND BCD SPECIAL COURT-MARTIAL CASES PENDING

Name & Grade	Unit	Type of Restraint and Date	Offenses and Dates	Dates											Excluded Days	Net Days	Counsel TC/DC	Remarks
				Of Preferral	To SCMCA	To SPCMCA	To IO	Art 32 Completed	Rec'd by SJA	Pre-Trial Advice	Of Referral	Served	Trial	Sentence				
Brown, SFC	HHB, Division Arty	None	Larceny 2 Jan	16 Jan	16 Jan	18 Jan	20 Jan	30 Jan	8 Feb	12 Feb	12 Feb	13 Feb	27 Feb	DD, 2 yrs TF, E-1	None	42	Edwards/ Black	

Figure 3-1c

REGULAR SPECIAL COURT-MARTIAL CASES PENDING

Name & Grade	Unit	Type of Restraint and Date	Offenses and Dates	Dates						Sentence	Excluded Days	Net Days	Counsel TC/DC	Remarks
				Preferral	To SCMCA	To SPCMCA	Referral	Served	Trial					
Williams, SGT	A Co., 2/23d Eng	Restriction 16 May	agg. assault 16 May	18 May	19 May	20 May	23 May	23 May	1 July	3 mos, $200 x 3, E-1	1-30 June Defense delay	14	Pierce/ Hayne	

Figure 3-2

POST-TRIAL ACTIONS

Name & Grade	Sentence and Date	Dates													Remarks
		ROT Completed	ROT To TC/DC	ROT To MJ	ROT Auth	Auth ROT To SJA	Auth ROT To ACC	PTR	ROT/PTR To DC	DC Response	Action	Prom Order	PTR/ACT Prom Ord To Acc	ROT to OTJAG	
Smith, PV2	BCD, 90 days $100 x 3, E-1, 1 Apr.	6 Apr	6 Apr	6 Apr	8 Apr	8 Apr	Mailed 9 Apr	15 Apr	15 Apr.	18 Apr	22 Apr.	24 Apr.	Mailed 25 Apr.	Mailed 30 Apr	

DEPARTMENT OF THE ARMY
CRIMINAL LAW DIVISION
ROOM 124
PRETRIAL STATUS REPORT

RANK/NAME UNIT SSAN/CASE #	ART 32 INVESTIGATOR TRIAL COUNSEL DEFENSE COUNSEL	FIRST OFF 32 APPT 32 HEAR	PREFERRED REFERRED SERVED	PREF + 120 ELAPSED DEF DELAYS	TRIAL DT LEVEL FORUM	ARTICLE VIOLATIONS 1ST CHARGE DESCRIPTION	REMARKS
** TYPE: GCM							
SPC BROWN, J	MAJ ANDERSON	02 APR 94	10 APR 94	08 AUG 94		121	Property w
A/1/11th infantry	CPT Picasso	12 APR 94	02 MAY 94	31	GCM	He stole from another soldier	recovered.
111-11-1111 JAGS9400014	CPT Monet	18 APR 94	03 MAY 94	8		in the barracks, $200.00	
SFC GREEN, B	MAJ JONES	26 MAR 94	01 MAY 94	29 AUG 94		118	Pending Ar
A/2/319th FA	MAJ Johnson	03 MAY 94		10	GCM	SFC Green murdered and robbed	32
000-00-0000 JAGS9400015	CPT Warren	10 MAY 94		0		a prostitute.	
SGT WILLIAMS, C	MAJ HOWARD	16 APR 94	01 MAY 94	29 AUG 94		128	Pending
B/23d Engr Bn	CPT Charger	03 MAY 94		10	GCM	He struck another NCO with a	referral
222-22-2222 JAGS9400020	CPT Pinkerton	09 MAY 94		0		pool cue.	

Figure 3-3

Page No. 1

DEPARTMENT OF THE ARMY
CRIMINAL LAW DIVISION
ROOM 124
POST-TRIAL STATUS REPORT

RANK/NAME UNIT SSAN/CASE #	TRIAL BEG TRIAL END ROT COMPL	SENTENCE	ROT TO TC ROT TO DC ROT AUTH	RECD BY CA ACC SERVED SJA REVIEW	CA ACTION ACTION DATE TO RVW AUTH	REMARKS
** TYPE: BCD						
PV2 SMITH, B	22 APR 94	Bad Conduct Discharge; Grade	25 APR 94	11 MAY 94	Approved	Copy of ROT served on
C/447th S&S	23 APR 94	Reduction to PV1; Partial	25 APR 94	02 MAY 94	11 MAY 94	accused.
333-33-3333 JAGS9400018	25 APR 94	Forfeiture	01 MAY 94	10 MAY 94	13 MAY 94	

Figure 3-4

Chronology

18 May -- offense: poss., transfer, sale 8.48g hashish to Agent Smith

23 May -- offense: poss., transfer, sale 4.21g hashish to Agents Smith and Dunn

15 June -- lab analysis completed - USACIL

18 June -- apprehension at unit - offense: poss. 2.08g hashish (Agent Dunn)

26 June -- preferral of charges . . . recommendation: GCM

27 June -- received case file; scheduled interview with PV2 Johnson for 28 June; logged case in

28 June -- interview with Johnson . . . discussed: rights to counsel; attorney-client relationship; restraint imposed (none); possible character witnesses; stay out of trouble. Next appointment: 2 July, 1400, my office

30 June -- interviewed Agent Smith and Agent Dunn (SPC Goodwin was present); discovery request to TC; chain of custody forms

1 July -- reviewed CID file with trial counsel present; informant is PVT Abell

2 July -- interview with Johnson . . . discussed options: wants to plead guilty; stay out of Ft. Leavenworth . . . brought in list of character witnesses . . . will contact him when I hear about a deal

1400 - interviewed Abell (tape recorded with his consent)

Figure 3-5. Sample free form defense counsel chronology

3 July	--	charges referred (GCM); Johnson served by legal specialist (Stevens); interviewed chain of command; reviewed 201 file and finance records
5 July	--	proposed deal to TC . . . BCD, 12 months confinement, and waive the 32 investigation
6 July	--	deal signed by Johnson
7 July	--	deal accepted . . . trial date: 0900, 13 July, Division courtroom, class A uniform
8 July	--	witness request to TC; TC agreed to stipulate re: allotment; interview with Johnson . . . Offer to Plead prepared and submitted . . . Judge Alone request submitted
9 July	--	interview with Johnson . . . discussed: trial procedures; testimonial rights; data on page one of charge sheet; providency inquiry; trial advice; stipulation of fact
10 July	--	conference with MJ and TC. Discussed documents to be presented and procedures. TC agrees to stipulate to expected testimony of Sergeant Jones
13 July	--	trial - sentence: DD, 18 months Conf., forfeit $300 x 18 months; discussed appellate rights
2 Aug	--	received record of trial
4 Aug	--	returned record of trial to chief of justice - no substantial errors
18 Aug	--	sent copy of promulgating order to Johnson at USACA

Figure 3-5. Sample free form defense counsel chronology

b. Sample Trial Counsel Chronology. When counsel begin a chronology of a case (things to do and things accomplished), most of the initial information may be readily obtained from viewing a wall chart (Figures 3-1, 3-2, and 3-3). Counsel will want to correctly record the accused's name, unit, defense counsel, the offenses, and date of restraint. Counsel need to record the preferral date, level of court, whether there is an Article 32 investigation, the identity of the investigator, and any delays and the reasons for them. Once counsel has this information, a proposed chronology of trial efforts will usually fall into nine major areas.

(1) Initial Action: Counsel will record such things as witness availability, conflicts of interest or disqualifications to serve as trial counsel, existence of pretrial publicity, and if defense counsel has the file. Counsel should immediately begin to monitor time accountability.

(2) Case Investigation: Counsel will note visits to the crime scene; interviews of witnesses; presence of character, real, medical, and documentary evidence; existence of expert testimony or analysis; coordination with law enforcement officials; whether the accused has undergone psychiatric evaluation or polygraph examination; and availability of personnel and finance records.

(3) Case Preparation: Counsel will note preparation of an elements of proof checklist; boilerplate; motions; court member questionnaires; voir dire; potential arguments; direct and cross-examination; desired instructions; and need for special findings.

(4) Document Check: Counsel should note when the charge sheet and convening orders are reviewed and

monitor and record the progress of the Article 32 investigation and subsequent pretrial advice.

(5) Conferences, Discussions, and Correspondence with Military Judge and Defense Counsel: Counsel should record the results of conferences, correspondence, and discussions with the military judge and defense counsel regarding the trial date, discovery and witness requests, proposed pleas/motions, forum selection, correctness of the first page of the charge sheet, and government disclosures.

(6) Trial Administration: Counsel should record the date of service of charges, when findings and sentence worksheets are prepared, and when visual aids and "flyers" for the court have been completed.

(7) Trial Notices: Counsel should record when and which parties to the trial have been notified of the trial date.

(8) Chapter 10 and Pretrial Agreement: Counsel should record and monitor these actions.

(9) Post Trial: Counsel should record the result of the trial and then record and monitor when the accused received appellate rights (where necessary); monitor preparation of the record; record when and if witnesses are paid; and record the date the record is forwarded to the defense counsel, military judge, and the accused.

c. Sample Defense Counsel Chronology. When defense counsel begin their chronology, their initial information may be readily obtained from a wall chart. Once that information is recorded, defense counsel's chronology of their efforts will generally fall into seven major categories.

(1) Initial Action: Counsel should record potential conflicts of interest, disqualifications of counsel, restraint of the accused, any pretrial publicity, witness availability, discovery requests, sanity inquiries, and the possibility of a speedy trial motion. Immediately begin to monitor and record exclusions under R.C.M. 707(c).

(2) Client Interview: Counsel should note what was discussed during these meetings; e.g., discussion of charges, maximum punishment, court-martial process, right to counsel, attorney/client relationship, truthfulness, accused's account of events, possible character evidence, forum selection, options on plea, courtroom orientation, testimonial rights, appearance/demeanor, where to contact counsel, next appointment, and general advice (e.g., stay out of trouble and keep quiet).

(3) Case Investigation: Counsel should record when and if they visited the crime scene; interview of witnesses; presence of real, character, documentary, and medical evidence; whether there is expert testimony available; date and results of a polygraph; and if there will be an Article 32 investigation.

(4) Conferences, Discussions, and Correspondence with Military Judge and Trial Counsel: Counsel should record the results of conferences, correspondence, and discussions with the military judge and trial counsel. Counsel should record the trial date; dates of discovery and witness requests; dates of notification of pleas, motions, and forum choice; and the date the findings and sentence worksheets were reviewed.

(5) Document Check: Counsel should record when they reviewed the charge sheet, convening orders,

and the Article 32 report and pretrial advice, where applicable, specifically noting potential problem areas.

(6) Case Preparation: Counsel should record whether and when they prepared an elements of proof checklist, a written plea, motions, court member questionnaires, voir dire, opening statement, possible arguments, areas of possible direct and cross-examination, and requests for instructions.

(7) Post Trial: After the trial, counsel should review the need for appellate rights, a deferment request, an Article 38(c) brief, and Article 69(a) appeal, clemency petition, and family assistance.

3-2. Sample charge sheet and allied documents

a. The charge sheet is the single most important document in the court-martial process. Trial counsel must ensure that it is free from defects and that it accurately reflects the offenses indicated by the evidence. After a careful review of the document, trial counsel should correct and initial slight errors or obvious mistakes. See R.C.M. 603(b). Any major or substantial changes should be handled in accordance with R.C.M. 603(d). Defense counsel should carefully examine the charge sheet for defects which may affect the validity of the court-martial process or prejudice a substantial right of the accused. See comments after Figure 3-6 for a sample review of a charge sheet.

The convening orders which bring the court-martial into existence must be examined for accuracy and completeness. Any error in the orders or need for change of the detailed members should be brought to the attention of the convening authority. R.C.M. 504. See comments after Figure 3-7 for a sample review of

convening orders. Requests for excusal of members should be made to the convening authority or SJA. See R.C.M. 505 and AR 27-10, para. 5-18c.

Trial and defense counsel usually will be assigned to a case after an investigation has been initiated by law enforcement authorities. The reports of these investigative agencies will provide the groundwork for counsel's case investigation. In addition, trial counsel will frequently be called upon to coordinate the investigation, to render opinions regarding sufficiency of evidence, to assist in the procurement of search authorizations, and to authorize the disposition of evidence. Counsel should be familiar with the jurisdiction of military law enforcement agencies, the methods of investigation used, and the forms and reports which are the substance of their recorded activities. Examples of commonly used law enforcement forms are contained in this chapter beginning at Figure 3-8.

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
Missing, Robert I. S.	789-12-3456	SSG	E-6

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Headquarters and Headquarters Company, 1st Battalion, 71st Infantry, U.S. Army	11 Nov 86	Six Years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$1,311.90	None	$1,311.90	Pretrial Confinement	17 July 1987

II. CHARGES AND SPECIFICATIONS

10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE 121

SPECIFICATION: 1: In that Staff Sergeant Robert I. S. Missing, U.S. Army, Headquarters and Headquarters Company, 1st Battalion, 71st Infantry, did, at Fort Blank, Missouri, on or about 15 July 1987, steal two caliber .45 pistols, each valued at $57.00, of a total value of $114.00, property of the United States.

Specification 2: In that Staff Sergeant Robert I. S. Missing, U.S. Army, Headquarters and Headquarters Company, 1st Battalion, 71st Infantry, did, at Fort Blank, Missouri, on or about 15 July 1987, steal a wristwatch, of a value of about $105.00, the property of Sergeant First Class Bertram Doolittle.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
Leader, John W.	CPT	HHC, 1st Bn, 71st Inf

d. SIGNATURE OF ACCUSER	e. DATE
John W. Leader	25 July 1987

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 25th day of July, 19 87, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Albert M. Notary
Typed Name of Officer

1st Battalion, 71st Infantry
Organization of Officer

CPT
Grade

Adjutant
Official Capacity to Administer Oath
(See R.C.M. 307(b)—must be commissioned officer)

Albert M Notary
Signature

DD FORM 458 84 AUG

Figure 3-6

EDITION OF OCT 69 IS OBSOLETE.

12.

On 25 July, 19 87, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me *(See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)*

John W. Leader
Typed Name of Immediate Commander

HHC, 1st Battalion, 71st Infantry
Organization of Immediate Commander

CPT
Grade

John W. Leader
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 0900 hours, 25 July 19 87 at 1st Bn, 71st Inf, Ft. Blank, MO
Designation of Command or

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE[1] Commander

Albert M. Notary
Typed Name of Officer

Adjutant
Official Capacity of Officer Signing

CPT
Grade

Albert M. Notary
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
HQ, 20th Inf Division & Fort Blank, MO	Fort Blank, Missouri	13 August 1987

Referred for trial to the General court-martial convened by Court-Martial Convening Order 16, Headquarters, 20th Infantry Division and Fort Blank, Missouri

, 2 August 19 87, subject to the following instructions:[2] None

By Command of MAJOR GENERAL BLUNT
Command or Order

Robert G. Smith
Typed Name of Officer

Adjutant General
Official Capacity of Officer Signing

LTC
Grade

Robert G. Smith
Signature

15.

On 13 August, 19 87, I (caused to be) served a copy hereof on (each of) the above named accused.

John M. Evans
Typed Name of Trial Counsel

CPT
Grade or Rank of Trial Counsel

John M. Evans
Signature

FOOTNOTES: 1 — When an appropriate commander signs personally, inapplicable words are stricken.
2 — See R.C.M. 601(e) concerning instructions. If none, so state.

☆U.S. G.P.O. 1984-421-646/17048

Figure 3-6 (continued)

(1) Check the name, grade, and organization of the accused listed in Part I with the same data contained in each specification in Part II. Cross check this data with relevant personnel documents, such as DA Form 2-1.

(2) Check the record of service data with personnel records, for example, Personnel Qualification Record - Part II, DA Form 2-1.

(3) Compare the pay data to the most current military pay scale for appropriate grade and time in service. This data should reflect the pay at the time of sentencing.

(4) Ask the accused's commander if any restraint has been imposed. Update this information as necessary.

(5) Carefully review each specification to ensure compliance with R.C.M. 307(c).

(a) Compare the specification with the form specification for the relevant offense in MCM, 1984, Part IV.

(b) Ensure that the numbering of specifications and charges is correct.

(c) Ensure that the specifications allege jurisdiction over the accused (e.g., an allegation that the accused is a member of the U.S. Army).

(6) Ensure that the charges are properly sworn before a commissioned officer authorized to administer oaths.

(7) Check the charge sheet and allied papers to ensure that the accused has been informed of the charges and that the appropriate letters of transmittal indicating recommendations as to disposition are included as enclosures. See R.C.M. 308 and 401(c).

(8) Review the referral endorsement to ensure that the appropriate convening authority has referred the case to a court-martial panel already in existence. Check the date and number of accompanying order(s) for correlation. See if any additions or deletions are necessary in the appointed court-martial panel.

(9) Cause the charges to be served upon the accused after referral. Note the date of service and the trial counsel's name, grade, and signature on all copies of the charge sheet.

DEPARTMENT OF THE ARMY
HEADQUARTERS, 20TH INFANTRY DIVISION AND FORT BLANK
Fort Blank, Missouri 63899

COURT-MARTIAL CONVENING ORDER
NUMBER 14 12 August 19XX

Pursuant to authority contained in paragraph 5, General Order No. 25, Department of the Army dated 30 July 1977, a general court-martial is hereby convened. It may try such persons as may properly be brought before it, and shall meet at this Headquarters, unless otherwise directed. The court-martial will be constituted as follows:

MEMBERS

COL ALBERT F. LONG, SSAN: 382 41 7654, IN, 1st Bde, 20th Inf Div
COL DALE C. INGRAM, SSAN: 543 26 9048, AR, 2d Bde, 20th Inf Div
LTC HERBERT C. SMITH, SSAN: 806 51 8729, CE, 20th Eng Bn
MAJ WILLARD T. PERRY, SSAN: 297 49 5678, FA, 1st Sqdn, 21st Cav
MAJ FRANCIS H. LEE, SSAN: 089 50 2570, IN, 1st Bn, 73d Inf
CPT JOHN R. DIXON, SSAN: 329 50 4302, AR, 1st Bn, 2d Arm
CPT WILLIAM C. SNYDER, SSAN: 479 02 4390, QM, 20th S&T BN
1LT SYLVIA E. MORNINGS, SSAN: 230 40 3387, AG, 1st PERSCOM

JOHN T. BLUNT
Major General, USA
Commanding

BY COMMAND OF MAJOR GENERAL BLUNT:

OFFICIAL:

JAMES S. SLADE
Colonel, GS
Chief of Staff

ROBERT G. SMITH
LTC, AGC
Adjutant General

DISTRIBUTION "X"

Figure 3-7. Court-Martial Convening Order

1. Check the number and date of the order and compare them with the referral data on page two of the charge sheet.
2. Use MCM, App. 6, and AR 27-10 to ensure that the format of the order is correct.
3. Ensure that the type of court and the place of meeting are designated.
4. Examine the list of detailed court members for any deficiency in qualifications or apparent grounds for challenge. See R.C.M. 912(f).
5. Have a sufficient number of members detailed or available to meet minimum quorum requirements after the exercise of challenges. Normally, a minimum of 6 members should be detailed to a special court-martial and 8 members should be detailed to a general court-martial panel.
6. The person signing the convening order "for the commander" should have proper authority to do so. The authority line should read "BY COMMAND OF" when the commander is a general officer and "BY ORDER OF" for all other grades.
7. Distribution should be made in accordance with AR 27-10 and local requirements.

b. Documents Commonly Allied with the Charge Sheet.

Form	Name	Reference	Sample
DA Form 3975	Military Police Report	AR 190-45, FM 19-10	Figure 3-8
DA Form 3997	Military Police Desk Blotter	AR 190-45, FM 19-10	Figure 3-9
DA Form 3946	Military Police Accident Report	AR 190-45, FM 19-25	Figure 3-10

DA Form 1920	Alcoholic Influence Report	AR 190-5, AR 190-45, FM 19-10	Figure 3-11
DA Form 4137	Evidence/ Property Custody Document	AR 195-5, AR 190-45, FM 19-10	Figure 3-12
CID ROI	Report of Investigation	AR 195-2	Figure 3-13
CID Form 72	Laboratory Report	CID Reg. 195-20	Figure 3-14
DA Form 3744-R	Affidavit Supporting Request for Authorization to Search and Seizure	AR 27-10	Figure 3-15
DA Form 3745-R	Search & Seizure Authorization	AR 27-10	Figure 3-16
Memorandum	Consent to Search		Figure 3-17
DA Form 3881	Rights Warning Procedure/ Waiver Certificate	AR 190-30, FM 19-10	Figure 3-18
DA Form 2823	Sworn Statement	AR 190-30, FM 19-10, AR 190-5	Figure 3-19
DA Form 4187	Personnel Action	AR 680-1	Figure 3-20

MILITARY POLICE REPORT For use of this form, see AR 190-45; the proponent agency is ODCSOPS	MILITARY POLICE REPORT NUMBER 00287-97-MPC004	DATE 900710	USACRC CONTROL NUMBER 97-MPC004-4618C-7G182

THRU:	TO:	FROM:
CDR, 781st Sup BN Ft, Blank, MO 63899	CDR, E CO, 781st Sup Bn Ft. Blank, MO 63899	HQ, USATC&FB ATTN: PMO Ft. Blank, MO 63899

1. REPORT TYPE/STATUS ☐ Information ☐ Commander's Action (*DA Form 4833*) ☐ Supplemental ☒ Complaint

2. EVALUATION ☒ Criminal Offense ☐ Military Offense ☐ Traffic Offense ☐ Founded ☐ Unfounded ☐ Information

3. COMPLAINT/OFFENSE/INCIDENT (*See Reverse/Attached for Summary*)	4. LOCATION (*Address*) ☒ On Post ☐ Off Post	5. TIME OF OFFENSE	6. DATE OF OFFENSE
Larceny (Art 121, UCMJ)	Rm 103, Bldg 5728 Ft Blank, MO 63899	0130	900709

7. OFFENSE CODES	8. COMPLAINT RECEIVED BY	9. TIME RECEIVED	10. DATE RECEIVED
7G1B2	SSG Williams, Duane NMI	0730	900709

11. MP ACTION REFERRED TO: ☒ MPI ☐ CID ☐ Civil Authorities ☐ Traffic ☐ Other (*Specify*) — a. DATE REFERRED: 900709

12. NAME OF SUBJECT	a. GRADE	b. ORGANIZATION (*Include address and telephone number*)
JONES, Thomas Jefferson	E-4	E Company, 781st Sup Bn Ft. Blank, MO 63899 (518) 435-9874
c. SSN: 631-12-6754	d. PLACE OF BIRTH: Mud Suck Ridge, WVA	e. DATE OF BIRTH: 700529

f. CAT (1)	g. COLOR HAIR	h. COLOR EYES	i. WEIGHT	j. HEIGHT	k. AGE	l. JUVENILE	m. SEX
A	Brown	Hazel	180	6' 1"	20	☐ Yes ☒ No	☒ Male ☐ Female

n. COMPLEXION	o. RACE (2)	13. INVOLVEMENT	14. DRESS	15. COOPERATIVE	16. IDENTIFYING MARKS
Fair	C	☒ Alcohol ☐ Drugs	☐ Uniform ☒ Civilian	☒ Yes ☐ No	2" scar on right arm

17. PERSONS RELATED TO REPORT (*Place Additional Entries on Reverse/Attached*)

a. NAME	b. GRADE	c. SSN	d. ORGANIZATION/ADDRESS/TELEPHONE NUMBER	e. (1)	f. (3)
Monroe, Joe B.	E-5	237-90-8714	E Co, 781st Sup Bn, Ft Blank, MO	A	C
Switt, Amos O.	E-5	432-87-9436	E Co, 781st Sup Bn, Ft Blank, MO	A	B
Hick, George A.	E-8	118-63-6732	E Co, 781st Sup Bn, Ft Blank, MO	A	D

18. PROPERTY DATA

a. DATE	b. (4)	c. (5)	d. AMOUNT
900709	E	B	95.00

19. DISPOSITION OF

a. OFFENDER	b. EVIDENCE
Released to unit, 1030	Sony Walkman, SN#456923, entered on DA Form 4137; retained in evidence room

ENCLOSURES	DISTRIBUTION	FOR THE COMMANDER (*Strike out if not applicable*)
DD Form 629 (Jones) DD Form 1920 (Jones)	Unit SJA ADACP USACRC PMO	TYPED NAME, RANK AND TITLE OF REPORTING OFFICER George I. Issue CPT, MP, Asst Adjutant SIGNATURE: George I. Issue

(1) CATEGORY	(2) RACE	(3) STATUS	(4) PROPERTY TYPE	(5) PROP ACTION
A-Army B-Other Service C-Family Member D-DA Civilian E-Civilian F-Contractor G-Other Govt Empl H-FGN Natl Empl I- Other FGN Natl J-Other	R-Red M-Yellow N-Black C-White H-Hispanic X-Other	A-Not Used B-Witness C-Victim D-Complainant E-Military Police F-Civil Authorities G-Sponsor	A-Govt Prop/Funds B-Govt Vehicle C-NAF Prop/Funds D-NAF Vehicle E-Private Property F. Private Vehicle G. Host Govt Prop/Funds H-Host Govt Vehicle	A-Lost B-Stolen C-Recovered D-Damaged

DA FORM 3975, MAY 1988 EDITION OF JAN 74 IS OBSOLETE

Figure 3-8

MILITARY POLICE DESK BLOTTER
For use of this form, see AR 190-45; the proponent agency is Office of the Deputy Chief of Staff for Personnel.

DATE (From 0001 hours to 2400 hours): 15 August 1987

PAGE NO: 1

UNIT OR STATION DESIGNATION: Ft. Blank, MO MP Station 63899

NO. OF PAGES: 2

ENTRY NO.	TIME	SUMMARY OF COMPLAINT, INCIDENT, POLICE INFORMATION	SUMMARY OF ACTION TAKEN	ENTERED BY
1	0001	BLOTTER OPENED	Information	SMITH
2	0140	TRAFFIC ACCIDENT: FAILURE TO YIELD RIGHT OF WAY (AR III-II, PARA II-I) SUBJECT: JONES, JOHN, E-4, M/Cau/20, 123-82-1000, Co A, 999th Inf Bde, Ft. Blank, MO VICTIM: SMITH, JOE A., E-8, M/Neg/43, 444-65-9123, 112th Med Det, Ft. Blank, MO COMPLAINANT: Same as victim VEH # 1: '77 FORD, 4dr, USA Reg # 01G27170, Unit marking FB/TDC A013 VEH # 2: '82 CHEVY, 2dr, MO/87, Lic plate # 11-01231 DAMAGES: VEH #1 Est. $500.00 VEH #2 Est. $250.00 TIME/DATE: 0025 hrs, 15 Aug 87 LOCATION: LINCOLN & 11th St., Ft. Blank, MO MIL/POL: SP4 WRIGHT, 999th MP Co DETAILS: At approximately the above time and date, patrol C/20 was dispatched to the above location reference the above TA. Investigation revealed that JONES, operator of Veh #1, was in violation of AR XXX-XX, PARA XX-X (FAILURE TO YIELD RIGHT OF WAY) in that he stopped at the above location but did not allow SMITH, operating Veh #2, who had the right of way to pass thru the intersection before proceeding through himself. No drugs or alcohol involved. No injuries.	MPR NO. 10119-87 DA Form 3975 DA Form 3946 DA Form 2823 (3) initiated & fwd to TAI office	SMITH
3	1830	WRONGFUL POSSESSION OF MARIJUANA (ART # 134, UCMJ) SUBJECT: JAY, JOHN D., E-2, M/Cau/22, 910-86-3472, Co B, 90th S&T Bn, Ft. Blank, MO COMPLAINANT: HARRIS, AL, E-6, M/Cau/34, HHC, 90th S&T Bn. WITNESS: SMITH, JOHN, E-6, M/Neg/33, HHC, 90th S&T Bn. TIME/DATE: 1730 hrs, 15 Aug 87 LOCATION: Bldg # 1237 (CCF), Ft. Blank, MO DETAILS: At approx 1745 hrs the above date, it was reported to this station that JAY was searched by HARRIS prior to entering the CCF for prohibited items. At this time HARRIS found a clear plastic bag containing suspected marijuana in JAY'S right front trouser pocket. JAY was apprended, advised of his legal rights, and transported to this station for processing. The suspected marijuana was taken by MPI (GOOD).	MPR NO. 10120-87 DA Form 3975 DA Form 3881 DA Form 2823 (2) initiated MPDO, MPI (GOOD) Unit SDNCO (SFC RAY) notified. JAY rel'd to RAY on DA Form 629 at 2000 hrs, 15 Aug 87	MANN

DA FORM 1 DEC 72 3997 REPLACES DA FORM 19-50, 1 NOV 56, WHICH WILL BE USED.

GPO : 1983 0 - 409-963

Figure 3-9

MILITARY POLICE DESK BLOTTER For use of this form, see AR 190-45; the proponent agency is Office of the Deputy Chief of Staff for Personnel.	DATE (From 0001 hours to 2400 hours) 15 August 1987	PAGE NO 2
UNIT OR STATION DESIGNATION Ft. Blank, MO MP Station 63899		NO. OF PAGES 2

ENTRY NO.	TIME	SUMMARY OF COMPLAINT, INCIDENT, POLICE INFORMATION	SUMMARY OF ACTION TAKEN	ENTERED BY
4	2030	"RESTRICTED ENTRY"	MPR NO. 10121-87 DA Form 3975 DA Form 3881 DA Form 2823 (3) initiated. MPDO, CID (RANDALL) notified at 1930 hrs, 15 Aug 87	MANN
5	2245	RAPE (ALLEGED) (ART # 120, UCMJ) SUBJECT: JONES, JOEY M., E-4, M/Cau/24, 187-76-3476, Co A, 999th Inf Bn, Ft. Blank, MO VICTIM: "PROTECTED IDENTITY" d/wife of of a member of this command COMPLAINANT: Same as Victim TIME/DATE: 1910 hrs, 15 Aug 87 LOCATION: Wooded area near Post Theater (bldg # 282) Ft. Blank, MO DETAILS: At approximately 1950 hrs this date, this station was notified by the above victim, that at approximately 1910 hrs this date, while walking home from the Post Exchange, she was accosted by JONES, who is known by the victim. She was dragged into a wooded area near the theater. The victim states that JONES threatened her with a knife, ordered her to remove her clothing, and while still threatening her with knife, forcibly had sexual intercourse with her. Victim states that JONES fled the scene after asking her not to report him. Victim then walked to this station to report the incident. Victim was transported to the hospital for examination and treatment of minor lacerations and bruises. Investigation continues by CID.	MPR NO. 10122-87 DA Form 3975 DA Form 3881 DA Form 2823 (2) initiated. MPDO, CID (RANDALL) notified at 2000 hrs, 15 Aug 87 JONES rel'd to unit commander (CPT LANE) on DA Form 629 at 2355 hrs. 15 Aug 87 Victim transported to Ft. Blank Hosp. for examination and treatment.	
6	2400	BLOTTER CLOSED /s/ SAMUEL EASY 1LT, MPC	Information	Mann

DA FORM 1 DEC 72 3997 REPLACES DA FORM 19-50, 1 NOV 56, WHICH WILL BE USED.

GPO : 1983 O - 409-963

Figure 3-9 (continued)

MILITARY POLICE TRAFFIC ACCIDENT REPORT

For use of this form, see AR 190-45; the proponent agency is ODCSPER

IMI ACTIVITY CODE REPORT NO: 00231 - 87

DATE OF ACCIDENT: YR 87 MO 04 DAY 30 | TIME (USE 2400 HOUR): 2315 HRS | DAY OF COLLISION: ☐ SUNDAY ☐ MONDAY ☐ TUESDAY ☐ WEDNESDAY ☒ THURSDAY ☐ FRIDAY ☐ SATURDAY

MILITARY RESERVATION: ☒ ON ☐ OFF | ROAD OR STREET ON WHICH ACCIDENT OCCURED: THOMAS ST | NAME AND LOCATION OF MILITARY RESERVATION, CITY, STATE, ETC: FT BLANK, MO 63899

AT INTERSECTION — NAME OF INTERSECTING STREET: NA | NOT AT INTERSECTION — NAME OF NEAREST INTERSECTING ST, HIGHWAY, OR OTHER PERMANENT IDENTIFYING LANDMARK: 38TH ST | NO OF FEET: 25 | DIRECTION: W

IF ACCIDENT OCCURED OFF MILITARY RESERVATION AND OUTSIDE CITY LIMITS: INDICATE ____ MILES ☐N ☐S ☐E ☐W FROM ☐ CITY LIMITS ☐ CENTER OF CITY OR TOWN

KIND OF LOCALITY: ☐ TROOP BILLETS ☐ RESIDENTIAL ☐ MFG OR INDUST ☐ OPEN COUNTRY ☐ SCHOOL OR PLAYGROUND ☐ BUSINESS ☐ OTHER

TYPE ACCIDENT: ☒ VEHICLE-VEHICLE ☐ VEHICLE-PEDICYCLE ☐ STOLEN VEHICLE ☐ OTHER ☐ VEHICLE-OBJECT ☐ VEHICLE-RR TRAIN ☐ SINGLE VEHICLE (NON COLLISION) ☐ VEHICLE-PEDESTRIAN ☐ HIT & RUN

TOTAL NO OF VEHICLES INVOLVED: 2

SEVERITY: NO KILLED | NO INJURED | ☒ PROPERTY DAMAGE ONLY

VEHICLE 1	VEHICLE 2	DRIVING LANES	VEHICLE 1	VEHICLE 2	CHARACTER	VEHICLE 1	VEHICLE 2	SURFACE	VEHICLE 1	VEHICLE 2	CONDITIONS	VEHICLE 1	VEHICLE 2	DEFECTS		WEATHER		LIGHT
		ONE	☒		STRAIGHT			CONCRETE			DRY			HOLES, RUTS, BUMPS, ETC		CLEAR		DAYLIGHT
☒	☒	TWO			CURVE	☒	☒	BLACK TOP	☒	☒	WET			LOOSE MATERIAL ON SURFACE		RAIN		DAWN
		THREE OR MORE	☒	☒	LEVEL			BRICK			MUD			DEFECTIVE SHOULDER		FOG		DUSK
		DIVIDED HIGHWAY			ON GRADE			GRAVEL			SNOW	☒	☒	NO DEFECTS		SNOWING	☒	DARK ST LIGHTS
		OTHER			OTHER			OTHER			OTHER			OTHER		OTHER		DARK NO ST LIGHTS

VEHICLE 1	VEHICLE 2		VEHICLE 1	VEHICLE 2		VEHICLE 1	VEHICLE 2		VEHICLE 1	VEHICLE 2		OTHER (EXPLAIN)
		STOP & GO SIGNAL			FLASHING LIGHT			WARNING SIGN			ONE WAY STREET	
		NO TRAFFIC SIGNAL			OFFICER OR WATCHMAN			SOLID CENTER LINE	☒	☒	STOP SIGN	

VEHICLE 1

USA REGISTRATION OR LICENSE NO: CRB-847 (MO) | MAKE: CHEV | YEAR: 86 | BODY TYPE: 2DR HT

UNIT MARKINGS, DECAL NO: BH543 (RED) | ☒ PRIVATELY OWNED ☐ GOVERNMENT

REGISTERED OWNER (IF NOT DRIVER) (LAST, FIRST, MI): PERCY, CLYDE F., SSG

ADDRESS OF OWNER: Co. A, 3/60 Inf, FT BLANK, MO 63899

NAME AND ADDRESS OF INSURANCE COMPANY OR AGENT: ALL PLACE INS, BLANK CITY, MO 63898

NAME (LAST, FIRST, MI), GRADE AND ADDRESS: PERCY, HELEN R, 306 HARD ROAD, NORTH BLANK, MO 63892 | SSN: 405-13-7701 | AGE: 19 | SEX: ☐ MALE ☒ FEMALE

DRIVER'S LICENSE/PERMIT NUMBER: 0-438615 24 | STATE: MO

LIMITATIONS ON LICENSE/PERMIT: ☐ NO ☒ YES (SPECIFY): CORR LENSES | DRIVING EXPERIENCE (YEARS): 3 MONTHS

CODES: (1) CAT ____ (2) INJ ____ (3) SEAT BELT ____ (4) SEAT POS ____

VEHICLE 2

USA REGISTRATION OR LICENSE NO: AEL-732 (GA) | MAKE: FORD | YEAR: 84 | BODY TYPE: 2 DR HT

UNIT MARKINGS, DECAL NO: CH 347 (BLUE) | ☒ PRIVATELY OWNED ☐ GOVERNMENT

REGISTERED OWNER (IF NOT DRIVER) (LAST, FIRST, MI):

ADDRESS OF OWNER:

NAME AND ADDRESS OF INSURANCE COMPANY OR AGENT: COUNTY FARM, SLOKUM, GA 39601

NAME (LAST, FIRST, MI), GRADE AND ADDRESS: BROWN, HARVEY G., 4237 REDROCK, MARIETTA, GA | SSN: 262-92-1156 | AGE: 36 | SEX: ☒ MALE ☐ FEMALE

DRIVER'S LICENSE/PERMIT NUMBER: 262-92-1156 | STATE: GA

LIMITATIONS ON LICENSE/PERMIT: ☐ YES (SPECIFY) ☒ NO | DRIVING EXPERIENCE (YEARS): 16

CODES: (1) CAT ____ (2) INJ ____ (3) SEAT BELT ____ (4) SEAT POS ____

OTHER PERSONS

NAME AND ADDRESS	VEH NO	CODES → AGE	SEX	CATEGORY (1)	INJURY (2)	SEAT BELT (3)	SEAT POSITION (4)
BROWN, MILDRED S., Same AS DRIVER #2	2	34	F	E	A	D	3

NAME AND ADDRESS: NA

PEDESTRIAN WAS GOING ☐N ☐S ☐E ☐W ALONG/ACROSS (NO. STREET, ROAD OR HIGHWAY): ____

FROM (NW TO SW CORNER, OR EAST TO WEST SIDE, ETC): ____ TO ____

CROSSING WITH SIGNAL	CROSSING NO SIGNAL	STANDING ON ROADWAY	WALKING IN ROAD AGAINST TRAFFIC
CROSSING AGAINST SIGNAL	HITCHING ON VEHICLE	COMING FROM BEHIND PARKED CAR	WALKING IN ROAD WITH TRAFFIC
CROSSING NOT AT INTERSECTION	PLAYING ON ROADWAY	PUSHING OR WORKING ON VEHICLE	OTHER

NAME AND ADDRESS	TELEPHONE NUMBER
MCDONALD, LINDA L., SP4, 274-38-4014 Co. B, 3/60 INF, FT BLANK, MO 63899	734-6410

(1) CATEGORY	(2) INJURY CLASS	(3) SHOULDER/LAP BELTS	(4) SEAT POSITION
A ARMY OFFICER B ARMY ENLISTED C OTHER SERVICE OFFICER D OTHER SERVICE ENLISTED E CIVILIAN F DEPENDENT O OTHER	A NO INJURY B DEAD AT SCENE C DEAD ON ARRIVAL D DIED IN HOSPITAL E INCAPACITATING INJURY F NONINCAP (EVIDENT) INJURY G POSSIBLE INJURY H INJURY UNKNOWN	A LAP BELT USED B SHOULDER HARNESS USED C BOTH USED D NOT USED E NOT INSTALLED F LAP BELT FAILED G SHOULDER HARNESS FAILED H BOTH FAILED U UNKNOWN	4 1 / 5 2 / 6 3 7 OTHER POSITION (BUS-MOTORCYCLE) 8 POSITION UNKNOWN

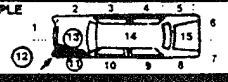
DA FORM 1 SEP 73 3946 — PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE.

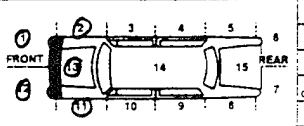
Figure 3-10

VEHICLE DAMAGE INSTRUCTIONS

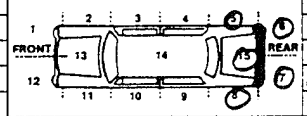
1. In each box, circle the number of each damaged area.
2. Shade area of severest impact.
3. Draw arrow(s) to show principal direction of force.

EXAMPLE





13. HOOD
14. ROOF
15. TRUNK
16. UNDERCARRIAGE
17. OVERTURN



13. HOOD
14. ROOF
15. TRUNK
16. UNDERCARRIAGE
17. OVERTURN

SKETCH DAMAGE

SEVERITY OF DAMAGE VEHICLE NO 1
■ DISABLING DAMAGE ☐ OTHER M.V. DAMAGE
☐ FUNCTIONAL DAMAGE ☐ NO DAMAGE

TOWED BY: WILSON WRECKING
TO: WILSON AUTO, BLANK CITY, MD

SEVERITY OF DAMAGE VEHICLE NO 2
☐ DISABLING DAMAGE ☐ OTHER M.V. DAMAGE
■ FUNCTIONAL DAMAGE ☐ NO DAMAGE

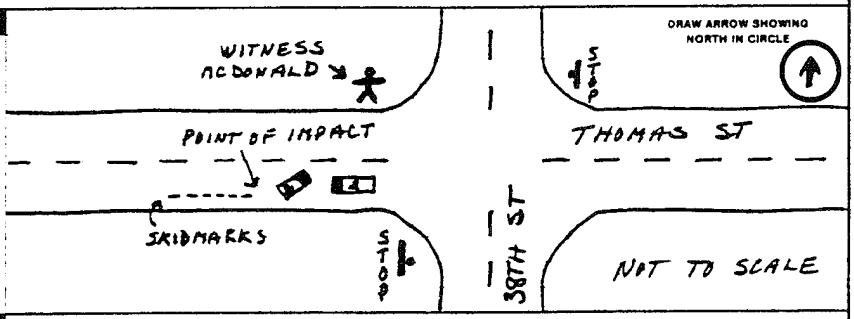
TOWED BY: RELEASED TO
TO: OPERATOR

SEVERITY OF DAMAGE OTHER VEHICLE
☐ DISABLING DAMAGE ☐ OTHER M.V. DAMAGE
☐ FUNCTIONAL DAMAGE ☐ NO DAMAGE

TOWED BY:
TO:

DAMAGE TO PROPERTY (OTHER THAN VEHICLE)

1. Identify:
   Roadway & roadway features
   Vehicles
   Pedestrians
   Objects on/off roadway
   Traffic controls
   Skidmarks
   Unusual/temperature conditions (Ice patch, construction areas, etc.)
2. Locate probable point of impact
3. Show vehicle, pedestrian or object positions at impact
4. Show probable vehicle or pedestrian paths before and after collision



Indicate what probably happened before, during and after the crash. Include information not on sketch, e.g., driver disability, reduced visibility, pedestrian clothing color, construction or repair work, etc.

VEHICLE 2 (BROWN) WAS STOPPED AT THE STOP SIGN WAITING TO CROSS 38TH ST. VEHICLE 1 (PERCY) APPROACHED FROM THE REAR AND WAS UNABLE TO STOP WHEN SHE APPLIED THE BRAKES. THERE SKIDMARKS (APPROX 20') ON THE WET PAVEMENT. VISIBILITY WAS APPROXIMATELY 100 – 150 FT.

DIRECTION HEADED		DRIVER 1	DRIVER 2	CHECK ONE OR MORE	DRIVER 2	CHECK ONE OR MORE	VEHICLE 1	VEHICLE 2	SPECIFY FEET/MPH
	N S E W			BACKING		OVERTAKING OR PASSING	150	NA	ESTIMATED DISTANCE WHEN DANGER WAS FIRST NOTICED (FEET)
		X		GOING STRAIGHT AHEAD		AVOIDING VEH OBJ	30	NA	ESTIMATED SPEED WHEN DANGER WAS FIRST NOTICED (MPH)
VEH 1	☐ ☐ ■ ☐			MAKING LEFT TURN	X	SLOWING OR STOPPING	15	0	ESTIMATED SPEED AT IMPACT (MPH)
		X		SKIDDING	X	STOP IN TRAFFIC LANE	30	35	DISTANCE TRAVELED AFTER IMPACT (FEET)
VEH 2	☐ ☐ ■ ☐			MAKING RIGHT TURN		OTHER (SPECIFY)			
				MAKING "U" TURN			20	20	LAWFUL SPEED (MPH)

DRIVER 1	DRIVER 2	CHECK ONE OR MORE	DRIVER 1	DRIVER 2	CHECK ONE OR MORE	DRIVER 2	CHECK ONE OR MORE	DRIVER 1	DRIVER 2	CHECK ONE	VEHICLE 1	VEHICLE 2	CHECK ONE OR MORE
X		EXCEEDING SPEED LIMIT			NO OR IMPROPER SIGNAL		ALCOHOL INVOLVED			CHEMICAL TEST GIVEN			DEFECTIVE BRAKES
X		SPEED EXCESSIVE FOR CONDITIONS			DISREGARDED TRAFFIC SIGNAL		DRUGS INVOLVED			CHEMICAL TEST REFUSED			DEFECTIVE HEAD LIGHTS
		FAILED TO YIELD			IMPROPER TURN		ABILITY IMPAIRED			TEST RESULTS			DEFECTIVE REAR LIGHTS
		DISREGARDED STOP SIGNAL			UNKNOWN		ABILITY NOT IMPAIRED	DRIVER NO 1	DRIVER NO 2				TIRES WORN OR SMOOTH
		VISION OBSTRUCTED			OTHER (SPECIFY)	X	UNKNOWN	% BAC	% BAC				TIRES PUNCTURED OR BLOWN
		FOLLOWING TOO CLOSE					SEE ATTACHED DD FORM 1920 "ALCOHOLIC INFLUENCE REPORT"						OTHER (SPECIFY)
		IMPROPER OVERTAKING											

NAME OF PERSON(S) APPREHENDED	CHARGES	REPORT NUMBER
PERCY, HELEN R.	SPEED EXCESSIVE FOR CONDITIONS	DD FORM 1805 A665175
		DD FORM 1805 A665176

TIME MILITARY POLICE NOTIFIED (HOUR)	TIME MILITARY POLICE ARRIVED AT SCENE OF ACCIDENT (HOUR)
2321 HRS	2327 HRS

WHERE ELSE WAS INVESTIGATION MADE	DID MILITARY OPERATOR COMPLETE DD FORM 518 "ACCIDENT IDENTIFICATION CARD"	YES	NO
NA	NA		
IF OFF MILITARY RESERVATION, WHO ELSE CONDUCTED AN INVESTIGATION (IF OTHER AGENCY CONDUCTED COMPLETE INVESTIGATION, SO INDICATE)	DID MILITARY OPERATOR COMPLETE STANDARD FORM 91 "OPERATOR'S REPORT OF MOTOR VEHICLE ACCIDENT"		
NA	NA		
	WAS FORM COMPLETED FROM ON SCENE INVESTIGATION (IF NOT, EXPLAIN)	X	

DATE	TYPED OR PRINTED NAME AND GRADE OF INVESTIGATOR	INVESTIGATOR'S SIGNATURE AND GRADE
300487	ALICE E. McMILLION, E-3	Alice E. McMillion, E-3

DATE APPROVED	APPROVED BY	INCLOSURES	DISTRIBUTION
30 Apr 87	C. Lincoln Rogers, LTC Deputy Provost Marshal	STATEMENTS (4)	D

Figure 3-10 (continued)

ALCOHOLIC INFLUENCE REPORT

INSTALLATION	VIOLATION REPORT NO.	ACCIDENT REPORT NO
Fort Blank, MO 63899	00734-87	NA
DATE, TIME AND LOCATION OF ACCIDENT OR INCIDENT	**DATE AND TIME IN CUSTODY**	**APPREHENDING OFFICER**
280487, 2300 hrs, 23d St., Ft. Blank	280487 2305 hrs	SP4 Brown, A. W.
NAME OF SUBJECT	**GRADE/CATEGORY**	**SSN**
ROGERS, Thomas Earl	E-3	416-70-9355
UNIT OF ASSIGNMENT/ADDRESS	☒ DRIVER ☐ PASSENGER ☐ PEDESTRIAN	
Co B, 99th Transportation Bn, Ft. Blank, MO		

AGE	SEX	APPROX WEIGHT	OPERATOR'S LICENSE NO.	STATE
21	☒ Male ☐ Female	160	046825	Washington

Check all applicable boxes describing conditions observed, i.e., more than one box may be checked to describe conditions observed.

SECTION I - OBSERVATIONS

MADE BY *(Name, grade, SSN & organization)*	WITNESSED BY *(Name, grade, SSN & organization)*
BROWN, Alan W., E-4, 123-65-9141 999th MP Co, Ft. Blank, MO	MARKS, Philip D., E-5, 579-21-0901 999th MP Co, Ft. Blank, MO

CLOTHES *(Describe type & color)*	HAT OR CAP: None	
	JACKET OR COAT: None	
	SHIRT OR DRESS: Blue Checked Shirt	
	PANTS OR SKIRT: Blue Pants	
	CONDITION ☐ Disorderly ☐ Disarranged ☐ Soiled ☐ Mussed ☒ Orderly	DESCRIBE: Neatly dressed
BREATH	ODOR OF ALCOHOLIC BEVERAGE ☐ Strong ☒ Moderate ☐ Faint ☐ None	
ATTITUDE	☐ Excited ☐ Hilarious ☐ Talkative ☐ Carefree ☒ Sleepy ☐ Profanity ☐ Combative ☐ Indifferent ☐ Insulting ☐ Cocky ☐ Cooperative ☐ Polite	
UNUSUAL ACTIONS	☐ Hiccoughing ☐ Belching ☐ Vomiting ☐ Fighting ☐ Crying ☐ Laughing	
SPEECH	☐ Not understandable ☐ Mumbled ☒ Slurred ☐ Mush mouthed ☐ Confused ☐ Thick tongued ☐ Stuttered ☐ Accent ☐ Fair ☐ Good	

SPONTANEOUS ACTS *(Statements, walking, turning, etc)*

Stumbled when exiting vehicle. Had trouble locating driver's license.

INDICATE BRIEFLY WHAT FIRST LED YOU TO SUSPECT ALCOHOLIC INFLUENCE	SIGNS OR COMPLAINT OF ILLNESS OR INJURY
Weaving across center line.	None

SECTION II - PERFORMANCE TESTS *(Warning of rights in accordance with separate departmental policy is required for military personnel)*

ADMINISTERED BY *(Name, grade, SSN & organization)*	DATE & TIME TESTS PERFORMED
BROWN, Alan W., E-4, 123-65-9141, 999th MP Co	280487 2330 hrs

BALANCE	☐ Falling ☐ Needed support ☐ Wobbling ☒ Swaying ☐ Unsure ☐ Sure	
WALKING	☐ Falling ☐ Staggering ☐ Stumbling ☒ Swaying ☐ Unsure ☐ Sure	
TURNING	☐ Falling ☐ Staggering ☐ Hesitant ☒ Swaying ☐ Unsure ☐ Sure	
FINGER TO NOSE	RIGHT ☐ Completely missed ☒ Hesitant ☐ Sure	LEFT ☐ Completely missed ☒ Hesitant ☐ Sure
COINS	☐ Unable ☒ Fumbling ☐ Slow ☐ Sure ☐ Other	BALANCE DURING COIN TEST: Had to rest knee on floor.
ABILITY TO UNDERSTAND INSTRUCTIONS	☐ Poor ☒ Fair ☐ Good	EFFECTS OF ALCOHOL ☐ Extreme ☒ Obvious ☐ Slight ☐ None ABILITY TO DRIVE ☒ Unfit ☐ Fit

REMARKS

DD FORM 1 AUG 73 1920

Figure 3-11

SECTION III - INTERVIEW *(Warning of rights in accordance with separate departmental policy is required for all personnel)*

Were you operating a vehicle? Yes Where were you going? Home

What street or highway were you on? Not sure Direction of travel? "toward home"

Where did you start from? EM/EW club What time did you start? not sure What time is it now? midnight

What city (county) are you in now? Ft. Blank What is the date? 5th What day of the week is it? Friday

INTERVIEWER TO FILL IN ACTUAL	TIME	DAY	DATE	INTERVIEWER'S NAME
	2350	Friday	280487	SP4 Brown

When did you last eat? 6 hours ago What did you eat? hamburger and french fries

What were you doing during the last three hours? talking with friends

Have you been drinking? some What? beer How much? a couple Where? at the club

Time started? not sure Time stopped? not sure Are you under the influence of an alcoholic beverage now? no

What is your occupation? mechanic When did you last work? today

Do you have any physical defects? no If so, what's wrong? NA

Do you limp? No Have you been injured lately? No If so, what's wrong? NA

Are you ill? No If so, what's wrong? NA

Did you get a bump on the head? No Were you involved in an accident today? No Have you had any alcoholic beverage since the accident? NA

If so, what? NA Where? NA How much? NA When? NA

Have you seen a doctor or dentist lately? NO If so, who? NA When? NA

What for? NA Are you taking tranquilizers, pills or medicines of any kind? NA

If so, what kind? (Get sample) NA Last dose? NA Do you have epilepsy? NO Diabetes? NO

Do you take insulin? No If so, last dose? NA Have you had any injections of any other drugs recently? NA

If so, what for? NA What kind of drug? NA Last dose? NA

When did you last sleep? last night How much sleep did you have? six hours Are you wearing false teeth? No Glass eye? No

HANDWRITING SPECIMEN *(Signature and/or anything he chooses)*

SECTION IV - CHEMICAL TEST DATA

TYPE OF SPECIMEN: ☒ Blood ☐ Breath ☐ Saliva ☐ Urine ☐ Other

TIME, DATE AND LOCATION OF TEST: 0015 290487 Ft. Blank Hospital

ADMINISTERED BY *(Name, grade, SSN & organization)*: BROWN, William X., MAJ, MC 762-03-4732, Ft. Blank Hospital

TEST RESULT: See attached results

IF TEST REFUSED, OR UNABLE TO BE ADMINISTERED, STATE REASON: NA

SECTION V - VIDEO TAPE, MOTION PICTURE, VOICE RECORDINGS

TYPE COVERAGE: ☐ Video tape ☐ Motion picture ☒ Voice

SCOPE OF COVERAGE: ☐ Observation ☐ Performance test ☒ Interview

TAKEN BY *(Name, grade, SSN & organization)*: MARKS, Philip D., E-5, 579-21-0901, 999th MP Co

REFERENCE CODE: Tape # 25-75

SECTION VI - SUPPLEMENTARY DATA

	NAME	ADDRESS	TELEPHONE NO.	CONDITION
WITNESSES	None			
PASSENGERS IN SUSPECT'S VEHICLE	None			

☆ U.S. G.P.O. 1984-421-646/8217

Figure 3-11 (continued)

EVIDENCE/PROPERTY CUSTODY DOCUMENT

For use of this form see AR 190-45 and AR 195-5; the proponent agency is US Army Criminal Investigation Command

MPR/CID SEQUENCE NUMBER: 0005-85-CID063

CRD REPORT CID RCI NUMBER: 0005-85-CID063-46846

RECEIVING ACTIVITY	LOCATION
Fort McClellan FO, Third Region, USACIDC	Fort McClellan, AL 36205-5000
NAME, GRADE AND TITLE OF PERSON FROM WHOM RECEIVED ☐ OWNER ☒ OTHER Crime Scene	ADDRESS (Include Zip Code) N/A

LOCATION FROM WHERE OBTAINED	REASON OBTAINED	TIME/DATE OBTAINED
3673-B Church Road (Living Room) Fort McClellan, AL 36205	Evidence	0900 to 1130 2 Jan 85

ITEM NO.	QUANTITY	DESCRIPTION OF ARTICLES (Include model, serial number, condition and unusual marks or scratches)
1	1	Baseball, approximately 2½" in diameter, brand name Wilson, white and red in color, leather like construction, scuffed, marked under the brand name Wilson, PGP, 2 Jan 85, 0900. (Right top desk drawer)
2	1	Drinking glass, about 4 inches in height, clear in color, glass construction; marked on bottom of glass PGP, 2 Jan 85, 0904. (Right middle desk drawer)
3	1	Bottle labeled Jim Beam, quart size, about 10 inches in height, no visible contents, clear in color, glass construction, marked on bottom of bottle, PGP, 2 Jan 85, 0905. (On top of coffee table)
4	1	Cigarette butt, about one inch long, white in color, partially burnt and flattened condition, labeled Kent, placed in vial, both vial and seal marked PGP, 2 Jan 85, 0915 0005-85-CID063. (In ash tray on coffee table)
5	1	Bag, about four by five inches, brown paper construction, approximately half full, containing suspected marihuana, marked on bag and seal PGP, 2 Jan 85, 1130 005-85-CID063. (Left top dresser drawer)
XXXX

CHAIN OF CUSTODY (Continued)

ITEM NO	DATE	RELEASED BY	RECEIVED BY	PURPOSE OF CHANGE OF CUSTODY
4 and 5	24 Jan 85	SIGNATURE: Reg Mail NAME, GRADE OR TITLE: # 5678	SIGNATURE: Roger R. List NAME, GRADE OR TITLE: Roger R. LIST, SA	Rec'd by Evidence Custodian
1 thru 5	14 Feb 85	SIGNATURE: Roger R. List NAME, GRADE OR TITLE: Roger R. LIST, SA	SIGNATURE: Peter J. Paul NAME, GRADE OR TITLE: Peter J. KANE, MAJ, JAGC	Rel to TC for Court
1 thru 5	15 Feb 85	SIGNATURE: Peter J. Paul NAME, GRADE OR TITLE: Peter J. KANE, JAGC	SIGNATURE: Roger R. List NAME, GRADE OR TITLE: Roger R. LIST, SA	Ret to Evidence Custodian
1 and 2	8 Mar 85	SIGNATURE: Roger R. List NAME, GRADE OR TITLE: Roger R. LIST, SA	SIGNATURE: Paul J. Kelley NAME, GRADE OR TITLE: Paul J. KELLEY, CW3, USA	Ret to owner Final Disposition
3 4 5	8 Mar 85	SIGNATURE: Roger R. List NAME, GRADE OR TITLE: Roger R. LIST, SA	SIGNATURE: Item 4,5 BURNED/Item 3 CRUSHED NAME, GRADE OR TITLE: DESTROYED	Final Disposition
		SIGNATURE NAME, GRADE OR TITLE	SIGNATURE NAME, GRADE OR TITLE	
		SIGNATURE NAME, GRADE OR TITLE	SIGNATURE NAME, GRADE OR TITLE	
		SIGNATURE NAME, GRADE OR TITLE	SIGNATURE NAME, GRADE OR TITLE	

FINAL DISPOSAL ACTION

RELEASE TO OWNER OR OTHER (Name / Unit) Item 1 and 2, CW3 Paul J. KELLEY, Co B, HQ Comd, Ft McClellan

DESTROY Items 3, 4, and 5

OTHER (Specify)

FINAL DISPOSAL AUTHORITY

ITEM(S) 1 thru 5 ON THIS DOCUMENT, PERTAINING TO THE INVESTIGATION INVOLVING PFC John S. DOE (Grade)

Co A, 1st Bn, 5th Tng Bde, Ft McClellan, AL XX (ARE) NO LONGER (Name) (Organization)

REQUIRED AS EVIDENCE AND MAY BE DISPOSED OF AS INDICATED ABOVE. (If article(s) must be retained, do not sign, but explain in separate correspondence.)

Hugh H. JOYCE, CPT, JAGC (Typed / Printed Name, Grade, Title) Hugh H. Joyce (Signature) 7 Mar 85 (Date)

WITNESS TO DESTRUCTION OF EVIDENCE

THE ARTICLE(S) LISTED AT ITEM NUMBER(S) 3, 4, and 5 XXXX (WERE) DESTROYED BY THE EVIDENCE CUSTODIAN, IN MY PRESENCE, ON THE DATE INDICATED ABOVE

SA Hubert L. HARRISON, Ft McClellan Field Office (Typed / Printed Name, Organization) Hubert L. Harrison (Signature)

Figure 3-12 (continued)

DEPARTMENT OF THE ARMY
U.S. ARMY CRIMINAL INVESTIGATION COMMAND
FORT BLANK FIELD OFFICE
FORT BLANK, MISSOURI 30965-6754

REPLY TO
ATTENTION OF

CINUE-OP (195-2b) 20 JAN 1989

SUBJECT: CID REPORT OF INVESTIGATION - FINAL - 0028-89-CID111-50622-5Q6C/5L6D

To: See Distribution

LOCATION OF OCCURRENCE: HHC, 5th Trans Bn, 4th Trans Gp, Ft Blank, MO (FBMO).

DATE/TIME OF OCCURRENCE: 6 Nov 88; 0001-2400.

DATE/TIME REPORTED: 10 Jan 89; 1125.

INVESTIGATED BY: SA SAMUEL E. SPADE, 2347.

TITLE: 1. LEWIS, Janet May; SPC; 316-04-6178; 26 May 65; Gaithersburg, MD; F;White; HHC, 5th Trans Bn, 4th Trans Gp, FBMO; Wrongful Possession and Use of Cocaine.

VICTIM: 1. US Government (HHC, 5th Trans Bn, 4th Trans Gp, FBMO); Wrongful Possession and Use of Cocaine.

SYNOPSIS: Investigation revealed LEWIS possessed and used cocaine which was detected through unit urinalysis.

STATUTES:

Article 112a, UCMJ - Wrongful Possession and Use of Cocaine

BASIS FOR INVESTIGATION: On 10 Jan 89, Inv Peter E. MUELLER, Drug Suppression Team (DST), Ft Blank Field Office (FBFO), USACIDC, was notified by 1LT Sylvia C. Baker, 219-66-6753, Cdr, HHC, 5th Trans Bn, 4th Trans Gp, FBMO, that LEWIS' urinalysis was positive for cocaine.

Figure 3-13

NARRATIVE:

1. COMMAND COORDINATION:

1.1 About 1125, 10 Jan 89, BAKER coordinated with Inv MUELLER and identified LEWIS as the individual whose urinalysis was positive for cocaine. The urinalysis was administered on 6 Nov 88. BAKER provided a copy of the Urinalysis Custody and Report Record (DA Form 5180-R) (exhibit 1).

1.2 About 1425, 10 Jan 89, Inv MUELLER informed BAKER that LEWIS was advised of her rights, which she waived and admitted using cocaine.

2. INTERVIEW OF SUBJECT:

SPC LEWIS: About 1125, 10 Jan 89, Inv MUELLER advised LEWIS of her rights, which she waived, and rendered a statement (exhibit 2) admitting to the possession and use of cocaine.

3. STAFF JUDGE ADVOCATE (SJA) COORDINATION:

About 1553, 10 Jan 89, Inv MUELLER briefed CPT Ervin L. GREEN, 512-89-0241, Office of the SJA, FBMO, on this investigation. CPT GREEN opined there is probable cause to believe LEWIS committed the offenses of Wrongful Possession and Use of Cocaine.

EXHIBITS:

ATTACHED:

1. DA Form 5180-R, 24 Nov 88.

2. Waiver Certificate and Statement of SPC LEWIS, 10 Jan 89.

NOT ATTACHED:

None.

The original of exhibit 1 is maintained in the files of HHC, 5th Trans Bn, 4th Trans Gp, FBMO. The original of exhibit 2 is forwarded with the USACRC copy of this report.

Figure 3-13 (continued)

CID Report of Investigation 0028-89-CID111-50622

STATUS: This is a final report, pending results of commander's action.

REPORT PREPARED BY:

Kenneth O Chung

KENNETH S. CHUNG
SPECIAL AGENT, 3641

REPORT APPROVED BY:

Michael M. Weaver

MICHAEL M. WEAVER
CPT, MP
COMMANDING

DISTRIBUTION:
1-USACRC (orig)
1-Rgn
1-Cdr, 5th Trans Bn
1-SJA, FBMO (CPT GREEN)
1-PMO, FBMO
1-File

Figure 3-13 (continued)

CRIMINAL INVESTIGATION
LABORATORY REPORT
CID Regulation 195-20

DATE PREPARED
20 November 1988

PREPARING LABORATORY	CONTRIBUTOR	
Commander USACIL-CONUS Ft Gordon, GA 30905	Commander U.S. Army Training Center & Fort Dix Fort Dix, New Jersey 08640	PAGE 01 OF 01 PAGES LABORATORY CASE NUMBER 79-CID131-17436-C CONTIBUTOR CASE NUMBER 10-22-79~~79~~-DF22-8N

SUSPECT(S)

DOE, Cornelius Ralph

EVIDENCE EXAMINED

The exhibit listed below was received by John E. Smith in a sealed container which was transmitted to the USACIL-CONUS by registered mail package, registered mail number 12214. There was no indication that the sealed evidence container had been opened between the time it was mailed by the submitting agency and the time it was received by the undersigned.

Exhibit 1 An envelope which contained one piece of blue paper perforated into four squares, two pieces of blue paper each perforated into two squares, and one square piece of blue paper (a total of nine squares).

FINDINGS:

Examination of an extract of four squares of Exhibit 1 revealed the presence of lysergic acid diethylamide (LSD), an hallucinogen listed on Schedule I of Public Law 91-513. The extract was consumed in analysis. The four squares were recovered after analysis and returned. The remaining five squares were returned.

John E. Smith

JOHN E. SMITH
Forensic Chemist

CID FORM 72
1 JUN 76

Figure 3-14

929M

AFFIDAVIT SUPPORTING REQUEST FOR AUTHORIZATION TO SEARCH AND SEIZE OR APPREHEND

For use of this form, see AR 27-10; the proponent agency is TJAG.

BEFORE COMPLETING THIS FORM, SEE INSTRUCTIONS ON PAGE 2

1. I, CWO James E. Snow (Name), 3d MPD (CI), Fort Gordon, Georgia (Organization or Address)

having been duly sworn, on oath depose and state that: on 7 October 1987, PFC John Doe, Headquarters and Headquarters Company, 3d Advanced Individual Training Brigade (Signal), US Army Signal Center and Fort Gordon, Fort Gordon, Georgia, reported to me that one blue and white portable "Smooth Tone" high-fidelity phonograph with gold script initials "JD" engraved on the cover, the property of Doe, was stolen from his living quarters by a person or persons unknown. The property was of a value of $200.00.

2. The affiant further states that: PFC Joseph R. Jones, Special Processing Detachment, Fort Gordon, Georgia, who lives next door to Doe, stated that at about 1700 hours on 7 October 1987 he was entering his driveway in his automobile when he noticed PFC Tom Smutt, Headquarters and Headquarters Company, 3d Advanced Individual Training Brigade (Signal), US Army Signal Center and Fort Gordon, Fort Gordon, Georgia, leaving Doe's house with a blue and white phonograph. Smutt put the phonograph in his automobile and drove away. PFC Larry Matthews, Headquarters and Headquarters Detachment, 3d Advanced Individual Training Brigade (Signal), Fort Gordon, Georgia, who lived directly across the street from Smutt, stated that at about 1750 hours on 7 October 1987 he was cutting his grass when Smutt arrived home in his automobile and removed a blue and white phonograph from his car. When Matthews called to ask Smutt if he had brought a new stereo, Smutt replied that he had and took the phonograph into his house. Smutt resides at 624 Red Clay Lane, Fort Gordon, Georgia. Both Jones and Matthews related the above information to me during an official Military Police investigation relating to the matter, after Doe had reported the incident, and Doe, Jones, and Matthews appear to be trustworthy and to have had no reason to tell an untruth on this case. Matthews has also provided valid information to the affiant on another matter on one previous occasion, which information proved to be accurate.

DA FORM 3744-R, Mar 85 EDITION OF AUG 84 IS OBSOLETE.

Figure 3-15

3. In view of the foregoing, the affiant requests that an authorization be issued for a search of the living quarters
(the person) (and)

known as 624 Red Clay Lane, Fort Gordon, Georgia, presently occupied by
(the quarters or billets) (and)

PFC Tom Smutt
(the automobile) ( ) and (seizure) (apprehension) of one blue and white portable
(items/persons searched for)

"Smooth Tone" high-fidelity phonograph with gold script initials "JD" engraved on the outside cover and of PFC Tom Smutt, HHC, 3d AIT Bde (Signal).

TYPED NAME AND ORGANIZATION OF AFFIANT
CWO JAMES E. SNOW, 3d MPD (CI)
3d MPD (CI), Fort Gordon, Georgia

SIGNATURE OF AFFIANT
J. E. Snow

SWORN TO AND SUBSCRIBED BEFORE ME THIS 7th DAY OF October 19 87 AT Fort Gordon, Georgia

TYPED NAME, ORGANIZATION AND OFFICIAL CAPACITY OF AUTHORITY ADMINISTERING THE OATH
CPT JOE FRIDAY, 3d MPD (CI)
Commander

SIGNATURE OF AUTHORITY ADMINISTERING THE OATH
Joe Friday

INSTRUCTIONS FOR

AFFIDAVIT SUPPORTING REQUEST FOR AUTHORIZATION TO SEARCH AND SEIZE OR APPREHEND

1. In paragraph 1, set forth a concise, factual statement of the offense that has been committed or the probable cause to believe that it has been committed. Use additional page if necessary.

2. In paragraph 2, set forth facts establishing probable cause for believing that the person, premises, or place to be searched and the property to be seized or the person(s) to be apprehended are connected with the offense mentioned in paragraph 1, plus facts establishing probable cause to believe that the property to be seized or the person(s) to be apprehended are presently located on the person, premises, or place to be searched. Before a person may conclude that probable cause to search exists, he or she must first have a reasonable belief that the person, property or evidence sought is located in the place or on the person to be searched. The facts stated in paragraphs 1 and 2 must be based on either the personal knowledge of the person signing the affidavit or on hearsay information which he/she has plus the underlying circumstances from which he/she has concluded that the hearsay information is trustworthy. If the information is based on personal knowledge, the affidavit should so indicate. If the information is based on hearsay information, paragraph 2 must set forth some of the underlying circumstances from which the person signing the affidavit has concluded that the informant (whose identity need not be disclosed) or his/her information was trustworthy. Use additional pages if necessary.

3. In paragraph 3, the person, premises, or place to be searched and the property to be seized or the person(s) to be apprehended should be described with particularity and in detail. Authorization for a search may issue with respect to a search for fruits or products of an offense, the instrumentality or means of committing the offense, contraband or other property the possession of which is an offense, the person who committed the offense, and under certain circumstances for evidentiary matters.

Figure 3-15 (continued)

M TAB TAB TAB TAB

SEARCH AND SEIZURE AUTHORIZATION

For use of this form, see AR 27-10; the proponent agency is TJAG.

TO: *(Name and Organization of the person to whom authorization is given.)*

Special Agent William P. Smith, 3d MPD (CI), Fort Gordon, Georgia

(An affidavit) (A (sworn) or (unsworn) oral statement) having been made before me by CWO James E. Snow
(Name of Affiant)

3d MPD (CI), Fort Gordon, Georgia
(Organization or Address of Affiant)

(which affidavit is attached hereto and made a part of this authorization), and as I am satisfied that there is probable cause to believe that the matters mentioned in the affidavit are true and correct, that the offense set forth therein has been committed, and that the property to be seized is located *(on the person) (at the place)* to be searched, you are hereby ordered to search the *(person) (place)* known as

624 Red Clay Lane, Fort Gordon, Georgia

for the property described as one blue and white portable "Smooth Tone" high-fidelity phonograph with gold script initials "JD" engraved on the outside cover

bringing this order to the attention of the *(person searched) (person in possession, if any person be found at the place or on the premises searched)*. The search will be made in the *(daytime) (nighttime)*, and if the property is found there, you shall seize it, issue a receipt therefor to the person from whom the property is taken or in whose possession the property is found, deliver the property to:

the Evidence Custodian, 3d MPD (CI), Fort Gordon, Georgia
(Name and Organization of Authorized Custodian)

and prepare a written inventory of the property. If there is no person at the searched place to whom the receipt may be delivered, the receipt will be left in a conspicuous location at the place or on the premises where the property is found.

Dated this 7th day of October, 19 87.

TYPED NAME AND GRADE OF AUTHORIZING OFFICIAL — DUTY POSITION OF AUTHORIZING OFFICIAL

ORGANIZATION OF AUTHORIZING OFFICIAL — SIGNATURE OF AUTHORIZING OFFICIAL

DA FORM 3745-R, Mar 85 — EDITION OF NOV 82 IS OBSOLETE.

Figure 3-16

Date_____

Location_____

I, _____(1)_____, having been advised of my constitutional right not to allow a search of my person, home, belongings, or property (including wall or footlocker) without a search warrant or commander's authorization, both of which would have to be used on probable cause, and having been advised of my right to refuse to consent to or to voluntarily allow such a search, hereby AUTHORIZE _____(2)_____ to conduct a complete search of _____(3)_____ for _____(4)_____ and to seize any or all of such item(s) if found within the areas I have allowed to be searched.

This permission is given by me to the above-named persons voluntarily and without threats or promises of any kind. I understand that I can refuse to give permission to search: that I can limit my permission to search to a specific area, and that I can withdraw my permission to search at any time.

_____

[Signature of individual granting permission]

Figure 3-17. Consent to Search

_____
[Signature of witness]

_____
[Printed name, rank, and
unit of witness]

NOTE: This document is included here, only to illustrate one of the formal ways military enforcement officials may memorialize an individual's consent to search. The directions that follow are for counsel's use, to ensure that the officials properly complete the document.

Directions for Use

1. Insert name of individual whose person, property, or area is to be searched.
2. Insert names and titles of individuals who are to conduct the search.
3. Insert specific areas to be searched (e.g., individual's locker, quarters, person).
4. Insert items to be searched for with as much specificity as possible.

Figure 3-17. Consent to Search

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

For use of this form, see AR 190-30; the proponent agency is DCSPER.

DATA REQUIRED BY THE PRIVACY ACT

AUTHORITY:	Title 10, United States Code, Section 3012(g).
PRINCIPAL PURPOSE:	To provide commanders and law enforcement officials with means by which information may be accurately identified.
ROUTINE USES:	Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.
DISCLOSURE:	Disclosure of your Social Security Number is voluntary.

LOCATION	DATE	TIME	FILE NO.
Fort Blank, Missouri	20 Jan 87	1000 hrs	

NAME (Last - First - MI)	ORGANIZATION OR ADDRESS
BAKER, BILL E.	HHC, 1st Cav.

SOCIAL SECURITY NO.	GRADE/STATUS
109-78-8497	PFC

SECTION A - RIGHTS WAIVER/NON-WAIVER CERTIFICATE

RIGHTS

The investigator whose name appears below told me that he/she is with the United States Army Criminal Investigation Division and wanted to question me about the following offense(s) of which I am suspected/accused: Robbery

Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:

1. I do not have to answer any questions or say anything.
2. Anything I say or do can be used as evidence against me in a criminal trial.
3. *(For personnel subject to the UCMJ)* I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both.

   - or -

   (For civilians not subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. However, I understand that I must make my own arrangements to obtain a lawyer and this will be at no expense to the Government. I further understand that if I cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for me in accordance with the law.
4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.

COMMENT *(Continue on reverse side)*

WAIVER

I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.

WITNESSES *(If available)*	SIGNATURE OF INTERVIEWEE
1. NAME *(Type or Print)* WILLIAM SMITH, SA	Bill E. Baker
ORGANIZATION OR ADDRESS AND PHONE CID, Fort Blank	SIGNATURE OF INVESTIGATOR Stanley P. Morgan
2. NAME *(Type or Print)*	TYPED NAME OF INVESTIGATOR STANLEY P. MORGAN
ORGANIZATION OR ADDRESS AND PHONE	ORGANIZATION OF INVESTIGATOR CID, Fort Blank

NON-WAIVER

I do not want to give up my rights:

☐ I want a lawyer. ☐ I do not want to be questioned or say anything.

SIGNATURE OF INTERVIEWEE

ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT (DA FORM 2823) SUBSEQUENTLY EXECUTED BY THE SUBJECT SUSPECT/ACCUSED.

DA FORM NOV 84 3881 EDITION OF MAY 81 IS OBSOLETE.

Figure 3-18

SECTION B - RIGHTS WARNING PROCEDURE

THE WARNING

1. WARNING - Inform the suspect/accused of:
   a. Your official position.
   b. Nature of offense(s).
   c. The fact that he/she is a suspect/accused.
2. RIGHTS - Advise the suspect/accused of his/her rights as follows:

   "Before I ask you any questions, you must understand your rights."

   a. "You do not have to answer my questions or say anything."
   b. "Anything you say or do can be used as evidence against you in a criminal trial."
   c. *(For personnel subject to the UCMJ)* "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."

      - *or* -

      (For civilians not subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. However, you must make your own arrangements to obtain a lawyer and this will be at no expense to the Government. If you cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for you in accordance with the law."
   d. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate."

Make certain the suspect/accused fully understands his/her rights.

THE WAIVER

"Do you understand your rights?"
(If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)

"Do you want a lawyer at this time?"
(If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)

"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?"
(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)

SPECIAL INSTRUCTIONS

WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.

IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY: In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.

PRIOR INCRIMINATING STATEMENTS:

(1) If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights, he/she should be told that such statements do not obligate him/her to answer further questions.

(2) If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.

NOTE: If (1) or (2) apply, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.

COMMENT *(Continued)*

Reverse of DA Form 3881

U.S. G.P.O. 1985-461-033: 27241

Figure 3-18 (continued)

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION	DATE	TIME	FILE NUMBER
Fort Arlington, Virginia	15 Nov 87	1000 hrs	
LAST NAME, FIRST NAME, MIDDLE NAME	**SOCIAL SECURITY NUMBER**		**GRADE/STATUS**
KLEIN, CARL WELDON	291-61-4045		Specialist Four
ORGANIZATION OR ADDRESS			
55th MP Co, Fort Arlington, Virginia			

I, Carl W. Klein, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I am a military policeman working patrol with my partner, SP4 Thomas Caster. On the morning of 15 Nov 87, we were instructed to report to the CO, Co B, 1/16 Inf, Fort Arlington, to pick up a subject, PFC Thomas Amherst, and bring him in for questioning regarding a larceny.

When we arrived at Co B, subject came in and the CO, CPT Leader, advised him of his rights and instructed him to go with us to the MP station for questioning. When we were dismissed, I told subject "Let's go" and he shouted "No" and ran. My partner and I gave pursuit on foot, overtook the fleeing subject in the orderly room and used necessary force to apprehend him. He was then transported to the PM detention facility. Neither my partner nor I were injured in the altercation. The subject received minor lacerations.

At no time did my partner or I make any references to the race of the subject or exhibit any threatening words, mannerisms or gestures. CWK

Not Used

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 2 PAGES
	CWK	

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF___ TAKEN AT___ DATED___ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE___ OF___ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

DA FORM 1 JUL 72 2823 SUPERSEDES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED.

Figure 3-19

STATEMENT (Continued)

CWK

Not Used

CWK

AFFIDAVIT

I, CARL W. KLEIN HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Carl W. Klein
(Signature of Person Making Statement)

WITNESSES:

Charles P. Rose

CHARLES P. ROSE
ORGANIZATION OR ADDRESS

55th MP Co.

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 15 day of November, 1987 at Fort Arlington, Virginia

F. K. Hoover
(Signature of Person Administering Oath)

FREDERICK K. HOOVER, CPT, MPC
(Typed Name of Person Administering Oath)

Commanding Officer, 55th MP Co
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE 2 OF 2 PAGES

☆U.S. G.P.O. 1983-421-646/8030

Figure 3-19 (continued)

PERSONNEL ACTION

For use of this form, see DA PAM 600-8 and AR 680-1; the proponent agency is MILPERCEN.

DATA REQUIRED BY THE PRIVACY ACT

Authority: Title 5, section 3012; Title 10, U.S.C. E.O. 9397. Principal Purpose: Use by service member in accordance with DA Pamphlet 600-8 when requesting a personnel action on his/her own behalf *(Section III)*. Routine Uses: To initiate the processing of a personnel action being requested by the service member. Disclosure: Voluntary. Failure to provide Social Security Number may result in a delay or error in processing of the request for personnel action.

THRU: *(Include ZIP Code)*	TO: *(Include ZIP Code)*	FROM: *(Include ZIP Code)*
	CDR, 99th Inf Div ATTN: MILPO Fort Defense, VA 22310	COMMANDER Co A, 1st Bn, 2d Inf Fort Defense, VA 22310

SECTION I - PERSONAL IDENTIFICATION

NAME *(Last, first, MI)*	GRADE OF RANK/PMOS *(Enl only)*	SOCIAL SECURITY NUMBER
LITTLE, GUY S.	PV1 E1	123-45-6789

SECTION II - DUTY STATUS CHANGE *(Proc 9-1, DA Pam 600-8)*

The above member's duty status is changed from Absent Without Leave

to Present for Duty

effective 1800 hours, 18 March 19 87

SECTION III - REQUEST FOR PERSONNEL ACTION

I request the following action:

	TYPE OF ACTION	Procedure		TYPE OF ACTION	Procedure
	Service School *(Enl only)*			Reassignment Married Army Couples	
	ROTC or Reserve Component Duty			Reclassification	
	Volunteering For Oversea Service			Officer Candidate School	
	Ranger Training			Asgmt of Pers with Exceptional Family Members	
	Reasgmt Extreme Family Problems			Identification Card	
	Exchange Reassignment *(Enl only)*			Identification Tags	
	Airborne Training			Separate Rations	
	Special Forces Training/Assignment			Leave - Excess/Advance/Outside CONUS	
	On-the-Job Training *(Enl only)*			Change of Name/SSN/DOB	
	Retesting in Army Personnel Tests			Other *(Specify)*	

SIGNATURE OF MEMBER *(When required)*	DATE

SECTION IV - REMARKS *(Applies to Sections II, III, and V) (Continue on separate sheet)*

Member surrendered at 502d AG Co, 2d Armd Div, this station.
Member departed AWOL on 14 Jan 87.

SECTION V - CERTIFICATION/APPROVAL/DISAPPROVAL

certify that the duty status change *(Section II)* or that the request for personnel action *(Section III)* contained herein -

☒ HAS BEEN VERIFIED ☐ RECOMMEND APPROVAL ☐ RECOMMEND DISAPPROVAL
☐ IS APPROVED ☐ IS DISAPPROVED

COMMANDER/AUTHORIZED REPRESENTATIVE	SIGNATURE	DATE
CPT Terry E. Leader	Terry E. Leader	19 Mar 1987

DA FORM DEC 82 4187 Figure 3-20 EDITION OF FEB 81 WILL BE USED. COPY 1

3-3. Preservation of testimony.

One of the most difficult problems for counsel is ensuring the presence of witnesses for trial. Reassignment, discharge, temporary duty, leave, and illness, witness availability must be addressed at the earliest possible stage of the trial. Trial counsel should alert unit commanders of all potential witnesses and the time frame in which the witnesses must be available. Sample letter formats are at Figures 3-21 and 3-22.

If it appears that witnesses will be unavailable when needed, coordinate with the commander in securing their availability or, in the alternative, preserve their testimony by interrogatory or deposition.

For persons pending court-martial charges, consult AR 600-31 regarding procedures for suspending favorable personnel actions. See Figure 3-23.

DEPARTMENT OF THE ARMY
HEADQUARTERS, 20TH INFANTRY DIVISION AND FORT BLANK
Fort Blank, Missouri 63899

AKPS-JA 12 August 19XX

MEMORANDUM FOR Commander, Battery A, 1st Battalion, 15th Field Artillery

SUBJECT: Court-Martial Witness Availability

1. The following member(s) of your unit are witnesses in the court-martial case of United States v. _____:

_____

_____

_____

2. During the next ___ days it will be necessary for these witnesses to be available for interviews and possible testimony at trial.

3. If any of these individuals will not be available during the designated period for any reason (e.g., illness, field exercises, leave, temporary duty, change of station, or discharge action), notify this office immediately.

4. Please take appropriate action to ensure none of these witnesses is allowed to depart this command until released by the Office of the Staff Judge Advocate.

EILEEN C. YEE
Captain, JA
Trial Counsel

Figure 3-21. Court-Martial Witness Requirement

DEPARTMENT OF THE ARMY
HEADQUARTERS, 20TH INFANTRY DIVISION AND FORT BLANK
Fort Blank, Missouri 63899

AKPS-JA 15 September 19XX

MEMORANDUM FOR Commander, Battery A, 1st Battalion, 15th Field Artillery

SUBJECT: Court-Martial Witness Availability

1. The following member(s) of your unit, previously identified as potential witness(es) in the court-martial case of United States v. _____, is (are) no longer required to remain in the command:

_____

_____

_____

2. Thank you for your cooperation and assistance in meeting this court-martial witness requirement. Please extend the appreciation of this office to anyone inconvenienced by this proceeding.

EILEEN C. YEE
Captain, JA
Trial Counsel

Figure 3-22. Court-Martial Witness Release

REPORT TO SUSPEND FAVORABLE PERSONNEL ACTIONS (FLAG)

For use of this form, see AR 600-8-2; the proponent agency is MILPERCEN.

SECTION I - ADMINISTRATIVE DATA

1. NAME (Last, First, MI)	2. SSN	3 RANK
JONES, Joseph C.	979-60-7861	SP4

4. ☒ On active duty ☐ Not on active duty ☐ On ADT — 5. ETS/ESA/MRD: 9 JAN 87

6. UNIT ASSIGNED AND ARMY MAJOR COMMAND: B Co., 2d Bn 80th Armor – FORSCOM

7 STATION (Geographical location): Ft. Defense, VA

8. PSC CONTROLLING FLAGGING ACTION AND TELEPHONE NUMBER: 20th Personnel Services Company 999-1234

9. THIS ACTION IS TO:

☒ Initiate a flag (Sections II and V only) ☐ Transfer a flag (Sections III and V only) ☐ Remove a flag (Sections IV and V only)

SECTION II - INITIATE A FLAG

10. ☒ A FLAG IS INITIATED, EFFECTIVE 24 Oct 86, FOR THE FOLLOWING REASON: **

NON-TRANSFERABLE

☒ Adverse action (A)

☐ Elimination - field initiated (B)

☐ Removal from selection list - field initiated (C)

☐ Referred OER (D)

☐ Security violation (E)

☐ HQDA use only - elimination or removal from selection list (F)

TRANSFERABLE

☐ APFT failure (J)

☐ Weight control program (K)

SECTION III - TRANSFER A FLAG

11. ☐ A FLAG IS TRANSFERRED FOR THE FOLLOWING REASON:

☐ Adverse action - HQDA directed reassignment (G)

☐ Adverse action - punishment phase (H)

☐ APFT failure (J)

☐ Weight control program (K)

☐ Supporting documents attached? ☐ Yes ☐ No

SECTION IV - REMOVE A FLAG

12. ☐ A FLAG IS REMOVED, EFFECTIVE _____, FOR THE FOLLOWING REASON:

☐ Case closed favorably (C)

☐ Disciplinary action taken (D)

☐ Soldier transferred to a different Army component or discharged while case in process (destroy case file) (E)

☐ Other final action (E)

SECTION V - AUTHENTICATION

DISTRIBUTION

1 - Unit Commander 1 - F&AO

1 - PSC 1 - Commander, gaining unit (transfer flag only)

NAME, RANK, TITLE, AND ORGANIZATION	SIGNATURE	DATE
JOHN R. DAVIS, CPT, AR, Adjutant 2d Bn 80th Armor	John R. Davis	25 Oct 86

DA FORM 268, JUN 87 EDITION OF 1 JAN 80 IS OBSOLETE.

Figure 2-1. Sample DA Form 268 to initiate a flag

Figure 3-23

a. Depositions.

(1) Procedural considerations for the taking of depositions.

(a) The procedures for taking a deposition are prescribed by Art. 49, UCMJ, and R.C.M. 702. In general, prerequisites for taking a deposition include the following.

1. A request for taking a deposition should be made to the convening authority (or after commencement of the trial, to the military judge) unless the parties agree that the deposition can be taken without cost to the United States. See R.C.M. 702(i).

2. The request should include personal data on the person to be deposed, a statement of the matters on which the person is to be examined, reasons for the deposition, and whether an oral or written deposition is requested. See R.C.M. 702(c)(2).

3. Opposing counsel should be shown the request and afforded an

opportunity to object prior to presentation to the convening authority or military judge. A subsequent failure to object may constitute waiver. See R.C.M. 702(h)(1).

4. With limited exceptions, a request for a written deposition may not be approved without the consent of the opposing party. See R.C.M. 702(c)(3)(B).

5. The opposing party must be provided with reasonable written notice of the time and place for taking the deposition and the name and address of each party to be examined. See R.C.M. 702(e).

6. Each party should be provided copies of all prior statements made by the deponent to which he or she would otherwise be entitled at trial. See R.C.M. 702(g)(1)(B).

7. The convening authority shall ensure that a neutral military or civil officer, authorized to administer oaths, is appointed as deposing officer. See R.C.M.

702(d)(1).

8. Subject to certain exceptions, the accused and defense counsel have the right to be present at the deposition proceeding. See R.C.M. 702(g).

(b) At the deposition hearing the deposing officer has a ministerial function. The deposing officer does not rule upon objections, but merely notes any objection and takes the evidence. See R.C.M. 702(f). Both counsel at the hearing should make all evidentiary and procedural objections. Failure to do so may constitute waiver of the objection. See R.C.M. 702(h).

(c) The deposition may be recorded by a court reporter or other means such as videotape, audiotape, or sound film. In the discretion of the military judge, the deposition may be played or read to the court-martial. See R.C.M. 702(g)(3). Transcripts should be verbatim. See R.C.M. 702(f)(6).

(d) Counsel should be aware of the preference for use of live witnesses. Thus, actual unavailability is

necessary. See Mil. R. Evid. 804(a); U.S. Const. amend. VI.

(e) R.C.M. 702(g)(3), Discussion, states that the reading/playing of a deposition at a court-martial is recorded and transcribed by the reporter and thus the deposition need not be included in the record. As a matter of sound practice, however, the tape/transcript should be attached to the record.

(f) See Figure 3-24 for a sample request to take a deposition and Figure 3-25 for a sample approval endorsement.

(g) See Figure 3-26 for a suggested format for a deposition on oral examination. Figure 3-27 contains sample authenticating certificates.

DEPARTMENT OF THE ARMY
HEADQUARTERS, 20TH INFANTRY DIVISION AND FORT BLANK
FORT BLANK, MISSOURI 63866-4000

AKPS-JA 1 September 19XX

MEMORANDUM FOR Commander, 20th Infantry Division and Fort Blank, Fort Blank, Missouri 63866-4000

SUBJECT: Request to Take a Deposition in the Case of United States v. Thomas Sublette

1. Pursuant to the provisions of R.C.M. 702, Manual for Courts-Martial, 1984, request permission to take the oral deposition of Master Sergeant Henry J. Simms, Headquarters Company, 20th Maintenance Battalion, at the Office of the Staff Judge Advocate, Fort Blank, Missouri, at 0900, 10 September 19XX. Said deposition is to be taken in connection with the charges and specifications in the pending general court-martial against Private Thomas Sublette, 369-47-2341, Headquarters Company, 20th Maintenance Battalion, alleging the willful disobedience of Master Sergeant Simms' order.

2. Master Sergeant Simms has been scheduled to undergo major surgery under general anesthesia and, according to his physician, will not be available for trial. Pretrial investigation indicates that he will be a necessary prosecution witness in the case. It is anticipated that on oral deposition, Master Sergeant Simms will testify that:

On the afternoon of 6 August 19XX, while he was First Sergeant of Headquarters Company, 20th Maintenance Battalion, he gave an order to Private Sublette to mow the lawn in front of the company dayroom (Bldg. T-400). This order was given in the presence of Lieutenant Ferguson. He and Lieutenant Ferguson then left the accused, who said nothing concerning the order. When he returned about five minutes later, Private Sublette had disappeared without mowing the lawn. He did not see Private Sublette again until the following day.

3. Because Master Sergeant Simms is the alleged victim, the defense has orally proposed, and the undersigned agrees, that the deposition be videotaped.

Figure 3-24. Sample Request for Deposition

Accordingly, request that you direct the deposing officer to videotape the deposition.

JERRY A. KHALIL
Captain, JA
Trial Counsel

Figure 3-24. Sample Request for Deposition

AKPS-A (AKPS-JA/1 Sep XX) 1st End MAJ Irving/dls/281-6120
SUBJECT: Request to Take a Deposition in the Case of United States v. Thomas Sublette

Cdr, 20th Infantry Division and Fort Blank, Fort Blank, Missouri 63866-4000 3 September 19XX

FOR CPT Jerry M. Khalil, Office of the Staff Judge Advocate, Fort Blank, Missouri 63866

1. Pursuant to the provisions of R.C.M. 702, Manual for Courts-Martial, 1984, Captain Michael C. Jackson, JA, Office of the Staff Judge Advocate, Fort Blank, Missouri, is directed to cause to be taken the deposition of the following named person, to be used in evidence in the trial by court-martial of Private (E-2) Thomas Sublette, Headquarters Company, 20th Maintenance Battalion, Fort Blank, Missouri:

MSG Henry J. Simms, Headquarters Company, 20th Maintenance Battalion, Fort Blank, Missouri

2. Captain Jackson is directed to follow the provisions of Art. 49, UCMJ, and R.C.M. 702. Furthermore, he is directed to record the proceeding on videotape as requested.

3. A copy of this correspondence shall be provided by you to the accused's detailed defense counsel.

FOR THE COMMANDER:

L. H. BROWN
LTC, AG
Adjutant General

Figure 3-25. Sample Approval of Request to Take Deposition

UNITED STATES	)	Fort Blank, Missouri
v.	)	
THOMAS SUBLETTE	)	
Private (E-2), US Army	)	DEPOSITION
369-47-2341	)	
HHC, 20th Maint. Bn.	)	

Deposing Officer:[1] Let the record reflect that this deposition proceeding commenced at 0900, 10 September 19XX, at the Office of the Staff Judge Advocate, Fort Blank, Missouri, pursuant to authority attached hereto as Enclosure 1. Present at the taking of the deposition are:

Captain Jackson, Deposing Officer.

Captain Khalil, Trial Counsel, certified in accordance with Art. 27(b) and previously sworn.

Captain Howard, Defense Counsel, certified in accordance with Art. 27(b) and previously sworn.

PVT E-2 Thomas Sublette, Accused.

MSG Henry J. Simms, Deponent.

Let the record further reflect that Sergeant Simms is present to testify as a witness for the prosecution in

---

[1] Pursuant to R.C.M. 702(f)(4), the deposing officer is responsible for administering all oaths and for maintaining an orderly deposition hearing.

Figure 3-26. Suggested Format for Deposition on Oral Examination

the forthcoming general court-martial of United States v. PV2 Thomas Sublette, convened by General Court-Martial Convening Order No. 18, Headquarters, Fort Blank, dated 1 July 19XX.

Trial Counsel: Counsel representing the accused is requested to state any objection he or she has pertaining to the taking of this deposition, including the notice of taking, time to prepare, or formal defect in the proceedings.

Defense Counsel: There are none. (I object _____.)

Deposing Officer: I will now swear the reporter, Ms. Norine Scribble: "You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God."

I will now swear the deponent, Master Sergeant Simms: "You swear (or affirm) that the evidence you are about to give shall be the truth, the whole truth, and nothing but the truth. So help you God."

DIRECT EXAMINATION

TC: Will you state your full name, grade, organization, and armed force?

Figure 3-26. Suggested Format for Deposition on Oral Examination

A: Henry J. Simms, Master Sergeant, 321-45-6789, Headquarters Company, 20th Maintenance Battalion, United States Army, Fort Blank, Missouri, sir.

Q: Do you know the accused in this case?

A: I do, sir.

Q: If you see him, will you point him out and identify him by name?

A: Private Thomas Sublette, sir. [pointing to the accused]

TC: Let the record reflect that the deponent pointed to the accused as he identified him by name. [To witness] Directing your attention to 6 August 19XX, what were your military duties that day?

A: I was First Sergeant of Headquarters Company, 20th Maintenance Battalion.

. . . .

TC: On 6 August 19XX, about an hour after you gave the accused the order to mow the lawn, what did Lieutenant Ferguson relate to you concerning the accused?

DC: I object to the last question as calling for

Figure 3-26. Suggested Format for Deposition on Oral Examination

hearsay.[2]

. . . .

TC: Will the reporter mark this document as Deposition Exhibit 1 for Identification. Sergeant Simms, do you recognize Deposition No. 1?

A: Yes, this is an informal receipt we regularly use in the unit. The number of tools and the date of the transaction were written on it by me and was signed by Private Sublette on the date of the transaction. This is the original.

TC: Let the record reflect that defense counsel was shown and examined Deposition Exhibit No. 1 for Identification. A copy will be substituted.

. . . .

CROSS-EXAMINATION

DC: I have no questions.

RE-DIRECT EXAMINATION

TC: Will you state where you can be located on 24 September 19XX, the proposed date of this trial?

---

[2] The officer taking the deposition makes no ruling on objections. The objections made at the taking of the deposition are decided by the military judge at trial.

Figure 3-26. Suggested Format for Deposition on Oral Examination

A: I am having an operation on my back on Friday. On the 24th of September I expect to be in the hospital in traction.

TC: Sergeant Simms, do you waive reading and signing this transcript?

A: Yes, sir.

TC: Does the accused object?

DC: No.

TC: Let the record reflect that these proceedings terminated at 1650, 10 September 19XX.[3]

---

[3] The officer taking the deposition should not conduct an independent examination of the witness.

Figure 3-26. Suggested Format for Deposition on Oral Examination

(a) Certificate of person taking deposition.

I certify that the above deposition was duly taken by me on the 10th day of September 19XX; the above-named witness, having been first sworn by me, gave the foregoing answers to the questions presented to him. I further certify that the detailed reporter, Norine Scribble, was duly sworn by me and that said reporter signed in my presence the reporter's certificate appearing below.

MICHAEL J. JACKSON
Captain, JA
Deposing Officer

(b) Reporter's certificate.

I certify that the foregoing interrogatories and answers thereto are true, complete, and accurate transcriptions of the interrogatories propounded to and the answers by the witness named above.

NORINE SCRIBBLE
Office of the SJA
Ft. Blank, Missouri

Figure 3-27. Authenticating certificates

(2) Presentation of deposition to court.

Depositions are documentary evidence and must be properly authenticated before being admitted into evidence. In addition, counsel must be able to prove the unavailability of the deponent at the time of trial. There are three possible methods for the admission of a deposition into evidence. Depositions may be admitted by stipulation as to the unavailability of the deponent and as to the authenticity of the deposition; by proving the unavailability of the deponent and by calling the deposing officer to authenticate the deposition; and by proving the unavailability of the deponent and by establishing the self-authenticating nature of the document. See Mil. R. Evid. 902. Examples of admissibility are shown below.

(a) Stipulation.

TC: The Prosecution and the Defense, with the express consent of the accused, stipulate that Master Sergeant Henry J. Simms, witness for the Prosecution, is presently unable to appear and testify at this trial because of his hospitalization and that Prosecution Exhibit 1 for Identification is a true and authentic oral deposition of the testimony of Master Sergeant Henry J. Simms. Prosecution Exhibit 1 for Identification has been previously shown to the Defense and is offered into evidence as Prosecution Exhibit 1 (Once the military judge ascertains that the accused and defense counsel voluntarily agree to stipulate, Prosecution 1 should be received in evidence. See DA Pam 27-9, para. 7-4.).

(b) Proof.

TC: The Prosecution offers Prosecution Exhibit 1 for Identification as the oral deposition of Master Sergeant Henry J. Simms. Prosecution (calls as a witness . . .) (offers documentation as to the absence and unavailability of Sergeant Henry J. Simms . . .).

DC: [Defense counsel offers no objection or cross-examines the witness or questions the offered documentary evidence.]

TC: In order to properly authenticate Prosecution Exhibit 1 for Identification, the Prosecution calls as a witness [the deposing officer].
[The deposing officer is called, examined, and testifies as to the authenticity of the document.]

DC: [Defense counsel offers no objection to the authenticity of the document or cross-examines the deposing officer].

TC: Because of the established absence of the deponent and the proper authentication of Prosecution Exhibit 1 for Identification by the deposing officer, the Prosecution requests that Prosecution Exhibit 1 for Identification be admitted into evidence as Prosecution Exhibit 1.

DC: (I have no objection.) (I object _____.)

(c) Proof Plus Self-Authenticating Document.

TC: The Prosecution offers Prosecution Exhibit 1 for Identification as the oral deposition of Master Sergeant Henry J. Simms. Prosecution (calls as a witness . . .)

(offers documentation as to the absence and unavailability of Master Sergeant Henry J. Simms . . .).

DC: [Defense counsel offers no objection or cross-examines the witness or questions the offered documentary evidence.]

TC: Pursuant to Mil. R. Evid. 902, the Prosecution offers Prosecution Exhibit 1 for Identification as a self-authenticating document.

DC: (No objection.) (I object _____.)

MJ: [Rules on objection.]

TC: Because of the established absence of the deponent and the proper authentication of Prosecution Exhibit 1 for Identification, the Prosecution requests that Prosecution Exhibit 1 for Identification be admitted into evidence as Prosecution Exhibit 1.

DC: (I have no objection.) (I object _____.)

INTERROGATORIES AND DEPOSITION [1]

UNITED STATES)
v.)
)
~~XXXXXXXXXXXXXXX~~[2])
Private John Q. Public, HHC 1st Inf Div (M), Ft Riley, KS)

Deposition of CPT Mark P. Lane (stationed) (~~residing~~) [2]

at HHC, 2d Bde, 1st AD, APO AE 09034 to be read in evidence before a [3]

general court-martial of the United States,

convened to meet at Fort Riley, KS by Cdr, 1st Inf Div (M)

dated 1 October 19 9X

TO: [4] MAJ John T. Markham, HHC, 2d Bde, 1st Armd Div, APO AE 09034

It is requested that you authorize the deposition of the above-named witness to be taken on the following interrogatories.

TRIAL COUNSEL OR OTHER PERSON REQUESTING DEPOSITION [5]

a. TYPED NAME (Last, First, Middle Initial)	b. OFFICIAL TITLE	
Evans, John T.	Trial Counsel	
c. UNIT/COMMAND NAME	d. LEGAL QUALIFICATIONS	
HHC, 1st Inf Div, Ft Riley, KS	Certified IAW Article 27(b)	
e. SIGNATURE: John T Evans	f. RANK: CPT	g. DATE SIGNED: 1 Oct 9X

Cdr, 1st Inf Div, Ft. Riley, KS

1 October, 19 9X

TO: MAJ John T. Markham, HHC, 2d Bde, 1st Armd Div, APO AE 09034,

You will take or cause to be taken the deposition of the above-named witness on the following interrogatories, cross-interrogatories, and additional interrogatories, if any. [6]

By order of MG Blunt.

PERSON ORDERING DEPOSITION OR PERSON SIGNING THEREFOR

a. TYPED NAME (last, First, Middle Initial)	b. RANK	c. SIGNATURE
Adjutant, John Q.	LTC	John Q Adjutant
d. UNIT/COMMAND NAME		e. OFFICIAL TITLE
HHC, 1st Inf Div, Ft. Riley, KS		Adjutant General

[1] *This form to be used when a deposition is taken on written interrogatories. It may be appropriately modified when used for an oral deposition. (See generally, RCM 702, MCM, 1984.)*

[2] *Strike out words not applicable.*

[3] *General, special, or summary court-martial, military commission, court of inquiry, or military board.*

[4] *Insert name or title of person who is requested to authorize the taking of the deposition. A separate letter complying with RCM 702(c)(2) should be enclosed.*

[5] *To be subscribed by the trial counsel or other person requesting the deposition with name, rank, unit/command name, and official title, as "trial counsel," "defense counsel," "summary court," "recorder," etc. Describe legal qualifications, as "certified in accordance with Article 27(b)," "member of the bar of the Supreme Court of _____" etc., if none, so state.*

[6] *If it is desired to give special instructions, there should be added "special instructions attached."*

DD Form 456, OCT 84, Page 1 *Previous editions are obsolete*

Figure 3-28

Interrogatories propounded by the above-named person requesting the deposition are as follows: [1]

First Interrogatory: Are you in the military service of the United States? If so, what is your full name, rank, unit/command name, and station? If not, what is your full name, occupation, and residence?

Answer: [2] Yes.

Mark P. Lane, CPT
HHC, 2d Bde, 1st Armd Div
Baumholder, Germany
APO AE 09034

Second interrogatory: Do you know the accused? If so, how long have you know him/her?

Answer: Yes. I knew the accused from Aug. 199X-2 to Jun. 199X while he was assigned to my unit at Fort Riley, Kansas.

Third interrogatory: Did the accused ever personally communicate to you that his family in Kansas was suffering serious financial difficulty?

Answer: No.

[1] *The officer taking the deposition shall administer the following oath to the deponent prior to deposing: "You (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth, so help you God?"*

[2] *If the spaces for answers are not sufficient, extra sheets may be inserted by the officer taking the deposition. In such case, he/she will rewrite the interrogatories, writing the answers immediately below the respective interrogatories.*

DD Form 456, OCT 84, Page 2

Figure 3-28 (continued)

The following cross-interrogatories are propounded by:

[1] To be subscribed by the defense counsel or other person with name, pay grade, unit/command name, and official title. Describe legal qualifications, as "certified in accordance with Article 27(b)," "member of the bar of the Supreme Court of _____," etc.; if none, so state. When deposition is requested by the defense, the trial counsel propounds the cross-interrogatories.

PERSON PROPOUNDING CROSS-INTERROGATORIES [1]

a. TYPED NAME (Last, First, Middle Initial)	b. OFFICIAL TITLE
Russell, Richard A.	Defense Counsel
c. UNIT/COMMAND NAME	d. LEGAL QUALIFICATIONS
Trial Defense Service	Certified IAW Article 27(b)

e. SIGNATURE	f. RANK	g. DATE SIGNED
Richard A. Russell	CPT	1 Oct 9X

First cross-interrogatory: [2] None.

Answer:

[2] If none, so state.

Additional interrogatories by the _____ are as follows: [3]

Answer:

[3] Insert "court," "commission," "board," if appropriate. If not applicable, or if no interrogatories are propounded, so state.

DD Form 456, OCT 84, Page 3

Figure 3-28 (continued)

My answers to the foregoing interrogatories, cross-interrogatories, if any, are indicated above.

WITNESS

a. TYPED NAME (Last, First, Middle Initial)	b. SIGNATURE	c. DATE SIGNED
Lane, Mark P.	Mark P Lane	15 Oct 9X

CERTIFICATE OF PERSON TAKING DEPOSITION

I certify that the above deposition was duly taken by me on the 15th day of October, 199X; the above-named witness, having been first sworn by me, gave the foregoing answers to the several interrogatories; that the above-named witness was given an opportunity to read his/her testimony after it was reduced to writing, and all corrections desired by the above-named witness were made; and the above-named witness subscribed the foregoing deposition in my presence at Baumholder, Germany, this 15th day of October, 19 9X. I further certify that the detailed reporter was duly sworn by me and that said reporter signed in my presence the reporter's certificate appearing below.

OFFICER TAKING DEPOSITION

a. TYPED NAME (Last, First, Middle Initial)	b. RANK	c. SIGNATURE	d. DATE SIGNED
Markham, John T.	MAJ	John T Markham	15 Oct 9X

e. UNIT/COMMAND NAME	f. OFFICIAL TITLE
HHC, 2d Bde, 1st Armd Div, APO AE 09034	Deposing Officer

REPORTER'S CERTIFICATION

I certify that the foregoing interrogatories and answers thereto are a true, complete and accurate transcription of the interrogatories propounded to and the answers by the above-named witness.

REPORTER

a. TYPED NAME (Last, First, Middle Initial)	b. SIGNATURE	c. DATE SIGNED
Burress, Barry C.	Barry C. Burress	15 Oct 9X

d. UNIT/COMMAND NAME
HHC, 2d Bde, 1st Armored Division, APO AE 09034

DD Form 456, OCT 84, Page 4

Figure 3-28 (continued)

3-4. Use of Lawyer's Assistants.

Lawyer's assistants or paralegals can be of substantial benefit to the trial and defense counsel. They should be involved in the cases to the maximum extent possible, as they can most effectively aid case preparation if they understand the issues. Counsel must remember, however, that they are responsible for the case, and must properly supervise, train, and manage all personnel assigned as lawyer's assistants. See Dep't of Army, Pam 27-26, Rules of Professional Conduct for Lawyers, Rule 5.3.

As lawyer's assistants have access to sensitive information, it is important that they be thoroughly instructed in their ethical obligations.

Trial and defense counsel should manage their lawyer's assistants by assigning weekly tasks or by having a standard procedure of case preparation so that the assistant automatically performs certain tasks whenever assigned a new case. Sample standardized procedures are at Figures 3-29 and 3-30.

Notes

1. Accused's Name and Rank _____

_____

2. SSN _____

3. Unit _____

4. Unit phone _____

5. Charges _____

_____

_____

_____

_____

6. Trial counsel's file contains:

	Item	Suspense	Received	Notes
a.	Charge sheet	_____	_____	
b.	CID/MPI report	_____	_____	
c.	MPRJ	_____	_____	
d.	Endorsement from CO	_____	_____	
e.	Endorsement from Bn CO	_____	_____	
f.	Appointment of Art. 32 IO	_____	_____	
g.	Notice of Art. 32 investigation	_____	_____	
h.	Art. 32 report (DA Form 457)	_____	_____	
i.	Endorsement from Bde CO	_____	_____	
j.	Pre-trial advice	_____	_____	
k.	Referral	_____	_____	

Figure 3-29. Pretrial Checklist for Trial Counsel's Assistant

	Item	Suspense	Received	Notes
l.	CMCO	_____	_____	
m.	Stipulations	_____	_____	
n.	Pretrial agreement	_____	_____	
o.	Judge alone request	_____	_____	
p.	Request for enlisted members	_____	_____	
q.	Findings worksheet	_____	_____	
r.	Sentence worksheet	_____	_____	
s.				
t.				
u.				
v.				
w.				
x.				
y.				
z.				

7.	Do the following:	Suspense	Done	Notes
a.	Review charge sheet for errors	_____	_____	
b.	Authenticate documents	_____	_____	
c.	Obtain defense motions	_____	_____	
d.	Obtain defense witness list	_____	_____	
e.	Obtain trial date	_____	_____	

Figure 3-29. Pretrial Checklist for Trial Counsel's Assistant

		Suspense	Done	Notes
f.	Notify members of trial date	_____	_____	
g.	Notify court reporter of trial date	_____	_____	
h.	Notify witnesses of trial date	_____	_____	
i.	Notify accused's commander of:	_____	_____	
	(1) Escort requirements	_____	_____	
	(2) Post-trial confinement requirements	_____	_____	
	(3) Accused's uniform requirements	_____	_____	
j.	Reserve courtroom	_____	_____	
k.	Serve accused	_____	_____	
l.	Prepare courtroom for trial	_____	_____	
m.				
n.				
8.	Interview gov't witnesses			
a.	_____ (Rank, Name)	_____	_____	
b.	_____	_____	_____	
c.	_____	_____	_____	
d.	_____	_____	_____	
e.	_____	_____	_____	
f.	_____	_____	_____	
g.	_____	_____	_____	

Figure 3-29. Pretrial Checklist for Trial Counsel's Assistant

		Suspense	Done	Notes
h.	_____	_____	____	
i.	_____	_____	____	
9.	Interview defense witnesses			
a.	_____	_____	____	
b.	_____	_____	____	
c.	_____	_____	____	
d.	_____	_____	____	
e.	_____	_____	____	
f.	_____	_____	____	
g.	_____	_____	____	
h.	_____	_____	____	
i.	_____	_____	____	
10.	Miscellaneous tasks.			
a.	_____	_____	____	
b.	_____	_____	____	
c.	_____	_____	____	
d.	_____	_____	____	
e.	_____	_____	____	
f.	_____	_____	____	
g.	_____	_____	____	
h.	_____	_____	____	
i.	_____	_____	____	

Figure 3-29. Pretrial Checklist for Trial Counsel's Assistant

Notes

1. Accused's Name and Rank _____

_____

2. SSN _____

3. Unit _____

4. Phone: unit/home _____

5. Charges _____

_____

_____

_____

_____

6. Defense counsel's file contains:

Item		Suspense	Received	Notes
a.	Charge sheet			
b.	CID/MPI report			
c.	MPRJ extracts			
d.	Other personnel documents			
e.	Endorsement from CO			
f.	Endorsement from Bn CO			
g.	Appointment of Art. 32 IO			
h.	Notice of Art. 32 investigation			
i.	DC's reply to IO's notice			
j.	Art. 32 report (DA Form 457)			

Figure 3-30. Sample Pretrial Checklist for Defense Counsel's Assistant

Item		Suspense	Received	Notes
k.	Endorsement from Bde CO	_____	_____	
l.	Pre-trial advice	_____	_____	
m.	Referral	_____	_____	
n.	CMCO	_____	_____	
o.	Stipulations	_____	_____	
p.	Pretrial agreement	_____	_____	
q.	Judge alone request	_____	_____	
r.	Request for enlisted members	_____	_____	
s.	Findings worksheet	_____	_____	
t.	Sentence worksheet	_____	_____	
u.				
v.				
w.				
x.				
y.				
z.				

7.	Do the following:	Suspense	Done	Notes
a.	Review charge sheet for errors	_____	_____	
b.	Authenticate documents	_____	_____	
c.	Serve gov't with motions	_____	_____	
d.	Obtain gov't motions	_____	_____	
e.	Serve gov't with response	_____	_____	

Figure 3-30. Sample Pretrial Checklist for Defense Counsel's Assistant

	Suspense	Done	Notes
f.	Obtain gov't witness list	_____	____
g.	Obtain gov't evidence list	_____	____
h.	Notify gov't of alibi and lack of mental responsibility, or innocent ingestion defenses	_____	____
i.	Obtain trial date	_____	____
j.	Notify defense witnesses of trial date	_____	____
k.	Review all gov't documents	_____	____
l.	Review witnesses' personnel files	_____	____
m.	Review members' personnel files	_____	____
n.	Prepare pretrial agreement	_____	____
o.	Prepare judge-alone request	_____	____
p.	Prepare enlisted member's request	_____	____
q.	Prepare E&M documents	_____	____
r.	Prepare Ch. 10 request	_____	____
s.			
t.			
u.			
v.			
w.			

Figure 3-30. Sample Pretrial Checklist for Defense Counsel's Assistant

		Suspense	Done	Notes
8.	Interview defense witnesses			
a.	_____ (Rank, Name)	_____	____	
b.	_____	_____	____	
c.	_____	_____	____	
d.	_____	_____	____	
e.	_____	_____	____	
f.	_____	_____	____	
9.	Interview gov't witnesses			
a.	_____	_____	____	
b.	_____	_____	____	
c.	_____	_____	____	
d.	_____	_____	____	
e.	_____	_____	____	
f.	_____	_____	____	
10.	Miscellaneous tasks			
a.	_____	_____	____	
b.	_____	_____	____	
c.	_____	_____	____	
d.	_____	_____	____	
e.	_____	_____	____	
f.	_____	_____	____	

Figure 3-30. Sample Pretrial Checklist for Defense Counsel's Assistant

3-5. Mental Responsibility (R.C.M. 706)

If it appears to any party that there is reason to believe that the accused lacked mental responsibility for any offense or lacks capacity to stand trial, that fact and the basis of the belief shall be transmitted to the convening authority or military judge, as appropriate. R.C.M. 706(a) and (b). As demonstrated in the following request formats, the request should be tailored to the facts of the case. Request any specifically desired psychological testing, outline the particular legal issues to be addressed, and provide all pertinent background information.

As a general rule, timeliness is important because behavior and mental responsibility at the time of the offense is the critical issue. The closer in time to the offense that the psychiatric evaluation is done, the better the expert can render an opinion about the accused's mental condition at the time of the alleged crime(s). See chapter 3, sec. B, paragraph 2g, infra, concerning requests for appointment of an expert, such as a psychiatrist, to assist the defense preparation of the case.

A sample request for a sanity board is at Figure 3-31; however, defense counsel need only submit the questions noted in R.C.M. 706 and, in some cases, a minimal request may be advisable.

DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
3D ARMORED DIVISION FIELD OFFICE
APO NEW YORK 09079

ATZF-TDS 8 November 19XX

MEMORANDUM FOR Commander, 3d Armored Division, APO New York 09039

SUBJECT: Request for Sanity Board

1. Pursuant to R.C.M. 706, Manual for Courts-Martial, United States, 1984, the accused hereby requests the convening authority appoint a sanity board to determine whether the accused is competent to stand trial and whether the accused was mentally responsible for the alleged offenses.

2. In support of this request the defense provides the following:

a. I met with the accused on two occasions before he was placed in pretrial confinement. The first was in the detention cell of the Butzbach Military Police Station on the morning of 7 November 19XX and the second was a one-hour interview in my office during the evening of 7 November 19XX. During both meetings, PFC Duncan was disoriented and did not understand why he was in jail. It took PFC Duncan in excess of 3 minutes to sign his name on the rights to counsel form, and even then he could not remember how to spell his last name.

b. The two guards who watched PFC Duncan on 7 November confirmed that he acted in a bizarre manner all day. They indicated that his personality changed continuously and that he banged his head against the walls of the cell. All attempts to communicate with him were in vain. In their opinion, PFC Duncan does not comprehend what is going on around him.

c. The bizarre nature of the circumstances surrounding the alleged offenses calls into question the mental condition of the perpetrator. There appears to be no rational basis or motive for the offense.

d. The accused has a history of bizarre behavior which has resulted in his referral to mental hygiene on three previous occasions.

Figure 3-31. Sample Request for Sanity Board

3. The defense requests that a board of at least three psychiatrists be appointed to examine the accused. Furthermore, I request that these board members be the most experienced and qualified psychiatrists in the US Army and that at least one member be board certified in forensic psychiatry.

4. In conjunction with the sanity board, I request that the accused also receive the following examinations:

a. A complete physical examination to include body fluid laboratory evaluations and an electroencephalogram.

b. A complete neurological examination to include a Cat-Scan.

c. A thorough battery of psychological tests, to include, at a minimum, an intelligence indicator (such as the Shipley or Wechsler Adult Intelligence Scale); a personality inventory (such as the Minnesota Multiphasic Personality Inventory); and a series of other tests to indicate bizarre thought processes (such as the Rorschach Ink-Blot Test, Thematic Apperception Test, and Bender Gestalt Test). These tests should be administered and interpreted by a board certified clinical psychologist. All test results should be documented and retained for defense use.

d. To the extent possible, I request that tests be utilized which eliminate or at least minimize cultural and ethnic bias. In addition, I request that the psychologist address the degree to which he feels the accused's current incarceration affected the test results.

5. I request that the sanity board address the following questions concerning PFC Duncan's current mental condition.

a. Does PFC Duncan currently have a severe mental disease or defect?

If the answer to a is yes, please answer the following 5 questions:

(1) What is the clinical psychiatric diagnosis, using the American Psychiatric Association's Diagnostic and Statistical Manual III-R (DSM III R)?

Figure 3-31. Sample Request for Sanity Board

(2) Is this severe mental disease or defect service disqualifying?

(3) What is the accused's prognosis for recovery?

(4) Can this severe mental disease or defect be successfully controlled by treatment with drugs?

(5) Does long-term commitment appear to be a necessary alternative?

b. What is the accused's intelligence level?

c. Does the accused have the mental capacity to understand the nature of the proceedings and the seriousness of the charges against him?

If the answer to c is no, please answer the following questions:

(1) What is the clinical psychiatric diagnosis, using DSM-III-R?

(2) Can this mental disease or defect be successfully treated/controlled by treatment with drugs?

(3) What is the prognosis and expected time for recovery?

d. Does the accused have the mental capacity to cooperate intelligently in his own defense?

If the answer to d is no, please answer the following.

(1) What is the clinical psychiatric diagnosis, using DSM-III-R?

(2) Can this mental disease or defect be successfully treated/controlled by treatment with drugs?

(3) What is the prognosis and expected time for recovery?

Figure 3-31. Sample Request for Sanity Board

6. I request that the sanity board address the following questions concerning PFC Duncan's mental condition at the time of the alleged offense.

a. At the time of the offense, did the accused have a severe mental disease or defect?

If the answer to a is yes, please answer the following questions:

(1) What is the clinical psychiatric diagnosis, using DSM III-R?

(2) Is this condition the result of deterioration, destruction, malfunction, or non-existence of the mental faculties rather than moral faculties?

(3) Is this condition an abnormality manifested only by repeated criminal or otherwise antisocial conduct?

(4) Is this severe mental disease or defect merely a defect of character or personality caused by inadequate training and development, lack of moral restraint, or a personal, social, or cultural standard of conduct which differs from that of society as a whole?

b. Was the accused, at the time of the offense, as a result of such severe mental disease or defect, unable to appreciate the nature and quality or the wrongfulness of his conduct?

(1) Was this complete impairment?

(2) Did the accused "lack the capacity" to appreciate the wrongfulness of his conduct?

c. Was the accused, at the time of the offense, able to formulate a specific intent to kill, to know the probable consequences of his actions, or to premeditate a design to kill?

If the answer to c is no, please answer the following questions:

(1) What is the clinical psychiatric diagnosis, using DSM III-R?

(2) What is the prognosis?

Figure 3-31. Sample Request for Sanity Board

7. The defense desires to attend all meetings of the sanity board where the accused is present. This attendance will be strictly non-participatory and non-intrusive. Should this request be denied, I request that all interviews of the accused be tape recorded.

8. If the accused displays any psychomotor retardation, catatonic posturing, inability to communicate, or any other physical manifestation of his mental condition, I request that a video tape be made depicting these observations.

9. The defense requests that the sanity board consider all of the following materials in reaching their findings.

   a. Charge sheet and CID Report.

   b. PFC Duncan's mental hygiene records.

   c. PFC Duncan's medical records.

   d. Observation reports filed by the guards at the confinement facility.

   e. CID background check of family and prior unit.

   f. Personnel file (to include efficiency reports and letters of appreciation).

   g. Sworn statements by CPT Smith, 1SG Walker, and PFC Higgins.

10. If the government has any additional information it feels is pertinent, I request that it be included in the packet which goes to the sanity board and that I be provided a copy.

11. I request strict compliance with the disclosure prohibitions of Mil. R. Evid. 302.

12. The defense requests a delay in the proceedings of this case until a written report has been rendered by the sanity board.

JAMES E. ROSEN
CPT, JA
Defense Counsel

Figure 3-31. Sample Request for Sanity Board

3-6. Elements of Proof Checklist

The elements of proof checklist identifies the facts the prosecution must prove beyond a reasonable doubt at trial. The checklist should be prepared by trial and defense counsel early in the preparation of a case for trial, preferably on the day the case file is first reviewed. The checklist may be as simple as a sheet of paper with a line drawn down the center. On the left side of the sheet are the elements of the offense(s). These elements may be found in Part IV of the Manual or in DA Pam. 27-9, Chap. 3. On the right side of the sheet are the witnesses, documents, and methods which can be used to prove the elements. The right side of the sheet will probably change during trial preparation as certain witnesses, documents, or methods are discarded and new witnesses, documents, or methods are discovered. See Figure 3-32 for an example of an Elements of Proof Checklist for a specification alleging desertion.

Elements to be Proved	Method of Proof
a. Sergeant Peter Arnold absented himself from his unit: Company A, 20th Signal Bn, Fort Leonard Wood, MO on 4 June 19XX	Authenticated copy of DA Form 4187 from Company A, 20th Signal Bn., showing a change in accused's status from "present for duty" to "absent without leave" on 4 June was without proper authority.
b. The accused's absence without proper authority from anyone competent to give him leave.	
c. Accused intended at the time of absenting himself or at some time during the absence to remain away permanently from his unit.	Pete Jones (Toyson, MO) will identify accused and will testify that he hired accused on 30 June XX as a mechanic; that accused told him he had "gone over the hill" and would never return to the Army; and, that accused to his knowledge always wore civilian clothing. Judicial notice that

Figure 3-32. Sample Elements of Proof Checklist

	Toyson is 70 miles from Fort Leonard Wood.
d. The accused remained absent until 13 May 19XX.	Authenticated copy of DA Form 4187 showing accused's change in status from "absent without leave" to "present for duty" on 13 May 19XX.
e. The absence was terminated by apprehension.	Written stipulation of expected testimony (or live testimony) of Policeman John Smith that he took the accused into custody at Jones' Garage in Toyson, Mo. on 13 May XX.

Figure 3-32. Sample Elements of Proof Checklist

Section II
Case Preparation

3-7. The Article 32 Investigation and Pretrial Advice

Generally, no charge may be referred to a general court-martial unless there has been an investigation conducted in accordance with Article 32 and a pretrial advice by the staff judge advocate in accordance with Article 34.

The statutory purposes of the Article 32 investigation are: (1) to inquire into the truth of the matters asserted in the charges; (2) to check the form of the charges and specifications; and (3) to make recommendations concerning the disposition of the charges in the interest of justice and discipline. In furtherance of these purposes, the investigating officer is charged with conducting a thorough and impartial investigation.

The staff judge advocate's pretrial advice serves as an additional screening device which affords the convening authority legal advice concerning disposition of the case.

See Figure 3-33 for a sample appointment of an Article 32 investigating officer. Figure 3-34 is a sample witness request for an Article 32 investigation and Figure 3-35 is a sample investigating officer's report. Figure 3-36 contains a sample checklist for review of an Article 32 investigation.

Figure 3-37 is a sample pretrial advice--short form, referral. Figure 3-38 is a sample pretrial advice--short form, partial referral. For a sample pretrial advice--long form with optional information, see Figure 3-39. Figure 3-40 is a sample checklist to be used for reviewing pretrial advice.

DEPARTMENT OF THE ARMY
HEADQUARTERS, 20TH INFANTRY DIVISION AND FORT BLANK
FORT BLANK, MISSOURI 63866-4000

S: 30 Mar 199X

AKPS-AA 13 Mar 199X

MEMORANDUM FOR Executive Officer, 1st Bn, 3d Bde, 20th Infantry Division, ATTN: AKPS-AZ (Major Emmet P. Green), Fort Blank, Missouri 63866

SUBJECT: Appointment of Art. 32 Investigating Officer

1. You are hereby directed to investigate the enclosed charges against SSG Harold C. Clark, 546-77-7270, Co. C, 2d Bn, 1st Bde, 20th Infantry Division, Fort Blank, MO. This investigation takes priority over all normal duties, TDY, and leave.

2. Your investigation will be conducted in accordance with Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial (MCM), 1984, and you will use DA Pam 27-17 as a procedural guide.

3. Captain Bill R. Smith, OSJA, Fort Blank, is appointed as the government representative and is authorized to participate in the investigation. The accused is defended by Captain Will K. Reardon, USATDS, Ft. Blank. Each of these parties plays an adversarial role in the proceedings. Avoid talking to either of these parties (and any prospective witnesses) about the merits of the case outside of formal sessions where all parties have the opportunity to be present.

4. Captain Karen A. DeLoa, OSJA, Fort Blank (TEL 236-8211/8231), will act as your legal advisor. You are directed to contact her within 24 hours after receipt of this letter to arrange for a legal briefing.

5. A report of your investigation will be submitted in 5 copies on DD Form 457 (Investigating Officer's Report) (see Appendix 5, MCM) to reach this headquarters NLT 72 hours after completion of the investigation.

Figure 3-33. Sample Appointment of Article 32(b) Investigating Officer

6. You are hereby delegated the authority to approve pretrial delays pursuant to R.C.M. 707.

7. The completed report of investigation will be forwarded to this headquarters NLT 30 March 199X. Your report will contain a detailed chronology with full explanation of any delays.

Encl

WILLIAM T. SMITH
Colonel, IN
Commanding

Figure 3-33. Sample Appointment of Article 32(b) Investigating Officer

DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
FORT BLANK FIELD OFFICE
FORT BLANK, MISSOURI 63866-5001

AKPS-TDS 15 July 199X

MEMORANDUM FOR Executive Officer, 1st Bn, 3d Bde, 20th Infantry Division, ATTN: AKPS-AZ (Major Emmet P. Green), Fort Blank, Missouri 63866

SUBJECT: Request for Witnesses

1. Pursuant to R.C.M. 405(f) and (g), MCM, 1984, the defense requests that the following witnesses be called to testify at the Article 32 investigation of SSG Harold C. Clark:

a. Mr. Donald E. Robinson, 1026 N. Farragut St., Radcliff, MO 63863 (TEL 632-0687);

b. CPT William Staten, HHC, 2d Bn, 1st Bde, Ft. Blank;

c. SFC Gregory Hawthorne, 2d Bn, 1st Bde, Ft. Blank.

2. The defense also requests that the following documents be procured for examination and consideration at the hearing:

a. Sworn statement of Mr. Donald E. Robinson, given to Agent Dailey, Ft. Blank CID, on 1 July 199X;

b. MPRJ of SSG Harold C. Clark.

3. If any of these requests cannot or will not be granted, please notify me immediately. I am prepared to give a full demonstration of the relevance of these requests.

EDWARD H. SMITH
Major, JA
Defense Counsel

Figure 3-34. Request for Witnesses

INVESTIGATING OFFICER'S REPORT

(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)

1a. FROM: *(Name of Investigating Officer — Last, First, MI)*	b. GRADE	c. ORGANIZATION	d. DATE OF REPORT
BLAIR, BRUCE B.	MAJ	HHB, 1st Battalion, 77th FA, 1st Cav Division, Ft. Hood, TX	9 August 199X

2a. TO: *(Name of Officer who directed the investigation — Last, First, MI)*	b. TITLE	c. ORGANIZATION
WOODWARD, WILLIAM A.	COMMANDER	1st Battalion, 77th FA, 1st Cav Division, Ft. Hood, TX

3a. NAME OF ACCUSED *(Last, First, MI)*	b. GRADE	c. SSN	d. ORGANIZATION	e. DATE OF CHARGES
ZAKE, JACK	SSG/E-6	546-77-7270	B Btry, 1st BN, 77th FA 1st Cav Div, Ft. Hood,TX	1 August 199X

(Check appropriate answer)	YES	NO
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)	X	
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)	X	
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d)(2), 502(d)	X	

7a. NAME OF DEFENSE COUNSEL *(Last, First, MI)*	b. GRADE	8a. NAME OF ASSISTANT DEFENSE COUNSEL *(If any)*	b. GRADE
HOWARD, THOMAS T.	CPT		
c. ORGANIZATION *(If appropriate)* U.S. Army Trial Defense Service 1st Cav Division Office		c. ORGANIZATION *(If appropriate)*	
d. ADDRESS *(If appropriate)*		d. ADDRESS *(If appropriate)*	

9. *(To be signed by accused if accused waives counsel. If accused does not sign, investigating officer will explain in detail in Item 21.)*

a. PLACE	b. DATE

I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.

c. SIGNATURE OF ACCUSED

10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: *(Check appropriate answer)*	YES	NO
a. THE CHARGE(S) UNDER INVESTIGATION	X	
b. THE IDENTITY OF THE ACCUSER	X	
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31	X	
d. THE PURPOSE OF THE INVESTIGATION	X	
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE	X	
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT	X	
g. THE RIGHT TO CROSS-EXAMINE WITNESSES	X	
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED	X	
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION	X	
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING	X	
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE *(If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)*	X	

b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL

NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading *(Example: "7c".)* Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."

DD FORM 84 AUG 457 Figure 3-35 EDITION OF OCT 69 IS OBSOLETE.

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: *(Check appropriate answer)*

NAME *(Last, First, MI)*	GRADE *(If any)*	ORGANIZATION/ADDRESS *(Whichever is appropriate)*	YES	NO
Meyer, Lee V.	CPT	HHB, 1st Bn, 77th FA, 1st Cav, Ft Hood	X	
Victor, Dale Z.	CPT	15th AG Company, 1st Cav Div, Ft Hood	X	
Garrett, Lucy		1000 Eye St., Killeen, TX 76541	X	

b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED. X

13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH.

DESCRIPTION OF ITEM	LOCATION OF ORIGINAL *(If not attached)*	YES	NO
DA Form 2823 - Statement of Felix Bane, dtd 19 July 198X	OSJA, 1st Cav Division	X	
DA Form 2823 - Statement of the Accused, dtd 27 July 199X	" " " "	X	

b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED X

14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOT COMPETENT TO PARTICIPATE IN THE DEFENSE. *(See R.C.M. 909, 916(k).)*		X
15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT *(If Yes, specify in Item 21 below.)*		X
16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL	X	
17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM	X	
18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED	X	
19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. *(See R.C.M. 405(d)(1).*	X	

20. I RECOMMEND:

a. TRIAL BY ☐ SUMMARY ☐ SPECIAL XX GENERAL COURT-MARTIAL

b. ☐ OTHER *(Specify in Item 21 below)*

21. REMARKS *(Include, as necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.)*

I received this file at 1500 hours, 2 August 199X. I informed defense counsel on that date that I intended to hold the initial hearing at 0800 hours 4 August 199X. Defense requested a delay to 7 August due to a scheduled trial. I granted defense counsel's request.
AR 711-140, as changed, shows that the stock number of the stolen pistol is 1005-673-7965. The value of this stock number is $98.00 not $108.00 as charged. This publication is not appended to the report due to its bulk, but it was shown to the defense and considered by me without objection. The specification of Charge II should be amended.
The accused requested the presence of Mr. Joe Skinner, his former commander, now discharged, as a character witness. I talked to Mr. Skinner on the phone concerning his availability. He is trying to get established in his new job and stated he would not come to the hearing even if reimbursed. I therefore denied the accused's request. Mr. Skinner believed the accused to be of good character and trustworthy. I told the accused I would consider this favorable info.

22a. TYPED NAME OF INVESTIGATING OFFICER	b. GRADE	c. ORGANIZATION
BRUCE B. BLAIR	MAJ	HHB, 1st Bn, 77th FA, 1st Cav Div, Ft. Hood

d. SIGNATURE OF INVESTIGATING OFFICER	e. DATE
/s/ Bruce B. Blair	9 August 199X

☆U.S. G.P.O. 1984-421-646/17045

Figure 3-35 (continued)

Review of the Article 32 Investigation.

(1) Does the investigating officer possess the requisite neutrality and maturity?

(2) Has a neutral judge advocate been appointed as legal advisor to the investigating officer?

(3) Have there been any ex parte conversations between the investigating officer and counsel for either side, or between the investigating officer and prospective witnesses, regarding the merits of the case.

(4) Have all charged offenses been thoroughly investigated?

(5) Was the accused afforded the proper opportunity to be present, to counsel, to present evidence on his or her behalf, and to confront available government witnesses?

(6) Has there been any improper consideration of unsworn statements or other alternative forms of evidence? See R.C.M. 405(g)(4) and (5).

(7) Have all tapes, transcripts, or other records of testimony which are susceptible to a Jenck's Act (Title 18 U.S.C. 3500) request been properly safeguarded?

(8) Are all delays properly documented?

(9) Is DD Form 457, Investigating Officer's Report, properly completed? See DA Pam 27-17 or Appendix 5, MCM.

Figure 3-36. Sample Checklist for Review of Article 32 Investigation

DEPARTMENT OF THE ARMY
HEADQUARTERS, FORT BLANK
Fort Blank, Missouri 77777

AKPS-JA 10 June 199X

MEMORANDUM FOR COMMANDING GENERAL

SUBJECT: Advice on Disposition of Court-Martial Charges

1. I have reviewed the attached charges, allied papers, and report of investigation in the case of Private E-1 William E. Smith, 429-86-4916, U.S. Army, Headquarters Company, 1st Battalion, 69th Infantry, Fort Blank, Missouri, and render this advice in accordance with the provisions of Article 34, Uniform Code of Military Justice, and R.C.M. 406, Manual for Courts-Martial, 1984.

2. Legal Conclusions. After reviewing the attached charges, allied papers, and report of the Article 32 investigation, I have reached the following legal conclusions:

a. Each specification alleges an offense under the Uniform Code of Military Justice.

b. The allegations in each specification are warranted by the evidence indicated in the report of the Article 32 investigation.

c. There is court-martial jurisdiction over the accused and all charged offenses.

3. Recommendations. I recommend that all charged offenses be tried by general court-martial and that the case be referred to trial by General Court-Martial Convening Order Number 14, Headquarters, Fort Blank, Missouri, dated 1 May 199X.

3 Encls
1. DD Form 458 w/allied papers
2. DD Form 457 w/allied papers
3. CMCO #14

/s/
DONALD S. DOE
Colonel, JA
Staff Judge Advocate

Figure 3-37. Sample Pretrial Advice - Short Form

DIRECTION OF THE CONVENING AUTHORITY:

All recommendations of the Staff Judge Advocate are (approved) (disapproved).

JAMES E. RYDER
Major General, USA
Commanding

Figure 3-37. Sample Pretrial Advice - Short Form

DEPARTMENT OF THE ARMY
HEADQUARTERS, FORT BLANK
Fort Blank, Missouri 77777

AKPS-JA 10 June 199X

MEMORANDUM FOR COMMANDING GENERAL

SUBJECT: Advice on Disposition of Court-Martial Charges

1. I have reviewed the attached charges, allied papers, and report of investigation in the case of Private E-1 William E. Smith, 429-86-4916, U.S. Army, Headquarters Company, 1st Battalion, 69th Infantry, Fort Blank, Missouri, and render this advice in accordance with the provisions of Article 34, Uniform Code of Military Justice, and R.C.M. 406, Manual for Courts-Martial, 1984.

2. Legal Conclusions. After a thorough review of the attached charges, allied papers, and report of the Article 32 investigation, I have reached the following legal conclusions:

a. Each specification charged alleges an offense under the Uniform Code of Military Justice.

b. The allegations in the specifications to Charge I and Charge II are warranted by the evidence indicated in the report of the Article 32 investigation. The allegations contained in Charge III and its specifications are not supported by the evidence in the report of the Article 32 investigation and may not be referred to a general court-martial.

c. There is court-martial jurisdiction over the accused and all charged offenses.

3. Recommendations.

a. I recommend that the offenses contained in Charges I and II be tried by general court-martial and that the case be referred to trial by General Court-Martial Convening Order Number 14, Headquarters, Fort Blank, Missouri, dated 1 May 199X.

Figure 3-38. Sample Pretrial Advice - Short Form (Including Dismissal of Charge)

b. I recommend that Charge III and its specifications be dismissed.

3 Encls
1. DD Form 458 w/allied papers
2. DD Form 457 w/allied papers
3. CMCO #14

/s/
DONALD S. DOE
Colonel, JA
Staff Judge Advocate

DIRECTION OF THE CONVENING AUTHORITY:

All recommendations of the Staff Judge Advocate are (approved) (disapproved).

JAMES E. RYDER
Major General, USA
Commanding

Figure 3-38. Sample Pretrial Advice - Short Form (Including Dismissal of Charge)

DEPARTMENT OF THE ARMY
HEADQUARTERS, FORT BLANK
Fort Blank, Missouri 77777

AKPS-JA 10 August 199X

MEMORANDUM FOR COMMANDING GENERAL

SUBJECT: Advice on Disposition of Court-Martial Charges

1. I have reviewed the attached charges, allied papers, and report of investigation in the case of Private E-1 William E. Smith, 429-86-4916, U.S. Army, Headquarters Company, 1st Battalion, 69th Infantry, Fort Blank, Missouri, and render this advice in accordance with the provisions of Article 34, Uniform Code of Military Justice, and R.C.M. 406, Manual for Courts-Martial, 1984.

2. (OPTIONAL) Personal Data Concerning Accused.

a. Date of Birth: 8 May 1962

b. Martial Status: Married

c. Number of Dependents: 3

d. Prior Military Service:

Dates	Service	Discharge
14 March 1981- 14 March 1983	U.S. Army	Honorable

e. Current Service: 15 April 1989 for 3 years.

f. Aptitude Area GT Score: 87

g. Education: High School Graduate

h. Prior Disciplinary Record: Article 15 - Assault - 15 May 1986

i. Prior Convictions: None

j. Restraint: Restriction to company area, 24 June 199X

Figure 3-39. Sample Pretrial Advice - Long Form with Optional Information

3. (OPTIONAL) Summary of Charges:

Charge	UCMJ Art.	Spec	Gist of Offense	Maximum Punishment Authorized
I	86	1	AWOL 6 June 199X-1 3 June 199X	DD, CONF 1 yr, TF, RLEG
		2	AWOL 7 June 199X - 24 June 199X	DD, CONF 1 yr, TF, RLEG

4. (OPTIONAL) Summary of Available Evidence:

a. On 6 June 199X-1, the accused, without authority, absented himself from his unit and remained absent until 3 June 199X, when he was apprehended by civilian authorities in St. Louis, Missouri.

b. On 7 June 199X, after being in military control for only four days, the accused again absented himself from his unit without authority. He remained absent until he voluntarily turned himself into the Fort Blank military police station on 24 June 199X.

5. (OPTIONAL) Extenuating and Mitigating Factors:

a. In an unsworn statement given at the Article 32 investigation the accused stated that he went AWOL because his mother was ill and had financial problems. PVT Smith is the sole source of support for his mother.

b. The accused is qualified as a sharpshooter with the M-16 rifle.

6. (OPTIONAL) Recommendations:

a. Unit Commander: General Court-Martial.

b. Battalion Commander: General Court-Martial.

c. Brigade Commander: General Court-Martial.

Figure 3-39. Sample Pretrial Advice - Long Form with Optional Information

d. Article 32 Investigating Officer: General Court-Martial.

7. Legal Conclusions. After reviewing the charges, allied papers, and report of the Article 32 investigation, I have reached the following legal conclusions:

a. Each specification alleges an offense under the Uniform Code of Military Justice.

b. The allegations in each specification are warranted by the evidence indicated in the report of the Article 32 investigation.

c. There is court-martial jurisdiction over the accused and all charged offenses.

8. Staff Judge Advocate Recommendation: I recommend that all charged offenses be tried by general court-martial and that the case be referred to trial by Court-Martial Convening Order Number 14, Headquarters, Fort Blank, Missouri, dated 1 May 199X.

3 Encls
1. DD Form 458 w/allied papers
2. DD Form 457 w/allied papers
3. CMCO #14

/s/
DONALD S. DOE
Colonel, JA
Staff Judge Advocate

DIRECTION OF THE CONVENING AUTHORITY:

All recommendations of the Staff Judge Advocate are (approved) (disapproved).

JAMES E. RYDER
Major General, USA
Commanding

Figure 3-39. Sample Pretrial Advice - Long Form with Optional Information

Review of Pretrial Advice (R.C.M. 406).

1. IMPARTIAL ADVICE. Is the SJA precluded from rendering impartial advice because of personal or prior involvement in the case?

2. SUFFICIENCY OF SPECIFICATIONS. Has the SJA rendered a conclusion with respect to whether each specification alleges an offense under the UCMJ?

3. EVIDENCE. Has the SJA rendered a conclusion with respect to whether each offense is warranted by the evidence?

4. JURISDICTION. Has the SJA rendered a conclusion with respect to whether a court-martial would have jurisdiction?

5. ACTION. Has the SJA recommended the action to be taken by the convening authority?

6. ACCURACY. If additional matters are included in the advice, are they accurate?

7. PERSONAL ACTION. Did the SJA personally make an independent and informed appraisal of the charges and evidence and personally sign the advice?

Figure 3-40. Sample Checklist for a Review of Pretrial Advice

3-8. Case Investigation

As soon as counsel receive the case file, a proof analysis sheet should be prepared using the elements listed for that offense from the R.C.M. After analyzing the evidence in the file, counsel should consider examining the scene where significant events in the case took place. In many cases familiarity with the site of the offense may be necessary for an intelligent examination of witnesses.

All witnesses should initially be interviewed by counsel soon after receiving the case. They should first be permitted to tell their own stories with as little interruption as practicable; then they should be questioned extensively concerning the facts about which they may testify. See Figure 3-41 for a sample format for conducting interviews.

In addition to a careful interrogation of all known witnesses, counsel may want to interview persons known to frequent the area where the offense occurred, or randomly question unit members in search of leads to new evidence and witnesses.

If it is anticipated that a witness may have to be impeached using the contents of the interview, a third person should be present, or some other means of documenting the contents of the interview should be used.

Occasionally, trial counsel will desire to have a witness, or defense counsel will desire to have the accused, take a polygraph examination. Counsel should

consult AR 195-6 for the criteria used by the Criminal Investigation Division in evaluating polygraph authorizations. For a sample polygraph authorization (DA Form 2805), see Figure 3-42. In addition, it is always good practice to coordinate with the local CID authorities for local variations on policy or on the format for making requests.

Counsel should personally examine all physical and documentary evidence in the case and promptly make discovery requests to obtain discoverable evidence in the hands of the opposition. Sample formats for making discovery requests are at Figures 3-43 and 3-44.

In cases involving personal injury, the medical records of relevant parties should be examined to document injuries and to discover any past history of injuries. Each party is entitled to such relevant medical records under R.C.M. 701. Defense counsel can obtain the records through the trial counsel or obtain the permission of the patient to inspect and obtain copies of relevant documents. Examples of authorizations for release of medical records are shown at Figures 3-45 and 3-46. Some medical facilities may have their own forms, however. See AR 40-66, chap. 2.

If records from financial institutions (banks, credit unions, etc.) are needed, consult AR 190-6.

After completing the initial investigation, counsel should re-interview those witnesses who are expected to testify at trial. It is essential that counsel know the exact content of witnesses' expected testimony before

placing them on the witness stand. This policy should be strictly adhered to even if it is necessary to request a recess at trial.

If the locations of objects and matters of distance are important, suitable diagrams, sketches, or photographs should be prepared for use in re-interviewing of witnesses and at trial. To avoid having to testify as a witness, the exhibits should be prepared by a qualified person who will be available to authenticate them at trial.

NAME: DATE: _____
RANK:
ORGANIZATION:
LOCAL TELEPHONE NUMBER:
YEARS IN SERVICE: TIME IN PRESENT UNIT:
ETS:
HOME OF RECORD:
FACTS: (who, what, when, where, why, and how)

HAVE YOU EVER BEEN CONVICTED IN ANY COURT? FOR WHAT?

HAVE YOU EVER RECEIVED AN ARTICLE 15? FOR WHAT?

HAVE YOU EVER BEEN TO ANY TYPE OF REHABILITATION CENTER? FOR WHAT?

DO YOU KNOW THE ACCUSED?

WHAT IS YOUR OPINION OF HIM AS A SOLDIER? AS A TRUTHFUL PERSON?

DO YOU KNOW THE FOLLOWING WITNESSES?

_____ HOW LONG _____
OPINION

_____ HOW LONG _____
OPINION

_____ HOW LONG _____
OPINION

_____ HOW LONG _____
OPINION

INVESTIGATOR'S NOTES ON PERSON:

OPINION OF THE INDIVIDUAL AS A WITNESS:

Figure 3-41. Sample Witness Interview Information Sheet

POLYGRAPH EXAMINATION AUTHORIZATION

For use of this form, see AR 195-6; proponent agency is US Army Criminal Investigation Command

DATE OF REQUEST: 1 January 199X

REPOSITORY / DOSSIER NO:

TO: *(Authorizing Representative)*
Commanding Officer, 6th MP Group (CI)
Presidio of San Francisco, CA 94129

FROM: *(Requesting Agency)*
Detachment B, 6th MP Group (CI)
Presidio of San Francisco, CA 94129

1. Request authority to conduct polygraph examination of:

EXAMINEE NAME *(Last, First, Middle)* OR SOURCE NUMBER	GRADE	SOCIAL SECURITY NO
Jones, John	PFC	444-44-4444
UNIT, ADDRESS, OR DOD AFFILIATION	DATE AND PLACE OF BIRTH	
HHC, 4th Bn, 20th Inf Bde	23 May 1962 San Francisco, California	

2. The following information is provided:

a. (U) Consistent with circumstances of the case, investigation by other means has been as thorough as circumstances reasonably permit and the development of additional information by means of polygraph examination is essential and timely for the further conduct of the investigation.

b. (U) The proposed examinee has been interviewed, and the examination is to be conducted in accordance with AR 195-6.

c. (U) For criminal investigation polygraph examinations: The offense which forms the basis for the investigation is punishable under the Uniform Code of Military Justice by death or by confinement for a term of one year or more and there is reasonable cause to believe that the proposed examinee has knowledge of or was involed in the matter under investigation.

d. (U) For military intelligence polygraph examinations: The investigation pertains to an alleged unauthorized disclosure of classified information; alleged acts of espionage, sabotage, treason, subversion, sedition, or disaffection; or the purpose of the investigation is to resolve credible derogatory information indicating allegations of poor character, untrustworthiness, unreliability, or acts which may adversely affect military operations or security, causing substantial doubt that access to classified information is clearly consistent with national security; or the purpose is for foreign national limited access authorization to classified information; or the proposed examinee is being used as an agent or operative in an approved intelligence or counterinteiligence operation.

e. ( ) Basis for investigation (MI: Purpose)

f. ( ) Summarized justification for request:

At approximately 1530 hours, 11 December 199X-1, JONES, Money Courier for the Bay Area Exchange, Presidio of San Francisco, California, converted $3,900.00 in checks and currency into one dollar bills and coins at the Wells Fargo Bank, Presidio of San Francisco, California. He was accompanied by a Military Police Escort, PFC William J. WILLS, 406-52-4741, Company B, 30th MP Battalion. JONES and WILLS removed several bags of money without counting the bags and transported them to the Bay Area Exchange Accounting Office, Building M-27, Presidio of San Francisco, California. There, JONES reportedly discovered that a bag of $500.00 in dimes was missing. An accounting at the bank indicated that, as there was no overage of funds, the missing money had been delivered to JONES at the time of conversion.

JONES denied stealing the money and requested that he be given a polygraph examination for purposes of exculpation.

g. (U) Initial request for authorization.
Request confirms telephonic request made on _____.

TYPED NAME, GRADE, POSITION OF REQUESTER	SIGNATURE OF REQUESTER
HERBERT EISENBERG, CW4, USA Commanding	Herbert Eisenberg
SPECIAL HANDLING INSTRUCTIONS AND NOTICES	DOWNGRADING/REGRADING/TERMINATION MARKING

DA FORM 1 Oct 76 2805 PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE

Figure 3-42

TO: (Requesting Agency)

Detachment B, 6th MP Group (CI)
Presidio of San Francisco, CA 94129

DATE

5 Jan 199X

[X] CONDUCT OF POLYGRAPH EXAMINATION IS AUTHORIZED.

[ ] THIS CONFIRMS TELEPHONIC AUTHORIZATION GRANTED ON _____.

[ ] CONDUCT OF THE POLYGRAPH EXAMINATION IS NOT AUTHORIZED.

[ ] PRIOR TO AUTHORIZATION, FURNISH THE FOLLOWING:

REMARKS

TYPED NAME, GRADE, POSITION OF AUTHORIZING REPRESENTATIVE

COL James Brown, Commanding Officer, 6th MP Gp (CI), Presidio of SF, CA 94129

SIGNATURE OF AUTHORIZING REPRESENTATIVE

J. Brown

Figure 3-42 (continued).

UNITED STATES	)
	)
v.	)
	) REQUEST FOR DISCOVERY
Name, Rank	)
SSN	)
Unit	)

1. Comes now the accused, by and through counsel, and requests the government, under R.C.M. 701, the Military Rules of Evidence, and the local Rules of Court, to produce for the use, inspection, and reproduction by the accused, through counsel, the following:

a. The contents of all statements, oral and written, made by the accused that are relevant to the case known to the trial counsel and within control of the armed forces. Disclosure is requested prior to arraignment pursuant to Mil. R. Evid. 304(d)(1).

b. Disclosure of all evidence seized from the person or property of the accused, or believed to be owned by the accused, that the prosecution intends to offer into evidence against the accused at trial. Disclosure is requested prior to arraignment pursuant to Mil. R. Evid. 311(d)(1).

c. Disclosure of all evidence of prior identification of the accused at a line-up or other identification process that the prosecution intends to offer into evidence against the accused at trial. Disclosure is requested prior to arraignment pursuant to Mil. R. Evid. 321(d)(1).

d. Names, locations, and telephone numbers of all witnesses and potential witnesses interviewed in this case or otherwise used in developing the case against the accused.

e. The contents of all statements, oral or written, made by witnesses or potential witnesses in connection with the investigation of this case, to include summaries of conversations with representatives of the government.

f. Pursuant to Mil. R. Evid. 612, any writings or documents used by witnesses to prepare for trial.

g. Any known evidence tending to diminish credibility of witnesses, including but not limited to

Figure 3-43. Sample Defense Discovery Request

prior civilian or military convictions, prior Article 15s, any adverse administrative actions, or evidence of other character,
conduct, or bias bearing on witness credibility under Mil. R. Evid. 608. See Brady v. Maryland, 373 U.S. 83 (1963); United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985); United States v. Brickey, 16 M.J. 258 (C.M.A. 1983).

h. Pursuant to Mil. R. Evid. 301(c)(2) and United States v. Webster, 1 M.J. 216 (C.M.A. 1975), disclosure of any immunity or leniency pertaining to witnesses or to potential witnesses.

i. Access to all personnel and medical records of all potential witnesses if they are presently or were formerly in the Army.

j. The military status of all witnesses. As to those presently in civilian status, I request the date of separation from the armed forces, the discharge provisions used to effect such discharge, and a summary of circumstances explaining any discharges for other than completion of the obligated term of service.

k. The names of all government investigators who have participated or are presently participating in the investigation of the case.

l. All personal or business notes, memorandums, and writings prepared by investigators in the case which are not furnished pursuant to any other provisions of this request.

m. A copy and/or the location of documents and items of real evidence intended to be used at trial.

n. All evidence in the possession of the government favorable to the accused.

o. Access to the MPRJ of the prospective court members.

2. The accused cannot properly prepare for trial without production and inspection of the documents and items requested.

3. Request the government promptly inform the defense counsel if it does not intend to comply with any of the provisions of this request.

Figure 3-43. Sample Defense Discovery Request

4. This is a continuing request.

Captain, JA
Defense Counsel

Figure 3-43. Sample Defense Discovery Request

UNITED STATES	)	
	)	
v.	)	
	)	REQUEST FOR DISCOVERY
Name, Rank	)	
SSN	)	
Unit	)	

1. Comes now the government under R.C.M. 701 and the Military Rules of Evidence and requests the defense to produce for the use, inspection, and reproduction by the government, through trial counsel, the following:

a. Books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial. R.C.M. 701(b)(3).

b. Results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case, or copies thereof, which are within the possession, custody, or control of the defense, which the defense intends to introduce as evidence in the defense case-in-chief or which were prepared by a witness whom the defense intends to call at trial when the reports or results relate to that witness' testimony. R.C.M. 701(b)(4).

c. If the defense intends to offer the defense of alibi, disclosure of the specific place(s) at which the defense claims the accused to have been at the time of the alleged offenses, and the names and addresses of the witnesses upon whom the defense intends to rely to establish alibi. R.C.M. 701(b)(1).

d. If the defense intends to rely upon the defense of lack of mental responsibility or to introduce expert testimony relating to any mental disease, defect, or other condition bearing upon the guilt of the accused, notice of such intent. R.C.M. 701(b)(2).

e. Any foreign law of which the defense will request the court to take notice. Mil. R. Evid. 201A(b).

f. An offer of proof regarding evidence of sexual misconduct by a victim. Mil. R. Evid. 412(c)(1) and (2).

g. Whether the defense intends to disclose classified information. Mil. R. Evid. 505(h).

Figure 3-44. Sample Government Discovery Request

h. Whether the defense intends to disclose privileged government information. Mil. R. Evid. 506(h).

i. Whether the defense intends to impeach a witness with a conviction older than ten years. Mil.R. Evid. 609(b).

2. This is a continuing request. R.C.M. 701(d).

Captain, JA
Trial Counsel

Figure 3-44. Sample Government Discovery Request

MEDICAL RECORD	AUTHORIZATION FOR DISCLOSURE OF INFORMATION For use of this form, see AR 40-66; the proponent agency is Office of The Surgeon General

This form will not be used for authorization to disclose alcohol or drug abuse patient information from medical records or for authorization to disclose information from records of an alcohol or drug abuse treatment program. For authorization to disclose alcohol or drug abuse patient information, see 42 CFR 2 and AR 600-85.

(Pursuant to the Privacy Act of 1974, Public Law 93-579)

PHYSICIAN OR MEDICAL TREATMENT FACILITY AUTHORIZED TO RELEASE INFORMATION	It is understood that this authorization may be revoked at any time, if requested in writing, except to the extent that action will have already been taken.

PATIENT DATA

NAME (*Last, First, MI*)	DATE OF BIRTH	SOCIAL SECURITY/IDENTIFICATION NUMBER
PERIOD OF TREATMENT (*Month, Day, Year*)	TYPE OF TREATMENT ☐ OUTPATIENT ☐ INPATIENT ☐ BOTH	

RESTRICTIONS ON INFORMATION (*Specify*)

USE OF MEDICAL INFORMATION

☐ FURTHER MEDICAL CARE ☐ INSURANCE CLAIM(S) ☐ ATTORNEY ☐ DISABILITY DETERMINATION
☐ OTHER (*Specify*)

INFORMATION DESTINATION

INDIVIDUAL OR ORGANIZATION TO WHOM INFORMATION SHOULD BE RELEASED (*Name and Address*)

(ANY DISCLOSURE OF MEDICAL RECORD INFORMATION BY THE RECIPIENT(S) IS PROHIBITED EXCEPT WHEN IMPLICIT IN THE PURPOSES OF THIS DISCLOSURE)

RELEASE AUTHORIZATION

I hereby request and authorize the named physician/medical treatment facility to release the medical information described above to the named individual/organization indicated.	DATE
SIGNATURE OF PATIENT/PARENT/GUARDIAN	RELATIONSHIP TO PATIENT

IMPRINT OF PATIENT IDENTIFICATION PLATE WHEN AVAILABLE

DA FORM 5006-R, OCT 81 Figure 3-45

REQUEST FOR PRIVATE MEDICAL INFORMATION For use of this form, see AR 40-42; the proponent agency is the Office of The Surgeon General	DATE

PATIENT'S NAME AND SOCIAL SECURITY NUMBER	MEDICAL TREATMENT FACILITY *(Name and Location)*

REASON FOR REQUEST

PRIVATE MEDICAL INFORMATION SOUGHT *(Specify dates of hospitalization or clinic visits and diagnosis, if known)*

REQUESTOR'S NAME, TITLE, ORGANIZATION AND SOCIAL SECURITY NUMBER

FOR USE OF MEDICAL TREATMENT FACILITY ONLY

Check applicable box

☐ APPROVED ☐ DISAPPROVED *(State reason for disapproval)*

SUMMARY OF PRIVATE MEDICAL INFORMATION RELEASED

SIGNATURE OF APPROVING OFFICIAL	DATE

DA FORM 4254-R, 1 Jul 74 Figure 3-46

a. Appointment of Defense Experts.

The trial counsel, defense counsel, and the court-martial have equal opportunity to obtain expert witnesses. UCMJ, art. 46 and Mil. R. Evid. 706(a). Consequently, the accused is entitled to Government funding of any expert, if that expert has relevant testimony. The Government may provide an adequate substitute for the defense-requested expert, but the substitute must have similar professional qualifications and consistent, not divergent, views. See Ake v. Oklahoma, 470 U.S. 53, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985); U.S. v. Van Horn, 26 M.J. 434 (C.M.A. 1988). The Government, upon request, must also provide the defense with an expert consultant "sufficient to adequately prepare the defense for trial." Van Horn, citing Ake; U.S. v. Garries, 22 M.J. 288 (C.M.A. 1986). In making its request, the defense must be specific in defining material issues which could be developed by the expert consultant and witness. U.S. v. Tornowski, 29 M.J. 578 (A.F.C.M.R. 1989). Providing one person as the consultant to both the trial counsel and defense counsel may be permissible over defense objection, but only if the consultant did no independent testing, would not be testifying for the Government, and simply provides a neutral interpretation of the evidence for both sides. U.S. v. Burnett, 29 M.J. 473 (C.M.A. 1990).

A sample request for appointment of a government expert to assist the defense is at Figure 3-47.

A sample request for appointment of a non-government expert to assist the defense at Figure 3-49.

APVG-JA-TDS 22 May 199X

MEMORANDUM FOR COMMANDER, 25TH INFANTRY DIVISION (LIGHT),
SCHOFIELD BARRACKS, HAWAII 96857-6000

SUBJECT: Request for Appointment of Expert to Assist the Defense in the Case of United States v. Private E-2 Michael D. Warren

1. Pursuant to the provisions of R.C.M. 703, Manual for Court-Martial, 1984, Mil. R. Evid. 706, and United States v. Toledo, 25 M.J. 270 (C.M.A. 1989), aff'd, 26 M.J. 104 (C.M.A. 1988) request appointment of [an expert in _____] [a psychiatrist] to assist in [examination of evidence pertaining to _____ testing] [preparation of an insanity defense] in the above-styled case. This appointment is not for treatment or diagnosis.

2. Appointment of a psychiatrist to assist the defense is relevant and necessary because [state facts relating to the condition of the accused and circumstances of the alleged offense which demonstrate the necessity for an expert.]

SALLY FORTH
CPT, JA
Defense Counsel

Figure 3-47. Sample Request for Government Expert

APVG-JA-TDS 22 May 199X

MEMORANDUM FOR COMMANDER, 25TH INFANTRY DIVISION (LIGHT),
SCHOFIELD BARRACKS, HAWAII 96857-6000

SUBJECT: Request for Authority to Employ Expert to Assist the Defense in the Case of United States v. Sergeant First Class John S. Kookie

1. Pursuant to the provisions of R.C.M. 703, Manual for Court-Martial, 1984, Mil. R. Evid. 706, and United States v. Toledo, 25 M.J. 270 (C.M.A. 1988), aff'd, 26 M.J. 104 (C.M.A. 1988), request authority to authorize employment and fix compensation for _____ to assist the defense as an expert in the above-styled case.

2. Appointment of _____ to assist the defense as an expert is relevant and necessary for the following reasons:

a. [State facts which demonstrate the necessity for an expert.]

b. [State facts explaining why the Government has not or cannot provide an adequate substitute and why this expert satisfies those requirements.]

3. Request compensation for _____ in the amount of _____. [Explain basis of compensation.]

KATHERINE E. HOWELL
CPT, JA
Defense Counsel

Figure 3-48. Sample Request for Nongovernment Expert

b. Appointment of Defense Investigator.

The accused can request appointment of an investigator to assist the defense. See United States v. Garries, 22 M.J. 288 (C.M.A. 1986). To employ an independent investigator, the accused must demonstrate why a government agent, typically CID or MPI, is not an adequate substitute (for example, if a special expertise can be identified or if a conflict-of-interest can be articulated).

A sample request for appointment of a government investigator to assist the defense is at Figure 3-49.

APVG-JA-TDS 22 May 199X

MEMORANDUM FOR COMMANDER, 25TH INFANTRY DIVISION (LIGHT), SCHOFIELD BARRACKS, HAWAII 96857-6000

SUBJECT: Request for Appointment of Investigator to Assist the Defense in the Case of United States v. Private E-2 Bobby O. Schembeckler

1. Pursuant to the provisions of R.C.M. 703, Manual for Court-Martial, 1984, Mil. R. Evid. 706, and United States v. Garries, 22 M.J. 288 (C.M.A. 1986), request appointment of an investigator to assist the defense in the above-styled case.

2. Appointment of an investigator to assist the defense is relevant and necessary because [state facts which demonstrate the necessity for an investigator, i.e., what the investigator would do.]

MEL HIZER
CPT, JA
Defense Counsel

Figure 3-49. Sample Request for Government Investigator

3-9. Character Evidence.

Both sides should routinely investigate the accused's character and that of key witnesses. In addition to potential use on the merits, for impeachment, or for sentencing, character evidence can play a major role in evaluating alternate dispositions of the case. Accordingly, it is crucial that this part of counsel's case preparation be thorough and timely.

Relevant documents include: (1) Personnel qualification record - DA Form 2a (see Figure 3-50 for a sample); (2) Personnel qualification record - DA Form 2-1 (see Figure 3-51 for a sample); (3) Armed Services Vocational Aptitude Battery (see Figure 3-52 for an explanation of terms); (4) Leave and Earnings Statement (see Figure 3-53 for a sample statement); (5) Record of proceedings under Article 15, UCMJ (see Figure 3-54 for a sample record of proceedings under Article 15, UCMJ); (6) Extract of military records of previous convictions (see Figure 3-55); (7) Authentication form (see Figure 3-56 for a sample authentication of personnel records); (8) Letters from civilian friends of the accused (see Figure 3-57 for a sample letter to a civilian friend of the accused to solicit a character letter); (9) Letters from family members (see Figure 3-58 for a sample letter to a family member of the accused); (10) Letters from military acquaintances of the accused (see Figures 3-59 and 3-60 for sample letters to military acquaintances of the accused).

PREPARED 8X AUG 31 PCN: AAC-P73
PPA KH TYPE RECORD PERSONNEL-INQY

PERSONNEL QUALIFICATION RECORD, PART 1

CD 9X AUG 31 SCN C1

VOUCHER NO KHSD

* 1.NAME:	CARTER, ANTHONY A.	
* 2.SSN:	348-46-3179	
* 3.VSSSN CODE:	V	
* 4.MPC/CODE:	ENLISTED E	
* 5.SEX/CODE:	MALE M	

SECTION I - PERSONAL DATA

* 6.RACE/CODE:	WH-CAU C	11.ETH GRP/CODE: OTHER X
7.DATE OF BIRTH:	9X-21 0104	12.CITZSHP/CODE: NATIVE-BORN 1
8.NUMBER DEPENDENTS:	01	13.MRTL STS/CODE: MARRIED M
9.NO ACMP CSDEP PCS:	00	14.REL PREF/CODE: PROT-OTHER 70
10.NO ACMP NCSDEP PCS:	00	

* 1.GRADE/CODE	SPC M	
* 2.DATE OF RANK:	9X-00401	
* 3.SVC COMP/CODE:	REG R	
* 4.PMOS/ASI:	13B10 00	
* 5.LANG-1/CODE:		
* 6.LANG-1/CODE:		
* 7.SCTY STS CODE:	G	
* 8.SCTY CLNC/CODE:	SECRET S	
* 9.PULHES:	111111	
*10.PHYS CAT CODE:	A	
11.GT SCORE:	93	
12.OJT COMP DATE:		
13.MIL EDUC/CODE:	FA AIT	
14.CIV EDUC/CODE:	12 YRS	

SECTION II - QUALIFICATION DATA

15.PROMOTION IND:		29.SQT RATING/CODE: NO PREV SCORE
16.DUAL SVC GRADE/CODE:		30.SQT SCORE:
17.DUAL SVC COMP/CODE		31.PROM PTS-C/DATE:
18.SMOS/ASI:	00000 00	32.PROM PTS-P/DATE:
19.DUTY MOS/ASI:	13B10 00	33.REEN ELIG/INELIG: ELIG W/WAIVER
20.BONUS MOS/EFF DATE		34.PER SCTY INV INIT/DATE:
21.PROM/PROG MOS:		*35.PER SCTY INV COMP/DATE:
22.SP-DY-ASG-PAY-STATS:	NONE	*36.FLD DETMD PER SCTY STS:
23.SPAY1/SPAY2:		37.DPT DETMD PER SCTY STS:
24.IPAY1/IPAY2:		38.PER RLBTY PGM ASGN STS:
25.SQT MOS:		39.PERS SCTY INV INIT STS:
26.SQT DATE-1:		*40.PERS SCTY INV COMP STS:
27.SQT DATE-2:		
28.SQT PERCENTAGE:	%	

* 1.UPC:	PW101	
* 2.UNIT NAME:	HHC 1ST BN, 18TH INF	
* 3.REPORT DATE:	8X-3 0323	

SECTION III - UNIT DATA

* 4.ARRIVAL DATE:	9X-3 0323	7.LOSING UPC:
* 5.DEPART DATE:		8.REGT AFFIL:
* 6.GAINING UPC:		9.REGT HOMEBASE:

1.PEBD:	9X-4 0708	
2.BASD:	9X-4 1108	
3.ETS:	9X 1107	
4.CURR TERM SVC/CODE:	4 YR 4	
5.DELAY IN SEP/CODE		
6.DATE LAST PCS:		
7.DATE OF LAST EER:		
8.EER DATE VERIF:		
9.DATE OF LAST PHOTO:		
10.DATE ELIG AFRM:		

SECTION IV - SERVICE DATA

11.DATE ELIG GOMDL:	9X-1 11		
12.FHA ELIG IND:			
13.DLOS:			
14.DROS/DEROS:			
15.AEA/TERM DATE:			
16.LAST CBT TOUR/DATE:	NONE Z		
17.CURR/LAST FST/CODE:	NONE Z		
18.TRAVEL STATUS:			
19.OVERSEAS PREF/CODE:	1.HAWAII 15	2.NO-PREF 00	3.NO-PREF 00
20.CONUS PREF/CODE:	FT CARSON CO CC		

1.POSITION NO:		
2.POSITION TITLE:	DUTIES UNASSIGNED	

SECTION V - POSITION DATA

3.AUTH MOS/ASI:	5.AUTH LANG/CODE:
4.AUTH GRADE/CODE:	

SECTION VI - LOCAL DATA

DA FORM 2A (01 MAY 85) (ASTERISKS INDICATE WARTIME DATA ELEMENTS)

Figure 3-50

SECTION I – IDENTIFICATION DATA

1. NAME	2. SSN
WILLIAMS, WILLIAM WESLEY	342-34-4770

SECTION II – CLASSIFICATION AND ASSIGNMENT DATA

3. MOS EVALUATION SCORES ☐ CONT

MOSC	YR & MO	SCORE	YR & MO	SCORE	YR & MO	SCORE

4. ASSIGNMENT CONSIDERATIONS ☐ CONT

5. OVERSEA SERVICE ☐ CONT

FROM	THRU	AREA AND COUNTRY	MO	TYPE	NTC	DEPN ARR OS

DA FORM 2-1 1 JAN 73

SECTION II – CLASSIFICATION AND ASSIGNMENT DATA (Continued)

6. MILITARY OCCUPATIONAL SPECIALTIES ☐ CONT

MOSC	TITLE	DATE
P 13B10	FIELD ARTILLERY CREWMAN	840321

7. AVIATION ASI & GUNNERY QUALIFICATION ☐ CONT

AIRCRAFT		INSTR PILOT		GUNNERY SYSTEM	
F/W	R/W	F/W	R/W	TNG	INSTR

8. APTITUDE AREA SCORES ☐ CONT

AREA	SCORE	AREA	SCORE
GT	96		
GM	93		
EL	102		
CL	93		
MM	110		
SC	98		
QQ	97		
FA	101		
OF	88		
ST	94		
DATE	831109		
PLACE	FT. POLK, LA		

9. AWARDS, DECORATIONS & CAMPAIGNS ☐ CONT

ASR

Rifle M-16 Exp Qual 831210

Hand Grenades Exp Qual 831212

10. OTHER TESTS ☐ CONT

TEST	SCORE	DATE
MDB	105	831109
OCT		
DLAT		
OQI-1		
FAST		
OB		
WOCB		

11. AMERICAN BOARD CERTIFICATION & LICENSES OR CERTIFICATES HELD ☐ CONT

12. LANGUAGE PROFICIENCY

DA FORM 330 SUBMITTED	DATE

PERSONNEL QUALIFICATION RECORD – PART II

– Figure 3-51

SECTION V - MISCELLANEOUS

27 REMARKS

28 ITEM CONTINUATION

ITEM NO.	DATA

I certify that I am the custodian of the Personnel Records of Private (E-2) William W. Williams and that the foregoing DA Form 2A and 2-1, consisting of 5 pages, is a true and correct copy of the original document maintained in the personnel records of Private Williams.

D. G. Myer

D. GARY MYER
CW2, U.S. Army
Military Personnel Officer

SECTION IX - RESERVE COMPONENT DATA

32a. READY RESERVE OBLIGATION EXPIRATION DATE

b. DA FORM 3726 OR 3726-1 AGREEMENT EXPIRATION DATE

c. SERVICE OBLIGATION EXPIRATION DATE

d. MANDATORY REMOVAL FROM ACTIVE STATUS

e. RETIREMENT YEAR ENDING DATE

29 DATE DA FORM 20B PREPARED

30 DATE DUPLICATE DA FORM 2-1 SUBMITTED

31 REPORT OF CHANGES

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23
24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46
47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69
70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92

33. DATE

PREPARED	REVIEWED
831120	870822

34. SIGNATURE

William W. Williams

Figure 3-51 (continued)

SECTION VII - CURRENT AND PREVIOUS ASSIGNMENTS

35. RECORD OF ASSIGNMENTS ☐ CONT

EFFECTIVE DATE	DUTY MOSC	PRINCIPAL DUTY	ORGANIZATION AND STATION (OR OVERSEAS COUNTRY)	NON DUTY DAYS (PP YR/MO)	NON-RATED DAYS (PP YR/MO)	TYPE REPORT
830708 -	831107	SOLDIER ON DELAYED ENLISTMENT PROGRAM				NONE
831108		ENLISTMENT	AFEES ST. LOUIS, MISSOURI			NONE
831111	09B00	BCT	Co B 4th Bn 1st Tng Bde Ft Polk LA			NONE
840118		CASUAL	ENROUTE TO FT. SILL, OK			NONE
840119	09S00	STUDENT AIT 13B	Co A 2d Bn 5th Tng Bde Ft Sill OK			NONE
840322		CASUAL	ENROUTE TO FT. BLANK, MO			NONE
840323	76Y10	ASST ARMORER	Co B 4th Bn 3d Tng Bde, Ft Blank MO			NONE
840520		DUTY TO CONFINEMENT				NONE
840616	76Y10	CONFINEMENT TO DUTY	Co B 4th Bn 3d Tng Bde, Ft Blank MO			NONE
840620	71L10	MAIL CLERK	HHC, SP TRPS, FT. BLANK, MO			NONE
840831		DUTY TO AWOL				NONE
840929		AWOL TO DFR				NONE
860626		DFR TO RTN MIL CONTROL	HHC, SP TRPS, FT. BLANK, MO			NONE
860626		PRETRIAL CONFINEMENT	FT. BLANK, MO			NONE
860627	002	DUTIES UNASSIGNED	HHC, SP TRPS, FT. BLANK, MO			NONE
860308		DUTY OT AWOL				NONE
860809		AWOL TO DFR				NONE
870730		DFR TO RTN TO MIL CONTROL	HHC, SP TRPS, FT. BLANK, MO			NONE

(2)

- Fold Here -

Figure 3-51 (continued)

SECTION II – CLASSIFICATION AND ASSIGNMENT DATA (Continued)

13. PILOT RATINGS

ORIGINAL	DATE	CURRENT	DATE

14. FLYING STATUS ☐ CONT

INSTRUMENT CERTIFICATION

15. INTERNSHIPS, RESIDENCIES AND FELLOWSHIPS ☐ CONT

HOSPITAL	TYPE OR SERVICE	MONTHS	YEAR

16. HOSPITAL/TEACHING APPOINTMENTS AND PRIVATE PRACTICE ☐ CONT

FROM	THRU	INSTITUTION/LOCATION	TYPE	DURAT

17. CIVILIAN EDUCATION AND MILITARY SCHOOLS ☐ CONT

SCHOOL	MAJOR/COURSE/MOSC	DURAT	COMP	YEAR
CENTRAL HS ST. LOUIS	General Educ		NO	
USAFAS	13B10 - AIT	8 wks	YES	84

SECTION III – SERVICE, TRAINING AND OTHER DATES

18. APPOINTMENTS AND REDUCTIONS ☐ CONT

GRADE	COMP	EFFECTIVE DATE	DATE OF ELIG/RANK
PV1		831108	831108
PV2		840425	840425
PV1		840612	840612
PV2		840804	840804

19. SPECIALIZED TRAINING ☐ CONT

SUBJECT	DATE
ATP 21-114 (BCT)	831118
Geneva-Hague Conventions	840114
Military Justice	831111
Benefits of Honorable Discharge	831112
STD OF CDT	831112
EO	840114

20. BASIC ENLISTED SERVICE DATE (BESD): COMP PENDING

21. TIME LOST (Sec 972, Title 10, USC) ☐ CONT

FROM	THRU	DAYS	REASON
840520	840616	27	SPCM CONFINEMENT
840831	860616	654	AWOL
860808	860730	356	AWOL

SECTION IV – PERSONAL AND FAMILY DATA

22. PHYSICAL STATUS

HEIGHT	WEIGHT	GLASSES
69	135	XX YES ☐ NO

DATE OF EXAM 830708

23. PLACE OF BIRTH AND CITIZENSHIP

SELF PHOENIX CITY, ALABAMA

SPOUSE ST. LOUIS, MO

CITIZENSHIP OF SPOUSE NATIVE

24. NUMBER OF DEPENDENTS

ADULT	CHILDREN
1	0

25. HOME OF RECORD ADDRESS

HOR: ST. LOUIS, MO

318 Spruce St.
St. Louis, MO 63101

26. CIVILIAN OCCUPATION

JOB TITLE: MAIL CLERK

DOT CODE	CRITICAL OCCUPATION	NO. MONTHS EMPLOYED	MOSC
	☐ YES ☒ NO	12	

DUTIES PERFORMED

EMPLOYER

Figure 3-51 (continued)

(GT) General Technical	Consists of arithmetic reasoning and word knowledge.
(GM) General Maintenance	Consists of arithmetic reasoning; general science battery; mechanical comprehension; and automotive information.
(EL) Electronics	Consists of arithmetic reasoning; shop information; electronics information; mechanical comprehension; and electronics scale.
(CL) Clerical	Consists of arithmetic reasoning; word knowledge; attention-to-detail; and attentiveness scale.
(MM) Motor Maintenance	Consists of mathematics knowledge; shop information; electronics information; automotive information; and maintenance scale.
(SC) Surveillance/ Communication	Consists of arithmetic reasoning; knowledge; mechanical comprehension; and space perception.
(CO) Combat	Consists of arithmetic reasoning; shop information; space perception; attention-to-detail; and combat scale.
(FA) Field Artillery	Consists of arithmetic reasoning; general information; mathematics knowledge; electronics information; and attentiveness scale.
(CF) Operator & Food	Consists of general information; automation information; and attentiveness scale.
(ST) Skilled Technical	Consists of arithmetic reasoning; mathematics knowledge; and general science battery.

Figure 3-52. Explanation of Armed Services Vocational Aptitude Battery

ARMY/AIR FORCE LEAVE AND EARNINGS STATEMENT (ACTIVE AND RESERVE FORCES)

ID	NAME (LAST, FIRST, MI)	SOC. SEC. NO.	GRADE	PAY DATE	YRS SVC	ETS	BRANCH	ADSN DSSN	PERIOD COVERED
	SIMPSON EDWARD C	303857978	E6	820129	09	960111	ARMY	5056	1-30 APR 91

	ENTITLEMENTS		DEDUCTIONS		ALLOTMENTS		SUMMARY	
	TYPE	AMOUNT	TYPE	AMOUNT	TYPE	AMOUNT		
A	BASE PAY	1448.70	FED TAXES	68.23	AFAF	2.00	+AMT FWD	.00
B	BAQ	418.50	FICA	110.83	BANK	241.00	+TOT ENT	2,301.53
C	BAS	184.50	SGLI	8.00			-TOT DED	1,111.29
D	PRO PAY	198.00	USSH	.50			-TOT ALMT	243.00
E	VHA	51.79	EVEN $	.00			=NET AMT	947.24
F	EVEN $	.04	MID-MONTH-PAY	923.73			-CR FWD	.00
G							=EOM PAY	947.24
H								
I								
J								
K								
L								
M								
N								
O								
	TOTAL	2301.53		1111.29		243.00		

	BF BAL	ERND	USED	CRBAL	ETSBAL	LOST	PAID	USE LOSE	FED TAXES	WAGE PERIOD	WAGE YTD	MS	EX	ADD'L TAX	TAX YTD
LEAVE	60.0	17.5	28	49.5	190.5	.5	.0	2.0		1646.70	7159.35	M	5	.00	392.38

	WAGE PERIOD	WAGE YTD	TAX YTD	STATE TAXES	CODE	WAGE PERIOD	WAGE YTD	M S N	EX	ADD'L TAX	TAX YTD
FICA TAXES	1448.70	5794.80	443.31		WA	.00	.00	M	05	.00	.00

	BAQ TYPE	BAQ DEPN	VHA ZIP	RENT AMT	SHARE	STAT	JFTR	DEPNS	2D JFTR	BAS TYPE	CHARITY	TPC	PACIDN
PAY DATA	W/DEP	SPOUSE	29207	420.00	1	R				REGULAR	8.00		EBCOGR81

REMARKS: 5 2 0034003

RATE CHG BASIC PAY 910401(091)
CHANGE SDAP 910413(104)
VHA BASED ON W/DEP, ZIP 29207

STOP EVEN $ PAYMENT 910401(091)
RATE CHG SGLI 910401(113)
BANK 1ST UN NATL BANK
ACCT# 3468222975

Figure 3-53

RECORD OF PROCEEDINGS UNDER ARTICLE 15, UCMJ

For use of this form, see AR 27-10; the proponent agency is TJAG.

See Notes on Reverse Before Completing Form

NAME	GRADE	SSN	UNIT	PAY (Basic & Sea/Foreign)
GRAVEL, JAMES E.	SP4	199-24-4880	D Co, 1/5 Inf, 1st Inf Bde, Ft. Blank, MO	$814.00

1. I am considering whether you should be punished under Article 15, UCMJ, for the following misconduct: 1/

On or about 0800 hours, 20 June 199X you absented yourself without authority from D Co, 1/5 Inf, 1st Inf Bde, located at Fort Blank, Missouri and remained so absent until on or about 0300 hours, 22 June 199X. This is a violation of Article 86, UCMJ.

2. You are not required to make any statements, but if you do, they may be used against you in this proceeding or at a trial by court-martial. You have several rights under this Article 15 proceeding. First I want you to understand I have not yet made a decision whether or not you will be punished. I will not impose any punishment unless I am convinced beyond a reasonable doubt that you committed the offense(s). You may ordinarily have an open hearing before me. You may request a person to speak on your behalf. You may present witnesses or other evidence to show why you shouldn't be punished at all *(matters of defense)* or why punishment should be very light *(matters of extenuation and mitigation)*. I will consider everything you present before deciding whether I will impose punishment or the type and amount of punishment I will impose. 2/ If you do not want me to dispose of this report of misconduct under Article 15, you have the right to demand trial by court-martial instead. 3/ In deciding what you want to do you have the right to consult with legal counsel located at Building T-3100. You now have 48 hours to decide what you want to do. 4/

DATE / TIME	NAME, GRADE, AND ORGANIZATION OF COMMANDER	SIGNATURE
1 Jul 9X / 0900	WILBUR L. WILSON, CPT, D Co, 1/5 Inf, 1st Inf Bde	W. L. Wilson

3. Having been afforded the opportunity to consult with counsel, my decisions are as follow: *(Initial appropriate blocks, date, and sign)*

a. [ ] I demand trial by court-martial.

b. [JEG] I do not demand trial by court-martial and in the Article 15 proceedings:

(1) I request the hearing be [JEG] Open [ ] Closed. *(2)* A person to speak in my behalf [JEG] Is [ ] Is not requested. *(3)* Matters in defense, mitigation, and/or extenuation: [ ] Are not presented [JEG] Will be presented in person [ ] Are attached.

DATE	NAME AND GRADE OF SERVICE MEMBER	SIGNATURE
2 Jul 87	JAMES E. GRAVEL, SP4	James E Gravel

4. In a(n) [WW] Open [ ] Closed hearing 5/ all matters presented in defense, mitigation, and/or extentuation, having been considered, the following punishment is imposed: 5/6/

Reduction to the grade of PFC/E-3 (suspended for 90 days).

~~5. I direct the original DA Form 2627 be filed in the [ ] Performance fiche [ ] Restricted fiche of the OMPF.~~ 7/

~~6. You are advised of your right to appeal to the Cdr, 1/5 Inf~~ within 5 calendar days. An appeal made after that time may be rejected as untimely. Punishment is effective immediately unless otherwise stated above.

DATE	NAME, GRADE, AND ORGANIZATION OF COMMANDER	SIGNATURE
2 Jul 9X	WILBUR L. WILSON, CPT, D Co, 1/5 Inf, 1 Inf Bde	W. L. Wilson

7. *(Initial appropriate block, date, and sign)*

a. [ ] I do not appeal b. [ ] I appeal and do not submit additional matters 8/9/ c. [JEG] I appeal and submit additional matters 8/9/

DATE	NAME AND GRADE OF SERVICE MEMBER	SIGNATURE
2 Jul 9X	JAMES E. GRAVEL, SP4	James E. Gravel

8. I have considered the appeal and it is my opinion that: The proceedings were conducted in accordance with law and regulation and the punishment is not disproportionate to the offense committed.

DATE	NAME AND GRADE OF JUDGE ADVOCATE	SIGNATURE
3 Jul	SHAWN B. KELLY, CPT, JAGC	Shawn Kelly

9. After consideration of all matters presented in appeal, the appeal is

[WW] Denied [ ] Granted as follows: 10/

DATE	NAME, GRADE, AND ORGANIZATION OF COMMANDER	SIGNATURE
6 Jul 9X	ORDER N. DeCOURT, LTC, 1/5 Inf, 1st Inf Bde	O. N. DeCourt

10. I have seen the action taken on my appeal.	DATE	SIGNATURE OF SERVICE MEMBER
	7 Jul 9X	James E. Gravel

11. ALLIED DOCUMENTS AND/OR COMMENTS 11/12/13/

DA FORM 2627 AUG 84 Figure 3-54 EDITION OF NOV 82 IS OBSOLETE

ORIGINAL

NOTES

1/ Insert a concise statement of each offense in terms stating a specific violation and the Article of the UCMJ *(Part IV, MCM)*. If additional space is needed, use item 11 or continuation sheets as described in note 11 below.

2/ Inform the member of the maximum punishment which may be imposed under Article 15.

3/ Inform the member that if he or she demands trial, trial could be by SCM, SPCM, or GCM. Additionally, inform the member that he or she may object to trial by SCM and that at SPCM or GCM he or she would be entitled to be represented by qualified military counsel, or by civilian counsel at no expense to the government. If the member is attached to or embarked in a vessel, he or she is not permitted to refuse Article 15 punishment. In such cases, all reference to a demand for trial will be lined out and an appropriate remark will be made in item 11 indicating the official name of the vessel and that the member was attached to or embarked in the vessel at the time punishment was imposed.

4/ Give the member copy 5 of this form.

5/ Offenses determined not to have been committed will be lined out. If the imposing commander decides not to impose any punishment, the member will be notified and all copies of this form destroyed.

6/ Amounts of forfeitures of pay will be rounded off to the next lower whole dollar. If a punishment is suspended, the following statement should be added after it: To be automatically remitted if not vacated before *(date)*. If punishment includes a written admonition or reprimand, it will be attached to this form and listed in item 11.

7/ The imposing commander will initial the appropriate block. The OMPF performance fiche is routinely used by MOS/specialty career managers and DA selection boards. The OMPF restricted fiche is not given to MOS/speciality career managers or DA selection boards without approval of the Cdr, MILPERCEN or selection board proponent.

8/ If the member appeals, this form and all written evidence considered by the imposing commander will be forwarded to the superior authority.

9/ Before acting on an appeal, it must be referred to a judge advocate for advice when the punishment, whether or not suspended, includes reduction of one or more pay grades from the fourth or a higher pay grade, or is in excess of one of the following: 7 days arrest in quarters, 7 days correctional custody, 7 days forfeiture of pay, or 14 days of either extra duties or restriction. *(See Article 15e(1) to (7), UCMJ.)*

10/ The superior authority will initial the appropriate block. If the appeal is granted, the specific relief granted will be stated according to note 12.

11/ In this space indicate the number of pages attached as follows: Allied documents on appeal consist of _____ pages. Allied documents include all written matters considered by the imposing commander submitted by the member on appeal and the commander's rebuttal, if applicable. If additional space is needed for completion of any item*(s)*, use plain bond headed "Continuation Sheet 1", etc.

12/ Applicable portions of the following format may be used to record action taken on appeal. Appropriate language should be entered in item 11 or, if necessary, on a continuation sheet. Supplementary actions *(para 3-38, AR 27-10)* will be recorded on DA Form 2627-2.

Suspension, Mitigation, Remission, or Setting Aside

(DATE)

On *(date)*, the punishment(s) of _____
imposed on *(date of punishment) (was) (were) (suspended and will be automatically remitted if not vacated before (date)) (mitigated to) (set aside, and all rights, privileges, and property affected restored) (by my order) (by order of) (the officer who imposed the punishment) (the successor in command to the imposing commander) (as superior authority)*.

(Typed name, grade, and organization of commander) /s/_____

13/ Racial/ethnic identifiers will be placed in Item 11 *(Chapter 15, AR 27-10)*.

Reverse of DA Form 2627, Aug 84

Figure 3-54 (continued)

EXTRACT OF MILITARY RECORDS OF PREVIOUS CONVICTIONS

IDENTIFICATION

1. NAME (Last, First, Middle Initial)	2. SSN	3. RANK	4. UNIT/COMMAND NAME
Jackson, Carlos A.	189-12-3456	PFC	HHC, Headquarters Command

PART I - RECORD OF PREVIOUS CONVICTIONS BY COURTS-MARTIAL[1]

5a. TYPE OF COURT-MARTIAL	b. CM ORDER OR SCM NO	c. HEADQUARTERS	d. ARTICLE(S)
Special	200	Fort Bland, Arkansas	121

e. SYNOPSIS OF SPECIFICATION(S) INCLUDING DATE OF OFFENSE *(If more space is needed, continue on reverse.)*

Wrongful appropriation of a government vehicle on 6 Nov. 198X-4.

f. SENTENCE ADJUDGED[2]	g. DATE SENTENCE ADJUDGED (YYMMDD)	h. DATE SENTENCE FINALLY APPROVED[4] (YYMMDD)
Restriction to the company area for one month and forfeiture of $60.00.	198X-4/11/27	198X-4/12/5

i. I CERTIFY THE FOREGOING IS CORRECT[3]

(1) (a) TYPED OR PRINTED NAME OF PERSON SIGNING ORIGINAL ENTRY IN MILITARY RECORD (Last, First, Middle Initial)	(b) RANK
Johnson, Cynthia Y.	CPT
(2) (a) TYPED OR PRINTED NAME OF PERSON SIGNING ORIGINAL ENTRY IN MILITARY RECORD (Last, First, Middle Initial)	(b) RANK
Johnson, Cynthia Y.	CPT

6a. TYPE OF COURT-MARTIAL	b. CM ORDER OR SCM NO.	c. HEADQUARTERS	d. ARTICLE(S)

e. SYNOPSIS OF SPECIFICATION(S) INCLUDING DATE OF OFFENSE *(If more space is needed, continue on reverse.)*

f. SENTENCE ADJUDGED[2]	g. DATE SENTENCE ADJUDGED (YYMMDD)	h. DATE SENTENCE FINALLY APPROVED[4] (YYMMDD)

i. I CERTIFY THE FOREGOING IS CORRECT[3]

(1) (a) TYPED OR PRINTED NAME OF PERSON SIGNING ORIGINAL ENTRY IN MILITARY RECORD (Last, First, Middle Initial)	(b) RANK
(2) (a) TYPED OR PRINTED NAME OF PERSON SIGNING ORIGINAL ENTRY IN MILITARY RECORD (Last, First, Middle Initial)	(b) RANK

PART II - ATTESTING CERTIFICATE BY CUSTODIAN

7. NAME OF UNIT / COMMAND OF CUSTODIAN	8. ADDRESS OF UNIT / COMMAND OF CUSTODIAN (Street, City, State, Zip Code)	9. DATE COMPLETED (YYMMDD)
HHC, Headquarters Command	Fort Bland, Arkansas	198X/08/01

I certify that I am the official custodian of the military personel records pertaining to previous convictions by court-martial of the above-named person, and that the foregoing is a true copy of the entries contained therein.[1]

10. TYPED NAME (Last, First, Middle Initial)	11. RANK	12. OFFICIAL CAPACITY	13. SIGNATURE
Milliner, Archibald M.	CW2	Adjutant	Archibald M. Milliner

[1] *Only admissable previous convictions will be listed. To determine admissibility, see rules on reverse. For Army personnel, the extract will be prepared from the Service Record or DA Form 2-2. For Air Force personnel, the extract will be prepared from AF Form 1226. For Navy personnel the extract will be prepared from NAVPERS Form 1070/607 or Administrative Remarks, Page 13. For Marine Corps personnel, the extract will be prepared from NAVMC Form 118(13)-PD.*

[2] *For convictions by summary courts-martial or special courts-martial without a military judge, entry is "Sentence as Approved."*

[3] *If the service record certification block being extracted fails to contain the required: (a) Signature of the personnel records custodian, request that officer to take immediate corrective action; (b) rank and unit/command of the custodian of the conviction record, enter remark such as "None," "Rank not shown," "Unit/command not shown," as appropriate, in applicable block of the extract. Entries in this section are extracted from the source document. No actual signatures will be made in this section.*

[4] *Applies only to convictions by summary courts-martial and special courts-martial without a military judge. The date of sentence approval is the date that review has been completed pursuant to Article 64 or Article 66, if applicable.*

DD Form 493, OCT 84 Figure 3-55 *Previous editions are obsolete*

AAPT-AG DATE

MEMORANDUM FOR Whom It May Concern

SUBJECT: Authentication of Personnel Records of
(Name) _____ (SSN) _____

I certify that I am the official custodian of the military personnel records of the subject soldier, whose records are attached to this certificate, and that the below-listed documents contained therein are maintained by regulation as a part of those records and are current and correct to the best of my belief:

DA Form 2-1
DA Form 2A
(Others)

SIGNATURE BLOCK OF CUSTODIAN

Figure 3-56. Sample Authentication of Personnel Records

DEPARTMENT OF THE ARMY
Headquarters, US Army Armor Center
United States Army Trial Defense Service
Fort Knox, Kentucky 40121

[Date]

[Address]

Dear _____:

Your [friend] [former student] [_____], [rank and full name of the accused], has been charged with [the commission of a military offense] [name of the offense]. His or her trial by court-martial will be held in the very near future. I am his or her lawyer, and I will defend him or her in this matter, before a military court.

[Rank and last name of the accused] [first name of the accused] has authorized me to contact you for information that may be of assistance in his or her defense. In this regard I need a letter from you concerning the character and background of [rank and last name of the accused] [first name of the accused]. In your letter, please address the following questions:

a. How do you know [rank and last name of the accused] [first name of the accused]?

b. How long have you known him or her?

c. During the time you have known him or her, how often have you had contact with him or her (daily, twice a week, once a month, etc.)?

d. What type of person is he or she?

e. What are his or her best character traits?

f. What is your opinion of his or her truthfulness? Has he or she ever lied to you? Would you believe him or her under oath?

g. What is or was his or her reputation for truthfulness (i.e., other people's opinions)?

h. If you have observed his or her job performance, what is your opinion of it? Has he or she ever worked for you?

Figure 3-57. Sample Letter to Civilian Friend of Accused

i. What is his or her level of reliability, responsibility, and integrity?

Please include information expressing your personal regard for [rank and last name of the accused] [first name of the accused], including your opinion concerning his or her [specific traits in issue], ambitions, potential, and citizenship. If possible, kindly include his or her reputation concerning these traits (i.e., the opinion of others) as well. I am also interested in such matters as his or her participation in school or church activities prior to entering the service and any family or domestic difficulties of which you are aware. Feel free to tell me anything you might know which might tend to mitigate or explain his or her present predicament with military authorities. Please address all correspondence "To Whom It May Concern."

If you know of relatives, neighbors, friends, or others who will write letters on behalf of [rank and last name of the accused] [first name of the accused], please ask them to do so or forward their names to me so that I can contact them directly.

Please give this matter your immediate attention as the court-martial will be held in the very near future. I have enclosed a self-addressed envelope for your convenience.

Sincerely.

Encl

Captain, U.S. Army
Defense Counsel

Figure 3-57. Sample Letter to Civilian Friend of Accused

DEPARTMENT OF THE ARMY
Headquarters, US Army Armor Center
United States Army Trial Defense Service
Fort Knox, Kentucky 40121

[Date]

[Address]

Dear _____:

I am an Army officer and lawyer who has been appointed as defense counsel for your [son] [daughter] [husband] [_____]. He or she has been charged with [the commission of a military offense] [name of the offense] and is scheduled to be tried by court-martial in the very near future. He or she has authorized me to write you for information which may be of assistance in his or her defense.

To enable me to present the strongest possible case in his or her behalf, I need a letter from you outlining in detail your [son's] [daughter's] [husband's] [_____] character, background, and home life. In your letter, please address the following questions:

a. What type of person is he or she?

b. What are his or her best character traits?

c. What is his or her level of reliability, responsibility, and integrity?

d. What is your opinion of his or her truthfulness?

e. What is his or her reputation for truthfulness (i.e., other people's opinions)?

Also, please include information regarding his or her family background, school performance, community service, and past achievements. Feel free to tell me anything you know about his or her background which might tend to mitigate or explain his or her present predicament with the military. In addition, please contact your clergy or anyone else in a position of authority or responsibility who will write a letter to me attesting to your [son's] [daughter's] [husband's] [_____] good character and their personal regard for him or her. In the alternative, please

Figure 3-58. Sample Letter to a Family Member

provide me with the names of such persons so that I can contact them directly. Please address all correspondence "To Whom It May Concern."

Since the court-martial will be held in the very near future, I ask that you give this matter your immediate attention. I have enclosed a self-addressed envelope for your convenience.

Sincerely,

Captain, U.S. Army
Defense Counsel

Enclosure

Figure 3-58. Sample Letter to a Family Member

DEPARTMENT OF THE ARMY
Headquarters, US Army Armor Center
United States Army Trial Defense Service
Fort Knox, Kentucky 40121

[Date]

[Address]

Dear _____:

[Rank and full name of the accused] has been charged with [the commission of a military offense] [name of the offense]. His or her trial by court-martial will be held in the very near future. I have been appointed as defense counsel for [rank and last name of the accused] [first name of the accused], who has authorized me to write you for information which may be of assistance in his or her defense.

To enable me to present the strongest possible case, I need a letter from you concerning the character and background of [rank and last name of the accused] [first name of the accused]. In your letter, please address the following questions:

a. How do you know [rank and last name of the accused] [first name of the accused]?

b. How long have you known him or her?

c. During the time you have known him or her, how often have you had contact with him or her (daily, twice a week, once a month, etc.)?

d. What type of person is he or she?

e. What are his or her best character traits?

f. What is your opinion of his or her truthfulness? Has he or she ever lied to you? Would you believe him or her under oath?

g. What is or was his or her reputation for truthfulness (i.e., other people's opinions)?

h. If you have observed his or her job performance, what is your opinion of it?

Figure 3-59. Sample Letter to Military Personnel

i. What is his or her level of reliability, responsibility, and integrity?

Please include in your letter your personal regard for [rank and last name of the accused] [first name of the accused], including your opinion of his or her [specific traits in issue], performance as a soldier, ambition, and potential. If possible, kindly include his or her reputation concerning these traits (i.e., other people's opinions) as well. In addition, feel free to tell me anything you might know which might tend to mitigate or explain his or her present predicament with military authorities. Address all correspondence "To Whom It May Concern."

If you know of others who will write letters on behalf of [rank and last name of the accused], please ask them to do so, or forward their names to me so that I can contact them directly.

Please give this matter your immediate attention as the court-martial will be held in the very near future. I have enclosed a self-addressed envelope for your convenience.

Sincerely,

Captain, U.S. Army
Defense Counsel

Enclosure

Figure 3-59. Sample Letter to Military Personnel

DEPARTMENT OF THE ARMY
HEADQUARTERS, US ARMY ARMOR CENTER
UNITED STATES ARMY TRIAL DEFENSE SERVICE
FORT KNOX, KENTUCKY 40121

[Date]

[Address]

Dear _____:

[Rank and full name of the accused] has been charged with [the commission of a military offense] [name of the offense] and is pending trial by court-martial. I have been appointed as his or her defense counsel. He or She has authorized me to write you for information which may be of assistance in his or her defense. In that regard, I ask that you complete and return the enclosed form. If you have no knowledge or opinion concerning certain questions on the form, just write "No knowledge" in the appropriate space.

Please feel free to provide any additional information you feel will be relevant to this matter. You may add additional pages so long as you sign and number each page.

Notice that the form requires the signature of a notary public. Your local SJA office will provide notarial service for you. If obtaining the signature of a notary will cause undue delay, please just sign the form and return it without the notarization.

Since the court-martial will be held in the very near future, please give this matter your immediate attention. I have enclosed a self-addressed envelope for your convenience.

Sincerely,

Captain, U.S. Army
Defense Counsel

Enclosure

Figure 3-60. Sample Letter to Military Personnel (Alternative Form)

UNITED STATES	)	
	)	
v.	)	AFFIDAVIT
	)	
[Rank and Full Name of the Accused]	)	

I, _____, am aware that [rank and full name of the accused] has been charged with [the commission of a military offense] [name of the offense]. I wish to provide the following information for use during his or her court-martial:

A. Information concerning me:

1. Age_____
2. Time in service_____
3. Rank_____
4. DOR_____
5. Branch/MOS_____
6. Unit_____
7. Duty position_____
8. Length of time in current position_____
9. Awards/decorations_____
10. I have known [rank and last name of the accused]
    a. Since_____
    b. From where_____
11. My relationship with him or her is/was_____
    _____
12. The frequency of my contact with him or her is/was [daily, weekly, etc.]_____
13. Social contact with him or her is/was_____

B. Information concerning [rank and last name of the accused]:

On a scale of 1 to 10, with 10 being the best, it is my opinion, based on my personal observation and knowledge of [rank and last name of the accused], that the following evaluation of him or her is accurate:

1. Truthfulness _____
2. Honesty _____
3. Reliability _____
4. Responsibility _____
5. Loyalty _____
6. Integrity _____
7. Lawfulness _____
8. Peacefulness _____
9. Military bearing _____
10. Duty performance _____
11. Devotion to family _____

I am/was aware of his or her reputation, and on a scale from 1 to 10, with 10 being the best, his or her reputation is/was as follows:

1. Truthfulness _____
2. Honesty _____
3. Reliability _____
4. Responsibility _____
5. Loyalty _____
6. Integrity _____
7. Lawfulness _____
8. Peacefulness _____
9. Military bearing _____

10. Duty performance _____

11. Devotion to family _____

C. Examples of his or her good character traits are as follows (relate stories which illustrate these traits):

D. Extenuating and/or mitigating factors concerning him or her and/or the charged offenses:

E. Additional comments:

I swear or affirm that the information stated above (and on all the pages attached hereto) is true and accurate to the best of my knowledge.

_____ _____

Date Signature

Sworn and subscribed to before me this _____ day of _____, 19___.

_____

Notary Public

Section III
Trial Notes

Trial notes should be compiled by both parties prior to the court-martial. When properly written, they can assist counsel in preparing and presenting their cases. Figures 3-61 and 3-62 contain sample trial notes for trial and defense counsel. Figure 3-63 contains a sample legal brief for a motion to suppress. Each counsel should use a checklist during trial to ensure that appropriate instructions are given to the court members. An excellent checklist can be found at Appendix A, DA Pam 27-9, Military Judges' Benchbook, or at figure 3-64.

a. Preliminary matters (prior to assembly). The information contained under this heading must be supplied by the trial counsel during the initial Article 39(a) session. This information may be penciled in the margin of the procedural guide, written on a separate sheet of paper clipped to the guide, or entered by grease pencil on an acetate covered copy of the trial guide. Regardless of which method the trial counsel adopts, he or she should never have to delay the proceedings while searching for this information.

(1) Orders: Court convened by Court Martial Convening Order No. 13, 2 July 1992, Fort Blank, Missouri.

(2) Military judge and members (to be completed in order of rank as court assembles):

PRESENT

LTC Purple, Military Judge.

COL Silver

LTC Brown

MAJ Green

MAJ Pink

CPT Blue

1LT Orange

2LT Gold, Court Members.

CPT Victor, TC

CPT Helper, Asst TC

CPT Winner, DC

CPT Aider, Asst DC

ABSENT

2LT White, court member (excused by the convening authority)

Figure 3-61. Sample Trial Notes for Trial Counsel

(3) Accused: Sergeant Peter C. Arnold, Co A, 20th Sig Bn.

(4) Court reporter: Jane R. Wright

(5) Prosecution counsel properly certified and sworn in accordance with the UCMJ.

(6) Prosecution counsel not disqualified.

(7) General nature of charges:

(a) Desertion on 4 Jun 1990 from Fort Blank until apprehension 13 May 1992 at Toyson, Missouri, in violation of Article 85.

(b) Preferred by CPT Michael Coyle and forwarded with recommendation for trial.

(c) Investigated by MAJ Roger Fox (See DD Form 457).

(d) Forwarded by LTC Morton Beale and COL John Fox (See letters of transmittal).

(e) Records disclose no grounds for challenge.

(f) No member or military judge to be called as witness for prosecution.

(8) Charges were served on accused on 2 Jul 1992.

b. Anticipated defense pleas and motions.

(1) Pleas: Not guilty, but guilty of the lesser included offense of AWOL.

(2) Motions: Motion for speedy trial: Account for delay (13 May 1992 - 14 Aug 1992).

(a) Accused returned to military control and placed in pretrial confinement: 13 May 1992.

Figure 3-61. Sample Trial Notes for Trial Counsel

(b) Charges preferred: 15 May 1992.

(c) Charges received at Bn Hq: 19 May 1992.

(d) Charges given to investigating officer: 20 May 1992.

(e) Art. 32 investigation completed: 17 June 1992.

28 days lapse: (from investigating officer)
6 days _____ testimony at Art. 32
4 days _____ DC unavailable; other cases
16 days _____ delay requested by DC
2 days _____ preparing report
28 days

(f) Case referred to trial by GCM: 30 June 1992.

13 days lapse: Administrative and clerical work and preparation of advice.

(g) Charges served on accused: 2 July 1992.

(h) Lapse of time until trial: Division field exercise from 6 July - 20 July 1992.
Military judge not available between 20 July 1992 and date of trial.

Figure 3-61. Sample Trial Notes for Trial Counsel

c. Voir dire and challenges.

(1) Voir dire questions.

(2) Challenges for cause: none.

(3) Peremptory challenge: none.

d. Opening statement. The prosecution will show that on or about 4 June 1990, the accused, Sergeant Peter C. Arnold, went AWOL from his unit, Co A, 20th Sig Bn, Fort Blank, MO, and that he remained absent until he was apprehended by civilian police at Toyson, Missouri, and returned to military control on 13 May 1992 -- an absence of over 23 months. The evidence also will show that at the time Sergeant Arnold was apprehended he was dressed in civilian clothing and had been gainfully employed as a mechanic at an automobile agency in the town of Toyson for practically the entire period of his absence.

e. Evidence (in order of introduction).

(1) Offer an authenticated copy of DA Form 4187. (This exhibit shows that the accused, Sergeant Arnold, is a member of Company A, 20th Signal Bn, and that his status changed from "present for duty" to "absent without leave" on 4 June 1990). Prosecution Exhibit #1.

Figure 3-61. Sample Trial Notes for Trial Counsel

(2) Peter Jones, shop foreman, Jones Motor Co., Toyson, Missouri, will testify as follows: He knows accused . . . can identify him . . . met accused 30 June 1990 . . . accused wanted mechanic's job . . . hired accused 30 June 90 . . . accused worked for him since that date . . . conversation with accused, 12 May 92 . . . accused said he had been in Army . . . became disgusted, gone over hill . . . said he wanted no part of Army and would never return to it . . . called police station 13 May 92 because he did not want someone who was AWOL working for him . . . policeman came . . . took Arnold away . . . heard Arnold say to policeman he was AWOL . . . Arnold to his knowledge always wore civilian clothes.

(3) Offer the written stipulation of expected testimony of John Smith, policeman, Toyson, Mo. Prosecution Exhibit #2.

(4) Offer into evidence an authenticated copy of DA Form 4187 from Company A, 20th Signal Bn, showing a change in accused's status from "absent without leave" to "present for duty" on 13 May 1992.

(5) Request court to take judicial notice that Toyson is 70 miles from Fort Blank.

Figure 3-61. Sample Trial Notes for Trial Counsel

(6) Proposed cross-examination of accused. "Absented himself 4 Jun 90 . . . did not have authority to be absent . . . remained AWOL until apprehended on 13 May 92 . . . did not contact Army authorities during absence . . . wore civilian clothes . . . did not contact Red Cross or chaplain . . . knew Red Cross representative and chaplain were on post at Fort Blank . . . Made no effort to seek assistance from CO or other financial sources with personal problems.

f. Argument. The prosecution has produced competent evidence showing that on 4 Jun 90 the accused, Arnold, deserted the service of the United States Army and remained absent until he was apprehended by the civilian police and turned over to the MPs at Toyson, MO, on 13 May 92. Prosecution Exhibit 1, the DA Form 4187 from the accused's unit, shows that he absented himself without authority from that unit on 4 Jun 90. The facts and circumstances surrounding the apprehension of the accused and his return to military control at Toyson, MO, on 13 May 92, were proven by the stipulation concerning the testimony of policeman Smith and by the testimony of Peter Jones. Concerning the question of whether the accused intended to remain absent permanently from his place of service, the record clearly shows that such an intent was in his mind. This intent may be inferred by the court from these facts in the record: (1) accused remained absent from his organization for a long period of time without turning himself in at a military installation; (2) he secured private employment almost

Figure 3-61. Sample Trial Notes for Trial Counsel

immediately after he absented himself; (3) he worked at a civilian job during his absence; (4) in addition, the conversation between the accused and Peter Jones, the shop foreman, in which Arnold said that he "wanted no part of the Army and would never return" clearly indicates the intent not to return to military service.

g. Instructions or special findings (to be attached as separate Enclosures).

(1) Prosecution proposed instruction on the elements of desertion in the case of United States v. SGT Peter C. Arnold, Co A, 20th Sig Bn:

The specification charges the accused with desertion in violation of Article 85, which provides in part that any member of the armed forces of the United States who, without authority, goes or remains absent from his organization, with intent to remain away therefrom permanently, is guilty of desertion.

The court is advised that, to find the accused guilty of the specification and charge, it must be satisfied by legal and competent evidence beyond a reasonable doubt:

(i) That on 4 June 1990 at Fort Blank, Missouri, the accused absented himself from his unit, Company A,

Figure 3-61. Sample Trial Notes for Trial Counsel

20th Sig Bn;

(ii) That he remained so absent until 13 May 1992;

(iii) That his absence was without authority from anyone competent to give him leave;

(iv) That the accused intended at the time of absenting himself or at some time during this absence to remain away permanently from his unit; and

(v) That the accused's absence was terminated by apprehension.

(2) Prosecution's proposed instruction on the lesser included offense of absence without leave in the case of United States v. Arnold, Co A, 20th Sig Bn:

The Court is further advised that included within the offense of desertion is the lesser offense of absence without leave in violation of Article 86, which provides in part that any member of the armed forces who, without authority, absents himself or remains absent from his unit shall be punished as a court-martial may direct. The elements of absence without leave are as follows:

(i) That on 4 June 1990 at Fort Blank, Missouri, the accused absented himself from his unit, Company A,

Figure 3-61. Sample Trial Notes for Trial Counsel

20th Sig Bn;

(ii) That such absence was without proper authority from anyone competent to give him leave; and

(iii) That he remained so absent until 13 May 1992.

You are further advised that if you have a reasonable doubt that the accused is guilty of desertion, but you are satisfied by legal and competent evidence beyond a reasonable doubt that the accused is guilty of the lesser included offense of absence without authority, you may nevertheless reach a finding of guilty, but in this event it will be necessary for you to modify the specification and the charge by exceptions and substitutions so that they will reflect findings as to which you have no reasonable doubt.

(3) Special findings. [For special findings when the accused is tried by military judge alone, see R.C.M. 918].

h. Visual aids. None.

Figure 3-61. Sample Trial Notes for Trial Counsel

a. Preliminary matters.

(1) Accused:

(a) Name and grade: Peter C. Arnold, Sergeant (E-5)

(b) Organization: Co A, 20th Sig Bn

(c) Station: Fort Blank, MO.

(2) Accused to be defended by detailed defense counsel and detailed assistant defense counsel.

(3) Defense counsel properly certified and sworn in accordance with the UCMJ.

b. Charges and specifications.

Charge. Violation of the Uniform Code of Military Justice, Article 85.

Specification. Desertion (with intent to remain absent permanently); 4 June 90 to 13 May 92 (23 months, 10 days), terminated by apprehension.

c. Lesser included offenses: Absence without leave.

d. Elements of offenses charged:

(1) Accused absented himself from Co A, 20th Sig Bn, at Ft. Blank on 4 June 90.

(2) Such absence was without authority.

(3) Accused intended at time of absenting himself, or at some time during absence, to remain away permanently from his

Figure 3-62. Sample Trial Notes for Defense Counsel

organization.

(4) Accused remained absent until 13 May 92.

(5) Absence was terminated by apprehension by civilian police at Toyson, MO. Accused returned to military control on 13 May 92.

e. Voir dire and challenges:

(1) Voir dire questions.

(2) Challenges for cause: none.

(3) Peremptory challenge: Colonel Silver.

(4) Alternate: Lieutenant Colonel Bradd.

f. Motions:

(1) Dismissal: Speedy trial.

(a) The accused moves to dismiss the charge and specification for lack of speedy trial.

(b) Argument: Evidence is clear that from the time of the return of accused to military control on 13 May 1992 until today, 14 August 1992, accused was placed in immediate pretrial confinement . . . Accused an experienced noncommissioned officer

Figure 3-62. Sample Trial Notes for Defense Counsel

with a spotless record . . . Confinement lasted 93 days . . . No "immediate" steps to try accused. Conclusion: a potential violation of Article 10, as well as a violation of Article 33 and the Sixth Amendment . . . An inexplicable, unconscionable deprivation of fundamental liberty without relief or trial . . . dismissal is required.

(2) Appropriate relief: None.

g. Pleas:

(1) To the specification: Guilty, except the words "and with intent to remain away therefrom permanently," "in desertion," and "he was apprehended." To the excepted words, "not guilty."

(2) To the charge: Not guilty, but guilty of a violation of Art. 86.

h. Prosecution witnesses: Refer to section below.

i. Motion for finding of not guilty: None.

j. Opening statement: The accused, by his pleas in this case, admits that he was absent without authority from his unit at Ft. Blank, MO. Hence, the only disputed question in this case is whether the accused intended to remain absent permanently

Figure 3-62. Sample Trial Notes for Defense Counsel

the only disputed question in this case is whether the accused intended to remain absent permanently from his unit. The defense will show that this was not his intent. In fact, a contrary intent will be shown by the testimony of accused, his wife, and the stipulated testimony of his father-in-law. Concerning the admitted offense of AWOL, the defense will show, for the consideration of the court, the existence of extenuating and mitigating circumstances.

k. Evidence:

(1) Cross-examination of Peter Jones: That the accused was a good and reliable worker; that accused told him several times of his need for money to meet medical and hospital expenses.

(2) Offer in evidence, as Defense Exhibit A, a written stipulation of expected testimony of Mr. John Johnson, Toyson, MO.

(3) Mrs. Irma Arnold of Mankato, MO, the wife of accused, will testify as follows: Wife of Peter C. Arnold . . . resided with her father in Toyson . . . husband in Army at Ft. Blank . . . husband only able to come home one weekend each month . . . married 8 years . . . has 3 children . . . she became very ill on 15 May 90 . . . 20 May 90 she became worse . . . taken to hospital . . . emergency operation . . . on 3 Jun 90 husband

Figure 3-62. Sample Trial Notes for Defense Counsel

weeks . . . after return from hospital it was necessary to have help at home . . . care for her, children, father . . . husband said he was AWOL . . . accused worried about his status . . . said many time that he would return to his unit as soon as he paid bills . . . planned to return after payday 1 June 1992.

(4) Accused, SGT Peter C. Arnold, Co A, 20th Sig Bn, Ft. Blank, MO will testify as follows: He is the accused in the case . . . 4 Jun 90 went and asked one of the medical aidmen in battalion dispensary if wife could be cared for in station hospital, and the medical aidman told him the station hospital had no facilities for treatment of dependents, except those who lived on the post . . . previously had tried to get quarters on the post, but they were unavailable . . . asked unit commander for leave . . . not granted . . . was worried . . . on 20 May 90, wife's condition became worse . . . she was taken to hospital . . . again requested leave . . . no success . . . could only get one weekend pass each month . . . left Ft. Blank on pass on 2 June 1990 . . . went to Toyson intending to return to camp in time for morning formation on 4 June 1990 . . . found wife very ill . . . wife in hospital 8 weeks . . . expenses high . . . help needed for care of children and father-in-law . . . thought it necessary to get a job, stay home

Figure 3-62. Sample Trial Notes for Defense Counsel

expenses high . . . help needed for care of children and father-in-law . . . thought it necessary to get a job, stay home and save the cost of a maid at night . . . no intent to desert . . . intended to return when wife well . . . bills paid . . . hospital and doctor bills totaled $8000 . . . last of bills paid 1 May 92 . . . likes Army career . . . never told Pete Jones he wanted no part of the Army and would never return to it . . . told him that there are times when a person feels that he wants no part of the Army.

(5) Offer in evidence an oral stipulation as follows: On 21 May 90, an emergency operation was performed on Mrs. Irma Arnold, the wife of the accused in this case; that Mrs. Arnold was in a civilian hospital for 8 weeks after the operation and required a special nurse for 4 weeks of this time; that the hospital bill was $6000 and the doctor bill was $2000; that these bills have been paid by the accused at the rate of approximately $750 per month, the last payment on the hospital bill having been made on 1 May 92. The expenses incident to the illness and hospitalization of Mrs. Arnold were not covered by the Dependent Medical Care Act (10 U.S.C. 1071-1087). (TC agreed to stipulate 20 July 1992.)

Figure 3-62. Sample Trial Notes for Defense Counsel

1. Argument: Before the court properly can find an accused guilty of a charge of desertion, the prosecution must show beyond a reasonable doubt that the accused intended to absent himself permanently from his unit. What does the evidence show in this case? There is prosecution testimony by the shop foreman, Peter Jones, to the effect that Arnold told him he was AWOL from his unit at Ft. Blank, MO, and that he wanted no part of the Army and would never return. Arnold has denied making this statement. In support of his contention that he at all times intended to return to his unit, accused has testified as to his intent to return and has introduced to the court the corroborating testimony of his wife and, by stipulation, the corroborating testimony of his father-in-law. The court will recall that these corroborating witnesses both stated that on numerous occasions accused discussed his problems with them and clearly indicated that as soon as the family was out of debt he would return to his unit. The uncontradicted defense evidence shows the accused made regular monthly payments on the indebtedness and had paid his medical bills in full by the first of May. The expected time of his return was thus based upon the happening of a certain event--the payment of his bills. In fact, according to the testimony of the defense witnesses, the accused, having accomplished his purpose in accordance with his plans, was preparing to return to Ft. Blank on 1 Jun 92. Accused has admitted that he went AWOL. He now realizes that this was wrong; however, his action was motivated solely by a genuine and worthy concern for the welfare of his wife and family. The court has heard the uncontroverted evidence of the defense concerning the serious and lengthy illness of Mrs. Arnold and may properly take these extenuating matters into consideration. Note also that the accused is a good worker.

Figure 3-62. Sample Trial Notes for Defense Counsel

m. Instructions (to be attached as separate Enclosures): Defense's proposed instruction in the case of United States v. Arnold, Co A, 20th Sig Bn:

You are instructed that the accused's plea of guilty of the lesser included offense of absence without leave will warrant a finding of guilty of that offense without further proof, but that a plea of guilty of absence without leave is not itself a sufficient basis for a conviction of desertion. The court is instructed that no inference of an intent to remain absent permanently arises from any admission involved in the plea of guilty to the lesser included offense of absence without leave, and to warrant a conviction of desertion the evidence must establish this intent beyond reasonable doubt.

n. Matters in mitigation.

(1) Accused will testify as follows: "Served from 19 Aug 1986 to 21 July 1989 with honorable discharge . . . tank mechanic . . . SPC in Jun 84 . . . good conduct medal . . . never court-martialed . . . reenlisted in July 89 . . . sergeant in Aug 1989.

(2) Offer the following evidence from the accused's personnel file: Letter of Commendation from company commander for outstanding performance during recent field exercises . . . copy of order awarding accused the good conduct medal . . . copies of most recent Enlisted Efficiency Reports reflecting outstanding performance of duties.

Figure 3-62. Sample Trial Notes for Defense Counsel

(3) Accused's First Sergeant will testify as follows: "Known accused since he was first assigned to unit in July 1989 . . . accused has served as tank mechanic and acting platoon sergeant . . . performance of duties has always been outstanding . . . was aware of accused's family problems . . . feels accused made a mistake but has learned his lesson and would not repeat his misconduct if given a second chance . . . would like to have accused back in unit even after court-martial."

(4) Argument as to sentence: Prior spotless record . . . his misconduct was caused by temporary disregard of possible consequences when he was faced with overwhelming difficulties . . . no reason to believe accused requires confinement to assure his rehabilitation to perform honorable and valuable service . . . if confinement or punitive discharge is imposed, it will result in severe punishment of a man for taking care of his family; it will punish his family more than it will punish the accused . . . recommend that any punishment imposed not extend to confinement or punitive discharge.

United States	)	
	)	DEFENSE BRIEF
v.	)	
	)	
NICHOLAS R. SMITH	)	MOTION TO SUPPRESS
SPC, U.S. Army	)	
Accused	)	

I. ALLEGATION OF ERROR:

The accused, SPC Nicholas R. Smith, through detailed defense counsel, moves this court to suppress the written statement allegedly made by the accused on 16 September 1992, on the grounds that it was involuntary.

II. FACTS:

On 16 September 1992, the accused was taken to the office of the Fort Blank Drug Suppression Team where he was placed under apprehension by SA Black in connection with a drug transaction that the accused allegedly participated in on 13 August 1992. SA Black very hurriedly read the accused his Article 31, UCMJ, and Miranda rights using DA Form 3881. After reading the rights, but before securing a waiver, SA Black explained to the accused that his options were to "Pound sand and wait to see him in court, just say nothing, or admit that he had made a mistake and now try to help the police suppress the drug problem." SA Black then told the accused to initial several places on the DA 3881 and sign. SPC Smith is a native of Panama and has Spanish

Figure 3-63. Sample Legal Brief

as his native tongue. When SPC Smith is placed in a stressful situation, his comprehension of English is reduced dramatically.

SA Black began to interrogate the accused concerning the events of 13 August 92; he asked the accused a series of questions concerning the evening in question. SPC Smith repeatedly denied that he had any knowledge that the purpose of the venture was to purchase cocaine. After the denials, SA Black badgered the accused by continually repeating the same questions and became visibly angry when the accused continued to deny having knowledge of the cocaine transaction. These actions led the accused to believe that he would not be allowed to leave the CID office until he confessed. At this point, SPC Smith replied, "OK if that's what you want me to say, I will say it." SA Black then typed the confession and SPC Smith signed it.

III. ISSUES:

A. Whether the accused was properly advised of his Article 31, UCMJ, and Miranda rights, and did he validly waive those rights?

B. Whether the conduct of SA White resulted in a coerced confession by the accused?

IV. ARGUMENT:

A. Military Rule of Evidence 305 requires that prior to any custodial interrogation, a soldier be warned that he has the right to remain silent, that any

Figure 3-63. Sample Legal Brief

statements made may be used against him in a court-martial, and that he has the right to consult with counsel. The rule further requires that after receiving the applicable warnings, the soldier can waive these rights and make a statement, provided the waiver is made freely, knowingly, and intelligently. Mil. R. Evid. 305 is based on Article 31 of the UCMJ and the well known United States Supreme Court case of Miranda v. Arizona, 384 U.S. 436 (1966).

The Miranda opinion is quite explicit in its requirement that interrogators make an accused aware of his or her rights. After discussing the inherent compelling pressure that is always present during custodial interrogation, the court states that:

> In order to combat these pressures and permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively appraised of his rights, and the exercise of those rights must be fully honored. . . . At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent." Miranda, 384 U.S. at 719-20.

The court further states, in discussing the requirement that an accused be warned that anything he says can be used in court, that:

Figure 3-63. Sample Legal Brief

> It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Miranda, 384 U.S. at 721.

Finally, the court states that:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retain an appointed counsel. Miranda, 384 U.S. at 724.

This case is very similar factually to United States v. Molinary-Rivera, 13 M.J. 975 (A.C.M.R. 1982). In that case, the Army Court of Military Review suppressed the confession of a Spanish speaking soldier, ruling that the government failed to sustain its burden of proving that the accused knowingly and voluntarily waived his rights to remain silent and to the assistance of counsel in view of the fact that the accused was deficient in English comprehension, and his difficulties with the English language were compounded by the interviewer's incorrect explanation of his rights. Miranda stands for the proposition that custodial interrogation is an inherently coercive situation for an individual to be in, and the evidence in his case will indicate that SPC Smith's understanding of English was negligible when placed in a stressful situation. SA Black compounded this problem by hurriedly reading the accused his rights

Figure 3-63. Sample Legal Brief

and by elaborating on his options in the manner he did, e.g., "Pound sand . . .," etc. The defense maintains that SA Black's actions in this case do not satisfy the "heavy burden" standard imposed on the government, and the accused did not knowingly and intelligently waive his rights to self-incrimination and counsel.

B. Military Rule of Evidence 304 basically establishes that any confession or admission of an accused must be suppressed if the statement is obtained through the use of coercion, unlawful influence, or unlawful inducement. Judgments on this issue are drawn from the totality of the circumstances of a particular situation, to include the background and character of the individual being questioned. United States v. Jones, 6 M.J. 770 (A.C.M.R. 1978). SA Black's actions as described in the facts clearly coerced SPC Smith into confessing. His act of repeatedly asking the same question and his angry responses to SPC Smith's denials led the accused quite understandably to feel that he would not be allowed to leave the CID office if he did not comply with SA Black. This is particularly true in light of the inadequate rights advisement rendered to the accused.

The defense maintains that this confession should be suppressed as totally involuntary.

JOSE G. ESCALERA
CPT, JA
Defense Counsel

Figure 3-63. Sample Legal Brief

CHECKLIST FOR INSTRUCTIONS*

I. Prior to Findings

A. Preliminary Remarks.

1. Initial Instructions to the Court (Page 2-43, Update Memo 11)..... ( )

2. Other General Introductory Explanations..... ( )

a. Joint Offenders (Paragraph 7-2)..... ( )

b. _____..... ( )

B. Elements of Offenses Charged (para ____; para ____; para ____)..... ( )

CH/SP_____ LIO_____ ( )

CH/SP_____ LIO_____ ( )

CH/SP_____ LIO_____ ( )

1. Terms having special legal significance/ connotation (para____; para____; para____)..... ( )

2. Law of Principals (Paragraph 7-1)..... ( )

C. Other Lesser Included Offenses (para____; para____) ( ) (Including definition of terms having special legal connotation)

D. Special and Other Defenses.

1. Self-Defense (Paragraph 5-2)..... ( )

2. Defense of Another (Paragraph 5-3)..... ( )

3. Accident (Paragraph 5-4, Update Memo 7)..... ( )

4. Duress or Coercion (Paragraph 5-5)..... ( )

5. Entrapment (Paragraph 5-6)..... ( )

6. Agency (Paragraph 5-7)..... ( )

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*The above format appears as Appendix A, DA Pam 27-9, Military Judge's Benchbook. All paragraph references are to that pamphlet and to the U.S. Army Trial Judiciary Benchbook Update Memos 1 through 13 (7 Dec. 1992-23 Nov. 1994) prepared by the Office of the Chief Trial Judge, U.S. Army Trial Judiciary, Nassif Building, 5611 Columbia Pike, Falls Church, Virginia 22041-5013.

Figure 3-64. Sample Format for Instructions Checklist

7. Obedience to Orders (Paragraph 5-8)..... ( )
8. Physical Impossibility or Inability (Paragraph 5-9)..... ( )
9. Financial and Other Inability (Paragraph 5-10). ( )
10. Ignorance or Mistake of Fact of Law (Paragraph 5-11)..... ( )
11. Voluntary Intoxication (Paragraph 5-12)..... ( )
12. Alibi (Paragraph 5-13)..... ( )
13. Character Evidence (Paragraph 5-14)..... ( )
14. Voluntary Abandonment (Paragraph 5-15, Update Memo 7)..... ( )
15. Parental Discipline (Paragraph 5-16, Update Memo 8)..... ( )
16. Evidence Negating Mens Rea (Paragraph 5-17, Update Memo 9)..... ( )
17. Self-Help Under a Claim of Right (Paragraph 5-18, Update Memo 13)..... ( )
18. Mental Responsibility at Time of Offense (Paragraph 6-3, 6-4, Update Memo 9)..... ( )
19. Partial Mental Responsibility (Paragraph 6-5, Update Memo 9)..... ( )
20. Personality (Character or Behavior) Disorders (Paragraph 6-6, Update Memo 9)..... ( )
21. Other..... ( )

E. Evidentiary and Other Matters
1. Pretrial Statements (Chapter 4)..... ( )
2. Law of Principals (Paragraph 7-1)..... ( )
3. Joint Offenders (Paragraph 7-2)..... ( )
4. Circumstantial Evidence (Paragraph 7-3, Update Memo 1)..... ( )
a. Proof of intent by circumstantial evidence (Paragraph 7-3, Update Memo 1)..... ( )

Figure 3-64. Sample Format for Instructions Checklist

b. Proof of knowledge by circumstantial evidence (Paragraph 7-3, Update Memo 1).. ( )

5. Stipulations (Paragraph 7-4)..... ( )
6. Depositions (Paragraph 7-5)..... ( )
7. Judicial Notice (Paragraph 7-6)..... ( )
8. Credibility of Witness (Paragraph 7-7)..... ( )
9. Interracial Identification (Paragraph 7-7.1).. ( )
10. Character Evidence (Paragraph 7-8)..... ( )
11. Expert Testimony (Paragraph 7-9, Update Memo 10)..... ( )
12. Accomplice Testimony (Paragraph 7-10)..... ( )
13. Prior Statements by Witness (Paragraph 7-11).. ( )
14. Accused's Failure to Testify (Paragraph 7-12). ( )
15. Other Offenses or Acts of Misconduct by Accused (Paragraph 7-13)..... ( )
16. Past Sexual Behavior of Nonconsensual Sex Victim (Paragraph 7-14)..... ( )
17. Variance--Findings by Exceptions and Substitutions (Paragraph 7-15)..... ( )
18. Value, Damage or Amount (Paragraph 7-16)..... ( )
19. Spill-Over (Paragraph 7-17, Update Memo 8).... ( )
20. Have You Heard Impeachment Questions (Paragraph 7-18, Update Memo 8)..... ( )
21. Grant of Immunity (Paragraph 7-19, Update Memo 10)..... ( )

F. Instructions on Findings.

1. Prefatory Instructions (Page 2-63, Update Memo 11)..... ( )
2. Other Appropriate Instruction (Page 2-67, Update Memo 11)..... ( )
3. Procedural Instructions on Findings (Page 2-72, Update Memo 11)..... ( )

Figure 3-64. Sample Format for Instructions Checklist

II. Sentencing.

A. Instructions on Sentence (Page 2-86, Update Memo 11)..... ( )

B. Other Instructions on Sentence (Page 2-97, Update Memo 11) ..... ( )

1. Summary of Evidence in Extenuation Mitigation _____..... ( )

2. Accused's Failure to Testify/Failure to Testify Under Oath..... ( )

3. Effect of Guilty Plea..... ( )

4. Mendacity..... ( )

5. Argument for Specific Sentence..... ( )

6. Other..... ( )

D. Concluding Instructions (Page 2-101, Update Memo 11)..... ( )

Notes/Remarks:

Figure 3-64. Sample Format for Instructions Checklist

3-11. Special Findings

Under Art. 51(d), UCMJ, and R.C.M. 918(b), counsel before courts-martial may request that the trial judge make special findings of fact. Special findings may be requested only as to matters of fact reasonably in issue regarding an offense and need be made only as to offenses of which the accused was found guilty. Special findings may be requested only in trials by court-martial composed of military judge alone. This provision of military law is derived from Rule 23(c) of the Federal Rules of Criminal Procedure.

A request for special findings is a tactical decision to be made by counsel. Special findings can help the defense on appeal by uncovering errors in a judge's understanding of the law and its application to the facts of a case. Counsel for the government, on the other hand, can protect the record by requesting special findings to show that the judge decided the case correctly.

The following is an example of special findings on the merits as they might appear in a special or general court-martial. Note that R.C.M. 918(b) specifies that the military judge may require counsel to present proposed special findings. Whether this obligation is mandatory or not remains unclear. See United States v. Falin, 43 C.M.R. 702 (A.C.M.R. 1971); United States v. Hussey, 1 M.J. 804 (A.F.C.M.R. 1976)); United States v. Gerard, 11 M.J. 440 (C.M.A. 1981); United States v. Pratcher, 14 M.J. 819 (A.C.M.R. 1982).

Sample findings appear below (Figure 3-65) containing both general and special findings.

UNITED STATES	)	
	)	
v.	)	Headquarters, III Corps, Fort Hood
	)	
JEAN BIRDBATH	)	SPECIAL AND GENERAL FINDINGS
SGT, US Army	)	
234-56-7890	)	
Co A, 2d Bn, 2d Inf	)	

On 7 January 1990, charges were preferred against the accused, Sergeant Jean Birdbath, 234-56-7890, alleging desertion on or about 15 August 1986 from his organization, to wit: Company A, 2d Battalion, 2d Infantry, located at Fort Hood Texas, until he was apprehended on or about 28 December 1989 in violation of Article 85, UCMJ.

On 15 January 1990, the accused was served with a copy of the charges, which were referred to trial by general court-martial by the Commanding General, III Corps, on 12 January 1990. Thereafter, the accused, after consultation with counsel and knowing the identity of the military judge, requested in writing under Article 16(1)(B), UCMJ, that he be tried by a court composed only of a military judge.

On 15 February 1990, the accused, having appeared with counsel, entered a plea of not guilty to desertion but guilty to the lesser included offense of absence without leave in violation of Article 86, UCMJ.

Figure 3-65. Sample Special and General Findings

The issues raised by said pleading were duly heard before this court on 16 February 1990 and evidence received from the government and the accused.

This court decides and finds as follows:

SPECIAL FINDINGS

1. The accused, Sergeant Jean Birdbath, at all the times herein mentioned was and now is a member of the United States Army.

2. The accused, Sergeant Jean Birdbath, did on 15 August 1986, absent himself without proper authority from his organization, to wit: Company A, 2d Battalion, 2d Infantry, located at Fort Hood, Texas.

3. The accused, Sergeant Jean Birdbath, intended at the time of absenting himself, to remain away permanently from his organization.

4. The accused, Sergeant Jean Birdbath, remained so absent until 28 December 1989, when he was apprehended at San Francisco, California.

5. The testimony of Sergeant Richard Roe, a witness for the defense, was unworthy of belief. Sergeant Roe, a friend of the accused, stated that the accused told him he intended to return to his unit after a short absence. Sergeant Roe's answers were given in a halting, hesitant, and evasive manner. His friendship for the accused, his demeanor on the stand, and

Figure 3-65. Sample Special and General Findings

unlawful absence; that he accepted permanent civilian employment; and that he expressed dissatisfaction with military service.

7. The court is convinced beyond a reasonable doubt that the accused intended to remain away permanently from his unit at the time he absented himself therefrom without authority.

GENERAL FINDINGS

The court finds beyond a reasonable doubt that the accused is guilty as stated when the general findings were announced during the trial.

Dated: 28 February 1990

_____

WENDELL G. EISENHOWER
COL, JA
Military Judge

Figure 3-65. Sample Special and General Findings

3-12. Essential Findings

Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record. R.C.M. 905(d); see also Mil. R. Evid. 304(d)(4), 321(f), and 311(d)(4). Essential findings are generally requested by counsel for the same reasons that special findings are requested. See the discussion above on special findings.

Section IV
Post-Referral Administration

3-13. Notice Formats

The following sample letters and formats are illustrative of ways counsel can document administrative communications and formalize liaison between the prosecution and the defense. It will be necessary for counsel to adapt them for local use and to tailor them to the facts of their particular case.

DEPARTMENT OF THE ARMY
Headquarters, 7th Infantry Division
Fort Ord, California 93491

AEUO-SJA [DATE]

MEMORANDUM FOR Commander, 1st Transportation Battalion, Fort Ord, CA 93941-5000

SUBJECT: Request for Trial Preparation by the Command

1. Trial in the case of the United States v. Private John T. Smith, 383d Transportation Company, 1st Transportation Battalion, Fort Ord, California, has been scheduled for 14 July 1990 in Building 818, Fort Ord, California.

2. Private Smith's defense counsel is Captain Dan K. Smoot (Phone 234-7407 or 7387). Captain Jack P. Anderson has been designated trial counsel (234-7685 or 6898).

3. It is requested that the following individuals, all prosecution witnesses, attend the trial:

CPT Samuel N. Sly	383d Trans. Co.
1SG Francis P. Rose	383d Trans. Co.
SSG Floyd A. Brown	383d Trans. Co.

4. As of this date, no request for witnesses has been received from the defense counsel. If and when such a request is received, your organization will be immediately notified of the individuals desired.

5. All witnesses and the accused should arrive at this office, Building 819, NLT 0800 hours, 14 July 1990. The trial can be expected to last one day. The witnesses are essential to the trial of the case; therefore, trial counsel should be notified immediately of any factors which might delay or prevent the attendance of any witnesses.

6. The members of the court appointed under Court-Martial Convening Order Number 10, your Headquarters, dated 29 February 1990, should arrive at this office NLT 0930 hours, 14 July 1990, for the trial. (copy attached).

Figure 3-66. Sample Request for Trial Preparation by the Command

7. All participants to the trial, including the accused, should appear in Class A uniform. A responsible NCO should be designated escort for the accused. If Private Smith is in pretrial confinement, he should be removed from the confinement facility sufficiently in advance of trial in order to assure his attendance on time and in proper uniform. In this regard the commander must notify the stockade of the pending release no later than 1600 hours on the day prior to release/trial in order that they may process the accused. This notification should be in writing but can be telephonic in exceptional cases.

KEVIN E. MCSHANE
Major, JA
Trial Counsel

CF:
Commander, 383d Trans Co, 1st Trans Bn

Figure 3-66. Sample Request for Trial Preparation by the Command

ATZH-JA [DATE]

MEMORANDUM FOR Cdr, _____

SUBJECT: Court-Martial Case Witness(es) (Notice of Trial)

(1. _____, a member of your unit is a witness in the court-martial case of United States v. _____.)

(1. The following members of your unit are witnesses in the court-martial case of United States v. _____:

_____

_____

2. The witness(es) should arrive at the General Court-Martial Facility, Building 33401, NLT _____ hours on _____ and should be seated in the witnesses' waiting area until called as a witness.

3. The witness(es) should be in _____ uniform and should wear the correct insignia of rank and a proper name tag.

4. If for any reason (this) (any) witness cannot be present at the time above stated, please contact the undersigned personally in advance at 4361 or 3079.

Captain, JA
[Trial Counsel][Defense Counsel]

Figure 3-67. Sample Notice of Trial to Witnesses' Unit Commander

ATZH-JA [DATE]

MEMORANDUM FOR Cdr, _____

SUBJECT: United States v. _____
(Notice of Trial Date)

1. The trial by court-martial of the above named member of your unit will be held on _____.

2. The accused at trial must be in _____ uniform; must wear the correct insignia of rank and any awards, decorations, or ribbons which the soldier is authorized or otherwise entitled to wear; and must wear the correct name tag.

3. An escort must be designated and provided by the unit commander to accompany the accused (see enclosed instructions), including those accused who are in pretrial confinement.

4. The accused and escort should report to (person to report to), Building 32402, NLT _____ hours, _____. If for any reason the accused cannot be present at that time, please contact the undersigned personally in advance at 4361 or 3079.

Encl

Captain, JA
Trial Counsel

Figure 3-68. Sample Notice of Trial to Accused's Unit Commander

ATZH-IA [DATE]

MEMORANDUM FOR Defense Counsel

SUBJECT: United States v. _____
(Notification of Proposed Trial Date)

1. The prosecution is prepared to proceed with trial in the above noted case on _____.

2. Mandatory R.C.M. 701 and Mil. R. Evid. disclosures are attached.

3. The prosecution suggests _____ as an appropriate date for an R.C.M. 802 pretrial conference.

4. Request that you notify the Trial Counsel and the Military Judge as soon as possible as to the anticipated plea, defense motions, the names and addresses of witnesses for the defense, and any documentary or physical evidence requested by the defense.

Encl

Captain, JA
Trial Counsel

CF:
Military Judge

Figure 3-69. Sample Notice of Trial to Defense Counsel

ATZH-TDS 1st End writer/typist/phone

DEFENSE COUNSEL, (ADDRESS) (DATE)

FOR TRIAL COUNSEL, (ADDRESS)

1. Receipt of your memorandum dated _____ is acknowledged.

2. The defense will (be ready) (not be ready) on the above scheduled trial date. (The defense requests a delay in the trial until _____. The delay is requested because _____.) The defense (does) (does not) agree with the suggested pretrial conference date.

Captain, JA
Defense Counsel

Figure 3-70. Sample Response to Notice of Trial

ATZH-JA [DATE]

MEMORANDUM FOR Post Confinement Facility

SUBJECT: Court-Martial Proceeding

1. The following individual is an accused in a court-martial: _____.

2. Have the accused dressed in _____ uniform and ready for pickup by his or her unit at _____ hours, _____, 19___.

3. This is for the accused's court-martial.

Captain, JA
Trial Counsel

Figure 3-71. Sample Notice of Trial to Confinement Facility

ATZH-JA [DATE]

MEMORANDUM FOR Personnel Escorting Accused

SUBJECT: Instructions for Escorts

1. An escort will be designated by the unit commander for any accused scheduled to be tried by court-martial. A witness will not be the escort. The soldier ordered by the unit commander to escort the accused to and from trial and to ensure the accused's presence during the trial by court-martial will be required to read and follow the instructions herein.

2. Soldiers assigned as escorts will be required to wear _____ _____ _____.

3. Escorts will ensure that the accused reaches the building as instructed by his or her commander NLT the designated time.

4. Escorts will function as bailiffs during the court-martial proceedings. That duty will consist of the following:

a. Occupying the seat nearest the door in the last row inside the courtroom;

b. Opening the door and summoning the witnesses from the witness waiting area immediately after the witness is called by the Trial or Defense Counsel ("The Prosecution (Defense) calls as its first (next) witness: _____.");

c. Answering the telephone in the witnesses' waiting area should it ring;

d. Additional instructions as required by the Trial Counsel or Military Judge.

5. Escorts will not carry weapons unless expressly authorized by the trial counsel or military judge.

Figure 3-72. Sample Trial Notice to Escorts

6. If the escort has any questions prior to or during trial, he or she should direct these to the trial counsel prior to or after trial or during a recess.

Captain, JA
Trial Counsel

Figure 3-72. Sample Trial Notice to Escorts

AZBS-JA [DATE]

MEMORANDUM FOR Commander, _____

SUBJECT: Trial Date and Witnesses, U.S. v. _____

1. Due to changes in the case schedule at this installation, the trial of the subject accused has been rescheduled for _____ 199X, at _____.

2. In addition to the witnesses previously requested by this office in the above-captioned case, it is hereby requested that the following individuals also appear at the trial:

_____
_____
_____

3. The above individuals, as well as those requested previously, should report to _____ in Building _____, NLT _____ hours, _____ 199X, for the trial. The _____ uniform should be worn.

4. Since the above individuals are necessary to the trial of this case, it is requested that this office (ATTN: _____) be notified immediately of any factors which might prevent or delay the attendance of any witnesses. Phone: _____.

Captain, JA
Trial Counsel

Figure 3-73. Sample Request for Additional Witnesses and Rescheduling of a Trial Date

SUBPOENA

The President of the United States, to Michael P. Terry
(Name and Title of Person being Subpoenaed).

You are hereby summoned and required to appear on the 25th day of October, 19 9X, at nine o'clock A.M., at Building 1509 Ft Carson, Colorado *(Place of Proceeding)*, (before _____ *(Name and Title of Deposition Officer)* designated to take your deposition) (a general court-martial of the United States) (a court of inquiry), appointed by a convening order of the Commanding General, Ft Carson, CO *(Identification of Convening Order or Convening Authority)*, dated 3 September 19 9X, to testify as a witness in the matter of United States v. PFC Thomas Doss *(Name of Case)* (and bring with you _____ *(Specific Identification of Documents or Other Evidence)*).

Failure to appear and testify is punishable by a fine of not more than $500 or imprisonment for a period not more than six months, or both. 10 U.S.C. § 847. Failure to appear may also result in your being taken into custody and brought before the court-martial (_____)under a Warrant of Attachment (DD Form 454). Manual for Courts-Martial R.C.M. 703(e)(2)(G).

Bring this subpoena with you and do not depart from the proceeding without proper permission.

Subscribed at Fort Carson, Colorado this 10th day of September 19 9X

Daniel C. Frost
(Signature (See R.C.M. 703(e)(2)(C))

DANIEL C. FROST, CPT, US ARMY, Trial Counsel

The witness is requested to sign one copy of this subpoena and to return the signed copy to the person serving the subpoena.

I hereby accept service of the above subpoena.

_____
Signature of Witness

NOTE: If the witness does not sign, complete the following:

Personally appeared before me, the undersigned authority, SFC John C. Clay, who, being first duly sworn according to law, deposes and says that at Colorado Springs, CO, on 12 September 19 9X, he personally delivered to Michael P. Terry in person a duplicate of this subpoena.

SFC
Grade

John C. Clay
Signature

Subscribed and sworn to before me at Fort Carson, Colorado, this 12th day of September 19 9X.

MAJ
Grade

US Army, Chief of Military Justice
Official Status

Glenda E. Batts
Signature

DD FORM 84 AUG 453 Figure 3-74 EDITION OF OCT 69 IS OBSOLETE.

☆ GPO : 1984 O - 421-646 (17036)

WARRANT OF ATTACHMENT

General Court-Martial of the United States

Fort Carson, Colorado

UNITED STATES)
v.)
)
PFC Thomas Doss)
)
_____)

The President of the United States, to the United States Marshal, Colorado Springs, Colorado
(United States marshal or such other person as may be directed,

_____:

RCM 703(e)(2)(G)(iv), MCM, 1984)

WHEREAS, Mr. Michael P. Terry, of Colorado Springs, Colorado, was on the 12th day of September, 19 9X, at Colorado Springs, Colorado, duly subpoenaed to appear and attend at Building 1509, Fort Carson, Colorado, on the 25th day of October, 19 9X, at nine o'clock a.m., before a general court-martial duly convened by a convening order of the Commander, Ft Carson, CO, dated 3 September, 19 9X, to testify on the part of the prosecution in the above-entitled case; and whereas he/she has willfully neglected or refused (to appear and attend)[1] (to produce documentary evidence which he/she was legally subpoenaed to produce) before said general court-martial, as by said subpoena required, although sufficient time has elapsed for that purpose; and whereas he/she has offered no valid excuse for his/her failure to appear; and whereas he/she is a necessary and material witness in behalf of the prosecution in the above-entitled case:

[1] Line out inappropriate words.

DD Form 454, OCT 84 Figure 3-75 Previous editions are obsolete.

NOW, THEREFORE, by virtue of the power vested in me, the undersigned, as military judge [1] of said general court-martial, by Article 46 of the Uniform Code of Military Justice (10 USC 846), you are hereby commanded and empowered to apprehend and attach the said Mr. Michael P. Terry wherever he/she may be found within the United States, its Territories and possessions, and forthwith bring him/her before the said general court-martial at Fort Carson, Colorado to testify as required by said subpoena.

C. Everett Bagnall

C. EVERETT BAGNALL, COL, US ARMY

Military judge of said [1] GENERAL COURT-MARTIAL

Dated at Fort Carson, Colorado

25 October , 19 9X

[1] *If there is no military judge, line out the words "military judge" and enter "convening authority."*

DD Form 454 Reverse, OCT 84

☆ GPO : 1984 O - 461-033 (27028)

Figure 3-75 (continued)

UNITED STATES	)	Fort Blank, Missouri
	)	
v.	)	
	)	DISCLOSURE OF SECTION III
William Greene	)	EVIDENCE
Private (E-1), US Army	)	
139-36-5941	)	
(Unit)	)	

Pursuant to Section III of the Military Rules of Evidence, the defense is hereby notified:

A. Rule 304(d)(1). There are (no) relevant statements, oral or written, by the accused in this case, presently known to the trial counsel (and they are appended hereto as appendix _____).

B. Rule 311(d)(1). There is (no) evidence seized from the person or property of the accused or believed to be owned by the accused that the prosecution intends to offer into evidence against the accused at trial [(and it is described with particularity in appendix _____) (and described as follows _____
_____
_____
_____)].

C. Rule 321(d)(1). There is (no) evidence of a prior identification of the accused at a lineup or other identification process which the prosecution intends to offer against the accused at trial [(and it is described with particularity in appendix _____) (and described as follows _____
_____)].

A copy of this disclosure has been provided to the military judge.

2 July 199X

JOHN J. JONES
Captain, JA
Trial Counsel

Figure 3-76a. Disclosure of Section III Evidence

UNITED STATES	)	Fort Blank, Missouri
	)	
v.	)	
	)	NOTICE OF MOTIONS TO SUPPRESS
William Greene	)	SECTION III EVIDENCE
Private (E-1), US Army	)	
139-36-5941	)	
(Unit)	)	

A. In response to the notice of disclosure that there is Section III evidence in this case which may be used at trial, notice is hereby given to the trial counsel of a motion to suppress (none of the notified evidence).

(_____

_____

_____).

B. The specific grounds for suppression are:

(_____

_____

_____).

A copy of this notice has been provided to the military judge.

4 July 199X

SIDNEY S. GREENFIELD
Captain, JA
Defense Counsel

Figure 3-76b. Notice of Motion to Suppress Section III Evidence

UNITED STATES)
)
v.)
)
_____)

(Location)

MOTIONS & HEARINGS CHECKLIST

	Yes	No	Legal Argument Only	Evidentiary Hearing
Jurisdiction	( )	( )	( )	( )
Speedy Trial	( )	( )	( )	( )
Article 32 Investigation	( )	( )	( )	( )
SJA Advice	( )	( )	( )	( )
Former Punishment	( )	( )	( )	( )
Former Jeopardy	( )	( )	( )	( )
Severance	( )	( )	( )	( )
Change of Venue	( )	( )	( )	( )
Denial of Counsel	( )	( )	( )	( )
Denial of Subpoena	( )	( )	( )	( )
Statute of Limitations	( )	( )	( )	( )
Failure to State Offense	( )	( )	( )	( )
Multiplicity	( )	( )	( )	( )
Suppression:	( )	( )	( )	( )
Pretrial Statement	( )	( )	( )	( )
Search and Seizure	( )	( )	( )	( )
Sanity	( )	( )	( )	( )
Discovery	( )	( )	( )	( )
Other (specify):				
_____	( )	( )	( )	( )
_____	( )	( )	( )	( )

Estimated Time Required for Hearing: _____

Suggested Date: _____

Figure 3-77. Motions and Hearings Checklist

AETE-TDS [DATE]

MEMORANDUM FOR Trial Counsel, Office of the Staff Judge Advocate, Hanau Branch Office, APO New York 09165

SUBJECT: Defense Trial Notice - United States v. _____

1. The defense in the case of U.S. v. _____ requests that the following defense witnesses be produced for trial:

2. This request for witnesses is made as an informal request pursuant to normal practice in this jurisdiction. If additional information under R.C.M. 703, MCM, 1984, is required before the witness will be produced please notify me immediately and I will submit a formal request. If any witness is no longer at the above listed unit/ location, please notify me and I will attempt to discover the witness's new address. If for any reason a witness will not be produced, I request that your decision not to produce be forwarded through the Staff Judge Advocate to the Convening Authority for review of your decision.

3. The defense anticipates the following plea will be entered at trial:

_____

_____

4. The defense anticipates a forum selection of:

_____

Figure 3-78. Defense Trial Notice to Trial Counsel

5. The defense intends to raise the following motions:

_____

_____

_____

_____

_____

_____

Captain, JA
Defense Counsel

Figure 3-78. Defense Trial Notice to Trial Counsel

DEPARTMENT OF THE ARMY
HEADQUARTERS, CAMP JONES
CAMP JONES, TEXAS

Order to Testify

1. As an officer empowered to convene general courts-martial, and pursuant to R.C.M. 704, I hereby make the following findings.

a. Private E-1 John Doe possesses information relevant to the pending trial by general court-martial of Private E-1 James Roe, and the presentation of his testimony at this trial is necessary to the public interest.

b. On 1 October 199X, Private E-1 John Doe made a sworn statement to an agent of the United States Army Criminal Investigation Command implicating himself in criminal conduct at Camp Jones, Texas, on or about 30 September 199X.

c. It is likely that Private E-1 John Doe would refuse to testify on the basis of his privilege against self-incrimination if subpoenaed to appear as a witness.

d. Counsel for Private E-1 John Doe has informed the Trial Counsel in the above mentioned case that she would advise Private E-1 John Doe to adhere to his right to remain silent under the Fifth Amendment to the United States Constitution should he be subpoenaed to testify at any court-martial concerning events at Camp Jones.

2. On the basis of these facts, pursuant to R.C.M. 704, I hereby order Private E-1 John Doe to appear and testify before the general court-martial now convened for the trial of Private E-1 James Roe. As provided in R.C.M. 704, no testimony or other information given by Private E-1 John Doe pursuant to this order (or any information directly or indirectly derived from such testimony or other information) shall be used against him in a criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.

LARRY C. MCCALL
Major General, USA
Commanding

Figure 3-79. Order to Testify--Grant of Immunity--Military Witness

DEPARTMENT OF THE ARMY
HEADQUARTERS, CAMP JONES
CAMP JONES, TEXAS

Order to Testify

1. As an officer empowered to convene general courts-martial, and pursuant to the provisions of sections 6002 and 6004, Title 18, United States Code, I hereby make the following findings.

a. John Doe possesses information relevant to the pending trial by general court-martial of Private James Roe, and the presentation of his testimony at this trial is necessary to the public interest.

b. On 1 October 199X, John Doe made a sworn statement to an agent of the United States Army Criminal Investigation Command implicating himself in criminal conduct at Camp Jones, Texas, on or about 30 September 199X.

c. It is likely that John Doe would refuse to testify on the basis of his privilege against self-incrimination if subpoenaed to appear as a witness.

d. Counsel for John Doe has informed the trial counsel for the above mentioned case that she would advise John Doe to adhere to his right to remain silent under the Fifth Amendment to the United States Constitution should he be subpoenaed to testify at any court-martial concerning events at Camp Jones.

2. On the basis of these facts, pursuant to section 6004, Title 18, United States Code, I hereby order John Doe to appear and testify before the general court-martial now convened for the trial of Private E-1 James Roe. As provided in section 6002, Title 18, United States Code, no testimony or other information given by John Doe pursuant to this order (or any information directly or indirectly derived from such testimony or other information) shall be used against him in a criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with this order.

Figure 3-80. Order to Testify--Grant of Immunity--Civilian Witnesses

3. This order is issued with the approval of the Attorney General of the United States as set forth in Exhibit 1 annexed hereto.

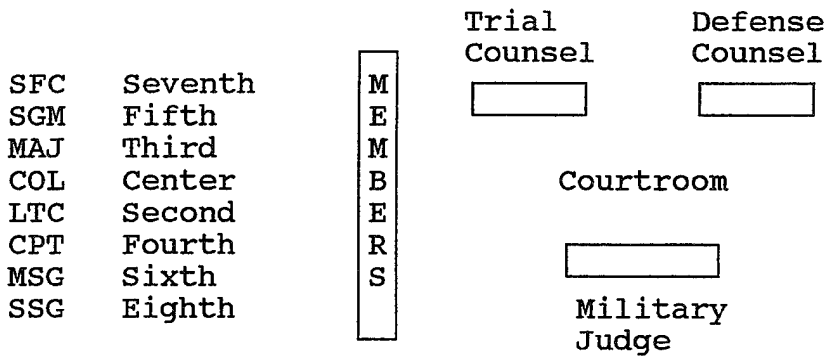
Encl

JOHN SMITH
Major General, USA
Commanding

Figure 3-80. Order to Testify--Grant of Immunity--Civilian Witnesses

3-14. Trial Documents

a. Court-Martial Member Seating Chart.



Seating should be with the president of the court in the center and the remainder of the members seated alternatively to the right and left of the president according to rank. Members should be properly arranged prior to entrance into court to allow them to walk into court in the order that they will fill the available seats (furthest seat in the "jury box" filled first).

Figure 3-81. Court-Martial Member Seating Chart

b. Plea Worksheet.

Your Honor, the accused _____(Rank)_____(Name)_____ pleads as follows:

1. To (all) (the) Specification(s) and (the) Charge(s): (Not Guilty) (Guilty).

2. To Specification _____, of (the) Charge (_____): (Not Guilty) (Guilty). To Specification _____, of (the) Charge (_____): (Not Guilty) (Guilty). To (the) Charge: (_____): (Guilty) (Not Guilty).

3. To the Specification: Guilty except the word(s): "_____(and "_____") To the excepted word(s): Not Guilty. To the Charge: (Guilty) (Not Guilty but Guilty of a violation of Article _____).

4. To the Specification: Guilty except the word(s) "_____" (and "_____)" substituting therefor, (respectively), the word(s): "_____" (and "_____"); to the excepted word(s): Not Guilty; to the substituted word(s): Guilty. To the Charge: (Guilty) (Not Guilty, but Guilty of a violation of Article _____).

5. To the Specification: Not Guilty but Guilty of the named lesser included offense of _____, a violation of

Figure 3-82a. Plea Worksheet Format

Article _____.* To the Charge: (Guilty) (Not Guilty, but Guilty of a violation of Article ___).

c. Findings and Sentence Worksheets.

---

*When the plea is to a named lesser included offense without the use of exceptions and substitutions the defense counsel should provide a written revised specification accurately reflecting the plea for inclusion in the record of trial as an appellate exhibit. See R.C.M. 910(a)(1), discussion.

Figure 3-82a. Plea Worksheet Format

Findings Worksheet

UNITED STATES)
)
V.) FINDINGS WORKSHEET*
)
_____)

Note: After the members have reached their findings the President shall strike all inapplicable language and announce the findings by reading the remaining language. (Do not read the bold-faced print).

_____ this court-martial finds you:
(Name and rank of accused)

I. IN CASE OF COMPLETE ACQUITTAL, ANNOUNCE:

Of all Charges and Specifications: Not Guilty.

II. IN CASE OF CONVICTION OF ALL CHARGES AND SPECIFICATIONS, ANNOUNCE:

Of all Charges and Specifications: Guilty.

III. IN CASE OF CONVICTION OF SOME BUT NOT ALL CHARGES AND SPECIFICATIONS, ANNOUNCE:

Of the Specification of Charge I: (Not Guilty) (Guilty)
Of Charge I: (Not Guilty) (Guilty)

Of Specification 1 of Charge II: (Not Guilty) (Guilty)
Of Specification 2 of Charge II: (Not Guilty) (Guilty)
Of Charge II: (Not Guilty) (Guilty)

Of Specification 1 of Charge III: (Not Guilty) (Guilty)
Of Specification 2 of Charge III: (Not Guilty) (Guilty)
Of Specification 3 of Charge III: (Not Guilty) (Guilty)
Of Charge III: (Not Guilty) (Guilty)

---

*For an example of a findings worksheet in a capital case, see Appendix D, DA Pam 27-9, Military Judge's Benchbook.

Figure 3-82b. Sample Findings Worksheet

(NOTE TO PREPARER: Each lesser included offense should be listed on a separate page in the following format and all blanks should be filled in so the members need only read the language without making any modifications:)

IV. LESSER INCLUDED OFFENSE FOR SPECIFICATION __ OF CHARGE __.

If you find the accused guilty of the lesser included offense of (insert name of the lesser included offense) in (the) Specification (__) of (the) Charge (__), read the following language instead of reading the language in Section III regarding (the) Specification (__) of (the) Charge (__):

Of (the) Specification (__) of (the) Charge (__): Not Guilty, but Guilty of (insert name of the lesser included offense) (in violation of Article(insert applicable number)).
(Of (the) Charge (__), (as to (the) Specification (__):) Not Guilty, but Guilty of a violation of Article (insert applicable number)).

Figure 3-82b. Sample Findings Worksheet

(NOTE TO PREPARER: The last page of the findings worksheet should be as follows:)

V. FORMAT FOR MAKING MINOR MODIFICATIONS TO A SPECIFICATION.

Cross out/fill in the blanks in the sample format below as appropriate and read the applicable language instead of the language in Section III on page 1 which corresponds to the specification. (If more space is required for making minor modifications to specification(s), use the language in the applicable sample below and write out the findings as to the other specification(s) on this page or on additional pages.)

A. Sample Findings by Exceptions:

Of (the) Specification (__) of (the) Charge (__):
Guilty, except the word(s)
"_____
_____
_____
_____,"
Of the excepted word(s): Not Guilty.

B. Sample Findings by Exceptions and Substitutions:

Of (the) Specification (__) of (the) Charge (__):
Guilty, except the word(s):
"_____
_____
_____
_____," and substituting therefore the word(s): "_____
_____
_____
_____,"
Of the excepted word(s): Not Guilty.
Of the substituted word(s): Guilty.

Figure 3-82b. Sample Findings Worksheet

United States)
)
v.) SENTENCE WORKSHEET
)
_____)

Note: After the court has reached a sentence, the President shall circle the punishment(s) selected and accomplish any necessary filling in or crossing out within the punishment(s) selected.

_____this court-martial sentences you:

1. To no punishment

REPRIMAND

2. To be reprimanded.

REDUCTION OF ENLISTED PERSONNEL

3. To be reduced to the grade of _____

FORFEITURES, FINE

4. To forfeit $_____pay per month for ___months.

5. To pay the United States a fine of $_____, [and to be (further) confined until the fine is paid, but not more than ___(days)(months)(in addition to the ___(days)(months) also herein adjudged.)]

RESTRICTION

6. To be restricted to the limits of _____for ____(days)(months)

HARD LABOR

7. To perform hard labor without confinement for ____(days)(months)

CONFINEMENT

8. To be confined for ___(days)(months)

Figure 3-82c. Sample Special Court-Martial Sentence Worksheet

PUNITIVE DISCHARGE*

9. To be discharged from the service with a bad conduct discharge.

Note: A court-martial has no authority to suspend a sentence or any part of a sentence.

APPELLATE EXHIBIT___

*Include this portion only for special courts-martial authorized to adjudge a bad-conduct discharge.

Figure 3-82c. Sample Special Court-Martial Sentence Worksheet

United States)
)
v.) SENTENCE WORKSHEET*
)
_____)

Note: After the court has reached a sentence, the President shall circle the punishment(s) selected and accomplish any necessary filling in or crossing out within the punishment(s) selected.

_____this court-martial sentences you:

1. To no punishment.

REPRIMAND

2. To be reprimanded.

REDUCTION OF ENLISTED PERSONNEL

3. To be reduced to the grade of _____

FORFEITURES, FINE

4. To forfeit $_____ pay per month for _____(months) (years).

5. To forfeit all pay and allowances.

6. To pay the United States a fine of $_____, [and to be (further) confined until the fine is paid, but not more than _____(days)(months)(years)(in addition to the ___(days)(months)(years) also herein adjudged.)]

RESTRICTION

7. To be restricted to the limits of _____for ___(days)(months).

---

*For an example of a sentence worksheet in a capital case, see Appendix C, DA Pam 27-9, Military Judge's Benchbook.

Figure 3-82d. Sample General Court-Martial Sentence Worksheet

HARD LABOR

8. To perform hard labor without confinement for ___(days)(months).

CONFINEMENT

9. To be confined for ___(days)(months)(years)(the length of your natural life).

PUNITIVE DISCHARGE

10. To be discharged from the service with a bad conduct discharge (Enlisted Personnel Only).

11. To be dishonorably discharged from the service (Enlisted Personnel and Warrant Officers Only).

12. To be dismissed from the service (Commissioned Officers and Cadets Only).

Note: A court-martial has no authority to suspend a sentence or any part of a sentence.

APPELLATE EXHIBIT_____

Figure 3-82d. Sample General Court-Martial Sentence Worksheet

a. Stipulations.

Stipulations can be made either orally or in writing. The following are examples of written stipulations. Note that a stipulation of fact may be given to the court-martial members to consider during deliberation while stipulations of expected testimony are only read into evidence. See R.C.M. 811(f).

(1) Stipulation of fact.

UNITED STATES	)	(Location)
	)	
v.	)	
	)	
DAVID A. JONES SPC, US Army 266-88-3926 B Co, 81st Maint Bn	)	STIPULATION OF FACT

It is hereby agreed by and between trial counsel and defense counsel, with the express consent of the accused, that the following facts are true and susceptible of proof:

On or about 9 August 199X, SPC Jones received 34 yellow uncoated tablets, 4 white uncoated tablets, and a piece of brown vegetable matter. These items were sent to Frankfurt Criminal Investigation Laboratory, were examined and then returned to the Darmstadt Field Office of Criminal Investigation. The tablets and vegetable matter that remained after chemical analysis were given to trial counsel, Captain Donald A. Offline, on 19 September 199X. At no time were any of the above mentioned items altered, substituted, or in any way tampered with except as was necessary for testing at the Frankfurt Criminal Investigation Laboratory. That material which remained after testing is the same material given SPC Jones and now in the possession of trial counsel.

DONALD A. OFFLINE CPT, JA Trial Counsel	DAVID A. JONES SPC, US Army Accused	PAMELA N. WOODS CPT, JA Defense Counsel

Figure 3-83a. Sample Stipulation of Fact

(2) Stipulation of expected testimony.

United States	)	(Location)
	)	
v.	)	
	)	
DAVID A. JONES	)	STIPULATION OF
SPC, US Army	)	EXPECTED TESTIMONY
266-88-3926	)	
B Co, 81st Maint Bn	)	

It is hereby stipulated by and between trial counsel and defense counsel, with the express consent of the accused, that if LTC James Mayden, United States Army, Europe, Registrar of Motor Vehicles, was called before the court as a witness and placed under oath, he would testify as follows:

I am the Registrar of Motor Vehicles for the United States Army, Europe. One of the duties of that position is operation of a central record system for the registration of privately-owned firearms. The duty is established by USAREUR Regulation 190-6, paragraph 5(c), dated 4 August 1979.

In my capacity as custodian of the registrations of privately-owned firearms I have searched all my records, and there is no record in existence that:

A. David A. Jones, SPC, B Co, 81st Maint Bn, APO 09086, ever registered any firearm with the Registrar of Motor Vehicles, USAREUR.

Figure 3-83b. Sample Stipulation of Expected Testimony

B. There is a pistol with a serial number of 54615.

All firearms are registered both by name of the registrant and by the serial number.

DONALD A. OFFLINE	DAVID A. JONES	PAMELA N. WOODS
CPT, JA	SPC, US Army	CPT, JA
Trial Counsel	Accused	Defense Counsel

Figure 3-83b. Sample Stipulation of Expected Testimony

(3) Stipulated chronology of events.

When the issue of speedy trial is raised by the defense, many trial counsel will offer a stipulated chronology in an attempt to meet the government's burden of proof. A stipulated chronology should not be used blindly as the sole means of meeting the government's burden. Moreover, the chronology, to be effective, must demonstrate that the factual matters stated in the chronology actually hampered the government's preparation for trial. An example of a stipulated chronology may be found in United States v. Ramsey, 28 MJ 370, 374 (C.M.A. 1989).

3-15. **Forum Selection**

Court-Member Questionnaire.

_____
Date Prepared

1. Full Name: _____
   Last First Middle
2. Rank: _____
3. Date of Rank: _____
4. (For Officers Only) Source of Commission: _____
5. Branch of Service: _____
6. Have you served in another armed force?
   _____ Yes _____ No
   a. Armed Force: _____
   b. Dates: _____
   c. Rank: _____
7. Years of active duty: _____
8. (For Officers Only) Have you had any enlisted service?
   _____ Yes _____ No
   a. Number of years of enlisted service: _____
   b. Highest grade attained: _____
9. Present duty station (do not abbreviate) and office telephone:

_____

_____

10. Present job assignment (be specific):

_____

_____

11. Have you attended college (undergraduate):
    ____ Yes ____ No If "yes," indicate the following:

Figure 3-84. Court-Member Questionnaire

	1ST COLLEGE	2ND COLLEGE
a. Name of college:		
b. Location:		
c. Years of attendance:		
d. Major field:		
e. Minor field:		
f. Degree awarded:		

12. Have you attended post-graduate school?

____ Yes ____ No If "yes," indicate the following:

	1ST UNIVERSITY	2ND UNIVERSITY
a. Name of University:		
b. Location:		
c. Years attended:		
d. Field of study:		
e. Degree awarded:		

13. Have you taken any law courses? (Include Army schools):

____ Yes ____ No If "yes" indicate the following:

	SCHOOL ATTENDED	DATE ATTENDED	COURSE TOPIC	LENGTH OF COURSE
a.				
b.				
c.				

14. Summary of military career (last 10 years).

FROM/TO	COMMAND	SPECIFIC ASSIGNMENT

(CONTINUE ON LAST PAGE IF NECESSARY)

Figure 3-84. Court-Member Questionnaire

15. Have you, or any close relative or close friend, ever been involved in any of the following areas?

____ Yes ____ No If "yes," check applicable areas and explain briefly

_____ Crime Prevention (Policeman, sheriff, detective, etc.)

_____ Medicine (Doctor, Nurse, Pharmacist, etc.)

_____ Mental Health (Psychiatrist, Psychologist, etc.)

_____ Law (Judge, attorney, law student, etc.)

_____

_____

_____

(CONTINUE ON LAST PAGE IF NECESSARY)

16. Have you ever served as a legal officer?

____ Yes ____ No If "yes," indicate as follows:

DATE	COMMAND	DESCRIPTION OF DUTIES
_____	_____	_____
_____	_____	_____

17. Have you (as Commanding Officer) ever convened:

	NUMBER	YEAR(S)
a. Summary Court-Martial:		
____ Yes ____ No	_____	_____
b. Special Court-Martial:		
____ Yes ____ No	_____	_____
c. Article 32 Pretrial Investigation:		
____ Yes ____ No	_____	_____
d. Special (BCD) Court-Martial:		
____ Yes ____ No	_____	_____
e. General Court-Martial:		
____ Yes ____ No	_____	_____

Figure 3-84. Court-Member Questionnaire

18. Have you ever served as a Trial Counsel or Defense Counsel?

____ Yes ____ No If "yes," indicate as follows:

Approximate Number of Times Served: _____

Dates (Years Only) Served: _____

19. Have you ever served as a summary court-martial officer?

____ Yes ____ No If "yes," indicate as follows:

a. Number of Times: _____

b. Dates (Years Only): _____

20. Have you ever imposed nonjudicial punishment under Article 15?

____ Yes ____ No

21. Have you been appointed as a member of a general or special court-martial within the last 12 months?

____ Yes ____ No If "yes," indicate as follows:

	How Many Times	Date (Year Only)
SPCM:	_____	_____
GCM:	_____	_____

22. Have you had any experience as a member of a general or special court-martial prior to the past 12 months?

____ Yes ____ No If "yes," indicate as follows:

	How Many Times	Date (Year Only)
SPCM:	_____	_____
GCM:	_____	_____

23. Have you ever served as a juror in a civilian trial? (either State or Federal.)

____ Yes ____ No If "yes," indicate for each:

YEAR	CIVIL OR CRIMINAL CASE	STATE OR FEDERAL COURT
____	_____	_____
____	_____	_____

Figure 3-84. Court-Member Questionnaire

24. Have you ever been a witness at a court-martial?

____ Yes ____ No

25. Is there anything in your background or experience that might affect your ability to serve as a court member?

____ Yes ____ No If "yes," explain briefly.

_____

_____

SIGNATURE

Figure 3-84. Court-Member Questionnaire

R.C.M. 921 sets forth procedures for the number of votes required for conviction of an accused. In all but exceptional situations, the concurrence of two-thirds of the members present is required. If, in computing the number of votes required, a fraction results, the fraction is counted as one. Example: If seven members are present to vote, five must agree upon a finding of guilty.

Defense counsel may wish to peremptorily challenge so as to be heard before a panel whose numbers result in the best advantage for his or her client.

For those who desire to play "The Numbers Game," here is a concise chart which should be helpful. It indicates the number of members composing the court, number of votes required for a finding of guilt or innocence, the best ratio for either side, and indications of when to challenge.

No. of Members	5	6	7	8	9	10	11	12	13
For guilty	4	4	5	6	6	7	8	8	9
For not guilty	2	3	3	3	4	4	4	5	5
Best for Pros.		*	X	X	*	X	X	*	X
Best for Defense		X		*	X		*	X	

KEY: Best ratio*
When to challenge X

AXBS-TDS [DATE]

MEMORANDUM FOR Commander, 1st Brigade, Fort Riley, Kansas 66442

SUBJECT: Request for Enlisted Members in the Case of United States v. _____.

I hereby request that the Convening Authority detail at least one-third enlisted members to my Special Court-Martial.

PV2, US Army
Accused

CPT, JA
Defense Counsel

Figure 3-85. Request for Enlisted Members

REQUEST FOR TRIAL BEFORE MILITARY JUDGE ALONE
(Article 16, UCMJ)

UNITED STATES
v.

SPECIALIST THOMAS FORD

1. ACCUSED

I have been informed that Colonel David W. Hernandez is the military judge detailed to the court-martial to which the charges and specifications pending against me have been referred for trial. After consulting with my defense counsel, I hereby request that the court be composed of the military judge alone. I make this request with full knowledge of my right to be tried by a court-martial composed of (commissioned)[1] officers (and, if I so request, enlisted personnel).[2]

a. TYPED NAME (Last, First, Middle Initial)	b. RANK	c. SIGNATURE	d. DATE SIGNED
Ford, Thomas	SPC	Thomas Ford	16 Aug 9X

2. DEFENSE COUNSEL

Prior to the signing of the foregoing request, I fully advised the above accused of his/her right to trial before a court-martial composed of (commissioned)[1] officers (and of his/her right to have such court consist of at least one-third enlisted members not of his/her unit, upon his/her request).[2]

a. TYPED NAME (Last, First, Middle Initial)	b. RANK	c. SIGNATURE	d. DATE SIGNED
Williams, Cynthia P.	CPT	Cynthia P. Williams	16 Aug. 9X

3. TRIAL COUNSEL

Argument is (not) requested.

a. TYPED NAME (Last, First, Middle Initial)	b. RANK	c. SIGNATURE	d. DATE SIGNED
Pierce, Richard B.	CPT	Richard B. Pierce	20 Aug 9X

4. MILITARY JUDGE

The foregoing request for trial before me alone is hereby: (X one) [X] APPROVED [ ] DISAPPROVED[3]

a. TYPED NAME (Last, First, Middle Initial)	b. RANK	c. SIGNATURE	d. DATE SIGNED
Hernandez, David W.	COL	David W. Hernandez	25 August 9X

[1] *Delete when the accused is a warrant officer or enlisted member.*
[2] *Delete when the accused is a commissioned officer or warrant officer.*
[3] *When request is disapproved, the basis for denial must be put on the record. (See MCM, 1984 RCM 903(c)).*

DD Form 1722, OCT 84 Figure 3-86 *Replaces edition of 1 OCT 69 which may be used until supply is exhausted*

3-16. Alternate Dispositions

a. Pretrial Agreements.

Pretrial agreements must, by their very nature, be tailored to the facts of the individual case. Those in normal use, however, generally tend to be either simple or complex with the complex forms presenting the likelier possibility of appellate litigation. The following format in Figure 3-87 should not present appellate problems.

UNITED STATES	)	Fort Blank, Missouri
	)	
v.	)	
	)	OFFER TO PLEAD GUILTY
CRAIG E. SMITH	)	
Private (E-2), US Army	)	
123-45-6789	)	2 July 199X
(Unit)		

I, Private (E-2) Craig E. Smith, the accused in a general court-martial now pending, having had an opportunity to examine the charges preferred against me, the investigating officer's report, and all statements and documents attached thereto, and after consulting with my defense counsel, Captain Victor R. Able, and being fully advised that I have a legal and moral right to plead not guilty, offer to plead as follows:

To the Specification of Charge I and Charge I: guilty;
To Specification 1 of Charge II: not guilty;
To Specification 2 of Charge II: guilty;
To Charge II: guilty

I offer to plead guilty to the Charges and to the Specifications as stated above provided that the convening authority will not approve any sentence in excess of the sentence attached hereto as Appendix I.

I agree to enter into a written stipulation with the trial counsel of the facts and circumstances surrounding the offense and further agree that this stipulation may be used to inform the members of the court or the military judge, if tried by him or her alone, of matters pertinent to an appropriate finding and/or sentence. If my plea is not accepted, this offer to stipulate is null and void.

I agree to request trial by military judge alone and to waive my right to trial before a panel of members.

I am satisfied with the defense counsel who has been detailed to defend me. He or she has advised me of the meaning and effect of my guilty plea, and I understand the meaning and effect thereof.

I understand that I may request to withdraw the plea of guilty at any time before the sentence is adjudged. I

Figure 3-87. Sample Pretrial Agreement

further understand that the Government may withdraw any time before I begin performance of promises contained herein, upon my failure to fulfill any material promise herein, when the military judge's inquiry discloses a disagreement as to any material terms of this agreement, or if findings are set aside due to an improvident plea or appellate review.

I further understand that this agreement will be automatically cancelled upon the happening of any of the following events:

1. Failure of agreement with the trial counsel on the contents of the stipulation of fact;

2. The withdrawal by either party from the agreement prior to trial;

3. My failure to request trial by military judge alone and to waive my right to trial before a panel of members.

4. The modification at any time of the agreed stipulation of fact without consent of trial counsel or myself;

5. The changing of my plea by anyone during the trial from guilty to not guilty; or,

6. The refusal of the military judge to accept my plea of guilty.

VICTOR R. ABLE
Captain, JA
Defense Counsel

CRAIG E. SMITH
Private (E-2), USA
Accused

The foregoing is (accepted)(not accepted).

_____
[Date]

JAMES E. RYDER
Major General, USA
Commanding

Figure 3-87. Sample Pretrial Agreement

UNITED STATES	)	Fort Blank, Missouri
	)	
v.	)	
	)	
WILLIE E. SMITH Private (E-2), US Army 139-36-5941 (Unit)	)	APPENDIX I

I, Private (E-1) Willie E. Smith, offer to plead guilty to the Charges and Specifications stated in the offer provided the convening authority will not approve any discharge in excess of a bad-conduct discharge, and will not approve any confinement in excess of confinement for eighteen months. The convening authority may approve any other lawful portion of the sentence, to include any fine.

VICTOR R. ABLE
Captain, JA
Defense Counsel

WILLIE E. SMITH
Private (E-2), USA
Accused

_____
[Date]

JAMES E. RYDER
Major General, USA
Commanding

Figure 3-87. Sample Pretrial Agreement (Sentence Limitation Requiring Disapproval of Portion of Sentence)

UNITED STATES	)	Fort Blank, Missouri
	)	
v.	)	
	)	
WILLIE E. SMITH Private (E-2), US Army 139-36-5941 (Unit)	)	APPENDIX I

I, Private (E-1) Willie E. Smith, offer to plead guilty to the Charges and Specifications stated in the offer provided the convening authority suspends any discharge in excess of a bad-conduct discharge, and suspends any confinement in excess of confinement for eighteen months. The convening authority may approve any lawful sentence. The suspensions mentioned above will be for a period of two years,* after which time the suspended part of the sentence will be remitted unless the suspension is sooner vacated. The suspensions mentioned above may be vacated, pursuant to R.C.M. 1108 and 1109, if the accused violates any punitive article of the code.

VICTOR R. ABLE
Captain, JA
Defense Counsel

WILLIE E. SMITH
Private (E-2), USA
Accused

_____
[Date]

JAMES E. RYDER
Major General, USA
Commanding

* A suspension at a non BCD SPCM may not exceed 9 months. A suspension at a BCD SPCM may not exceed one year. A suspension at a GCM may not exceed two years or any unexecuted portion of confinement (that portion of approved confinement unserved as of the date of action), whichever is longer. See para. 5-31, AR 27-10.

Figure 3-88. Request for Discharge in Lieu of Trial by Court-Martial.

Request for Discharge In Lieu of Trial by Court-Martial

Date Required by the Privacy Act of 1974
(5 U.S.C. 522a)

AUTHORITY: Section 301, Title 5, U.S.C. and Section 3012, Title 10, U.S.C.

PURPOSE: To be used by the commander exercising general court-martial jurisdiction over you to determine approval or disapproval of your request.

ROUTINE USES: Request, with appropriate documentation, including the decision of the discharge authority, will be filed in the MPRJ as permanent material and disposed of in accordance with AR 640-10, and may be used by other appropriate Federal agencies and State and local governmental activities where use of the information is compatible with the purpose for which the information was collected.

Submission of a request for discharge is voluntary. Failure to provide all or a portion of the requested information may result in your request being disapproved.

SUBJECT: Request for Discharge in Lieu of Trial by Court-Martial

TO:

1. I, _____ SSN _____, hereby voluntarily request discharge in lieu of trial by court-martial under AR 635-200, chapter 10. I understand that I may request discharge in lieu of trial by court-martial because of the following charge(s) which has (have) been preferred against me under the Uniform Code of Military Justice, each of which authorize(s) the imposition of bad-conduct or dishonorable discharge:

2. I am making this request of my own free will and have not been subjected to any coercion whatsoever by any person. I have been advised of the implications that are attached to it. By submitting this request for discharge, I acknowledge that I understand the elements of the offense(s) charged and am guilty of the charge(s) against me or of (a) lesser included offense(s) therein contained which also authorize(s) the imposition of a bad-conduct or dishonorable discharge. Moreover, I hereby state that under no circumstances do I desire

Figure 3-88. Request for Discharge in Lieu of Trial by Court-Martial.

further rehabilitation, for I have no desire to perform further military service.

3. Prior to completing this form, I have been afforded the opportunity to consult with appointed counsel for consultation (in addition, I have consulted with (military counsel of my own choice who was reasonably available) (civilian counsel retained at no expense to the Government)).[1] (Although I have received a lawful order to see consulting counsel, I persist willfully in my refusal to see him or her).[2] (I have consulted with counsel for consultation who has fully advised me of the nature of my rights under the Uniform Code of Military Justice[3] (the elements of the offense(s) with which I am charged, any relevant lesser included offense(s) thereto, and the facts which must be established by competent evidence beyond a reasonable doubt to sustain a finding of guilty; the possible defenses which appear to be available at this time; and the maximum permissible punishment if found guilty) (and of the legal effect and significance of my suspended discharge).) (Although he or she has furnished me legal advice, this decision is my own.) (I understand that, pursuant to a delegation of authority per paragraph 1-21l, my request for discharge in lieu of trial by court-martial may be approved by the commander exercising special court-martial convening authority (a lower level of approval than the general court-martial convening authority or higher authority) but the authority to disapprove a request for discharge in lieu of trial by court-martial may not be delegated.)[4]

4. I understand that, if my request for discharge is accepted, I may be discharged under conditions other than honorable. I have been advised and understand the possible effects of an Under Other Than Honorable Discharge and that, as a result of the issuance of such a discharge, I will be deprived of many or all Army benefits, that I may be ineligible for many or all benefits administered by the Veterans Administration, and that I may be deprived of my rights and benefits as a veteran under both Federal and State law. I also understand that I may expect to encounter substantial prejudice in civilian life because of an Under Other Than Honorable Discharge. I further understand that there is no automatic upgrading nor review by any government agency of a less than honorable discharge and that I must apply to the Army Discharge Review Board or the Army Board for Correction of Military Records if I wish review

Figure 3-88. Request for Discharge in Lieu of Trial by Court-Martial.

of my discharge. I realize that the act of consideration by either board does not imply that my discharge will be upgraded.

5. I understand that, once my request for discharge is submitted, it may be withdrawn only with consent of the commander exercising general court-martial authority, or without that commander's consent, in the event trial results in an acquittal or the sentence does not include a punitive discharge even though one could have been adjudged by the court. Further, I understand that if I depart absent without leave, this request may be processed and I may be discharged even though I am absent.

6. I have been advised that I may submit any statements I desire in my own behalf, which will accompany my request for discharge. Statements in my own behalf (are)(are not) submitted with this request.

7. I hereby acknowledge receipt of a copy of this request for discharge and of all enclosures submitted herewith.

[Date]

_____
(Signature of respondent)

Having been advised by me of (the basis for his contemplated trial by court-martial and the maximum permissible punishment authorized under the Uniform Code of Military Justice) (the significance of his or her suspended sentence to a bad conduct or dishonorable discharge); of the possible effects of an Under Other Than Honorable Discharge, if this request is approved; and of the procedures and rights available to him or her, _____ personally made the choice indicated in the foregoing request for discharge in lieu of trial by court-martial.

[Date]

_____
(Signature of counsel)

Figure 3-88. Request for Discharge in Lieu of Trial by Court-Martial.

[1] To be used when appropriate. Such counseling is not to be used in lieu of consultation with consulting counsel.

[2] To be used only when a soldier under military control refuses to obey an order to see consulting counsel. (See para 10-2c.)

[3] To be used in all cases when a soldier had consulted with consulting counsel.

[4] To be used when authority to approve a request for discharge in lieu of trial by court-martial has been delegated per paragraph 1-211.

Figure 3-88. Request for Discharge in Lieu of Trial by Court-Martial.

Section V
Post-Trial Functions

3-17. Trial Counsel Functions

a. The following pages contain forms commonly used by the trial counsel after trial.

M TAB TAB TAB TAB TAB TAB TAB

DEPARTMENT OF THE ARMY REPORT OF RESULT OF TRIAL

For use of this form, see AR 27-10; the proponent agency is TJAG

TO:

Commander
1st Infantry Division
Fort Riley, KS 66442

1. Notification under R.C.M. 1101 and AR 27-10, paragraph 5-20 is hereby given in the case of the United States v. Sergeant James Jones

2. Trial by General court-martial on 16 December 19 9X at Fort Riley, KS

convened by: CMCO Number 7 HQ, 1st Infantry Division, Fort Riley, KS 66442

3. Summary of offenses, pleas, and findings:

CH	ART UCMJ	SPEC	BRIEF DESCRIPTION OF OFFENSE(S)	PLEA	FINDING
I	86	1	AWOL (172 days)	NG	G
		2	AWOL (28 days)	NG	G

4. SENTENCE:

BCD, 8 months conf, TF, and reduction to E-1

5. Date sentence adjudged: 16 December 199X

6. Contents of pretrial agreement concerning sentence, if any: None.

7. Number of days of presentence confinement, if any: 1 December 199X through 16 December 199X, sixteen days.

8. Number of days of judge-ordered administrative credit for illegal presentence confinement or restriction found tantamount to confinement, if any:

None.

9. Total presentence confinement credit toward post-trail confinement: sixteen days.

10. Name(s) and SSN(s) of companion accused or co-accused, if any: None.

CF: Accused's Immediate Commander
Officer in Charge, Confinement Facility
Staff Judge Advocate

TYPED NAME — SIGNATURE

OTTO CONTROL

RANK — BRANCH OF SERVICE

Captain — Army

DA FORM 4430-R, MAY 87 EDITION OF OCT 85 IS OBSOLETE

Figure 3-89

CONFINEMENT ORDER

DATE: 24 Nov 19X

Prepare in duplicate. Original is retained by Confinement Officer; duplicate is returned to officer directing the confinement. The normal period for preferring court-martial charges following restraint of accused is 24 hours. *(As to who may direct confinement, see paragraph 21a, MCM 1951.)*

TO:	INSTALLATION
Confinement Officer	Fort Nassif, Virginia 23407

THE PERSON NAMED BELOW WILL BE CONFINED

LAST NAME - FIRST NAME - MIDDLE INITIAL	GRADE	SERVICE NUMBER/ SSAN	DEPARTMENT OF MILITARY SERVICE
WILLIAMS, MURRAY G.	E-2	101-97-7587	Army

ORGANIZATION
B Co, 55th Trans Bn
Fort Nassif, Virginia 23407

TYPE OF CONFINEMENT	OFFENSE(S) AND UCMJ ARTICLE(S) VIOLATED
[X] PRETRIAL [ ] RESULT OF COURT-MARTIAL	Robbery - Art. 122 Sodomy - Art. 125

TYPED OR PRINTED NAME, GRADE AND TITLE OF OFFICER ORDERING CONFINEMENT *(Or authorized representative)*	SIGNATURE OF OFFICER ORDERING CONFINEMENT *(Or authorized representative)*
WILL BOOKEM LTC, TC Commander, 55th Trans Bn	Will Booken

RECEIPT FOR PRISONER

THE PRISONER NAMED ABOVE WAS RECEIVED FOR CONFINEMENT AT:	HOUR	DATE
Installation Confinement Facility	1600	24 Nov 19 9X

TYPED OR PRINTED NAME AND GRADE OF CONFINEMENT OFFICER *(Or authorized representative)*	SIGNATURE OF CONFINEMENT OFFICER *(Or authorized representative)*
KEN HOLDEM CPT, MP	Ken Holden ORGANIZATION 55th MP Co Fort Nassif, Virginia 23407

DD FORM 1 MAY 66 497 REPLACES DD FORM 497, 1 SEP 63, WHICH IS OBSOLETE. ☆ U. S. GPO: 1980—310-981/8864

Figure 3-90

CERTIFICATE IN LIEU OF SUBPOENA

I hereby certify that, although not subpoenaed

_____(name)_____

_____(address)_____

_____

was requested to and did in fact appear at the trial by _____ Court-Martial in the case of the United States v. _____(name)_____, ___(SSN)___, _____(unit & location)_____ held at _____ on _____ 199X.

Captain, JA
Trial Counsel

(Note: The above certificate or one of the following documents must be submitted to the Finance Office along with the SF 1156 and SF 1157:

__A "Subpoena," or

__A "Request to Appear and Testify.")

Figure 3-91. Certificate in Lieu of Subpoena

Standard Form 1156
SEPTEMBER 1973
4 TREASURY FRM 2000
1156-104-01
EXCEPTION TO SF 1156
APPROVED BY NARS 5/8/70.

PUBLIC VOUCHER FOR FEES AND MILEAGE OF WITNESSES

Voucher No. 5

Schedule No.

Case No. GCM 3562

PAID BY

U.S. DEPARTMENT OF THE ARMY
(Department, Bureau, or Establishment)

The UNITED STATES, Dr.

To payees whose claims are attached hereto, for travel made, services rendered, and/or per diem in lieu of subsistence as witnesses for the United States before the

General Court-Martial Office of SJA
(Name of court or board)

at Fort Riley, Kansas Patton Hall
(Location)

during the period from 15 May 199X to 15 May 199X

in the case of Sergeant Robert Hilt, 123-45-6789 HQ, 1st Division

SUMMARY OF PAYMENTS

To 1 payee(s) listed on 1 sheet(s): Total amount of voucher, $ 51.00

I certify that this voucher, consisting of 1 *sheet(s), is correct and proper for payment in the amount of* $ 51.00

W. T. HOLLAND
(Authorized certifying officer)

15 May 199X
(Date)

CPT, JA, Trial Counsel
(Title)

ACCOUNTING CLASSIFICATION

Paid by check(s) or by cash, as noted on the attached sheets.

Figure 3-92

Standard Form 1157 (Rev. 4–80)
Department of the Treasury
I TFRM 4–2000
1157–107

CLAIMS FOR WITNESS ATTENDANCE FEES, TRAVEL, AND MISCELLANEOUS EXPENSES

Previous editions obsolete
NSN 7540-00-634-4347

PART I—ATTENDANCE CERTIFICATION

1. General Information

a. Witness Name Mr. James M. Bash
b. Witness Address
Street 1600 West Palm
City Topeka State KS Zip 12345
c. U.S. Citizen: Yes (XX) No ( ) Alien: Legal ( ) Illegal ( )

d. Case Name United States v. Hilt
e. Case Number GCM 3562
f. District or Location Fort Riley

2. Travel and Attendance Information

a. Dates of Travel From Residence to Case Location: From 15 May 9X To 15 May 9X
b. Dates of Travel From Case Location to Residence: From 15 May 9X To 15 May 9X
c. Dates of Attendance: From 15 May 9X To 15 May 9X

3. Certification

I certify that the witness named above attended in the case or matter indicated and is entitled to the statutory allowances for attendance and travel. In the proceedings before United States Magistrate where more than four witnesses were called, the Magistrate also certifies that the approval and certificate of the U.S. Attorney were first obtained.

Dan D. Bridgeford (Signature) CPT, JA, Trial Counsel (Title) 15 May 9X (Date)

PART II—WITNESS CLAIM FOR FEES AND ALLOWANCES

	Rate	No. of Days	Amount Claimed	Totals
1. Attendance Fees				
a. Fact, Pretrial Conference & Detained Witness		1	$	
Total Attendance Fees				$

	Rate	No. of Miles	Amount Claimed	
2. Mileage Allowance (Indicate type of privately owned vehicle: (auto) (motorcycle) (airplane)				
a. From Residence to Case Location (and Return)		90	$	
b. From Hotel/Motel to Court (or Court to Hotel/Motel)		0		
Total Mileage Allowance				$

	Rate	No. of Days	Amount Claimed	
3. Subsistence Per Diem Rate: _____ or HRGA Rate: _____ (HRGA: High Rate Geological Area)				
a. Meals		1	$	
b. Lodging				
Total Subsistence Allowance				$

	Amount Claimed	
4. Miscellaneous Allowances (See Item 8 Below)		
a. Common Carrier	$	
b. Parking Fees, Tolls, Taxi Fares		
Total Miscellaneous Allowances		$
5. Total Amount Claimed (Items 1–4, Part II)		$
6. Less Outstanding Check or Cash Advances		$
7. Net Amount Claimed by Witness		$

8. Use this space to itemize your expenses from Item 4, Part II above. Receipts are required for all common carrier and parking fees, and for all other single items in excess of $15.00.

Paid by Check No.
Paid by Cash $
(Signature of Payee)
(Date)

9. Witness Certification

I certify that the above data is correct and that payment has not been received, and that at the time of travel and attendance I (was) (was not) a U.S. Government employee and I (was) (was not) a citizen of the United States. (If not a citizen, present your Alien Registration Record with this form.) I (did) (did not) receive a Government Transportation Request to pay for my official travel.

James M. Bash (Signature) 15 May 9X (Date)

PART III—RESERVED FOR FINANCE OFFICE

1. Computation

a. Net Amount Claimed by Witness (From Item 7, Part II) $
b. Adjustments Due to Any Differences (Explain Differences)
c. Amount Authorized for Payment $
d. By _____ Title _____ Date _____

2. Accounting Classification Data _____

Figure 3-93

b. Sample Post-trial Recommendation.

The following is an example of a post-trial recommendation and addendum of the staff judge advocate, along with other associated paperwork.

JAGS-ADC (27-10e) 23 April 199X

MEMORANDUM FOR Commander, 13th Infantry Division, Fort Farm, MO 12345

SUBJECT: Post-Trial Recommendation of the Staff Judge Advocate - General Court-Martial Case of United States v. Orwell

1. This is my recommendation pursuant to Rule for Courts-Martial 1106 in the general court-martial case of Specialist Four James Orwell, U.S. Army, 123-45-6789, Headquarters and Headquarters Company, 13th Infantry Division, Fort Farm, MO 12345.

2. **SUMMARY OF THE ACCUSED'S SERVICE RECORD**:

a. Date and Term of Service: Enlisted 23 May 199X-1

b. Prior Service: None

c. Awards and Decorations: ASR, PRCHT BAD

d. Nonjudicial Punishment: None

e. Previous Convictions: None

3. **SUMMARY OF CHARGES, SPECIFICATIONS, PLEAS, AND FINDINGS**:

CH	ART	SPEC	GIST OF OFFENSE	PLEAS	FINDINGS
I	120		Rape	NG	G
II	134		Kidnapping	NG	G

4. **SENTENCE ADJUDGED**: The officer court-martial panel sentenced the accused to a dishonorable discharge, to be confined for 14 years, total forfeiture of all pay and allowances, and reduction to E-1.

5. **PRETRIAL RESTRAINT**: The accused was in pretrial confinement for 49 days prior to trial.

6. **POST-TRIAL MATTERS SUBMITTED BY THE ACCUSED**: The accused submitted a memorandum (enclosure 2) pursuant to Rule for Courts-Martial 1105(b)(1). You must consider this submission before

Figure 3-94. Sample Post-Trial Recommendation

taking action.[1] The accused alleges that testimony was improperly admitted in the presentencing proceedings and he asks that you reduce the severity of the sentence. I disagree. A proper foundation was laid for the rehabilitative potential testimony of the Company Commander. As a result, no corrective action is needed.[2]

7. **RECOMMENDATION OF THE STAFF JUDGE ADVOCATE**: I recommend that the sentence be approved and, except for that part extending to a dishonorable discharge, ordered executed.[3] A form of action designed to accomplish the foregoing is attached.

3 Encls
1. Record of Trial
2. Memo, 13th Div TDS, 22 May 9X
3. Proposed Action

AL S. BABYLON
LTC, JA
Staff Judge Advocate

---

[1] See United States v. Godreau, 31 M.J. 809 (A.F.C.M.R. 1990).

[2] If any timely defense submission raises "legal error," the SJA must respond as to the need for corrective action. If the defense raises legal error after being served with the post-trial recommendation, a supplemental recommendation will be necessary. See United States v. Hill, 27 M.J. 293 (C.M.A. 1988).

[3] Note, this post-trial recommendation must be served on both the accused and defense counsel. See R.C.M. 1106(f)(1).

Figure 3-94. Sample Post-Trial Recommendation

JAGS-ADC (27-10e) 28 May 199X

MEMORANDUM FOR Commander, 13th Infantry Division, Fort Farm, MO 12345

SUBJECT: Addendum to Post-Trial Recommendation of the Staff Judge Advocate, General Court-Martial Case of United States v. Orwell

1. This addendum is written to address allegations of error submitted by counsel for the accused in post-trial submissions and petitions for clemency submitted by the accused subsequent to my writing my post-trial recommendation. You must consider all defense submissions prior to taking action.

2. Defense counsel asserts in his response to my post-trial recommendation, per Rule for Courts-Martial 1106(f)(4), that the post-trial recommendation is erroneous, inadequate, and misleading because it fails to mention the awards and prior service that the accused allegedly garnered in Vietnam (enclosure 4). I disagree.

3. Prosecution exhibits 3 and 4, the accused's DA Form 2A and 2-1, were admitted into evidence without objection by the defense counsel. The accused's records do not indicate any prior service or any awards other than those already noted in my post-trial recommendation. However, the accused stated in an unsworn statement that he served in Vietnam and that he earned a number of awards.

4. The accused has submitted a petition for clemency with 16 statements attached (enclosure 5). The accused requests that you lessen the severity of the sentence. It is appropriate that you consider the petition for clemency and its 16 attached statements prior to taking action.

Figure 3-95. Sample Addendum to Post-Trial Recommendation

JAGS-ADC
SUBJECT: Addendum to Post-Trial Recommendation of the Staff Judge Advocate, General Court-Martial Case of United States v. Orwell

5. I have considered the allegations of error, the petition for clemency, and the statements submitted on the accused's behalf,[1] and no corrective action is necessary. I adhere to my original recommendation.[2]

5 Encls
1-3. nc
4. Memo, 13th Div TDS
23 May 9X
5. Ltr, SP4 Orwell
22 May 9X with 16
attached statements

AL S. BABYLON
LTC, JA
Staff Judge Advocate

---

[1] If a defense response is submitted, it should be listed as an enclosure to the supplemental recommendation or the convening authority should initial and date all defense submissions. See United States v. Craig, 28 M.J. 321 (C.M.A. 1989). This provides appellate courts with tangible proof that the convening authority considered these matters prior to taking action. See also United States v. Godreau, 31 M.J. 809 (A.F.C.M.R. 1990).

[2] Note, while R.C.M. 1106(f)(1) was amended to require service of the post-trial recommendation on both the accused and defense counsel, R.C.M. 1106(f)(7) was not amended similarly. The safest approach is to serve any addendum on both defense counsel and the accused. The staff judge advocate should use certificates of service. See United States v. McClelland, 25 M.J. 903 (A.C.M.R. 1988).

Figure 3-95. Sample Addendum to Post-Trial Recommendation

DEPARTMENT OF THE ARMY
Headquarters, VII Corps
Office of the Staff Judge Advocate
APO New York 09107

AETS-JA 17 April 199X

MEMORANDUM FOR Captain John Kirkpatrick, U.S. Army Trial Defense Service, APO New York 09157

SUBJECT: Service of the Staff Judge Advocate's Recommendation and Authenticated Copy of the Record of Trial in United States v. Anderson, 357-19-2468

1. In compliance with R.C.M. 1106(f), Manual for Courts-Martial, 1984, you are hereby served with an authenticated copy of the record of trial and a copy of the Staff Judge Advocate recommendation in the case of United States v. Anderson.

2. The record of trial and recommendation are furnished in order that you may correct or challenge any matter you believe erroneous, inaccurate, or misleading and to convey other comments you may decide to make.

3. Request you acknowledge receipt of this correspondence on the enclosed endorsement and submit any matter outlined above no later than COB, 28 April 199X. This correspondence and any matters you submit will become part of the record of trial. Your failure to take advantage of this opportunity by the above stated suspense will normally be deemed a waiver of any error in the recommendation. If additional time is required, a written request is necessary.

4. Due to the accused's confinement outside of the court-martial jurisdictional boundaries, the accused's copy of the authenticated record of trial and the Staff Judge Advocate recommendation are also forwarded for your action IAW R.C.M. 1104(b)(1)(c) and R.C.M. 1106(f)(1).

4 Encls
1. ROT for DC
2. ROT for Accused
3. Post-trial Review for DC
4. Post-trial Review for Accused

DONALD C. IACOCCA
MAJ, JA
Chief, Military Justice

Figure 3-96. Service of Post-Trial Recommendation and Record of Trial on Defense Counsel and the Accused

I certify that on this _____ day of April, 199X, two copies of this authenticated record of trial and the SJA's recommendation were delivered to CPT Kirkpatrick.

DONALD C. IACOCCA
MAJ, JA
Chief, Military Justice

Figure 3-96. Service of Post-Trial Recommendation and Record of Trial on Defense Counsel and the Accused

AETS-TDS 1st End

SSG Reyna/cch/AV 699-7403
17 April 199X

MEMORANDUM FOR Staff Judge Advocate, VII Corps, APO New York 09107

SUBJECT: Acknowledgment of Receipt of Post-Trial Recommendation and Record of Trial

Receipt of authenticated copy of the record of trial, a copy of the SJA's recommendation, and the accused's copy of the authenticated record of trial and SJA's recommendation is acknowledged this _____ day of April 199X.

JOHN P. KIRKPATRICK
CPT, JA
Defense Counsel

Figure 3-97. Acknowledgment of Receipt of Post-Trial Recommendation and Record of Trial

c. Prosecution Response to Submission of Defense Matters.

To indicate what, if any, response has been made by trial defense counsel, the SJA should list on the recommendation all enclosures or have the convening authority initial and date all documents. See United States v. Craig, 28 M.J. 321 (C.M.A. 1989). Note that if the defense raises legal errors in the timely defense submissions, the SJA must address those allegations. See United States v. Hill, 27 M.J. 293 (C.M.A. 1988).

3-18. Defense Counsel Functions

a. Filing An Extraordinary Writ. See Rule 27 (Petition for Extraordinary Relief, Writ Appeal Petition, Answer, and Reply) and Rule 28 (Form of Petition for Extraordinary Relief, Writ Appeal Petition, Answer, and Reply), United States Court of Appeals for the Armed Forces: Rules of Practice and Procedure, 38 M.J. LXXIII - CIX (effective July 1, 1983, as amended through March 31, 1994).

b. Exemplary Rehabilitation Certificate

Many prior service members hold general or other than honorable discharges. These same individuals, however, may have long records of good conduct in civilian life and are now finding it difficult to obtain meaningful employment because of the type of military discharge they received. An individual whose past three years of civilian conduct has been "exemplary" may apply for an "Exemplary Rehabilitation Certificate." This certificate will not alter the type of discharge or veteran's benefits. It will, however, entitle (if granted) the prior service person to special job counseling and job placement services. In order to apply for the "exemplary Rehabilitation Certificate," applicants must contact: US Department of Labor, Manpower Administration, Washington, DC 20210, ATTN: METR, telling that agency that they wish to apply for the "Exemplary Rehabilitation Certificate." Applicants must be sure to give their present mailing address. That agency will forward the necessary forms and directions.

c. Common Forms.

The following pages contain forms commonly used by the defense counsel after trial.

APPENDIX I

APPELLATE DEFENSE COUNSEL REPRESENTATION

TO: The Clerk of Court US Army Judiciary (JALS-CC) Nassif Building Falls Church, VA 22041	THRU: (Convening Authority)
TYPED NAME, GRADE, RANK, AND SSN OF ACCUSED	ORGANIZATION OF ACCUSED
DATE SENTENCE ADJUDGED	TYPE OF TRIAL (GCM) (BCD SPCM) (SPCM)

SECTION I

DESIRE OF ACCUSED AS TO APPELLATE DEFENSE COUNSEL REPRESENTATION

1. I have been advised by my military counsel, pursuant to the Uniform Code of Military Justice, Article 70, that if my case is referred to the United States Army Court of Military Review, I have the right to be represented before that Court of Military Review by Appellate Defense Counsel appointed by The Judge Advocate General of the Army, or by civilian counsel retained by me, or both. I understand that the United States Army Court of Military Review must review the trial transcript and the Judges of the Court must be satisfied beyond a reasonable doubt of my guilt based upon the evidence of record. I also understand that if the Court is convinced that my sentence as approved by the Convening Authority is unduly severe, that the Court has the authority to reduce the sentence accordingly but that under no circumstance may the Court increase the sentence as approved. I understand that my Appellate Defense Counsel's role at this stage of the proceedings would include a thorough examination of the record of trial and presenting to the Court of Military Review whatever facts and arguments that might affect the findings of guilty or the sentence as approved by the Convening Authority. I have been advised that if I waive my right to Appellate Defense Counsel, I will lose many of the benefits of close personal representation by a partisan advocate who would represent me in performing these functions.

2. I, _____, therefore:

( ) a. Desire to be represented before the Court of Military Review by Appellate Defense Counsel appointed by The Judge Advocate General of the Army. I understand that my appointed Appellate Defense Counsel will work in association with any civilian counsel retained by me as I have indicated below. I also understand that I may communicate with my appointed military Appellate Defense Counsel concerning legal and factual matters relating to my case as well as matters that concern a presentation on my behalf regarding clemency or sentence reduction. I understand that I may contact my Appellate Defense Counsel by writing to Defense Appellate Division, US Army Judiciary (JALS-DA), Department of the Army, 5611 Columbia Pike, Falls Church, Virginia 22041. I further understand that I have the right to communicate telephonically with my counsel.

( ) b. Intend to retain at my own expense civilian counsel, whose name and address is _____

( ) c. Have retained or have taken action to retain civilian counsel whose name and address is _____

( ) d. Intend to retain civilian counsel whose name and address will be furnished the Office of The Judge Advocate General of the Army.

( ) e. Do not desire to be represented by Appellate Defense Counsel before the Court of Military Review and hereby waive my right to such representation.

3. The following errors or other matters are urged as grounds for relief (initial after each):

_____

_____

_____

_____

_____

_____

_____

_____

_____

Figure 3-98. Appellate Defense Counsel Representation

SECTION I (CONT'D)

4. If I am placed on excess leave (either voluntarily or involuntarily) pending appellate action on my case, I can be contacted or a message may be left for me at the following address:

(TYPED OR PRINTED ADDRESS AND TELEPHONE NUMBER TO INCLUDE AREA CODE AND ZIP)

(Name) (In care of)

(Street address)

(City/State/Zip Code)

(Area Code/Tele. No.)

DATE	SIGNATURE OF ACCUSED

ACCUSED'D LAST NAME AND SSN

SECTION II

CERTIFICATION OF ADVICE TO ACCUSED OF APPELLATE RIGHTS

1. Reference is made to the record of trial by (general) (special) court-martial in the case of above named accused.

2. I hereby certify that I have advised the above named accused of his/her appellate rights prior to his/her having completed Section I, as follows:

a. That, in the event his/her case is reviewed by a Court of Military Review he/she may, within 10 days after the convening authority's action, forward a request to be represented by appellate defense counsel before the Court of Military Review and that failure to forward a request for such representation within 10 days may be regarded as a waiver of his/her right to appellate counsel before the Court of Military Review if such board had taken its final action in the case prior to the receipt of such request.

b. That, in the event his/her case is referred to a Court of Military Review under Article 69 of the Uniform Code of Military Justice, he/she has a right to be represented by appellate defense counsel before the Court of Military Review, and that his/her failure to notify the Court of Military Review of his/her desire to be represented by Appellate Defense Counsel prior to the time the Court of Military Review takes its final action in the case may be regarded as a waiver of his/her right to appellate representation.

c. That his/her request, if any, to be represented by Appellate Defense Counsel should be accompanied by a statement of the errors or other matters to be urged as grounds for relief and that, if desired, his/her trial defense counsel will prepare such statement for him/her.

d. That, in the event his/her case is reviewed by a Court of Military Review, he/she may, within 60 days after he/she is notified of the decision of the Court of Military Review, petition the United States Court of Military Appeals for a grant of review and that, if such review is granted, the Court need take action only with respect to issues specified in the grant of review and only with respect to matters of law.

e. That his/her right to request representation by appellate defense counsel before the United States Court of Military Appeals or the Court of Military Review includes the right to be represented by a civilian defense counsel if provided by him/her.

f. That at any time within 2 years after the sentence is approved by the convening authority, he/she may petition The Judge Advocate General for a new trial on the grounds of newly discovered evidence of fraud on the court.

DATE	SIGNATURE OF TRIAL DEFENSE COUNSEL

Figure 3-98. Appellate Defense Counsel Representation

ATZB-TDS 15 September 199X

MEMORANDUM FOR Commander, Fort Blank, Missouri

SUBJECT: Application for Deferment

1. Under the provisions of Article 57(d), Uniform Code of Military Justice, and R.C.M. 1101(c), the accused requests that the confinement portion of his or her sentence adjudged on _____ 19 ____ by the (General) (Special) (Summary) Court-Martial convened by Court-Martial Convening Order Number _____, Headquarters, Fort Blank, Missouri, dated _____ 19 ___, be deferred until (specified date) (the date the sentence is ordered into execution) (_____).

2. The accused submits:

a. that the purpose of the deferment provision of Article 57(d), UCMJ, is to "increase the post-conviction safeguards and remedies available to the accused" (see p. 4504, Senate Report Number 1601, 90th Congress, Second Session), and to "remedy the situation" of an accused serving his or her sentence to confinement before appellate review, which may result in reversal, is completed. United States v. Corley, 5 M.J. 558, 568 (A.C.M.R. 1978);

b. that he or she is not a danger to the community;

c. that there is no likelihood that he or she may repeat the offense(s) of which he or she has been convicted;

d. that there is no substantial risk that he or she will commit a serious crime;

e. that there is no likelihood that he or she will flee to avoid the service of his or her sentence and that there is no substantial risk that he or she will not appear to answer the judgment following the conclusion of appellate proceedings; and

f. that there is no likelihood that he or she will intimidate witnesses or otherwise interfere with the administration of justice.

Figure 3-99. Application for Deferment

3. The following establishes that the accused is not a danger to the community and that he or she will not flee the jurisdiction:

a. The offenses of which the accused was convicted are nonviolent;

b. The accused has never previously been convicted of a crime nor has he or she been punished under the provisions of Article 15, UCMJ;

c. The offense was one of impulse which will not be repeated;

d. The accused's first sergeant, company commander, and supervisor all testified at trial that the accused is a hard worker and a nonviolent person. All testified they would like him or her back in the unit immediately;

e. The accused was not in any restraint during the investigation of the offenses prior to preferral of charges nor during the pretrial proceedings after preferral of charges;

f. The accused made no attempt to flee the jurisdiction prior to trial;

g. The accused (has custody of his or her minor daughter who lives with him or her) (is the sole support for his wife or her husband and children who live with him or her in off-post quarters. Said quarters are owned by the accused subject to a home mortgage for which the accused must make monthly payments) (_____).

h. The accused has substantial investments in the local area, to wit: (home improvement loan) (loan secured by personal property) the security for which may be forfeited if the accused flees.

i. . . . .

4. The following errors which substantially prejudiced the accused were committed at trial:

a. The military judge improperly admitted into evidence Prosecution Exhibits 1, 2, and 3, which were obtained as a result of an illegal search and seizure;

Figure 3-99. Application for Deferment

b. The military judge improperly admitted into evidence a pretrial statement of the accused (Prosecution Exhibit 7) which was obtained in violation of Article 31, UCMJ;

c. The military judge improperly permitted a prosecution witness (name of witness) to refresh his memory in violation of Military Rule of Evidence 612.

LAWRENCE H. KOOK
CPT, JA
Defense Counsel

NOTE: Paragraph 3 should be tailored to those facts and circumstances of the particular case which tend to prove that the accused is not a danger to the community and is not a risk to flee the jurisdiction. See United States v. Brown, 6 M.J. 338 (C.M.A. 1978) and United States v. Thomas, 7 M.J. 763 (A.C.M.R. 1979).

Figure 3-99. Application for Deferment

AECD-TDS 16 August 199X

MEMORANDUM FOR Commander, U.S. Army Training Center and Fort Leonard Wood, Fort Leonard Wood, MO 65473

SUBJECT: Petition for Clemency under R.C.M. 1105

1. In United States v. Ogden, tried by general court-martial on 10 January 199X, at Fort Leonard Wood, Missouri, pursuant to General Court-Martial Convening Order 10, the accused received the following sentence: bad-conduct discharge, confinement for 1 year, total forfeitures of all pay and allowances for 1 year, and reduction to the lowest enlisted grade, E-1.

2. Pursuant to R.C.M. 1108, MCM, 1984, the undersigned recommend that the convening authority suspend the punitive discharge for the period of confinement plus six months.

3. The following matters are submitted in support of this petition:

a. The accused is only 18 years old.

b. The accused is married and has an 8-month-old baby girl.

c. This is the accused's first conviction by court-martial, and he has no previous Article 15's.

d. Prior to the accused's leaving his unit in desertion, the accused's wife contracted tuberculosis prior to giving birth to their child. The accused had compelling reasons for absenting himself from his unit, due to the severe mental pressure caused by his wife's illness.

4. Although the undersigned are aware of the seriousness of the offense for which the accused has been

Figure 3-100. Petition for Clemency

convicted, we believe that justice will best be served by the recommended clemency.

CLYDE H. TATER
Captain, JA
Defense Counsel

_____
(court member)

_____
(court member)

_____
(court member)

_____
(court member)

_____
(court member)

_____
(court member)

Figure 3-100. Petition for Clemency

1. Is the convening authority disqualified by prior action(s) concerning the case?

2. Is the SJA disqualified by prior participation in the case?

3. Are the accused's pleas and the findings of the court correctly stated?

4. Is the sentence correctly stated?

5. Was there a pretrial agreement in the case and, if so, is it properly reflected in the recommendation?

6. Was there any pretrial restraint in the case, and is it properly reflected in the recommendation?

7. Does the recommendation make a specific recommendation as to action?

8. Has there been a recommendation for clemency by the military judge or court-members and if so, if not raised by the defense, have you apprised the convening authority?

9. Has "legal error" been raised by the defense so as to require an SJA response under R.C.M. 1105? Is a supplemental recommendation necessary?

10. Has there been any allegation by the accused of ineffectiveness of counsel?

Figure 3-101. Sample Format to Examine Post-Trial Recommendations for Errors

11. If a supplemental recommendation has been prepared, does it contain "new matter" so as to require service on the defense?

12. Did the SJA personally sign the post-trial recommendation?

13. Does the recommendation reflect that the convening authority saw all defense submissions?

14. Does the recommendation reflect, by certificate of service or otherwise, that the defense was given the appropriate time to respond?

15. Is the action accurate?

Figure 3-101. Sample Format to Examine Post-Trial Recommendations for Errors

UNITED STATES	)	(Location)
	)	
v.	)	
	)	PETITION FOR REHEARING
BILLY GASTON	)	
SPC, USA	)	
(SSAN, Unit)	)	

The accused in the above titled case hereby petitions the convening authority to grant a rehearing based upon the following:

1. The accused was denied due process and a fair trial by the denial of his motion for mistrial based on the misconduct of members of the court during the court-martial.

2. The evidence presented by the prosecution was insufficient to overcome the presumption of innocence and prove the accused's guilt beyond a reasonable doubt.

3. One of the defense witnesses, whose testimony on cross-examination tended to impeach the defense theory of alibi, has recanted his testimony, thus presenting new evidence which might produce a substantially more favorable result for the accused.

ARGUMENT:

1. The record of trial in this case shows that during the progress of the trial at least two members of the court talked with an individual outside the presence of the court who was in no way connected with the trial of the case, but who knew the accused because of his previous association with the 8th Division Boxing Team. Upon being questioned by one member of the court, this individual stated that he remembered the accused and that he was dropped from the Boxing Team because he was out of shape. Later in the trial, when the accused testified under oath, he stated that he had been unable to lose enough weight to get into the weight class he was supposed to box in and that he was forced to forfeit one match because the CID detained him while investigating this case. After this, he was taken off the Boxing Team but continued to work out with the team as a trainer and sparring partner. These answers were made in response to a question by the member of the court who had previously talked to the outside individual. That question is contained in the record of trial as an appellate exhibit.

Figure 3-102. Petition for Rehearing

Upon learning of the outside conversation, the defense counsel moved for a mistrial because of the misconduct of a court member. After an extensive examination by voir dire concerning the misconduct, the military judge denied the motion.

The accused now petitions the convening authority for a new trial based on this same contention. The accused contends that, although the specific incident is relatively insignificant and irrelevant to the charges before the court, the convening authority must consider the whole import of the incident. If one or possibly two of the court members believed that the accused lied about why he was taken off the Boxing Team and thereby discredited his oath to tell the truth, this would also discredit, at least in their minds, the other more important and relevant portions of the accused's testimony. The fact that the court took evidence concerning the accused, however trivial, outside the presence of the court is patently prejudicial to the accused. When such prejudice is present, it is incumbent upon the convening authority to take such action as may be necessary to correct that prejudice. The accused submits that a rehearing should be granted on this basis.

2. Without going into great detail with regard to this contention, the accused merely asks that the argument of the trial defense counsel be read and considered carefully by the convening authority. It is well known that the accused is presumed innocent until proven guilty and that the government has the burden of proving the accused's guilt beyond a reasonable doubt. The defense contends that, considering all the evidence presented by the government, the evidence was insufficient to support a finding of guilty. The whole of the government's case rested upon an identification of the accused by the victim. The victim could not identify the accused by name prior to the Article 32 hearing. The only identification was made after a line-up held by the Mainz CID. After two viewings of the line-up in which the accused was present, the victim at first stated that his assailant was not present. After the line-up had ended and the participants dismissed, two CID agents talked to the victim, and at that time he said that his assailant was in the line-up and he described the clothes the assailant was wearing. The victim also stated that he pointed out to a friend his assailant shortly after the attack occurred; however, this friend was unable, under oath, to positively identify the accused. The victim

Figure 3-102. Petition for Rehearing

could not relate any distinguishing marks or other identification which pointed specifically to the accused. The only thing he hinged his identification on was a black leather or vinyl jacket worn by the assailant. Even this jacket was described differently by the victim in various statements made by him to the CID and at the Article 32 hearing.

The defense submits that there was clearly insufficient evidence presented by the prosecution from which the court could find beyond a reasonable doubt that the accused had been adequately identified by the victim. Accordingly, the accused asks that the findings of guilty be disapproved, or, in the alternative, that a rehearing be granted.

3. The final contention of the accused is based on two factors which warrant the granting of a rehearing by the convening authority. As is clear from the record of trial, the defense in this case was based on a theory of alibi. With due consideration for the principle that the accused is innocent until proven guilty and the principle that the government has the burden of proving guilt beyond a reasonable doubt, the defense asks that the convening authority consider the statement made by the president of the court during voir dire on the mistrial motion to the effect that he made his decision on the findings based on the testimony of the defense witnesses. This statement was not elaborated on further, but it implies that the burden of proof had shifted, at least in the mind of that court member, to the defense to prove the accused's innocence. This is an improper shifting of the burden of proof to the accused. Taken with this in mind, consider the testimony of PFC Alexander Davis, a defense witness. In cross-examination of this witness, the trial counsel was able to thoroughly confuse PFC Davis with regard to the time he had seen the accused on the night of the offense. In subsequent investigation since the date of the trial, the trial defense counsel has established that PFC Davis would, if asked to do so, sign a sworn statement recanting his testimony at the trial and stating the facts to be substantially as he related them at the previous Article 32 hearing in this case. He would state that he was confused by the questioning of the trial counsel and that his testimony at the trial was incorrect as to his seeing the accused at approximately 2330 hours on the night of the offense. The defense contends that this recantation amounts to new evidence in the case sufficient to support the granting of a rehearing.

Figure 3-102. Petition for Rehearing

In addition to the above grounds urged by the defense for a new trial, the accused asks that the convening authority thoroughly consider the entire record of trial and allied papers thereto, and then determine from all the circumstances whether or not the accused had a fair trial.

In the event that a rehearing is not granted, the defense asks that, in determining the final action to be taken in the case, the convening authority consider the matters presented in the accompanying Petition for Clemency before taking action in this case.

CLYDE B. TATER
Captain, JA
Defense Counsel

(Date)

Figure 3-102. Petition for Rehearing

APPLICATION FOR RELIEF FROM COURT-MARTIAL FINDINGS AND/OR SENTENCE UNDER THE PROVISIONS OF TITLE 10, UNITED STATES CODE, SECTION 869

For use of this form, see AR 27-10; the proponent agency is TJAG.

DOCKET NUMBER

(For TJAG Use)

(Read Instructions on Reverse BEFORE Completing Application)

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: 10 USC 869 AND 3037.

PRINCIPAL PURPOSES: To appeal your court-martial findings and/or sentence to The Judge Advocate General under the provisions of Article 69(b), UCMJ.

ROUTINE USES: To evaluate your appeal and aid in determining whether the relief sought is appropriate.

DISCLOSURE: Disclosure of the requested information is voluntary. Failure to provide complete information may delay evaluation of your appeal and may result in incomplete evaluation of your appeal.

1. NAME OF CONVICTED PERSON (Last, First, MI)		2. SSN
Doe, John D.		982-54-3210
3. PRESENT GRADE OR STATUS	4. DATE OF TRIAL	5. PLACE OF TRIAL
PVT E-1	20 Nov 9X	Fort Blank, Missouri
6. COMMAND CONVENING COURT-MARTIAL	7. TYPE OF COURT-MARTIAL	
HQ, 1st Battalion 66th Infantry Division Fort Blank, Missouri	☐ GENERAL ☐ SUMMARY ☒ SPECIAL	

8. OFFENSE(S) CHARGED (Article(s) and brief description of offence(s))	9. PLEA(S)
Ch I: Art. 121 — Larceny of $50 at Fort Blank on 22 Oct 199X from PFC John Smith.	N/G
Ch II: Art. 86 — AWOL from 1 Sep 199X to 21 Oct 199X.	G

10. FINDINGS OF THE COURT-MARTIAL, SENTENCE ADJUDGED, AND LATER MODIFICATIONS, IF ANY:

Guilty of both offenses.
Sentenced to: Confinement for 2 months, forfeiture of $100 per month for 2 months.

11. I BELIEVE RELIEF IN THE ABOVE NAMED COURT-MARTIAL IS JUSTIFIED BECAUSE: (State fully the reasons you believe relief should be granted. The reasons must relate to at least one of the five grounds set forth in Article 69(b), UCMJ.)

Inadmissible extrinsic offense evidence was used against me. See Mil. R. Evid. 404(b). Record page 18 demonstrates that trial counsel offered and had admitted evidence showing I had stolen a pair of socks from another soldier six months ago, but wasn't charged with the theft. I believe the trial judge should not have admitted the evidence because it prejudiced my case and prevented the court members from independently evaluating the evidence against me. I submit that the trial judge erred by failing to use Mil. R. Evid. 403 to exclude the evidence.

12. RELIEF REQUESTED

Finding as to Ch I set aside. Sentence reassessed to include no forfeitures.

13. NAME AND ADDRESS OF COUNSEL ASSISTING WITH APPLICATION, IF ANY: (Include ZIP Code)

Captain Jane Mason
OSJA, Fort Blank, Missouri

DA FORM 3499 AUG 84 Figure 3-103 EDITION OF MAY 69 IS OBSOLETE.

14. ENCLOSED ARE:

[X] A COPY OF COURT-MARTIAL ORDER(S) PROMULGATING RESULT OF TRIAL, AND LATER MODIFICATION(S), IF ANY.

[X] SWORN AFFIDAVITS, DOCUMENTS, OR OTHER MATTERS IN SUPPORT OF APPLICATION.

15. PRESENT ADDRESS OF APPLICANT *(Include ZIP Code) (Forward notification of any change)*

A Company, 1st Battalion,
3d Brigade, Fort Dennison, Colorado

16. OATH OR AFFIRMATION: *(See instruction 5)*

I DO SOLEMNLY [SWEAR] [AFFIRM AND DECLARE] THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF, THE STATEMENTS CONTAINED IN THIS APPLICATION *(including accompanying matters submitted)* ARE TRUE [SO HELP ME GOD]. I MAKE THIS ASSERTION UNDER THE PAINS AND PENALTIES OF FALSE SWEARING. *(Title 18, U.S. Code, Section 1001 provides a penalty of not more than $10,000 fine, five years imprisonment, or both, for knowingly making false statement in connection with this application.)*

John D. Doe

SIGNATURE OF APPLICANT

John D. Doe

NAME OF APPLICANT

SWORN TO BEFORE ME AND SUBSCRIBED IN MY PRESENCE THIS 3d DAY OF February 19 9X

(Seal)

Joyce Andrews

CPT, JA

OSJA, Fort Dennison

INSTRUCTIONS

(Read ALL Instructions Before Completing Form)

1. Application for relief from the findings or sentence, or both, of a court-martial case which has been finally reviewed, but has not been reviewed by the United States Army Court of Military Review *(formerly Board of Review)* is governed by Chapter 14, Army Regulation 27-10, which is summarized in these instructions.

2. Article 69(b) of the Uniform Code of Military Justice *(Title 10, US Code, Section 869(b))* provides that: "The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under section 866 of this title (Article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence."

3. Relief is authorized only when (1) the post-trial process of legal review of the case has been completed, and (2) at least one of the five grounds set forth in paragraph 2 above has been established to the satisfaction of The Judge Advocate General. Application for relief on the ground of sentence appropriateness normally will not be considered if the application is based solely on the quality of the behavior or duty performance of the convicted person after trial, or on any evidence of personal hardship not admitted at trial. For other avenues of relief, see Title 10, U.S. Code, Section 874 (Article 74, UCMJ) or 32 CFR 581.3 *(Army Board for the Correction of Military Records)*.

4. Except as provided in this paragraph, the application must be signed by the individual convicted by court-martial. In those cases where the individual is deceased, incapable of making application, or whose whereabouts are unknown, The Judge Advocate General may permit application to be made by such person as he/she determines to be competent and suitable, and to have a proper interest therein, including, but not limited to, a spouse, parent, or relative of the person convicted by court-martial substantially affected as a result of the findings or sentence, or both, which the applicant maintains should be vacated or modified. If application is not signed by the individual convicted, full explanation should be made and attached.

5. The application must be submitted under oath or affirmation executed before an official authorized to administer oaths. A notary public is usually authorized to perform this function. Military personnel on active duty may execute the application before a judge advocate or other officer authorized by Article 136(a) of the Uniform Code of Military Justice to administer oaths. Knowingly making a false statement in connection with an application for relief can be punished by a $10,000 fine, five years imprisonment, or both.

6. Applicant's entry in Item 11 should describe the reasons for the request for relief. Relevant facts which support the applicant's contentions should be included. Legal authorities may be presented in this section, or may be attached in the form of a legal brief, if applicant desires. Other matters tending to support applicant's allegations of error or impropriety, including but not limited to, sworn affidavits, official records, and other documents, may be attached. The applicant bears the burden of establishing an alleged impropriety. Unsupported allegations of matters outside the record of trial will seldom be sufficient to warrant relief.

7. A copy of the court-martial order *(or the record of trial in the case of a summary court-martial)* promulgating the findings, sentence, and action of the convening authority in the case, and a copy of any later modifying order(s), if available to the applicant, should be submitted with the application.

8. A copy of the record of trial in cases other than summary courts-martial should not be submitted.

9. If the applicant is a member of the command which convened the court-martial, or of a unit within the same general court-martial jurisdiction, the application should be submitted through the Office of the Staff Judge Advocate of that general court-martial jurisdiction. In all other cases, applications will be submitted directly to HQDA (JALS-ED), Nassif Building, 5611 Columbia Pike, Falls Church, VA 22041 and must be received on or before the last day of the 2-year period beginning on the date the sentence was approved by the convening authority. Failure to file within the prescribed time may be excused by The Judge Advocate General for good cause established by the applicant.

10. Submit only the original of this form.

11. Type, or print all entries in ink.

12. If space allotted is insufficient, attach additional sheet(s), indicating item number continued thereon.

13. Complete all items, if inapplicable, enter "None".

14. Applicant should send notice of change in address while application is pending to The Judge Advocate General at the address shown in instruction 9 above.

15. Applicant will be notified of receipt of application by The Judge Advocate General, and the result of review, when completed.

Reverse of DA Form 3499, Aug 84

☆ GPO : 1984 O - 421-646 (17044)

Figure 3-103 (continued)

APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552
(Please read instructions on reverse side BEFORE completing application.)

Form Approved OMB No. 0704-0003 Expires Dec 31, 1988

PRIVACY ACT STATEMENT

AUTHORITY: Title 10, U.S. Code 1552, Executive Order 9397, November 22, 1943.
PRINCIPAL PURPOSE: To apply for correction of a military record.
ROUTINE USES: To docket a case. Reviewed by board members to determine relief sought. To determine qualification to apply to board. To compare facts present with evidence in the record.
DISCLOSURE: Voluntary. If information is not furnished, applicant may not secure benefits from the Board.

1. APPLICANT DATA

a. BRANCH OF SERVICE *(X one)*
[X] (1) ARMY [ ] (2) NAVY [ ] (3) AIR FORCE [ ] (4) MARINE CORPS [ ] (5) COAST GUARD

b. NAME *(Last, First, Middle Initial) (Please print)*	c. PRESENT PAYGRADE	d. SERVICE NUMBER *(If applicable)*	e. SOCIAL SECURITY NUMBER
Jones, Robert G.	Civilian	123-45-6789	098-65-8654

2. TYPE OF DISCHARGE *(If by court-martial, state type of court.)*	3. PRESENT STATUS, IF ANY, WITH RESPECT TO THE ARMED SERVICES *(Active duty, Retired, Reserve, etc.)*	4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY
Bad Conduct Special Court	NA	1 Sep 9X

5. ORGANIZATION AT TIME OF ALLEGED ERROR IN RECORD	6. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. *(No expense to the Government)* *(X one)*
5th Infantry Division Fort Blank, Alaska	[X] a. YES [ ] b. NO

7. COUNSEL *(If any)*

a. NAME *(Last, First, Middle Initial)*	b. ADDRESS *(Street, City, State and Zip Code)*
NA	

8. I REQUEST THE FOLLOWING CORRECTION OF ERROR OR INJUSTICE:

I want a good discharge.

9. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST IN THE FOLLOWING PARTICULARS:

I had a good record up until I was court-martialed. In fact my company commander gave me an Article 15 for this offense, but the next commander ordered that I be court-martialed anyway.

10. IN SUPPORT OF THIS APPLICATION I SUBMIT AS EVIDENCE THE FOLLOWING: *(If Veterans Administration records are pertinent to your case, give Regional Office location and Claim Number.)*

I have attached copy of Article 15 and record of trial.

11. ALLEGED ERROR OR INJUSTICE DATA

a. DATE OF DISCOVERY 1 Aug 9X

b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THIS APPLICATION.

12. APPLICANT MUST SIGN IN ITEM 16. IF THE RECORD IN QUESTION IS THAT OF A DECEASED OR INCOMPETENT PERSON, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY APPLICATION. IF APPLICATION IS SIGNED BY OTHER THAN APPLICANT, INDICATE RELATIONSHIP OR STATUS BY MARKING APPROPRIATE BOX.

[ ] a. SPOUSE [ ] b. WIDOW [ ] c. WIDOWER [ ] d. NEXT OF KIN [ ] e. LEGAL REP [ ] f. OTHER *(Specify)*

13. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. *(U.S. Code, Title 18, Sec. 287, 1001, provides a penalty of not more than $10,000 fine or not more than 5 years imprisonment or both.)*

14. COMPLETE CURRENT ADDRESS, INCLUDING ZIP CODE *(Applicant should forward notification of all changes of address.)*	DOCUMENT NUMBER *(Do not write in this space.)*
746 Noble Circle, Towson, MD 36478	

15. DATE SIGNED	16. SIGNATURE *(Applicant must sign here.)*
2 Aug 9X	Robert G. Jones

DD Form 149, FEB 86 Figure 3-104 *Previous editions are obsolete.*

INSTRUCTIONS

(All data should be typed or printed)

1. For detailed information see:

   Air Force Regulation 31-3

   Army Regulation 15-185

   Coast Guard, Code of Federal Regulations Title 33, Part 52

   Navy, NAVEXOS P-473, as revised

2. Submit only original of this form.

3. Complete all items. If the question is not applicable, mark "None."

4. If space is insufficient, use "Remarks" or attach additional sheet.

5. Various veterans and service organizations furnish counsel without charge. These organizations prefer that arrangements for representation be made through local posts or chapters.

6. List all attachments and enclosures.

7. ITEMS 6 AND 7. Personal appearance of you and your witnesses or representation by counsel is not required to insure full and impartial consideration of applications. Appearances and representations are permitted, at no expense to the Government, when a hearing is authorized.

8. ITEM 8. State the specific correction of record desired.

9. ITEM 9. In order to justify correction of a military record, it is necessary for you to show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the alleged entry or omission in the record was in error or unjust. Evidence may include affidavits or signed testimony of witnesses, executed under oath, and a brief of arguments supporting application. All evidence not already included in your record must be submitted by you. The responsibility for securing new evidence rests with you.

10. ITEM 11. 10 U.S.C. 1552b provides that no correction may be made unless request is made within three years after the discovery of the error or injustice, but that the Board may excuse failure to file within three years after discovery if it finds it to be in the interest of justice.

MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW

ARMY	NAVY AND MARINE CORPS	COAST GUARD	AIR FORCE
(For Active Duty Personnel) Army Board for Correction of Military Records Department of the Army Washington, DC 20310-1803 **(For Other than Active Duty Personnel)** CO, USARPERCEN 9700 Page Blvd. St. Louis, MO 63132-5260	Board for Correction of Naval Records Department of the Navy Washington, DC 20370-5100	Chairman Board for Correction of Military Records (C-60) Department of Transportation 400 7th St., SW Washington, DC 20590	Board for Correction of Air Force Records AFMPC/DPMDOA1 Randolph AFB, TX 78150-6001

17. **REMARKS** *(Applicant has exhausted all administrative channels in seeking this correction and has been counseled by a representative of his/her servicing military personnel office. (Applicable only to active duty and reserve personnel.))*

DD Form 149 Reverse, FEB 86

☆ U.S. Government Printing Office: 1987—181-032/506

Figure 3-104 (continued)

APPLICATION FOR THE REVIEW OF DISCHARGE OR DISMISSAL FROM THE ARMED FORCES OF THE UNITED STATES

Form Approved
OMB No. 0704-0004
Expires Oct 31, 1990

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0004), Washington, DC 20503.

Privacy Act Statement

AUTHORITY: 10 U.S.C. 1553, 3013(g), Executive Order 9397, 22 Nov 43 (SSN).

PRINCIPAL PURPOSES: To apply for a change in the type of discharge issued.

ROUTINE USES: Placed in applicant's file. Used in applicant's case to determine the relief sought and to compare facts presented with evidence on record.

DISCLOSURE: Voluntary. If information is not furnished, applicant may not secure benefits from the board.

REQUESTING COPIES OF MILITARY RECORDS

Prior to applying for discharge review, potential applicants or their designated representatives may obtain copies of their military personnel records by submitting a Standard Form (SF) 180, Request Pertaining to Military Records, to the National Personnel Records Center (NPRC), 9700 Page Boulevard, St. Louis, MO 63132-5200.

PLEASE READ ATTACHED INSTRUCTIONS BEFORE COMPLETING THIS FORM

1. DATA PERTAINING TO INDIVIDUAL (APPLICANT) TO BE REVIEWED

a. NAME (*Last, First, Middle Initial*)	c. SOCIAL SECURITY NUMBER
Doe, Joseph A.	622-13-4567
b. ADDRESS (*Street, City, State, ZIP Code*)	d. SERVICE NO. (*If different from SSN*)
465 Airborne Drive Fort Blank, MO 73648	
	e. TELEPHONE NUMBER (*Include Area Code*) (876) 345-2874

f. BRANCH OF ARMED SERVICE (*X one*)		g. DISCHARGE RECEIVED: (*X one*)	
XX	(1) ARMY		(1) HONORABLE
	(2) NAVY		(2) GENERAL / UNDER HONORABLE CONDITIONS
	(3) AIR FORCE	XX	(3) UNDESIRABLE / UNDER OTHER THAN HONORABLE CONDITIONS
	(4) MARINE CORPS		(4) BAD CONDUCT (*Special court martial only*)
	(5) COAST GUARD		(5) UNCHARACTERIZED
h. DATE OF DISCHARGE (*YYMMDD*)			(6) OTHER (*Explain*)

2. APPEAL FILED IN BEHALF OF INDIVIDUAL TO BE REVIEWED (*If the reviewee is deceased or incompetent, complete this section. Appropriate evidence must accompany this form.*)

a. RELATIONSHIP OF INDIVIDUAL SUBMITTING THIS APPLICATION TO APPLICANT (*X one*)

	(1) NEXT OF KIN		(2) SURVIVING SPOUSE		(3) LEGAL REPRESENTATIVE

b. NAME (*Last, First, Middle Initial*)

3. BOARD ACTION REQUESTED (*X as applicable*)

XX	a. CHANGE DISCHARGE TO HONORABLE
	b. CHANGE DISCHARGE TO GENERAL / UNDER HONORABLE CONDITIONS
	c. CHANGE REASON FOR DISCHARGE TO:

4. TYPE OF REVIEW REQUESTED (*X one*)

	a. I and/or (*counsel/representative*) wish to appear at a hearing at no expense to the Government before the Board in the Washington National Capital Region.
XX	b. I and/or (*counsel/representative*) wish to appear at a hearing at no expense to the Government before a Traveling Panel closest to (*Enter city and state*)
	c. Conduct a RECORD REVIEW of my discharge based on my military personnel file and any additional documentation submitted by me. I and/or (*counsel/representative*) will not appear before the Board.

5. I HAVE ARRANGED TO BE REPRESENTED BY AND AUTHORIZE THE RELEASE OF RECORDS TO (*Complete if applicable*)

a. NAME OF COUNSEL / REPRESENTATIVE (*Last, First, Middle Initial*)	b. ORGANIZATION
Mr. Bob Jones	Jones, Means, and Day, Attorneys at Law
c. ADDRESS (*Street, City, State, ZIP Code*)	d. TELEPHONE NUMBER (*Include Area Code*)
876 Somerton Road, Eden, Missouri 73645	(876) 348-7625

6. WAIVER OF COUNSEL (*X if applicable*)

	I have read Item 6 of the instructions pertaining to the AVAILABILITY of counsel and elect NOT to be represented by counsel/representative (*leave Item 5 blank*)

DD Form 293, FEB 89 Figure 3-105 *Previous editions are obsolete.* 2550:041

7. SUPPORTING DOCUMENTS *(X as applicable) (Please print name and social security number on each document.)*	
	a. Will not be submitted. Please complete review based on available service records.
XX	b. Will be submitted within **60** days.
	c. Will be submitted within days.
	d. Are listed below and are attached to this application: *(Continue on a plain sheet of paper if more space is needed.)*
(1) DOCUMENT 1:	
(2) DOCUMENT 2:	
(3) DOCUMENT 3:	

8. ISSUES. The Board will consider any issue submitted by you prior to closing the case for deliberation. The Board also will review the case to determine whether there are any issues which provide a basis for upgrading your discharge. However, the Board is not required to respond in writing to issues of concern to you unless those issues are listed or incorporated by specific reference below. Read the instructions carefully that pertain to block 8 prior to completing this part of the application. If you need more space, submit additional issues on an attachment.

ISSUE 1:

My Undesirable Discharge was inequitable because it was based on one isolated incident in 28 months of service with no other adverse action.

ISSUE 2:

The Undesirable Discharge is improper because my preservice civilian conviction was improperly used in the discharge proceedings.

ISSUE 3:

ISSUE 4:

	a. Mark this block if you have listed additional issues as an attachment to this application.
	b. I previously submitted an application on *(Enter date)* and I am completing this form in order to submit additional issues.
XX	c. The above issues supersede all previously submitted.

9. CERTIFICATION

I make the foregoing statements as part of my application with full knowledge of the penalties involved for willfully making a false statement. *(U.S.Code, Title 18, Section 1001, provides a penalty as follows: A maximum fine of $10,000 or maximum imprisonment of 5 years, or both)*

a. DATE *(Year, Month, Day)*	b. SIGNATURE
9X/09/22	

UPON COMPLETION, MAIL THIS APPLICATION TO APPLICABLE ADDRESS BELOW

ARMY	NAVY & MARINE CORPS	AIR FORCE	COAST GUARD
CO, USARCPAC 9700 Page Blvd St. Louis, MO 63132-5200	NAVAL Discharge Review 801 No Randolph St. Arlington, VA 22203-1991	AFMPC/MPCDOA1 Randolph AFB, TX 78150-6001	Commandant (G-PE-1) U.S. Coast Guard Headq Washington, DC 20593-0001

DD Form 293 Reverse, FEB 89

Figure 3-105 (continued)

INSTRUCTIONS FOR COMPLETION OF DD FORM 293

REQUESTING COPIES OF YOUR OFFICIAL MILITARY PERSONNEL FILE

Submission of a request for an applicant's military records (including a request pursuant to the Freedom of Information Act or Privacy Act) after the DD Form 293 has been submitted shall automatically result in the suspension of processing of the application for discharge review until the requested records are sent to an appropriate location for copying, are copied, and are returned to the possession of the headquarters of the Discharge Review Board. Processing of the application shall then be resumed at whatever stage of the discharge review process is practicable.

Applicants are strongly encouraged to submit any request for their military records prior to applying for discharge review rather than after submitting in a DD Form 293 in order to avoid substantial delays in processing of applications and scheduling of reviews. Applicants and their counsel also may examine their military personnel records at the site of their scheduled review prior to the review. The Board shall notify applicants of the date of availability of the records for examination in their standard scheduling information.

ITEM 1a. Use the name which you served under while in the Armed Forces. If your name has since changed, then also include your current name after adding the abbreviation "AKA". If the former member is deceased or incompetent, see Item 2.

ITEM 1b. Indicate the address to be used for all future correspondence regarding this application. If you change this address while this application is pending, you must notify the Discharge Review Board immediately. Failure to attend a hearing as a result of an unreported change in address may result in waiver of your right to a hearing.

ITEMS 1c, 1d, 1e, 1f. Self explanatory.

ITEM 1g. If you received more than one discharge, the information in this item should refer to the discharge that you want changed.

ITEM 1h. Self explanatory.

ITEM 2a. If the former member is deceased or incompetent, the application may be submitted by the next of kin, a surviving spouse or a legal representative. Legal proof of death or incompetency and satisfactory evidence of the relationship to the former member must accompany this application.

ITEM 2b. Name of person submitting application on behalf of the former member should be entered.

ITEM 3. Mark either Item a or b but not both. If you mark Item c you must list the specific reason for discharge that you believe to be appropriate. If you do not mark any of these items, the Board will presume you want to change discharge to Honorable. If you do not mark Item c the Board will presume that you do not want a change in reason for discharge.

If you were separated on or after 1 Oct 82 while in an entry level status (see DoD Directive 1332.14, Encl 3, Part 1-F) with an under other than honorable conditions discharge and less than 180 days of active service, you can request a change to "Entry Level Separation." To do this, write in block 7 "Change to Entry Level Separation."

ITEM 4. TYPE OF REVIEW REQUESTED

A. Discharge Review is conducted in two basic ways: (1) Hearing or (2) Records Review.

1. Hearing. You may appear personally (alone or assisted by a representative/counsel) before the Board in the Washington National Capital Region or before a Traveling Panel in selected locations throughout the U.S. Former members of the Army who do not reside close to the location of a Traveling Panel may be provided the opportunity for presentation by a video-taped hearing which upon completion will be presented to the Board in the Washington National Capital Region. Detailed notification and/or scheduling information for all personal appearances will be provided after the application has been processed. In addition, without appearing yourself, you may have your case presented in the Region or before a Traveling Panel by a representative/counsel of your choice.

2. Records Review. Without you and/or your counsel appearing, you may have the Board conduct a Review based solely on military records and any additional documentation that you provide.

B. Applicants participating in a personal appearance or hearing examination may make sworn or unsworn statements, introduce witnesses, documents, or other information on their behalf. Department of Defense is not responsible for, nor will it pay for, any costs incurred by the applicant. Applicants may make oral or written arguments personally and/or through representative/ counsel. Applicants and witnesses who present sworn or unsworn statements may be questioned by the Board.

C. FAILURE TO APPEAR AT A HEARING OR RESPOND TO A SCHEDULING NOTICE. If you do not appear at a scheduled hearing or respond as required to a scheduling notice, and you did not make a prior, timely request for a continuance, postponement, or withdrawal of the application, you will forfeit the right to a personal appearance and the Board shall complete its review of the discharge based upon the evidence of record.

ITEM 5. Omit if you do not have a representative/counsel. If you later obtain the services of either, inform the Board immediately.

(Detached from DD Form 293, FEB 89)

ITEM 6. With regard to reviews involving a representative/counsel, the military services do not provide counsel representation or evidence for you, nor do they pay the cost of such representation under any circumstance. The following organizations regularly furnish representation at no charge to you. Representatives may or may not be lawyers.

1. American Red Cross
2. American Legion
3. Disabled American Veterans
4. Jewish War Veterans of the USA
5. Veterans of Foreign Wars

In addition, there are other organizations willing to assist you in completing this application and to provide representation at no cost. It is to your advantage to coordinate with your counsel prior to submitting this application. This will insure that your counsel is able to appear at the location you listed in ITEM 4. Please note that some of the organizations listed above only represent applicants who appear before the Board in the Washington National Capital Region. Contact your local veterans affairs office, Veterans Administration Office or veterans service organization for further information.

ITEM 7. Evidence not in your official records should be submitted to the Board before the review date. It is to your advantage to submit such documentation with this application or within the following 60 days. This also applies to legal briefs or counsel submissions. However, you have the right to submit evidence until the time the DRB closes the Review Process for deliberation. Documents that are of the most benefit are those which substantiate or relate directly to your Issues (see ITEM 8). Other documents that may be helpful are character references, educational achievements, exemplary post-service conduct and medical reports. You should add your name and social security number to each document submitted. The Board will consider all documents submitted in your behalf, but will respond in writing only to those issues set forth in accordance with the instructions for ITEM 8.

ITEM 8. "Issues" are the reasons why you think your discharge should be changed. You are not required to submit any issues with your application. However, if you want the Board to respond in writing to the issues of concern, you must list your issues in accordance with those instructions and regulations governing the Board.

Issues must be stated clearly and specifically. Your issue should address the reasons why you believe that the discharge received was improper or inequitable. It is important to focus on matters that occurred while you served in the Armed Forces.

The following examples demonstrate one way in which issues may be stated. The example issues do not indicate, in any way, the only type of issue that should be submitted to the Board.

EXAMPLE 1. My Undesirable Discharge was inequitable because it was based on one isolated incident in 28 months of service with no other adverse action.

EXAMPLE 2. The Undesirable Discharge is improper because the applicant's preservice civilian conviction, properly listed on his enlistment documents, was used in the discharge proceedings for frequent involvement.

List Issues. In ITEM 8 list each of your issues that you want the Board to address. There is no limit to the number of issues that you may submit. If you need additional space, continue on a plain sheet of paper and attach it to this application.

NOTE: If an issue is not listed in ITEM 8, it may result in the Board not addressing the issue even if the issue is discussed in a legal brief or other written submissions or at the hearing. Changes or additions to the list may be made on the DD Form 293 anytime before the DRB closes the Review Process for deliberation. It is recommended that all issues be submitted within 60 days of the application submission.

Please be sure that your issues are consistent with the Board Action Requested (ITEM 3). If there is a conflict between what you say in your issues and what you requested in ITEM 3, the Board will respond to your issue in the context of the action requested in ITEM 3. For example, if you request a General Discharge in ITEM 3 but your issue in ITEM 8 indicated you want an Honorable Discharge, the Board will respond to the issue in terms of your request for a General Discharge. Therefore, if you are submitting issues for the purpose of obtaining an Honorable Discharge, be sure to mark the box for an Honorable Discharge in ITEM 3.

Incorporation by Reference. Issues that are listed on a legal brief or other written submissions may be incorporated by reference in ITEM 8. The reference must be specific enough for the Board to clearly identify the matter being submitted as an issue. At a minimum, it shall identify the page, paragraph, and sentence incorporated.

EXAMPLE: ISSUE 1. Use brief, page 2, paragraph 1, sentences one and two.

Applicants should be as specific as possible with all references so the Board can clearly distinguish the scope of the issue. Because it is to your benefit to bring such issues to the Board's attention as early as possible in the review, if you submit a brief, you are strongly urged to set forth all such issues as a separate item at the beginning of the brief.

ITEM 9. Self explanatory.

(Detached from DD Form 293, FEB 89)

U.S. Government Printing Office: [illegible]

IN THE UNITED STATES ARMY COURT OF MILITARY REVIEW

UNITED STATES	)	MOTION TO WITHDRAW[1]
	)	
v.	)	US Army Court of Criminal Appeals
	)	
Private First Class JOHN DOE 123-45-6789	)	

TO THE HONORABLE JUDGES OF THE UNITED STATES ARMY COURT OF MILITARY REVIEW

The undersigned trial defense counsel in the above-styled case prays this Honorable Court's permission to withdraw as counsel for appellant. Counsel has continuously and in good faith represented the appellant from the date of his conviction until the present time. Counsel has received notification that Captain _____ has been designated and is now acting as appellate defense counsel in the instant case. Counsel further asserts that he will assist appellate defense counsel in any way necessary to ensure the most effective possible representation of appellant during the appellate review of the instant case.

WHEREFORE, the undersigned respectfully requests this Honorable Court's permission to withdraw as counsel in the above-styled case.

_____, 199__

MYLES T. FINE
Captain, JA
Trial Defense Counsel

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[1] See The Advocate, Mar-Apr 1977 at 2.

Figure 3-106. Motion to Withdraw as Appellate Counsel

PART III

TRIAL MANUAL

Chapter 4
Trial Manual

Section I
Motions

A motion is a request to the military judge for judicial action. There are generally four distinct phases to motions practice. The first of these is notice of motions to opposing counsel and military judge. The Military Rules of Evidence require, and ethical practice demands, timely notice of motions. Second, motions are orally made to the judge in sufficient detail so that the judge can determine the appropriate time in the proceeding for a hearing on the motion, and opposing counsel will be able to discharge his or her duties with respect to any hearing on the motion. Third, there is the hearing on the motions, including the presentation of evidence where necessary. Finally, the argument on the motions is made along with reference to legal precedent and authority.

EXAMPLE

MJ: Private Gray, I now ask you how do you plead. Before receiving your plea, I advise you that any motions you have to dismiss any charge or to grant other relief should be made at this time. Your counsel will answer for you.

DC: Your honor, the defense moves to dismiss the charge and specification for a failure to state an offense and also to move for the suppression of certain evidence which the trial counsel has disclosed to us that the prosecution intends to use at trial.

MJ: Have you given notice of these motions?

DC: Yes, your honor, I have.

MJ: Trial counsel, did you receive adequate notice of these motions?

TC: Yes, your honor.

MJ: Very well, we will take up the sufficiency of the specification first as that may dispose of the case. Defense counsel, what is your objection to the specification?

[**NOTE**: Since motions addressing sufficiency of specifications generally deal with legal and not factual matters, evidence will not normally be presented on this type of motion. The hearing will be conducted immediately and will consist of arguments by counsel on the legal sufficiency of the specification. If the motion is denied, the proceeding will continue.]

MJ: Defense counsel, please state your motion for suppression of evidence.

DC: Your honor, we have received a notice of disclosure which indicates that the prosecution will offer into evidence a box allegedly containing marijuana which the Government will apparently contend was lawfully seized from the person of the accused after an automobile accident on 21 June 19XX. It is our contention that this evidence was seized illegally. The search was without probable cause, not incident to apprehension and should be suppressed.

MJ: Does your motion go toward any object other than the box and the substance contained therein?

DC: No, your honor, it does not.

MJ: Trial counsel, do you intend to offer this evidence?

TC: Yes, we do.

MJ: Under what theory will you offer a foundation?

TC: Your honor, we believe the evidence was seized as a result of a search incident to the lawful apprehension of the accused.

MJ: Are you prepared to present evidence at this time?

TC: Yes, your honor.

MJ: Please proceed.

[**NOTE:** Because the prosecution would have the responsibility for establishing the admissibility of the evidence, the trial counsel will first present evidence. The defense is then afforded an opportunity to cross-examine government witnesses and present its own evidence.]

MJ: Does either side have any further evidence to present before argument on the motion?

TC: None by the Government.

DC: None by the defense.

MJ: Does the Government have an argument?

TC: Yes, your honor.

MJ: Please proceed.

[**NOTE:** After the trial counsel argues, the defense will be offered an opportunity to argue, and the trial counsel may be afforded a rebuttal argument because the Government has the burden of proof.]

Section II
Voir Dire and Challenges

4-1. General.

a. Introduction. Voir dire is the questioning of panel members to ensure that the accused is tried by an impartial court. The procedure for voir dire and challenges is set out in DA Pamphlet 27-9, Military Judges' Benchbook, section IV, paragraphs 2-23 through 2-25. The substantive law is governed by R.C.M. 912, examination and challenges of members, and by the extensive case law which discusses voir dire in the military.

b. Purposes. The statutory purpose of voir dire is to obtain information for the intelligent exercise of challenges. R.C.M. 912(d) discussion. But voir dire has other practical purposes, including highlighting pertinent aspects of counsel's case, establishing rapport with the panel, indoctrinating the members about counsel's view of certain facts or law, and identifying favorable and unfavorable court members. The degree to which counsel are permitted to attain these other purposes or, in effect, "argue the case during voir dire," is controlled by the military judge.

c. Scope and Control. The nature and scope of questioning members is within the discretion of the military judge. R.C.M. 912(d) discussion. The judge has broad powers in determining what questions may be asked and by whom. Some judges ask no questions and permit counsel to question the members extensively. Other judges ask a battery of standard questions which counsel may supplement, which is more in line with the federal practice. See Fed. R. Crim. P. 24(a). There is

no explicit right of the parties to question members personally. The judge may require that counsel submit questions to him in writing, but may not prohibit otherwise proper questions only because they were not submitted in writing. United States v. Torres, 25 M.J. 555 (A.C.M.R. 1987). The cardinal rule is to "know thy judge" and how that the judge controls voir dire.

4-2. Preliminary Matters

a. Selection Materials. A copy of written material used by the convening authority to select members must be provided to any party upon request (R.C.M. 912(a)(2)), but materials pertaining solely to nonselected members need not be provided unless the military judge finds good cause. Defense counsel may review these materials to determine if the members have been properly selected in accordance with the article 25, UCMJ "Big Six" criteria - age, education, training, experience, length of service, and judicial temperament. Trial counsel must be careful not to become involved in the nominating process; trial counsel may not "screen" the potential members provided by battalion or brigade commanders or division adjutants by recommending additions or deletions based upon counsel's appraisal of the members.

b. Pretrial Questionnaires. Pretrial questionnaires save time and contain a wealth of useful information (for example, in a father-daughter molestation case, how many members have teenage daughters?). Upon request of defense counsel, trial counsel must provide the member's written responses about date of birth, sex, race, marital status, age and number of dependents, home of record, civilian and military education, unit, past assignments, awards and decorations, and date of rank. The military judge must approve a request for additional information. Review

these questionnaires before trial. Many routine questions need not be asked and the questionnaires are a good basis for follow-on questions. For an example of a court member questionnaire, see chap. 3, sec. D, paragraph 1m, supra.

4-3. Group Voir Dire

a. Trial Counsel. Trial counsel has the first opportunity to conduct group voir dire, but often waives asking any questions. This may be because counsel has been too busy preparing for other parts of the trial, or because trial counsel feels no need to question those members who have been selected by the convening authority as "best qualified" under article 25, UCMJ, or because trial counsel hopes to reap the benefits of watching defense counsel do a poor voir dire and alienate the members. There are several scenarios, however, where trial counsel should seriously consider asking questions.

(1) Confidential informant. Some members believe confidential informants are untrustworthy and will not convict on evidence supplied by a confidential informant.

(2) Immunized witness. Some members believe that immunized witnesses are "free to lie" and will not convict on evidence from an immunized witness.

(3) Circumstantial evidence. Some members believe that circumstantial evidence is not as good as eyewitness testimony and will not convict where there is no eyewitness.

(4) One-on-one. Some members believe that ties go to the defense when one witness (often a sex crime victim) gives testimony that conflicts with the accused's testimony (especially when consent is a defense to rape).

(5) Urinalysis. Some members do not have confidence in the urine testing program and will not convict regardless of how sound and reliable the unit and laboratory procedures may have been.

(6) Unsympathetic victim. Some members believe that an accused is not guilty when the victim was at fault--for example, if a larceny victim left his wall locker unsecured, or if a rape victim dressed in revealing clothes or shared some drinks with the accused.

(7) Witness list. It is a good practice to read the list of potential witnesses to the members to determine if any of the members are disqualified based on their knowledge of a witness. Otherwise, the member may first learn of the witness during trial and become disqualified at that time, possibly creating a quorum problem.

(8) Preemptive voir dire. If the judge routinely permits defense counsel to ask extensive questions about members' attitudes and hypothetical scenarios, it is a good practice for trial counsel to preempt the defense thrust by educating the members about correct responses. For example, defense may ask, "How many members agree that a discharge and confinement are appropriate for anyone convicted of a barracks larceny?" Trial counsel may wish to preempt this artful questioning by asking, "Do you all realize that until you have heard all of the evidence and listened to the judge's instructions, you cannot determine what an appropriate sentence should be for this accused and this offense?" Remember that the ability of either side to ask these questions will be within the judge's discretion.

b. Defense Counsel. Voir dire is normally the province of defense counsel. It is traditionally regarded as one of the defense's best opportunities to influence the outcome of a case and should be an

important facet of the defense strategy. First impressions are lasting, and voir dire offers defense counsel the opportunity to make a favorable first impression on the court members. Do not voir dire for the sake of voir dire. Have a purpose. Tailor questions to your theory of this case. Hastily prepared "form" questions often are not helpful. Be wary of confusing questions, long questions, or awkward hypotheticals.

(1) Get the members to talk. Use open questions that invite responses. Make a statement and ask a certain member whether he or she agrees or disagrees; then ask for another member's views.

(2) Do not taint the panel. For example, if one member claims to know something about the case, do not ask him what he knows in front of the other members. Save those questions for individual voir dire. (Or else the member may blurt out, in front of the others, "I know he killed her because I read the final CID report").

c. Keeping Track of Answers

(1) For the record. The best method is to ask members to raise their hands for an affirmative response. If members respond merely by nodding their heads it is easy to miss a response, and it is easy for a member to hesitate about a difficult question and, unnoticed by counsel, give no response. A raised hand requires commitment and is a clear signal. Counsel should also state, for example, "negative response" or "positive response from COL Center", so that the record of trial is clear.

(2) For yourself. Keep track of the members' responses so that you will be able to tell the judge who is requested for individual voir dire and why, if necessary. It is difficult to ask questions, watch and listen to responses, and record the members'

demeanor, reactions, and answers all at the same time. Use an assistant (counsel or a legal specialist) to record the responses and reactions so you can better determine who to question or challenge and upon what grounds.

4-4. Common Grounds for Challenge

R.C.M. 912(f) lists fourteen grounds for causal challenges. Many of these, such as when a member has acted as counsel for a party as to a charged offense, are obvious conflicts which are left over from the days when line officers served as counsel and are now outdated. Listed below are some of the more common grounds for causal challenges.

a. Rating Chain Relationship.

b. Knowledge About the Case.

c. Knowledge of a Witness, Accused, or Counsel.

d. Victim of a Similar Crime.

e. Inflexible Attitude About Legal Instructions or Sentencing Options.

See the sample voir dire questions beginning at sec. B, paragraph 8, infra.

4-5. Individual Voir Dire

a. Defense. Normally defense counsel requests members for individual voir dire. Counsel should probe for bias and prejudice based on the member's responses during group voir dire. In conducting individual voir dire, defense counsel should follow the advice below.

(1) Get the member to talk. Use non-leading, open-ended questions.

(2) Make notes. Jot down exact words to "lock-in" a causal challenge; for example, "there's no way I could even consider any punishment other than a discharge for a barracks thief."

b. Trial Counsel. Trial counsel's role during individual voir dire is often one of damage control and rehabilitation. When a member has made a damaging statement due to his misunderstanding of the law or as a result of artful hypothetical questions, trial counsel may attempt to rehabilitate the member by having the member explain the response and by asking the three questions that appear below.

(1) Can you follow the judge's instructions about the law?

(2) Will you listen to all of the evidence before you decide, and base your decision only on the evidence presented at trial?

(3) Can you give this accused a full, fair, and impartial hearing?

These questions are not magical talismans; trial counsel must still get clear, unequivocal responses after a member has "waffled" or answered a question two different ways. For example, if a member says, "even though I have been the victim of four unsolved robberies, that probably will not affect my view of this robbery," make the member explain that response. Will it affect the member or not? Get a clear explanation for the record.

4-6. Exercising Causal Challenges

a. Trial Counsel. The prosecution rarely requests challenges for cause unless a member is clearly disqualified, and even then, the government often leaves the matter for defense counsel to resolve. Throughout the exercise of causal and peremptory challenges trial counsel must keep quorum requirements (five members for a general court-martial and three for a special court-martial) in mind.

b. Combinations of Biases. Defense counsel should state the challenged member's name and the grounds for challenge. Combinations of biases are most effective--for example, when the member rates someone else on the panel, has been the victim of a crime similar to that charged, and has read a serious incident report about the case. Even though no one of these three grounds, by itself, may justify a causal challenge, taken together it is more likely that the challenge will be granted.

c. Joining a Challenge. Trial counsel may oppose or join a defense challenge. An experienced trial counsel may join in a meritorious or even an arguable challenge to avoid needless appellate issues, to preclude the risk of reversal on appeal, and to keep the outcome "free from doubt." See United States v. Smart, 15 M.J. 21 (C.M.A. 1980).

d. Argument. The judge may permit each side to briefly argue why the challenge should be granted or denied. Be succinct. Quote the member's exact responses, when appropriate, and explain how that makes the member biased or unbiased. The burden of persuasion is on the party making the challenge.

e. Policy to Liberally Grant Causal Challenges. Military judicial policy is that the judge will liberally grant challenges for cause. The standard for abuse of discretion in reviewing denied causal challenge is lower than has heretofore been articulated. United States v. Moyar, 24 M.J. 635 (A.C.M.R. 1987). Some judges adhere to this mandate more "liberally" than others. The key here is to know your judge.

f. Preserving a Denied Challenge. If a defense challenge for cause is denied defense counsel should preserve that issue for appeal. Failure to use your peremptory challenge waives review of the denied causal.

U.S. v. Jobson, 31 M.J. 117 (C.M.A. 1990). Exercise of the peremptory preserves the issue. Note, however, the important "but for" test of 912(f)(4). If counsel uses their peremptory against the same person they unsuccessfully tried to challenge for cause, counsel must state words to the effect that "but for the fact the military judge denied my causal challenge I would have used my peremptory challenge against a different member." Failure to state the rule results in waiver of the denied causal challenge. There is no case-law authority for the idea that counsel must identify who the "other member" is they would have used their peremptory challenge against.

g. Note the effect of amendments to article 41, UCMJ, concerning the challenge of members. The amendments effective 7 November 1990, state that if exercise of a challenge for cause reduces the court below the minimum required, the parties shall exercise or waive all other causal challenges then apparent. Peremptories will not be exercised at that time. The change then states that each party gets one peremptory. If the exercise of a peremptory reduces the 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.

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.

4-7. Peremptory Challenges

a. Single Peremptory. Each party may challenge only one member peremptorily. An exception, as noted

above, exists when new members are added to the court. Ordinarily, trial counsel goes first, but trial counsel often waive the peremptory challenge if the membership is in danger of falling below a quorum or if the number of enlisted members, if requested, is in danger of falling below one-third of the total.

b. Common Prosecution Peremptories. Usually no reason is necessary for the exercise of a standard peremptory challenge. The major exception, of course, is a peremptory challenge that violates Batson v. Kentucky, 476 U.S. 79 (1986). Trial counsel may challenge a member based on responses the member gave during voir dire or based solely on a "hunch". Following are some traditional targets for the government peremptory challenge:

(1) The junior member. Due to lack of experience.

(2) Staff officer. Because this member is not a commander, not someone who "has heard it all before" or who regularly makes difficult personnel decisions.

(3) Lenient sentencer. Any member with a reputation as a lenient sentencer.

c. Defense Peremptory. Remember to preserve any denied causal challenges (see 6. f. above). Following are some common targets for the defense peremptory, depending on the type of case being tried:

(1) President of the panel. Because often this member is very experienced and possesses a strict judicial temperament.

(2) Commander or group leader. Because one who supervises and leads soldiers is often "wise in the ways of soldiers and their stories."

(3) A "hangman." A member with a reputation as a hard sentencer.

d. Discriminatory Peremptory Challenges. Trial and defense counsel may not use the peremptory challenge to exclude a member based on race. Batson v. Kentucky, 476 U.S. 79 (1986); Georgia v. McCollum, 112 S.Ct. 2348 (1992). In J.E.B v. Alabama, 114 S.Ct. 1419 (1994), the Supreme Court extended Batson to prohibit litigants from striking potential jurors solely on the basis of gender. When counsel object to a peremptory challenge as motivated by race or gender, the burden shifts to the opposing counsel to provide a race-neutral reason for the challenge. If the reason is acceptable, the member is excused; if not, the peremptory challenge is denied. There is no longer a requirement that the accused and challenged member be of the same cognizable racial minority group. Powers v. Ohio, 111 S. Ct. 1366 (1991).

4-8. Sample Voir Dire Questions

a. Does anyone know the accused? (Negative response.) (Positive response from _____.)

b. (If appropriate) Does anyone know any person named in any of the specifications?

c. 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?

d. Does anyone have any prior knowledge of the facts or events in this case?

e. Has anyone or any member of your family or anyone close to you ever been the victim of an offense similar to any of those charged in this case?

f. How many of you are serving as jurors or court-martial members for the first time?

g. (As to the remainder) Can each of you who has previously served as a juror or court-martial member put aside anything you may have heard in any previous preceding and decide this case solely on the basis of the evidence and the judge's instructions as to the applicable law?

h. The accused has pleaded not guilty to (all charges and specifications) (_____), and is presumed to be innocent until his guilt is established by lawful and competent evidence beyond a reasonable doubt. Does anyone have any quarrel with this rule of law?

i. Can each of you apply this rule of law and vote for a finding of not guilty unless you are convinced beyond a reasonable doubt that the accused is guilty?

j. You are all basically familiar with the military justice system, and you know that the accused has been charged; his charges have been forwarded to the convening authority and referred to trial by the convening authority. None of this warrants any inference of guilt. Can each of you follow this instruction and not infer that the accused is guilty of anything merely because the charges have been referred to trial?

k. Has anyone had any specialized law enforcement training or experience, to include duties as a military policeman (or policewoman), off-duty security guard, civilian police officer or comparable duties other than the general law enforcement duties common to military personnel of your rank and position?

l. Has anyone had any specialized training, education, or experience as a _____ (related to the case or to an expert witness who may testify).

m. Is any member of the court in the rating chain, supervisory chain, or chain of command, of any other member?

n. (If so) (To junior during individual voir dire) Will you feel inhibited or restrained in any way in performing your duties as a court member, including the free expression of your views during deliberation, by virtue of the fact that another member holds a position of authority over you?

o. (To senior during individual voir dire) Will you be embarrassed or restrained in any way in the performance of your duties as a court member if a member over whom you hold a position of authority should disagree with you?

p. Has anyone had any dealings with any of the parties to the trial, including trial counsel, which might affect your performance of your duties as a court member in any way?

q. Has any member received legal advice from trial counsel?

r. I expect that this trial will very likely last (beyond the normal duty day today) (through _____). Does anyone know of anything of either a personal or professional nature which would cause you to be unable to give your full attention to these proceedings throughout the trial?

s. Is any member aware of any matter which might raise a substantial question concerning your participation in this trial as a court member?

Section III
Rulings on Evidence and Offers of Proof

The Military Rules of Evidence provide specific criteria for raising and preserving objections to evidence. Mil. R. Evid. 103(a)(1) specifies that the opponent of evidence must specifically object, in a timely manner, to the evidence being offered. Counsel must then state with particularity the ground for objection, and if required by the circumstances, promptly move to strike the evidence.

If the opponent's objection is granted, the burden then shifts to the proponent. Mil. R. Evid. 103(a)(2) requires the proponent to then make a record on this matter using an offer of proof to establish the substance and admissibility of the excluded evidence. This offer must be specific in both context and detail, permitting the trial judge to thoroughly evaluate the evidence's merit. In making an offer of proof, counsel should at the very least address four issues: (1) nature of the excluded testimony; (2) what issue it affects; (3) how it affects that issue; and (4) how it relates to the theory of the case. Mil. R. Evid. 103(a)(2) mandates that appellate relief will not be available absent the substance of the evidence being made known to the military judge.

EXAMPLE

(SITUATION: The accused is on trial for alleged assault and AWOL. Trial counsel is in the process of offering an exhibit into evidence.)

TC: Your honor, the Government offers Prosecution Exhibit 13 for Identification into evidence as

Prosecution Exhibit 13. It is a properly completed Military Police Report.

DC: May we approach the bench, your honor?

MJ: Counsel and the accused may approach the bench.

DC: Your honor, we have a rather complex objection at this time, and I believe it would be better to litigate this matter out of the court members' presence.

MJ: You are certain this is something we cannot take up at a side-bar?

DC: Yes, your honor.

MJ: Very well, you may return to your seats. Ladies and gentlemen, counsel have raised an issue which we must litigate out of your presence. Therefore, I will ask that you return to the jury room and wait there. I will reconvene this session as soon as possible, probably within thirty minutes.

[All court members withdraw from the court room.]

MJ: You may proceed, defense counsel.

DC: Your honor, the defense believes Prosecution Exhibit 13 for Identification is not admissible under any of the hearsay exceptions or exemptions contained in Mil. R. Evid. 801, 803, and 804.

MJ: What is your position, trial counsel?

TC: Your honor, in light of the defense's objection we would like to call Staff Sergeant Thanalson to the stand for the purposes of making an offer of proof. He is the victim of the alleged assault and will be able to establish the admissibility of this document as recollection recorded, consistent with Mil. R. Evid. 803(5).

MJ: You may proceed. [Thanalson is called, and sworn. Introductory questions are asked and answered.]

TC: Sergeant Thanalson, do you recognize the person who assaulted you as being in the court room?

A: Yes, he is sitting over there next to defense counsel.

TC: Let the record reflect that Sergeant Thanalson has properly identified the accused.

TC: Sergeant Thanalson, how long ago did this assault take place?

A: About six months ago.

Q: What was your duty assignment at the time of the assault?

A: I was a gate guard here on post.

Q: Do you remember the exact date of the assault?

A: No.

Q: Do you remember any of the details of the assault?

A: No.

Q: I now show you Prosecution Exhibit 13 for Identification. Do you know what it is?

A: Yes, it is the M.P. Report I made out after the incident.

Q: Let me have it back. Do you remember any of the details on this report?

A: No.

Q: Even if I let you see it for a moment?

A: Sir, an assault like the one which occurred six months ago is a pretty frequent event in my job. It probably happens four or five times a month. After six months they all seem the same.

Q: Was the information you made on Prosecution Exhibit 13 accurate when done?

A: Yes, sir.

[DC cross examines.]

TC: No further questions. Your honor, the Government offers Prosecution Exhibit 13 for Identification into evidence as Prosecution Exhibit 13. It is evidence of the witness' memory now lost. If this evidence is going to be placed before the finder of

fact, it will have to be by using this document under Mil. R. Evid. 803(5).

[DC argues.]

MJ: I'll admit Prosecution Exhibit 13 for Identification as Prosection Exhibit 13. However, you may not give it to the court members. You may read those portions of it alluded to, however. Defense counsel may admit the document to establish any inconsistencies.

EXAMPLE (Mil. R. Evid. 412)

(SITUATION. The accused is on trial for the alleged rape of Ms. Eileen Plante. Defense counsel has served notice of his intent to offer evidence of past sexual conduct concerning the victim consistent with Mil. R. Evid. 412(b)(2)(B).)

MJ: Counsel, I have convened this Article 39(a) session pursuant to Mil. R. Evid. 412.

DC: Your honor, the defense believes we have admissible evidence concerning Ms. Plante's prior sexual activity which is relevant to these proceeding. We would like to be able to offer this evidence before the court members.

TC: Your honor, the Government believes Rule 412(a) prohibits such evidence from being admitted. We have read the defense's pleading and offer of proof and are still of the opinion such evidence is neither relevant nor admissible.

MJ: I believe the Government has a valid point, defense counsel. Do you have anything else to say on this matter?

DC: The defense believes the testimony will be admissible and within the provisions of Mil. R. Evid. 412. We request permission to make an offer of proof at this time through the victim herself. The defense believes this offer of proof will demonstrate that the evidence in question falls within one of the recognized exceptions to Mil. R. Evid. 412, specifically Mil. R. Evid. 412(b)(2)(B). Further, your honor, I request to make this offer of proof through the witness in question and answer fashion.

[**NOTE:** Counsel could also have summarized the offer of proof but that would not have been as effective, as we will see.]

MJ: You may proceed, defense counsel.

DC: Ms. Plante, how long have you known the accused?

A: About sixteen years. We went to school together.

DC: Ms. Plante, is it not true that you have had sexual relations with the accused on an intermittent basis over the past sixteen years?

A: Yes, but it was never anything serious.

Q: Is it not true that you had intercourse with the accused last December 27th and 28th, and then again last July 13th and 14th, just one month prior to the incident in question.

A: Yes, but those were accidental meetings. . .

Q: Concerning the offense in question, is it not true that you and the accused accidentally met in the post bank at 1000 hours on the morning of the day you were allegedly raped?

A: Yes, but I had no idea the accused would be there. I had just gone to the bank to make a withdrawal.

Q: And is it not true that you acted very friendly to him that morning, openly friendly?

A: Yes, we are, were, very good friends.

Q: And isn't it also true that just before leaving the bank you invited the accused over to your apartment for lunch that very afternoon.

A: Yes, but it was only because he looked hungry, and I had a roast left over from the night before.

Q: Is it not true that when the accused arrived at your apartment at noon you answered the door scantily clad in a nightgown?

A: What do you mean "scantily?"

Q: What was the nightgown made of, Ms. Plante?

A: Now I understand; yes, I was dressed scantily.

Q: Ms. Plante, do you always dress like that in the middle of the day?

A: Not always, it depends.

Q: Is it not true that after the accused arrived at your apartment you began to methodically seduce him, and, in fact, you thereafter willingly engaged in sexual relations with him over the next two days?

A: It wasn't for two days.

MJ: I have heard enough, counsel. It appears to me that you have established a basis for allowing this testimony to reach the finder of fact. It seems to establish a sequence of events which they may believe evidences a pattern of past sexual behavior, which in turn affects consent. I will, therefore, rule that this evidence may be presented to the court members at the appropriate time. [The military judge issues specific orders under Mil. R. Evid. 412(b)(2)(B).]

Section IV
Describing Witness Gestures

What may seem very clear to counsel during the course of a trial becomes obscure once the record is forwarded on appeal. A common victim of this reality is testimony concerning a witness' gestures. For instance, if counsel asks a witness in what manner the accused attacked him and the witness responds by indicating "the accused came at me with her knife, like this," such explanation will do little to assist reviewing authorities in appreciating the testimony. The following example suggests a better alternative.

EXAMPLE

Q: How far was the accused from the first sergeant?

A: I would say it was about as far as from here to the door in the rear of the courtroom.

TC: Will the defense agree that the distance indicated by the witness is about 30 feet?

DC: I would agree that it is between 25 and 30 feet.

TC: Let the record show that the distance indicated by the witness is between 25 and 30 feet.

TC: What did the accused do then?

A: He reached in his pocket like this, and took out a knife. He opened it, held it like this and began to walk toward the first sergeant, like this.

TC: Let the record show that as the witness testified, he put his right hand in his right front trousers pocket and then withdrew his right hand from his pocket, held his hand at his right side about belt high, assumed a slightly crouched position, and

walked slowly forward. Is this agreeable to the defense?

DC: No objection.

MJ: The record will so indicate.

Section V
Judicial Notice

Both at common law and under the Military Rules of Evidence, counsel are permitted to establish certain specific evidentiary matters not only by testimonial or documentary evidence, but also by judicial notice. Judicial notice is not to be confused with judicial fact finding. Judicial notice pursuant to Mil. R. Evid. 201 allows a judge to judicially note adjudicative facts, which can be further defined as facts generally known universally, or within a geographic area, relevant to the issue at bar. Pursuant to Mil. R. Evid. 201A, the military judge may take judicial notice of domestic or foreign law. Judicial notice is also permitted of facts which are capable of unquestionable and rapid determination via authoritative sources.

Mil. R. Evid. 201 allows the trial judge to take judicial notice sua sponte, or upon motion by either counsel. Counsel's motion here should contain the required guarantees of accuracy in order to facilitate a proper ruling. Judicial notice of an adjudicative fact may be taken at any time during the proceedings. A conclusion by the military judge that a fact will be judicially noticed is not binding on the court members, and the trial judge should specifically instruct them to that end.

EXAMPLE

TC: Request this be marked Prosecution Exhibit next in order for Identification.

REPORTER: This will be Prosecution Exhibit 6 for Identification.

TC: [Offering Prosecution Exhibit 6 for Identification to DC and the Military Judge.] Does the defense care to examine this exhibit?

DC: [Inspects the exhibit.]

TC: The prosecution requests that the court take judicial notice that the motor vehicle speed limit on Fort Leonard Wood, Missouri, on 23 July 19XX, was 10 miles per hour. To assist the court and reviewing authorities, the prosecution offers to the court Prosecution Exhibit 6 for Identification as Prosecution Exhibit 6. Prosecution Exhibit 6 for Identification is a true and accurate copy of paragraph 3a, Post Traffic Regulations, Fort Leonard Wood, Missouri, dated 4 July 1988, supporting the fact to be judicially noted.

DC: No objection.

MJ: The court will take judicial notice that on 23 July 19XX the motor vehicle speed limit on Fort Leonard Wood, Missouri, was 10 miles per hour. Prosecution Exhibit 6 for Identification is admitted in evidence as Prosecution Exhibit 6.

Section VI
Witness Competency

At common law a witness' competence to testify was a matter left within the trial judge's sound discretion. See United States v. Slozes, 1 C.M.R. 47 (C.M.A. 1951). The judge could raise the issue sua sponte, or be

requested to voir dire the prospective witness by either counsel. Such examination may have been required for many reasons, but initially all parties were concerned with the witness' basic capability to: (a) accurately observe an event, (b) remember it in some detail, and (c) be able to satisfactorily articulate that memory at trial. Four major witness concerns generally stimulated the need for voir dire:

1. Emotional and psychiatric capabilities;
2. Inebriation tendencies;
3. Drug abuse tendencies;
4. Child witnesses.

In each alternative, witnesses were traditionally questioned to determine whether their testimony would be relevant and of value to the finder of fact.

Mil. R. Evid. 601 changed the status quo. The Rule simply states that every person is competent to testify unless otherwise provided for in the Rules, such as the prohibitions against testimony by the military judge and court members.

The military judge has some discretion in this area, as Mil. R. Evid. 603 requires that a witness swear or affirm that he or she will tell the truth before being permitted to testify. See United States v. Lemere, 16 M.J. 682 (A.C.M.R. 1983) and United States v. Allen, 13 M.J. 597 (A.F.C.M.R. 1982). Emphasis is now on the weight to be given testimony and not the competency of the witness. See United States v. Matias, 25 M.J. 356 (C.M.A. 1987).

The following is an example of the traditional voir dire examination of a child witness.

EXAMPLE

Q: Marian, will you come over here with me and sit in this chair?

A: Yes.

Q: How old are you?

A: Seven.

Q: Do you go to school?

A: Yes.

Q: Where do you live?

A: At Quarters 104A, Fort Blank, Missouri.

Q: What grade are you in?

A: Second grade.

Q: Where do you go to school?

A: Here at Fort Blank, to Harrison School.

Q: What's your teacher's name?

A: Ms. Bonnie Nelson.

Q: Can you read from books, Marian?

A: Yes.

Q: Can you write?

A: Yes.

Q: Do you go to Sunday School?

A: Yes.

Q: Marian, do you know what a lie is?

A: Yes, I do.

Q: What is a lie?

A: It's when you tell something that didn't happen, something not true.

Q: And what does "true" mean, Marian?

A: What really happened.

Q: Marian, is it right or wrong to tell a lie?

A: It's wrong.

Q: What happens to someone who tells lies?

A: They might get whipped or punished.

Q: Who might whip or punish them?

A: Their mothers and fathers.

Q: Would anything else happen to them?

A: God would punish them when they die.

Q: Do you believe in God?

A: Yes.

Q: Do you believe God will punish you if you lie?

A: Yes.

Q: Marian, if I ask you to raise your hand and promise to tell the truth, will you promise to tell the truth?

A: Yes.

Q: And will you tell the truth about what happened when you are asked?

A: Yes.

DC: Your honor, at this time I request that the witness be sworn on the basis that competency has been established.

[**NOTE**: Examination of a child witness creates an additional factor not present with adult witness--and portrayed by this example: the child must evidence the capability to distinguish between truth and falsehood. Mil. R. Evid. 603 requires that a witness swear or affirm that he or she will tell the truth.]

Section VII
Non-Expert Witnesses

The primary qualification for any witness' testimony is establishing a factual predicate, a basis which demonstrates that the witness can testify accurately. With a non-expert witness, that basis must be created from observations and common experience which provide the framework for understanding the observation.

4-9. Drunkenness

TC: On 21 July 19XX, did you have occasion to observe the accused?

A: Yes.

Q: Where?

A: It was in the Orderly Room, Company A, 1st Battalion, 66th Infantry, here at Fort Riley.

Q: Under what circumstance?

A: He came in griping because he was on CQ the next day, Sunday.

Q: For what period of time did you observe the accused?

A: Approximately 15 minutes.

Q: Describe the accused's appearance as to cleanliness.

A: His face appeared unwashed and had a heavy beard.

Q: Describe the accused's appearance with respect to neatness and the proper wearing of his uniform.

A: His uniform was wrinkled, his tie pulled down and blouse unbuttoned.

Q: What was the accused's condition as to equilibrium?

A: He couldn't maneuver very well.

Q: Did you hear the accused speak?

A: Yes.

Q: Describe clarity and coherency of his speech.

A: He talked wild and didn't make much sense.

Q: What was the accused's condition as to muscular control and coordination?

A: He tried to pick up the clipboard which had the duty roster on it but dropped it.

Q: Describe the accused's complexion.

A: His face was flushed.

Q: Describe the condition of the accused's eyes.

A: They were bloodshot.

Q: Did you have an opportunity to smell the accused's breath?

A: Yes.

Q: How did it smell?

A: It smelled of liquor.

Q: As a result of your observations, did you form an opinion as to the accused's sobriety?

A: Yes, I did.

Q: What is that opinion?

A: In my opinion he was drunk.

4-10. Handwriting (Mil. R. Evid. 901(b)(2)).

TC: Have you ever seen the accused write in longhand?

A: Yes.

Q: How often?

A: Practically every day. We worked together for six weeks.

Q: Have you ever received documents purportedly written or signed by the accused?

A: Yes.

Q: Under what circumstances?

A: He made out the recurrent reports in longhand and would give them to me to approve before they were typed.

Q: How frequently?

A: Every month.

Q: As the result of your experience, are you familiar with the accused's handwriting?

A: Yes.

Q: When were you first notified that you might be a witness in this case?

A: Three weeks ago.

Q: When did you become familiar with the accused's handwriting?

A: Three months ago.

TC: Request that this be marked Prosecution Exhibit for Identification next in order.

REPORTER: This is Prosecution Exhibit 13 for Identification.

Q: I show you Prosecution Exhibit 13 for Identification. Please examine it and state whether or not you have an opinion as to who wrote this document.

A: Yes, I have an opinion as to who wrote this document.

Q: What is that opinion?

A: In my opinion, it was written by the accused, Specialist Harold C. Fingers.

4-11. Speed of a Vehicle (Mil. R. Evid. 701)

Q: Directing your attention to 13 July, at Canon Street and Ellenwood Avenue, did you happen to observe a Buick traveling North on Canon street?

A: Yes, I did.

Q: Did you observe anything unusual about the manner in which the vehicle was traveling?

A: Yes.

Q: What was that unusual factor.

A: Well, it seemed that the vehicle was going very fast. I say that because it was passing all the other cars on the road.

Q: Do you know what the speed limit on that road is?

A: Yes, I travel this highway every day to and from work. The speed limit is 50 miles per hour.

Q: Can you recognize a car that is going approximately the speed limit on this road?

A: Yes, I can.

Q: How fast were the cars going which were being passed?

A: About 50 miles an hour.

Q: How fast was the car going which passed these others?

A: At least 65. There would have been no way for the passing car to get by the others so quickly if it had not been going at least 15 miles per hour faster.

Section VIII
Expert Witnesses

The rules concerning the admissibility of expert opinion evidence are in Section VII of the Military Rules of Evidence. 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. 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 the facts are 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. 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. The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the military judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The trial counsel, the defense counsel, and the court-martial have equal opportunity to obtain expert witnesses under article 46, UCMJ. The employment and compensation of expert witnesses is governed by R.C.M. 703. The accused may call expert witnesses of the accused's own selection and at the accused's own expense. In the exercise of discretion, the military judge may authorize disclosure to the members of the fact that the military judge called an expert witness.

In cases where the opinion of an expert is admissible, there are generally four steps necessary for its admission:

1. The witness must be shown to be an expert in the field about which he is testifying;
2. He must be shown to have made observations that are within this specialty;
3. As a result of such observations he must have an opinion;
4. He must express the opinion.

The following are illustrations of these steps.

4-12. Traffic Expert

Q: On the ____ day of _____ 19 __, what were your duties?

Q: How much actual experience do you have as a traffic investigator?

Q: What formal schooling or courses of study have you received on the subject?

Q: What do your duties as traffic investigator consist of?

Q: About how many accidents of motor vehicles have you investigated?

[**NOTE**: Here counsel can bring out any special qualifications in the field such as: being an instructor in the subject, authoring a book or paper, being a member in a professional society or association, etc.]

Q: Have you ever testified in court as an expert in the field of traffic investigation?

Q: How many times? Before what courts?

Q: Have you ever been required to make written reports of your observations of traffic accidents for official use other than courts?

Q: About how many such reports have you made, and over what period of time?

Q: As a result of your experience in the field of traffic investigation, to what extent are you able to determine the circumstances surrounding the average automobile accident by observing the physical evidence at the scene of an accident shortly after it has happened?

Q: Your honor, at this time I request that you recognize this witness as an expert in traffic accident analysis.

4-13. Forensic Chemist

Q: Will you state for the court the formal education you have had in schools or colleges, the years you attended, and the degrees you have received?

Q: What portion of this education was in the field of chemistry?

Q: What experience have you had in the field of chemistry?

[NOTE: Here bring out any special qualifications in the field of forensic chemistry such as instructing in the field, authoring a book or paper, being a member in professional societies and associations, etc.]

Q: Have you ever testified in court as an expert in the field of chemistry? If so, how many times?

Q: Have you ever been required to make written reports of your observations and conclusions in the field of chemistry for official use? If so, about how many such reports have you made and over what period of time?

Q: As the result of your training and experience in the field of chemistry, do you consider yourself qualified to make a reasonable determination as to (the chemical composition of various substances) (the presence of a narcotic substance in a sample of urine) (_____)?

Q: Your honor, at this time I request that you recognize this witness as an expert in forensic chemistry.

Q: Have you been asked to examine certain compounds relative to this case?

Q: Who asked you to do so?

Q: What was delivered to you for such examination?

A: Two samples of substances which upon superficial examination appeared to be paint scrapings were delivered to me at my laboratory at _____ on _____. One of these samples was marked _____ and the other _____.

Q: What examination was requested of you?

A: It was requested that I conduct a spectroscopic analysis of the two samples in an effort to determine if they were of the same constituency.

Q: What did you do with respect to the sample?
Q: As the result of your examination and analysis of the two samples, have you formed an opinion with respect to their chemical composition?
A: I have.
Q: What is that opinion?

4-14. Expert Testimony as to Value

(SITUATION: Prosecution Exhibit 1, a Bulova watch, has previously been identified by its alleged owner as the watch missing from a jewelry store on 12 July 1992 in Smithville, Missouri. The owner has testified that he gave no one permission to take the watch, and that it was in good working condition on 12 July 1992.)

Q: State your name and address, please.
A: Harold E. Triball, 123 Lane Avenue, Smithville, Missouri.
Q: What is your occupation, Mr. Triball?
A: I am employed as a pawnbroker.
Q: By whom are you employed?
A: By Mr. Silver. I work at his pawnshop at 345 Lane Avenue, Smithville, Missouri.
Q: How far is that from Fort Leonard Wood, Missouri?
A: Almost a mile and a half.
Q: How long have you been a pawnbroker?
A: Thirteen years, as of last June.
Q: Where have you worked as a pawnbroker during that period?
A: Here in Smithville, Missouri.
Q: What does your work as a pawnbroker entail?
A: Well, I loan money on items which are pledged, and also buy and sell items of personal property.
Q: Do these items include watches?

A: Yes.

Q: Mr. Triball, I hand you Prosecution Exhibit 1, a Bulova watch, and ask you if you have seen that watch before?

A: Yes, I have.

Q: When was that?

A: Well, I examined it this morning before coming to court, and I also examined it on 18 July 1992.

Q: For what purpose did you examine it on 18 July 1992?

A: To make an appraisal of its fair market value as of 18 July 1992.

Q: How do you know that Prosecution Exhibit 1 is the same watch you examined on 18 July 1992?

A: By its general appearance and by my initials which I put on the tag here on that date.

Q: What is the condition of Prosecution Exhibit 1?

A: It is in good working condition.

Q: Mr. Triball, are you familiar with what the fair market value of a watch such as Prosecution Exhibit 1 was on 18 July 1992 in Smithville, Missouri.

A: Yes, in my business I have to know what the fair market value of such an item is in order to determine what amount to loan on it.

Q: In your opinion, what was the fair market value of Prosecution Exhibit 1 on 18 July 1992 in Smithville, Missouri?

A: About thirty-five dollars.

4-15. Psychiatrist

Direct examination:

Q: State for the court the formal education you have had in schools, colleges, and medical schools, the

years you attended, and the degrees you have received.

A: I received my undergraduate degree at the University of Virginia in 1962. In 1966 I received my medical degree from the University of Pennsylvania.

Q: Where and when were you licensed to practice medicine?

A: I was first licensed to practice in New York State in 1966. Since then I've been licensed to practice in Virginia, Maryland, and the District of Columbia.

Q: Beginning with your internship, what experience have you had in the practice of medicine?

A: I did my internship at Montefiore Hospital in New York City. My psychiatric residence was at the Albert Einstein College of Medicine, Bronx State Hospital, Bronx Municipal Hospital Center in New York City. Since 1968 I've been active in the practice and teaching of forensic psychiatry.

Q: What special education have you had in the field of psychiatry?

A: I have attended the American Academy of Psychiatry and the Law, and have participated in annual seminars on forensic psychiatry held the past five years by the American Psychiatric Association.

Q: Are you certified as a psychiatrist? By what board?

A: I was certified by the New York State Board of Psychiatric Examiners in 1970.

Q: What practical experience have you had in the field of psychiatry?

A: As I said before, I have been involved in the practice of psychiatry, both as the doctor of record and as a consultant, since 1968. Since that time I have been involved in over 1200 case studies.

Q: What writings on psychiatry have you authored and had published?

[**NOTE:** Here bring out any special qualifications in the field of psychiatry such as instructing in the field, authoring a book or paper, being a member in a professional society or association, etc.]

Q: Have you ever testified in court as an expert in the field of psychiatry? If so, how many times? For the prosecution, the defense, or both?

A: I've testified easily over 100 times and have testified for both sides, in different trials.

Q: Have you ever been required to make written reports of your observations and conclusions in the field of psychiatric medicine for official use? If so, about how many such reports have you made and over what period of time?

A: Yes. From 1970 until 1972 I served as a psychiatrist with the United States Army. In that capacity I wrote a number of psychiatric reports for official use. Since that time I have written reports for official use on the many occasions when I was requested by government authorities to psychiatrically evaluate individuals.

Q: As a result of your training and experience in the field of psychiatry do you consider yourself qualified to make a reasonable determination as to the existence or non-existence of a mental disease or defect in a patient after sufficient observation and examination?

A: Yes, I feel well-qualified to make such a determination.

[**NOTE:** At this point ask the court to accept the witness as an expert in psychiatry. Opposing counsel should be permitted to cross-examine the expert regarding his or her qualifications.]

Q: Have you ever had occasion to observe and examine the accused?

A: Yes.

Q: To what extent did you observe and examine him?

A: On three occasions I examined him, spending a total of 9 hours with him. I spent additional time examining his medical history. I also reviewed a good deal of material concerning the offenses with which he is charged.

Q: In your medical opinion, does the accused presently have a severe mental disease or defect?

A. Yes, in my opinion.

Q: If so, what mental disease or defect?

A: Depressive neurosis.

Q: How has this been determined?

A: As a result of my examination of him, and the application of the information gained in those interviews to his medical history.

Q: What is the clinical psychiatric diagnosis?

A: A condition of stress-related disorder that doesn't reach the level of a break in reality.

Q: At the time of the alleged offense, did the accused have a severe mental disease or defect?

A: Yes, he was suffering from the same disorder.

Q: How has this been determined?

A: By interposing my clinical evaluation upon what I have learned from official reports of the alleged offense.

Q: What is the clinical psychiatric diagnosis?

A: Once again, the same pre-psychotic anxiety-related disorder I have already mentioned.

Q: Was the accused, at the time of the alleged offense as a result of such severe mental disease or defect, unable to appreciate the wrongfulness of his conduct?

A: Yes.

Q: Does the accused presently possess sufficient mental capacity to understand the nature of the proceedings against him?

A: Yes.

Q: Does the accused currently have the mental capacity to conduct or cooperate intelligently in his defense?

A: Yes.

In cases where the accused possibly was under the influence of drugs at the time of the offense:

Q: Was the accused under the influence of alcohol or other drugs at the time of the offense?

A: Yes, the accused was under the influence of alcohol.

Q: If so, what was the degree of intoxication?

A: He was grossly intoxicated.

Q: Was it voluntary?

A: The condition was initially self-induced.

Q: Does the diagnosis of alcoholism, alcohol or drug induced organic brain syndrome, or pathological intoxication apply?

A: Yes, he suffers from a condition known as pathological intoxication.

[**NOTE:** Pathological intoxication is defined as intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.]

Cross-examination:

Q: You didn't examine the accused until six weeks after the crime, did you?

A. That is correct.

[NOTE: This question is important since psychiatrists will state that it is difficult to give an opinion as to a person's mental condition at a time prior to the time the person was first examined.]

Q: You only examined the accused on three occasions. Correct?

A: Yes.

Q: And you spent a total of nine hours with him. Right?

A: Yes.

Q: He had a prior psychiatric history?

A: Yes.

Q: You never talked to the accused's family, fellow soldiers, friends, or neighbors, did you?

A: No.

[NOTE: Develop whether the diagnosis fits the action of accused on date of crime -- e.g., a doctor may find an accused in a catatonic stupor months after the crime, but he may have been very alert while committing the crime.]

Q: Did you have psychological tests made?

A: Yes. He was administered the Minnesota Multiphasic Personality Inventory, the Wechsler Adult Intelligence Scale, the Sentence Completion Test, the Thematic Apperception Test, the Rorschach Test, the Projective Drawings, the Graham-Kendall Memory for Design Test and the Bender-Gestalt Test.

Q: Did you have examinations made to determine the presence of organic brain disease?

[**NOTE:** a. An X-ray examination.
b. A physical examination.
c. Electro-encephalogram, e.g., tracing of waves generated by electrical impulses from brain which may indicate epilepsy or brain tumors.
d. Pneumo-encephalogram. In this test, air is injected into the brain; x-rays of the brain will then show any unusual spaces in the brain.
e. Neurological examination, e.g., a check of central nervous system damage.]

[**NOTE:** If the witness did not conduct these various tests it can be argued that his examination was inadequate. If he did conduct the tests and found no organic brain damage then he can be asked the following question:]

Q: Then, doctor, you are replying entirely on what the accused told you about his symptoms or what you observed about his behavior while talking to him?
A: Yes, that's correct.
Q: The accused appreciated the wrongfulness of his conduct, didn't he?
A: Yes, to some degree.

[**NOTE:** If the answer is no, then the following questions might be asked, depending upon the circumstances, to show that the accused did in fact recognize he had committed a criminal act.]

Q: (a) However, the accused did flee from the scene, correct?

(b) He did pick a secluded spot to commit the crime, is that true?

(c) He did hide the (gun) (knife) (____), right?

Q: You don't know what motivated the accused, do you? (to secure money, to satisfy his lust, to gain revenge; or was he driven by some insane delusion to commit the crime)?

A: No, I cannot say what his motive was.

Q: You believe that all criminals suffer from mental disease, don't you?

A: Yes I do, to some extent.

[NOTE: There are some psychiatrists who believe that all criminals are suffering from mental disease. When the Court hears a psychiatrist state this, it may disregard his testimony.]

Q: You do believe a character or behavior disorder is a mental disease or defect, correct?

A: Yes, in my opinion a severe behavior disorder can qualify as a mental disease or defect.

Q: You define a mental disease or defect as any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls, right?

A: Yes.

Q: You have never testified in court that an accused was sane, have you?

A: That is correct.

[NOTE: This question should be saved for the "professional" defense psychiatrist.]

[NOTE: It is impossible to discuss all of the various ways to cross-examine a psychiatrist, but

the answers to the questions suggested will open up new avenues of cross-examination. The witness should be made to answer questions in language which the court can understand. If the expert does not give reasons for his opinion in understandable language, the court may disregard his testimony.]

4-16. Questioned Documents Examiner

Direct Examination:

Q: State your name, rank, and branch of service.

Q: What is your organization and station?

Q: Mr. Webb, since an expert witness must be shown to be qualified before he is allowed to testify as to his conclusions resulting from examinations, I must ask you certain questions regarding your qualifications.

Q: What is your military specialty?

Q: What are your duties as an Examiner of Questioned Documents?

Q: Do you devote most of your working time to the examination of documents?

Q: How did you acquire your knowledge of this profession?

Q: Do you belong to any scientific or professional organizations?

[**NOTE:** At this time counsel may either offer the witness as an expert, subject to objection by the opposing counsel, or proceed with the following questions without raising the specific question of the witness' qualification as an expert.]

Q: I hand you (Appellate) (Defense) (Prosecution) Exhibits ____ through ____ and ask you to state to the court what they are.

Q: Have you examined the (handwriting) (handprinting) (typewriting) (other pertinent document problem) appearing on these document(s) with other (handwriting) (handprinting) (typewriting) (_____)?

Q: From the examination you have made, and based upon your study and experience as an Examiner of Questioned Documents, did you reach a conclusion?

Q: Tell the court what your conclusion was?

Q: In making your examination (was) (were) the original document(s) used?

Q: Have you prepared photographic charts of the Exhibits in this case, and if so, do you have them with you?

Q: Were the photographic charts made from the Exhibits in this case?

Q: Can you make your testimony clearer and better understood by the use of these charts as you give your testimony.

Q: (TO JUDGE) We request the court's permission to allow the witness to leave the stand and demonstrate in his customary manner the observations made during his examination which formed the basis for his conclusion just expressed on the documents in question in this case, Prosecution Exhibits 1-6 for Identification.

Q: Would you demonstrate to the court your reasons for reaching the conclusion you have stated?

After cross-examination:

Q: Has anything been brought out on cross-examination that you wish to explain (in more detail) further?

Q: Has anything been brought out on cross-examination that in any way modifies or changes your conclusion?
Q: Request that the witness be permanently excused.

Section XI
Present Memory Refreshed and Past Recollection Recorded

If a witness is not able to testify about a relevant fact because of a lapse of memory, or the failure to recall a fact which was previously known, the technique of refreshing present memory may be used to rectify the deficiency. Mil. R. Evid. 612. Any object or document may be employed to refresh the witness' memory, but the witness must be able to testify from his or her own memory after viewing it. Just like every other document or object which is referred to at trial, one used for refreshing recollection must be marked as an exhibit and included in the record of trial.

4-17. Present Memory Refreshed. Mil. R. Evid. 612. Refreshing a witness' memory is frequently confused with a similar technique for obtaining forgotten facts. This related adversarial tool is known as recorded recollection. Mil. R. Evid. 803(5). The primary difference in obtaining testimony under these two evidentiary theories concerns (a) the foundation counsel must establish, and (b) the nature of evidence necessary to stimulate the witness' memory. The following examples clarify this point.

EXAMPLE

Q: Where did the investigating agent live at that time?
A: In the Terrybrook housing area, but I don't remember the name of the street or the house number.

Q: Did you know the street and house number at one time?

A: Yes, the street contained the name of a type of tree and the house number had 3 digits, but I just can't remember right now.

Q: Is there anything which would help you recall?

A: Yes, if I could see a map of the Terrybrook housing area or the report submitted by Mr. Rolow, I would remember.

[**NOTE**: Have document marked as exhibit for identification. This is only for purposes of reference, and it is not admitted unless it qualifies for some <u>other</u> purpose. Show the document to opposing counsel. Hand the document to the witness without revealing its contents.]

Q: I now hand you what has been marked Prosecution Exhibit 6 for Identification. What is this document?

A: This is a copy of Mr. Rolow's report.

Q: Will you examine it please, and then return it to me?

A: [Examines document, returns to counsel] Yes, sir.

[**NOTE**: Hold the document so that the witness may not read from it.]

Q: Now can you tell me on the basis of your independent recollection the name of the street and the house number where the agent lived at the time of the investigation.

A: Yes sir, he lived at 215 Pineridge Lane.

4-18. Recorded Recollection. Mil. R. Evid. 803(5). If a witness' memory on a point is completely exhausted, the contents of a document may be introduced as a substitute for the witness' memory. It is important to distinguish the document's contents from the document itself. Mil. R. Evid. 803(5) specifically establishes that the proponent of this evidence may only read its contents into evidence, but may not admit the document itself. The traditional common law exception of allowing an adverse party to admit the document in rebuttal still prevails.

To make use of this rule, counsel must show:

a. That the witness' memory is exhausted (i.e., that it cannot be refreshed by allowing him to read the document);

b. That a document exists which contains the witness' past knowledge on the point;

c. That the witness either made the document personally or it was made by someone else and the witness verified it; and,

d. Such document was made or verified at a time when the events it records were fresh in the witness' mind.

EXAMPLE

DC: Can you describe the exact times each of these events occurred?

A: No sir.

Q: Are you having difficulty recalling the facts?

A: Yes, I simply cannot recall them now.

Q: Is there anything which might help you to recall the facts?

A: Yes. I made a memo for record about two hours following the event.

Q: [Handing the memo to reporter] Request this document be marked Defense Exhibit for Identification next in order.

REPORTER: This will be Defense Exhibit B for Identification.

[The memo is shown to opposing counsel and the military judge.]

DC: I show you Defense Exhibit B for Identification and ask you to read it to yourself.

Q: Now that you have read it, can you answer my question?

A: No. Not without reference to the document.

Q: What is Defense Exhibit B for Identification?

A: It is a document I prepared shortly after the event.

Q: How do you know?

A: I specifically recall preparing it, and that is my signature on it.

Q: When did you prepare Defense Exhibit B for Identification with respect to the time of the events in question.

A: About two hours later.

Q: At the time you prepared this document, did you have personal knowledge of the facts you included?

A: Yes, I did.

Q: Did it truly represent your knowledge as it then existed?

A: Yes.

DC: The Defense requests that Defense Exhibit B for Identification be admitted into evidence as Defense Exhibit B, and that I be permitted to read it to the court members.

Section X
Statements of the Accused

Upon objection by the defense the prosecution must show that the accused's statements were voluntarily made and, therefore, admissible. Generally, the trial counsel must be prepared to show:

1. That the necessary rights warnings were given or that no rights warnings were required (e.g., spontaneous declaration, or accused was not a suspect when he was questioned);

2. That the accused understood his rights and voluntarily, knowingly and intelligently waived them; and

3. That the statements were voluntarily made without force, threats, promises, or influence which overbore the will of the accused.

Mil. R. Evid. 304 changed the procedure in several key areas. First, before arraignment the prosecutor must disclose to the defense the contents of all known oral or written statements made by the accused that are relevant to the case, known to the trial counsel, and within the control of the military. Any motions to suppress or objections must be made by the defense prior to pleas being submitted. Failure to do so, except for good cause shown, will waive the issue. Mil. R. Evid. 304(d)(2).

It is important for defense counsel to note that the provision that permits the military judge to require that the grounds for the objection or motion must be specifically stated. Mil. R. Evid. 304(d)(3). Examples of "specific" objections might include:

1. The accused was a suspect but was not given Article 31(b) warnings prior to interrogation; or

2. The accused was threatened with prosecution of her husband if she failed to make a statement, thereby rendering her statement involuntary.

When the issue is raised, the Government bears the burden of establishing the admissibility of the statement(s) in question, but only as to the grounds upon which the defense moved to suppress the evidence. The government's burden is a preponderance of the evidence standard. The issue is decided by the military judge in an out-of-court hearing. The question of admissibility ordinarily must be resolved before entering the plea; and where factual questions are presented, the military judge is required to state "essential findings of fact on the record." Mil. R. Evid. 304(d)(4). If the statement is admitted and the defense desires to place relevant evidence concerning the voluntariness of the statement before the court members, then the members must be instructed to give such weight to the statement as it deserves under all the circumstances. Mil. R. Evid. 304(e)(2).

The following lines of questioning may be adapted to meet the individual and varied objections of the defense and the circumstances surrounding the accused's statement(s). Each investigator or interrogator may use a different style in advising and questioning the accused. Counsel should, however, ensure that the legal requirements have been met.

EXAMPLE

Preliminary:

TC: The prosecution calls as a witness, Agent John Smith.

[Witness is sworn and takes his seat in the witness chair.]

TC: For the record would you please state your full name, organization, armed force, and social security number.

A: I am John Q. Smith, and I am a CID agent assigned to the CID detachment here at Fort Riley. I'm a member of the U.S. Army and my social security number is 666-12-1302.

TC: What are your duties in the CID office?

A: I conduct investigations of offenses allegedly committed by members of the Army or against Government property.

TC: Do you know the accused in this case?

A: Yes, that's him, PFC Grublich. [Points to accused.]

TC: Let the record reflect that Agent Smith correctly identified the accused.

TC: Agent Smith, were you on duty as a criminal investigator on 29 April of this year?

A: Yes, I was.

TC: In the performance of your duties on that date, did you meet with the accused?

A: Yes, I did.

TC: Would you please describe for us how you happened to meet with the accused.

A: On Friday, 28 April I determined that PFC Grublich was a suspect in a robbery which had taken place outside the PX on the night of 27 April. I called his unit but he was on TDY until late Friday night, so at 0700 hours on Saturday morning, that's the 29th, I went to his unit, identified myself and asked him to come down to the CID office for questioning.

TC: Please continue.

A: He got dressed and we drove to my office. I showed him into my office and offered him a cup of coffee and doughnut, which he accepted. Agent Gotcha

joined us because I wanted a witness to the warnings.

Rights Warnings:

[**NOTE:** The following are several examples of establishing that the rights warnings were given. Article 31(b) warnings are required whenever a "suspect" is questioned. The Miranda/Tempia right to counsel warnings are required whenever an individual in "custody" is interrogated. The customary advice normally combines the two warnings. These examples assume that only a general objection has been made.]

TC: What, if anything, did you do next?

A: I advised him of the offense of which he was suspected and of his rights under article 31, UCMJ, and of his right to counsel.

TC: Could you please be more specific?

4-19. Rights Warnings/Waiver Certificate (DA Form 3881)

A: I informed him of his rights using a Rights Warnings/Waiver Certificate, Department of the Army Form 3881. (See Figure 3-17 for a completed DA Form 3881.)

TC: What is DA Form 3881, and how is it used?

A: DA Form 3881 has a format on the back to explain a suspect's rights, and then the front part of the form is a waiver certificate that allows the individual to either refuse to give up his rights or to waive them and make a statement. After I had made him comfortable, I read him the back of the form.

TC: Let the record reflect that I'm showing to the defense counsel what has been previously marked as Prosecution Exhibit 3 for Identification.

TC: Agent Smith, I show you Prosecution Exhibit 3 for Identification. Do you recognize this exhibit?

A: Yes, this is the DA Form 3881 that I used in this case. I know because it has my signature on the front.

TC: Please tell us specifically what you told him.

A: I read verbatim from the back of the form, paragraphs 1, 2, 3--the part 3 that applies to persons subject to the UCMJ--and paragraph 4.

TC: Agent Smith, using this form would you please read the rights warnings in the exact same manner and tone that you read them to PFC Grublich on 29 April?

A: Yes, sir. Like I said, I told him that I was a CID criminal investigator and that he was suspected of committing the offense of robbery of Private Franks in violation of Article 122 of the UCMJ.
Then I read the appropriate warnings. I said:

"Before I ask you any questions, you must understand your rights.

You do not have to answer any questions or say anything.

Anything you say or do can be used as evidence against you in a criminal trial.

You have a right to talk to a lawyer before or after questioning or have a lawyer present with you during questioning. This lawyer can be a civilian lawyer you arrange for, and if necessary, you pay for, or a military lawyer detailed to you at no expense to you. Either one or both of these lawyers can be present."

I then asked him if he understood his rights and he said he did. I asked him if he wanted me to repeat the warnings or if he had any questions. He said "no" to both of my questions.

TC: Please continue.

A: After I determined that he understood his rights, I asked him the waiver questions on the back of the form. Specifically, I asked him if he wanted a lawyer at that time. He said, "No." I then asked him "At this time are you willing to discuss the offense under investigation?" He said he was willing to talk, so in accordance with the instructions on the form I turned to the front of the form.

I had him read and initial the "Rights" section on the front of the form--specifically paragraphs 1, 2, 3--the one applicable to personnel subject to the UCMJ--and finally paragraph 4. I then asked him again if he understood his rights and whether he wanted to talk. He said, "Yes," to both questions.

So I typed in the necessary information on the "waiver" portion of the form and explained that signing the waiver meant that he understood his rights, that he waived his right to a lawyer, and that he was willing to discuss the offenses with me. I had him read the waiver statement, and then I had him and Agent Gotcha, who witnessed all of this, sign the form. I also signed the form. I recognize all three signatures on this form.

TC: Did he indicate to you in any way, at any time, that he wanted to see an attorney?

A: No.

TC: Your honor, Prosecution Exhibit 3 for Identification is offered into evidence as Prosecution Exhibit 3.

[NOTE: Counsel may wish to wait until completion of the presentation of the evidence on the motion before introducing the exhibits. If counsel seeks immediate introduction of the exhibit, defense counsel may wish to question the witness before the military judge rules on admissibility.]

4-20. Memory

A: I gave him his rights by memory. Specifically, I told him: "You are suspected of robbing PFC Franks; you have a right to remain silent and not to say anything to me; that anything you say may be used against you at trial by court-martial; you have a right to have a detailed military lawyer, and you may retain a civilian lawyer at no expense to the Government; that either or both of these individuals can be present during questioning."

TC: What did you do next?

A: I asked him if he understood his rights. He said that he did. I then asked him if he wanted a lawyer. He said that he did not. I then asked him if he was willing to make a statement. He said that he was.

A: I gave PFC Grublich his rights by reading the rights warning card, GTA 19-6-6.*

TC: Let the record reflect that I am showing to the defense counsel what has been previously marked as Prosecution Exhibit 3 for Identification.

TC: Agent Smith, do you recognize this exhibit?

A: Yes, sir.

TC: What do you recognize it to be?

A: This is the GTA 19-6-6 that I use to give rights warnings. Those are my initials in the upper right hand corner.

[NOTE: If the witness does not have the specific card used at the interrogation, trial counsel should obtain an identical rights warnings card, establish a foundation for its use as demonstrative evidence, and use the card for the remainder of the questioning.]

TC: Using this card, would you please read the warnings in the same manner and tone that you did on 29 April when you advised the accused.

[Witness does so. See the previous discussion on use of the DA Form 3881 to give the warnings for a sample answer to a similar question from the trial counsel. The answer should include a specific description of rights given and questions asked by the interrogator to establish a knowing, voluntary, and intelligent waiver.]

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* "How To Inform Suspect/Accused Persons Of Their Rights," June 1991.

TC: Did the accused express to you at any time, in any way, that he did not understand his rights?

A: No, sir. He expressly stated that he waived his right to see an attorney.

TC: Did he indicate to you at any time, in any way, that he wanted to see an attorney?

A: No, sir. He expressly stated that he understood his rights.

TC: Your honor, the prosecution offers into evidence Prosecution Exhibit 3 for Identification as Prosecution Exhibit 3.

The Interview:

TC: After completing the warnings, what did you do?

A: First, I told him that if at any time he wanted a lawyer or wanted to stop talking, he should tell me and I would stop. He said that he understood that. I then questioned Grublich about the robbery, then typed a statement from his answers. I gave it to him to read and asked him to check it carefully, and then I asked him if he wanted to change it or if he had anything to add to it. He said the statement was correct and that he didn't want to add anything.

TC: Was Agent Gotcha present throughout this questioning?

A: No, not all the time. He was present during the time I was advising the subject, but he was in and out during the questioning. He was in my office when I completed typing the statement.

TC: Please continue.

A: Yes, sir. After PFC Grublich said he didn't want to add anything, I placed him under oath and asked him to sign his name at the place indicated and also to initial each page and my typing mistakes and

corrections. He did that and then I signed my name as having witnessed the statement. Mr. Gotcha signed his name attesting to the fact that he had witnessed the oath and the accused sign and initial each page and the corrections.

TC: Let the record reflect that I am showing to the defense counsel what has been previously marked as Prosecution Exhibit 4 for ID.

TC: Agent Smith, I now show you what has been marked as Prosecution Exhibit 4 for Identification. Do you recognize it?

A: Yes, I do. This is the typed statement I took from PFC Grublich on 29 April. You can see his signature and my signature and also Gotcha's signature. The date and time are also noted.

TC: Is this the original?

A: Yes it is. It has been in my case file.

TC: Thank you. [Trial counsel takes exhibit.] How long was it from the time you started advising him of his rights until he signed the statement?

A: About three hours. I advised him of his rights at about 0745 hours and he signed the statement at 1050. The time he signed is on the statement.

Voluntariness:

[**NOTE**: Even though the necessary rights warnings may have been given, the prosecution may still be required to prove that the statement was made voluntarily. For example, after giving the warnings and obtaining the waiver, the investigators allegedly used a rubber hose to obtain a "full" confession.]

TC: What inducements, if any, were offered to Grublich to obtain his statement?

A: None, sir.

TC: What force, if any, was used?

A: No force was used.

TC: Did you make any promises to the accused?

A: I promised him nothing.

TC: Did you offer him any bodily comforts?

A: Yes sir, I did. I offered him coffee, soft drinks, use of the latrine and a cigarette. He said he didn't smoke, but he did drink some coffee, and he used the latrine several times. He also made a couple of trips to the water fountain.

TC: Was PFC Grublich seated during this interview?

A: Yes. He used one of my office chairs.

MJ: Does the defense wish to cross-examine?

DC: (No, your honor) (Yes, your honor).

Cross-Examination:

[**NOTE:** Defense counsel should be aware of the prosecution's burden of proof in establishing the admissibility of an accused's statements. If the defense counsel is aware that the interrogator's warnings contained subtle, perhaps fatal, variations with the rights warnings card or certificate, that may be established by asking the interrogator to state verbatim the rights warnings just as he gave them to the accused. Although at first blush the prosecution has established the voluntariness of Grublich's statement, cross-examination might reveal facts that paint a different picture. For example, Grublich may have consumed a large quantity of coffee because he had only had two hours sleep before the CID agent picked him up at 0700. The

mental state of the interviewee is crucial to the question of knowing and intelligent waiver of applicable rights.]

Offer of Evidence:

[**NOTE:** After examination and cross-examination of all witnesses is completed the trial counsel should offer the accused's statement.]

TC: Your honor, the Government offers into evidence Prosecution Exhibit 4 for Identification as Prosecution Exhibit 4.

[**NOTE:** Under Mil. R. Evid. 304(e), if a specific objection is required, the prosecution need only meet the objection made. For example, if in the foregoing scenario the defense counsel bases the motion to suppress on inadequate right to counsel warnings, the prosecution can quickly focus, through questions to the interrogator, upon the exact issue to be litigated rather than covering the entire panoply of rights warnings and waiver.]

Section XI
Physical Evidence

Physical evidence is generally divided into two categories: (a) demonstrative, and (b) real. Demonstrative evidence is admitted solely for illustrative purposes, for example, a model of a pistol. Real, or original, evidence has a historical connection with the incident in question, for example, the actual pistol involved in the assault. If the item is used for illustration or demonstration, its specific identity is

generally not significant. On the other hand, if the item is connected with the incident or the accused, then the proponent must authenticate the item and show its relevance to the case before it will be admitted. There are three principal means of authenticating or identifying real evidence:

1. Evidence which because of its unique characteristics is readily identifiable.
2. Evidence which has been protected and controlled by a chain of custody.
3. A combination of methods 1 and 2.

Real evidence should not be placed before the trier of fact unless counsel intends to introduce it into evidence and believes it to be admissible. United States v. Pjecha, 7 M.J. 455 (C.M.A. 1979); United States v. Penn, 4 M.J. 879 (N.M.C.M.R.), pet. denied, 5 M.J. 259 (C.M.A. 1978); ABA Standards, The Prosecution Function Chapter 3, § 5 and The Defense Function Chapter 4, § 7).

4-22. Real Evidence

a. Readily Identifiable Evidence. Mil. R. Evid. 901(b)(4).

If the proponent can establish that the item possesses unique identifying characteristics and the witness recognizes those characteristics, then the item has been identified and can properly be admitted into evidence.

Articles with serial numbers or distinctive physical markings are usually considered as being readily identifiable. The proponent should establish both the witness' identification of the item and the list of physical characteristics the witness relies upon in making the identification. See United States v. Briddle, 443 F.2d 443 (8th Cir. 1971) (dark brown leather button with a picture of a whale on the front and a sticky

substance smeared on the back); Scruggs v. United States, 450 F.2d 359 (8th Cir. 1971) (metal tube and sawed-off shotgun deemed readily identifiable).

EXAMPLE

(SITUATION: The accused has been charged with stealing an AM/FM radio from a bunk-mate who takes the stand as a prosecution witness.)

WITNESS: After signing in from leave at the orderly room, I went to my barracks room.

TC: What was the condition of your room?

A: Well, the room looked okay except that I immediately noticed that my new radio was missing. I looked all over--even asked my buddies--but I couldn't find it.

TC: Could you describe it for us please?

A: Yes, sir. It was a Zenith Deluxe, AM/FM radio with digital clock. It was brand new and brown with silver trim.

TC: Would you recognize it if you saw it again?

A: Yes, sir. Definitely. Just after I bought it, I scratched my initials on the bottom--"A.A.F."

TC: Let the record reflect that I am showing to the defense counsel what has been previously marked as Prosecution Exhibit 5 for Identification. [Radio.]

[NOTE: Counsel should be careful not to display offered items of evidence before they are needed. To do so may be considered unprofessional conduct. See ABA Standards, The Prosecution Function Chapter 3, § 5. Counsel should be particularly careful in cases where the evidence may be inflammatory or

where prior display of the evidence constitutes leading the witness.]

TC: Now I show you Prosecution Exhibit 5 for Identification and I ask you to examine it please. Do you recognize it?

A: Yes. This is my radio.

TC: How do you recognize it?

A: The make, model, and color are the same, and on the bottom you can see my initials.

TC: Are you sure this is your radio?

A: Yes sir. I'm positive this is my radio.

TC: Your honor, the Government offers into evidence what has been marked as Prosecution Exhibit 5 for Identification as Prosecution Exhibit 5. Further, we request that at the conclusion of the trial a (picture) (written description) of the exhibit be substituted.

DC: We have no objections, your honor.

MJ: Prosecution Exhibit 5 for Identification is admitted into evidence as Prosecution Exhibit 5. Trial counsel, a (picture) (written description) of this exhibit will be attached to the record of trial and the exhibit released.

[**NOTE:** The above scenario could be applied to any number of situations where the witness can readily identify the object because of peculiar characteristics such as color, weight, size, texture, and so on. A simple "That's it" may not suffice. Counsel should continue questioning until the specific characteristics, if any, are elicited from the witness.]

b. Chain of custody.

A "chain of custody" is normally required when:

(1) The item is not readily identifiable. See United States v. Nault, 4 M.J. 318 (C.M.A. 1978) (discussing the chain of custody requirements for drugs).

(2) The item is readily identifiable, but the witness failed to note the item's unique physical characteristics.

(3) The item is readily identifiable, but its condition is a critical issue and is easily susceptible to change, e.g., murder victim's watch which supposedly stopped running at the time of death.

The "links" in the chain are those persons who handled the item. The proponent must affirmatively establish that the item being offered is the same article, in substantially the same condition, as when seized. Negatively, the proponent must prove that it is unlikely substitution or tampering occurred. Each link must establish: (1) initial receipt of the item, (2) final disposition of the item, and (3) methods of safekeeping between receipt and disposition. Element (3) can usually be established by showing that the item was maintained in a marked and sealed container, an office safe, or another location where it is unlikely that intermeddlers had access to it. United States v. Nault, supra. When the counsel at trial wants to introduce an in-court identification of an item or wants to introduce the item into evidence at trial, the chain of custody must run from the time of seizure to the time of trial. Counsel must actually establish the chain of custody here from the time the evidence is seized until the time it is admitted at trial. On the other hand, when counsel wants to introduce the results of a laboratory analysis,

the chain need only run from the time of seizure until that analysis. See State v. Corley, 288 N.W.2d 296 (1971). The following example demonstrates the procedure for establishing a chain of custody. Where a chain of custody document is used, consideration should be given to Mil. R. Evid. 803(6), (8), and 901(a), 902(4a) with analysis.

EXAMPLE

(SITUATION: On 2 June, Captain J.D. Becker, the company commander, was searching for narcotics in the accused's wall locker when he discovered a paper bag. After establishing the proper preliminary procedures regarding the search, trial counsel questions Captain Becker as follows.)

TC: And what did you find?

WITNESS: I reached into the paper bag and found five or six small aluminum foil packets. They were about one-inch square, and there seemed to be some powder leaking out of several of them.

TC: What did you do next?

A: I took the bag and its contents to my office and called the CID. Agent H. Stetser arrived a few minutes later. I gave the bag to him in the condition I found it.

TC: Did anyone, besides you, handle the bag between the time you seized it and when you handed it to Agent Stetser?

A: No.

TC: How long did you have the bag in your possession?

A: About fifteen or twenty minutes.

TC: Do you have any personal knowledge of what Agent Stetser may have done with the sack?

A: Yes. After I gave it to him, he sat at a table in my office, dumped the tin foil packets on the table and counted, I believe, six of them. He picked them up and placed them in some sort of plastic bag, tagged it, and then left my office.

TC: Thank you. I have no further questions.

MJ: Defense counsel, do you wish to cross-examine this witness?

DC: (Yes, your honor.) (No, your honor.)

[TC calls Agent Stetser to the stand and after the preliminary questions proceeds:]

TC: I draw your attention to 2 June. On that date did you have occasion to see Captain Becker?

A: Yes, I did.

TC: What if anything transpired on that date?

A: At approximately 0900 hours I received a call from Captain Becker in which he stated that he had some suspected drugs in his office. I immediately proceeded to his office, arriving there at 0910 hours. When I walked in, Captain Becker gave me a paper bag. I emptied its contents on a nearby table and counted out six tin foil packets containing some sort of powdery substance. I then picked up the packets and placed them in a plastic zip-lock bag. I sealed it and then prepared a property tag which I filled out, initialed, and dated. I attached it to the plastic bag.

TC: After placing the packets in the plastic bag and marking it, what did you do?

A: I hand-carried it. Actually, I placed it in my suit pocket and went back to the CID office, where I gave it to Agent Barbara Frey, our evidence custodian. That was at about 0945 hours.

TC: Would you describe for us the condition of the bag when you gave it up?

A: Yes sir. It was still sealed but some more of the powdery substance had spilled from the foil packets, so some of it was loose inside the plastic bag.

TC: During the time you had the plastic bag, did anyone else have access to it?

A: No, sir.

[NOTE: The witness is cross-examined. TC then calls Agent Frey, the CID evidence custodian, and questions her. After the preliminary matters are established, the trial counsel continues:]

TC: Agent Frey, I draw your attention to 2 June of this year. On that date did you see Agent Stetser in the course of your duties?

A: Yes, I did.

TC: Would you please describe the circumstances of your meeting?

A: At about 1000 hours on 2 June, Agent Stetser handed me some evidence he wanted processed. The evidence consisted of a plastic bag containing a number of smaller tin foil packets. There was also some white powder leaking from those tin foil packets into the plastic bag. The plastic bag was sealed.

TC: What did you do with it?

A: Well, I logged it in, tagged it, and personally mailed it by first-class registered mail to United States Army Criminal Investigation Laboratory, Fort Gillem, Georgia. It was placed in a large manila envelope.

TC: Could you be more specific about what you did when you tagged it?

A: Yes sir. I placed a tag on the plastic bag with the CID case number, my initials, and the date.

TC: Did you at any time see the plastic bag again?

A: Yes. About three weeks later I received the bag in the mail along with a laboratory report. When I got it back from the laboratory, the original sealed bag had been cut open, but the original seal was undamaged. The original bag and the evidence were contained in another sealed container with the USACIL report number on the seal. I placed this container in the evidence room safe, where it remained until today.

TC: Did anyone, to your knowledge, have access to the plastic bag while it was in the safe?

A: Well, before I mailed it, no one even touched it. As it was, I only had it in my personal possession for about one hour. Since I got it back from Fort Gillem and placed it in the safe, I have taken it out twice--once to show to you and once to show to the defense counsel. Besides the CID commander, I am the only one who even has the keys to get into the evidence room and the safe.

TC: Do you still have the bag in question?

A: Yes sir, I brought it with me this morning; here it is.

TC: Would the court reporter mark this Prosecution Exhibit for Identification next in order.

REPORTER: This will be Prosecution Exhibit 2 for Identification.

TC: Agent Frey, can you identify Prosecution Exhibit 2 for Identification?

A: Yes. This is the same bag that I received from Agent Stetser and sent to the Fort Gordon laboratory.

TC: How do you recognize it?

A: The contents appear to be the same, and I recognize my initials and Stetser's initials. Also, I recognize the CID case number.

TC: Your honor, the Government offers into evidence what has been marked as Prosecution Exhibit 2 for Identification, as Prosecution Exhibit 2.

[**NOTE:** TC may wish to reserve offering the exhibit into evidence until foundations for other related exhibits, if any, have been laid and cross-examination completed. At this point the defense counsel would cross-examine the witness and offer any objections to the admissibility of the evidence. Counsel should note that the foregoing example stops short of connecting the contents of the plastic bag with a laboratory report which establishes the identity of the powdery substance.]

c. Combination of Methods

In this case, if Captain Becker had identified the plastic bag and its contents, the prosecution would have used a combination of the "readily identifiable" technique and the "chain of custody" technique. See United States v. Martinez, 43 C.M.R. 434 (A.C.M.R. 1970). If the proponent relies on a strict chain of custody only, the last link in the chain need identify the item. In the previous example, that would be the evidence custodian, Agent Frey. See Mil. R. Evid. 803(6) and (8), where a chain of custody document is used.

d. Similar and Other Relevant Items

In a number of cases, items found in the possession of the accused are admitted into evidence upon a showing that they were similar to items used or possessed by the perpetrator. The majority view is that such evidence is admissible because it is logically relevant. It

increases the probability that the accused is the perpetrator. United States v. Chibbaro, 361 F.2d 365 (3d Cir. 1966). See Mil. R. Evid. 401.

Other logically relevant evidence may also be admitted notwithstanding the absence of direct connection with the accused. In United States v. Noreen, 48 C.M.R. 228 (A.C.M.R. 1973), a knife found in the victim's house was admitted into evidence although there was no showing that it was the murder weapon. The court noted that the knife was relevant because it tended to establish the fact that a weapon was located on the premises and was therefore available to the perpetrator.

4-23. Demonstrative Evidence

Demonstrative evidence, when used in conjunction with a witness' testimony, can illustrate or clarify that testimony. As in questions concerning the admissibility of real evidence, counsel should be aware of presenting to the trier of fact evidence which is relevant, but for any number of reasons, its unfair prejudicial impact substantially outweighs its probative value. See Mil. R. Evid. 403.

Demonstrative or illustrative evidence should normally be introduced into evidence. To do so the proponent need only establish that the items are sufficiently explanatory or illustrative of relevant testimony in the case to be of assistance to the trier of fact. See United States v. Pjecha, 7 M.J. 455 (C.M.A. 1979); United States v. Penn, 4 M.J. 879 (N.C.M.R. 1978). When the illustrative evidence is a map, chart, or diagram, it must also be verified. That is, someone sufficiently familiar with the locality, object, person, or other thing represented or pictured must testify that from his or her own personal knowledge or observation the

evidence faithfully represents the actual appearance of the subject matter in question.

a. Maps or charts

While the types of demonstrative evidence are as varied as counsel's creativity, the following example indicates how the use of a map or diagram of the crime scene might be helpful.

EXAMPLE

(SITUATION: The accused here is charged with larceny. Captain Jones, a prosecution witness, has testified that he saw the accused enter the building where the crime occurred. The trial counsel has directed Captain Jones to leave the witness chair and go to the easel on which the diagram has been previously placed (with cover sheet) and marked as Prosecution Exhibit 5 for Identification. The drawing indicates the outline of a building, the adjoining parking lot, and the direction North (arrow with letter "N" beside it).)

TC: Captain Jones would you please raise the cover sheet on the easel? Do you recognize Prosecution Exhibit 5 for identification?

A: Yes. This is a drawing I made yesterday, at your request, of the PX Annex and the parking lot next to it.

TC: What is the scale of the drawing?

A: Roughly, one inch equals two feet.

TC: Does this diagram accurately depict the PX Annex and the parking lot?

A: Yes. I didn't take any measurements, but I work in the vicinity, and I am sure of the general layout

that this diagram represents. I see it several times a day, and I've worked in the area for over two years.

TC: Would you please take one of those pens and label the PX Annex and the parking lot?

[Witness so marks the exhibit.]

TC: Let the record reflect that the witness has so labeled the drawing.

TC: Captain Jones, can you point out on this diagram where you were standing when you first saw the accused? And would you mark that point with a large capital "J?"

A: Yes sir, it was right here, just south of the building.

[Witness marks exhibit as requested.]

TC: Let the record indicate that Captain Jones has marked the exhibit as requested.

TC: Now, would you please show us where the accused was standing and mark that point with a capital letter "A?"

A: He was standing in the north end of the parking lot, right here. [Witness marks diagram.]

TC: Let the record indicate that the witness has marked the exhibit as requested.

TC: Now you previously testified that you saw the accused walking around the building. Would you please indicate on the exhibit his line of travel with a dotted line. [Witness so marks the exhibit.]

[NOTE: This line of questioning should continue until the witness' pertinent testimony is placed before the trier of fact in picture form. The method can be tedious but presents to the trier of fact and the appellate authorities a step-by-step construction of the illustrative evidence. After

moving for the chart's admission, counsel should request that a reproduction (usually photo) of the exhibit be made and attached to the record.]

b. Photographs

Other items of illustrative evidence, such as photographs, statistical charts, and models should be verified by the witness and, where possible, incorporated by reference into the witness' testimony. The following situation demonstrates introduction of a photograph.

EXAMPLE

DC: On 16 August, did you go to the motor pool of the 20th Signal Battalion?

A: Yes sir.

Q: What did you do there, if anything?

A: I took a photograph of a jeep in the parking lot there.

DC: Request that the reporter mark this Defense Exhibit for Identification next in order.

REPORTER: This will be Defense Exhibit A for Identification.

[The exhibit is shown to the trial counsel.]

DC: (TO WITNESS) I hand you Defense Exhibit A for Identification. Do you recognize it?

A: Yes sir. I do.

Q: What is it?

A: That is the photograph which I took on 16 August of a jeep that was parked in the motor pool of the 20th Signal Battalion.

Q: Is Defense Exhibit A for Identification a fair and accurate representation of the jeep as it looked to you at the time the picture was taken?

A: Yes sir.

DC: Defense Exhibit A for Identification is offered in evidence as Defense Exhibit A.

TC: No objection.

[**NOTE**: It is not necessary to have the photographer establish the foundation for the photograph. Any person sufficiently familiar with the area photographed can be the proponent of the photograph.]

Section XII
Documentary Evidence

Before documentary evidence may be admitted, either the proponent must establish its authenticity or opposing counsel may waive the requirement. A writing may be authenticated by any competent proof that it is genuine--is in fact what it purports or is claimed to be. Mil. R. Evid. 901 and 902. Authenticity may be established by either direct or circumstantial evidence. Establishing a document's authenticity, however, may not ensure its admissibility. For example, the document may be hearsay. Thus, in any case involving documentary evidence the proponent should be aware of authentication, hearsay, and best evidence rules. See generally Mil. R. Evid., Sec. VIII, IX, and X. The following examples illustrate some of the methods available for authenticating documents.

4-22. Official Records

An official record or report is one required to be kept by a public agency. The record must set forth the activities of that agency and must be prepared by an official pursuant to regulation or statute. The

preparing official must have an obligation to know or ascertain the truth of the facts recorded. Mil. R. Evid. 803(8).

If the document has been compiled in this manner, it may be authenticated without a witness being called. The proponent simply uses an attesting certificate from the document's custodian establishing the criteria mentioned above. Once this has been done, the burden shifts to the document's opponent to establish any impropriety. Mil. R. Evid. 902(4)(a).

EXAMPLE

TC: Your honor, the Government offers Prosecution Exhibits 13 and 14 for Identification into evidence. Prosecution Exhibit 13 for Identification is an attesting certificate from the accused's personnel officer establishing that he is the official custodian of the accused's 201 file. Prosecution Exhibit 14 for Identification is a record of prior conviction obtained from that file.

DC: Your honor, the defense objects to this unauthenticated hearsay being admitted. The custodian of the evidence must be called.

MJ: Overruled. Prosecution Exhibits 13 and 14 for Identification are admitted into evidence as Prosecution Exhibits 13 and 14.

[**NOTE**: Opposing counsel should of course closely examine any documents of this sort which are completed pursuant to regulation. A defect may render the document incompetent as an official record. See generally Mil. R. Evid. 803(8) and analysis.]

[NOTE: This method of authentication is a shorthand version. The proponent could call the custodian of the record to testify that the document was authentic. The foregoing procedure could be used to authenticate any official record. Confinement could be shown by an authenticated extract copy of the guard report, and previous convictions could be shown by an authenticated extract of the accused's service record.]

4-23. Records of Regularly Conducted Activity

Commonly referred to as business entries, these documents are admissible as an exception to the hearsay rule if they record an event or transaction made in the regular course of business at or near the time the event occurred. Preparation of the record must be accomplished as part of the activity's regular practice. Unlike official documents, the maker of a business entry need have no personal knowledge concerning the events in question. Mil. R. Evid. 803(6). The proponent of a business record, however, must generally establish the necessary foundation for admitting the record by calling a witness.

EXAMPLE

(SITUATION: In a murder prosecution, investigators have testified as to their observations at the scene of the crime and have identified Prosecution Exhibit 8 for Identification, a .38 caliber Smith and Wesson revolver, Serial No. 1234567, as the pistol found at the scene of the crime. No evidence has been presented concerning ownership.)

TC: Are you Sally Write, 614 Lane Avenue, Smithville, Missouri?

A: Yes.

TC: Where do you work?

A: I work as a bookkeeper and clerk for the Post Pistol Club.

TC: Is that Post Pistol Club here at Fort Leonard Wood?

A: Yes.

TC: As bookkeeper and clerk at the Pistol Club, do you have any duties to perform regarding registration of firearms?

A: Yes, I do. I am charged with responsibility for maintaining the files on registration of firearms; I assist another clerk in this activity.

TC: Will you explain the procedure for firearm registration?

A: Yes. Any member of the club who has a privately owned firearm which he wishes to use on our range is required to register it with the club prior to using it on the base or participating in club sponsored matches. The member must bring the gun in and have a Pistol Club Form 2 prepared by one of the clerks from information he furnishes us after he identifies himself. He then signs it, and it is placed in our files.

TC: Request the reporter mark this as Prosecution Exhibit next in order for Identification [handing document to reporter].

REPORTER: This will be Prosecution Exhibit 9 for Identification.

TC: [Hands to defense counsel] Let the record reflect that Prosecution Exhibit 9 for Identification has been shown to the Defense.

TC: Miss Write, I show you Prosecution Exhibit 9 for Identification and ask you if you recognize it?

A: Yes, I do, it is one of our firearms registration cards.

TC: Where did you get Prosecution Exhibit 9 for Identification?

A: I took it from the club files this morning.

C: Are registration forms like Prosecution Exhibit 9 for Identification made in the regular course of business of registering firearms at the club?

A: They are.

TC: When are they made?

A: Immediately after the registrant first comes to the club.

TC: Prosecution Exhibit 9 for Identification is offered in evidence as Prosecution Exhibit 9. Request permission to substitute an exact copy of the exhibit.

[NOTE: After admission of the document, the witness may be asked to explain the entries, if necessary.]

4-24. Banking Records

Banking records may be authenticated by a certificate or statement signed under oath, before a notary public, by the person in charge of the entry, or by his or her assistant.

That statement should indicate that:

a. The attached record is the original banking entry, a true copy, or an accurate translation of a machine or electronic entry;

b. The record was made in the regular course of banking business;

c. It was the routine course of the banking business to make the entry; and

d. The signer is the person in charge of the banking entry or his or her assistant.

This method constitutes an exception to the general rule that business entries must be authenticated by competent testimony. See Mil. R. Evid. 902(9).

4-25. Private Writings: Authentication by Author

There are several methods of authenticating private writings. One method is to have the author identify the writing at trial.

EXAMPLE

TC: You stated that the accused bought the radio. What did he do then, if anything?

A: He wrote a check in payment for it and gave it to me.

TC: Request that the reporter mark this exhibit as Prosecution Exhibit for Identification next in order.

REPORTER: This will be Prosecution Exhibit 2 for Identification.

[The exhibit is shown to the defense.]

TC: (TO WITNESS) I hand you Prosecution Exhibit 2 for Identification. Do you recognize it?

A: Yes, that's the check the accused gave me.

TC: Do you know who signed the check?

A: Yes.

TC: Who signed it?

A: The accused did.

TC: How do you know that it is the accused's signature?

A: He signed it in front of me.

TC: Referring to the reverse side of the check, Prosecution Exhibit 2 for Identification, do you know whose signature appears there?

A: Yes, mine. I endorsed the check before I deposited it to my account in the bank.

TC: Did you ever see the check, Prosecution Exhibit 2 for Identification, after you deposited it in the bank?

A: Yes, it was returned to me by the bank a few days later.

TC: Your honor, the Government offers into evidence Prosecution Exhibit 2 for Identification as Prosecution Exhibit 2.

4-26. Private Writings: Authentication of Signature

Another method of using direct evidence to authenticate a document is to have the witness identify the signature on the document.

EXAMPLE

TC: After the check, Prosecution Exhibit 2, had been returned to you by the bank, what, if anything, did you do?

A: I wrote a letter to the accused advising him that his check had been returned to me by the bank. A few weeks later I received a letter from the accused in answer to my letter, in which he acknowledged receiving my letter.

TC: Request that the reporter mark this Prosecution Exhibit next in order for Identification.

REPORTER: This will be Prosecution Exhibit 3 for Identification.

[The exhibit is shown to the defense.]

TC: (TO WITNESS) I hand you Prosecution Exhibit 3 for Identification. Do you recognize this exhibit?

A: Yes.

TC: How do you recognize it?

A: It's the letter I received from the accused concerning his check. I recognize his signature.

Q: How did you receive that letter, Prosecution Exhibit 3 for Identification?

A: It came through the regular mail.

TC: Prosecution Exhibit 3 for Identification is offered in evidence as Prosecution Exhibit 3.

[**NOTE:** The above technique of authentication is known as the "reply letter" method. It provides that "a letter or similar written communication, or a telegram or a radiogram, purporting to be a reply from the addressee of a written message shown to have been communicated to that addressee or to have been placed in a reliable channel of communication may be inferred to be genuine." See United States v. Bryson, 12 C.M.R. 85 (C.M.A. 1953); United States v. McDonald, 32 C.M.R. 689 (N.B.R. 1962).]

[**NOTE:** A variation of proving the authenticity of a document by circumstantial evidence is evidence concerning recognition of handwriting. This may be accomplished by someone sufficiently familiar with the writer's handwriting or by an expert who has compared the document with known examples of the writer's handwriting. See Mil. R. Evid. 901(b)(2) for further discussion and examples and tactics which the opponent may use to show the lack of authenticity.]

4-27. Presentation of Deposition to Court

Depositions are documentary evidence and must be properly authenticated before being admitted into evidence. In addition, counsel must be able to prove the unavailability of the deponent at the time of trial. There are three possible methods for the admission of a deposition into evidence:

a. By stipulation as to the unavailability of the deponent and as to the authenticity of the deposition;

b. By proving the unavailability of the deponent and by calling the deposing officer to authenticate the deposition; and

c. By proving the unavailability of the deponent and by establishing the self-authenticating nature of the document. See Mil. R. Evid. 902(8).

EXAMPLES

a. Stipulation

TC: The prosecution and the defense, with the express consent of the accused, stipulate that Master Sergeant Henry J. Simms, a witness for the prosecution, is presently unable to appear and testify at this trial because . . . and that Prosecution Exhibit 1 for identification is a true and authentic oral deposition of the testimony of Master Sergeant Henry J. Simms.

TC: I now show Prosecution Exhibit 1 for Identification [the deposition] to defense counsel and the accused.

MJ: Do defense counsel and the accused consent to the stipulation of fact and the authenticity of Prosecution Exhibit 1 for Identification?

DC: The defense counsel and the accused consent.

TC: The Prosecution offers Prosecution Exhibit 1 for Identification into evidence as Prosecution Exhibit 1.

b. Proof

TC: The Prosecution offers Prosecution Exhibit 1 for Identification as the oral deposition of Master Sergeant Henry J. Simms. Prosecution (calls as a

witness. . .) (offers documentation as to the absence and unavailability of Sergeant Henry J. Simms. . . .).

DC: [Defense counsel offers no objection or cross-examines the witness or questions the offered documentary evidence.]

TC: In order to properly authenticate Prosecution Exhibit 1 for Identification, the Prosecution calls as a witness [the deposing officer].

[The deposing officer is called, examined, and testifies as to the authenticity of the document.]

DC: [Defense counsel offers no objection to the authenticity of the document or cross-examines the deposing officer.]

TC: Because of the established absence of the deponent and the proper authentication of Prosecution Exhibit 1 for Identification by the deposing officer, the Prosecution requests that Prosecution Exhibit 1 for Identification be admitted into evidence as Prosecution Exhibit 1.

DC: (I have no objection.) (I object _____.)

c. Proof Plus Self-Authenticating Document

TC: The Prosecution offers Prosecution Exhibit 1 for Identification as the oral deposition of Master Sergeant Henry J. Simms. Prosecution (calls as a witness. . .) (offers documentation as to the absence and unavailability of Master Sergeant Henry J. Simms. . . .).

DC: [Defense counsel offers no objection or cross-examines the witness or questions the offered documentary evidence.]

TC: Pursuant to Mil. R. Evid. 902 the Prosecution offers Prosecution Exhibit 1 for Identification as a self-authenticating document.

DC: (No objection.) (I object _____.)

MJ: [Rules on question.]

TC: Because of the established absence of the deponent and the proper authentication of Prosecution Exhibit 1 for Identification, the Prosecution requests that Prosecution Exhibit 1 for Identification be admitted into evidence as Prosecution Exhibit 1.

DC: (I have no objection.) (I object _____.)

Section XIII
Character and Impeachment Evidence

Character evidence is generally admissible to establish the weight which should be given an individual's testimony. While such evidence may be used for other purposes, see, e.g., Mil. R. Evid. 404(b) (using extrinsic offense evidence) and 405(b) (using specific instances of conduct to establish an element of an offense), character evidence is not admissible to prove that a person has a criminal disposition, is a bad person, or, with respect to the accused, has committed the crime in question because a similar crime was committed in the past.

For the purposes of this section, character and impeachment evidence will be discussed primarily through five Military Rules of Evidence: Mil. R. Evid. 404(a) (the admissibility of character evidence generally); Mil. R. Evid. 405(a) (reputation and opinion evidence used to prove character); Mil. R. Evid. 608 (evidence of character, conduct and bias provable by reputation, opinion or specific instances of conduct); Mil. R. Evid. 609 (impeachment by evidence of previous convictions),

and Mil. R. Evid. 406 (habit and routine practices). While these five substantive Rules discuss when such evidence will be admissible, they must be read with Mil. R. Evid. 403, which describes the circumstances under which otherwise admissible character evidence may be suppressed. Mil. R. Evid. 403 provides that evidence should be excluded when its probative value is substantially outweighed by its unfairly prejudicial effect. Federal experience with 403 demonstrates that it is widely employed with the five provisions mentioned above. In fact, it is often the most effective argument counsel may have with respect to why such evidence should not be used at trial.

4-28. Mil. R. Evid. 404(a)

This provision allows counsel to use character evidence for three purposes: (1) to demonstrate a pertinent character trait of the accused; (2) to demonstrate a pertinent character trait of a victim; or (3) in conjunction with Mil. R. Evid. 607, 608, and 609, to demonstrate other witnesses' character. Mil. R. Evid. 404(a) evidence cannot be used to show that the witness is a bad person or <u>generally</u> has bad character traits. The Rule should be implemented only to demonstrate a <u>pertinent</u> character trait's applicability. Naturally, whenever the accused introduces any favorable character evidence, the government may respond in kind.

4-29. Mil. R. Evid. 405(a)

Mil. R. Evid. 405(a) establishes how character testimony may be offered at trial. The Rule provides three techniques: (1) opinion evidence; (2) reputation evidence; and (3) evidence of specific acts when used to impeach or rehabilitate a witness. Such evidence may not, however, be employed to bolster a witness.

The operation of Mil. R. Evid. 405(a) and 404(a) is illustrated below.

EXAMPLE

[**NOTE:** The accused is on trial for larceny. Defense counsel, pursuant to Mil. R. Evid. 404(a), has called a witness to testify about the accused's reputation for honesty. Mil. R. Evid. 405(a) will be used to elicit this testimony. It is important to recognize that 405(c) also permits such testimony to be presented by defense counsel in affidavit or similar form. In the event defense counsel uses such documentary evidence, the government may then rebut with documentary evidence.]

DC: Captain Cook, how long have you known the accused, Private Stading?

A: About three years. He and I arrived at Fort Bliss at about the same time during June 19XX.

Q: What is your present duty position, Captain Cook?

A: I am commander of A troop, 1st Squadron, 3d Armored Calvary Regiment, here on post.

Q: Do you know where Private Stading works, Captain Cook?

A: Yes, he works down at A troop, in the motor pool. He is a track vehicle mechanic.

Q: Do you know where Private Stading lives?

A: Yes, he lives here on post, in the barracks. He's lived there all three years he's been stationed at Fort Bliss.

Q: During the time you and Private Stading have been stationed together have you ever heard any community discussion about him?

A: Yes, like most troop commanders, I try to stay close to my men and try to find out how they are doing and what people think of them. This helps cut down on problems.

Q: Over the past six months have you heard Private Stading's reputation for honesty discussed on post?

A: Yes, I have.

Q: Can you tell the court what Private Stading's reputation for honesty is in the military community?

A: Yes. Everything I have heard about Private Stading's reputation for honesty is good. He has the reputation for being an honest person.

DC: No further questions.

TC: Captain Cook, you've never heard anything negative about the accused's reputation for honesty?

A: Never.

Q: And you know his reputation real well?

A: Yes, I do.

Q: Do you remember when the accused took a week's leave last month?

A: Yes.

Q: Have you heard that the reason for this leave was that the accused had to appear in district court in El Paso on larceny charges?

A: No, I haven't heard that.

Q: Have you heard he was indicted for larceny?

A: No.

TC: No further questions.

DC: When did Private Stading return from leave?

A: On the time and date scheduled.

Q: Has he taken any other leaves since then?

A: No.

Q: Have you heard that the charges against Private Stading were dismissed?

A: I have heard nothing about any criminal charges other than those at trial today.

Q: Have you heard anything in the community about Private Stading receiving any type of award for honesty?

A: Yes, three weeks ago everybody was talking about the Regimental Commander giving Private Stading an award for returning a starlight scope he found in the desert during a recent training mission.

DC: No further questions.

EXAMPLE CONTINUED

[**NOTE**: Based on the same facts discussed above, the witness may also be called to provide opinion testimony.]

DC: Captain Cook, how often do you see Private Stading at work?

A: Virtually everyday.

Q: What does that work entail?

A: Servicing very expensive military property with fungible high cost equipment.

Q: Based on your experience with Private Stading, what is your opinion concerning his honesty?

A: My opinion is that Private Stading is an honest person. I trust him.

DC: No further questions.

TC: Captain Cook, you are close to your men, aren't you?

A: Yes, I think a good commander should be.

Q: You know a lot about them, don't you?

A: Yes.

Q: You know a lot about the accused also, don't you?

A: Yes.

Q: Do you know that last month when the accused was on leave he had to go to a civilian court in El Paso and face a larceny charge?

A: No, I didn't know that.

TC: No further questions.

DC: Captain Cook, has Private Stading missed any duty since taking leave?

A: No.

Q: Do you know about Private Stading returning any expensive property he found to military control?

W: Yes. When we were in the field six weeks ago Private Stading found a starlight scope. It didn't belong to us; apparently some ADA unit left it out there. In any event, Private Stading gave it to me, and I turned it in.

Q: Do you know what happened thereafter?

A: Yes. Private Stading got an award from the Regimental Commander.

DC: No further questions.

4-30. Mil. R. Evid. 608

A common technique for demonstrating a witness' character involves presenting evidence which describes the witness' truthfulness or untruthfulness. Mil. R. Evid. 608(a) controls this area by providing that such testimony may be offered to impeach or to rehabilitate a witness, but it may not be used to bolster the witness's testimony. This means that after testifying, a witness, including the accused, may be attacked with evidence showing the witness is untruthful and therefore should not be believed. After this has been done, the proponent of the witness may present similar evidence to rehabilitate the witness, i.e., present testimony showing the witness is a truthful person and should be believed. The proponent of the witness, however, may not bolster that witness'

character by calling witnesses to demonstrate truthfulness unless or until an attack has been made.

Subparagraph (a) provides that evidence concerning a witness' character for truthfulness may be presented in either reputation or opinion from. Subparagraph (b) also allows the use of specific instances of conduct on cross-examination to demonstrate truthfulness or untruthfulness. Again, this testimony may be used to attack or rehabilitate a witness, not to bolster him.

Subparagraph (c) states that a witness may be impeached by demonstrating there was reason for the witness to misrepresent the facts at bar due to a bias, prejudice, or motive. This can be shown through examination, "or by evidence otherwise adduced." Mil. R. Evid. 608(c) is unique to the Military Rules of Evidence. The Federal Rules, for instance, do not have such a provision.

Notwithstanding the Federal Rules silence in this area, most federal courts have allowed such evidence to be admitted. United States v. Abel, 469 U.S. 45 (1984).

The following examples will help demonstrate how Mil. R. Evid. 608 can be used to show witness bias and believability.

EXAMPLE (TRUTHFULNESS)

[NOTE: In the situation below, a government undercover informant is on the stand testifying about having purchased heroin from the accused.]

TC: Private Soafer, what happened after you met the accused, SGT Batilla, in the supply room?

A: She gave me two small packets of what appeared to be heroin.

Q: What did you do with them thereafter.

A: I turned them over to Special Agent Yoder.

[**NOTE:** After the government presents the remainder of its case and rests, defense counsel calls Captain McIntosh].

DC: Captain McIntosh, what is your present duty assignment?

A: I am company commander of HHC, 1st Battalion, 3rd Brigade, here on post.

Q: How long have you held that position?

A: About two years.

Q: Do you know Private Soafer?

A: Yes, I do. He used to be a member of my unit. As a matter of fact, he was the unit morning report clerk when I first assumed command.

Q: Did you have an opportunity to deal with Private Soafer?

A: Yes, he was in the unit for about six months before he was transferred. During that period I had daily contact with him. I observed his performance of duty and had numerous conversations with him concerning unit readiness. As morning report clerk I depended upon him to keep the records straight.

Q: As a result of dealing with Private Soafer, have you formed an opinion as to his truthfulness.

A: Yes I have.

Q: What is that opinion?

A: Based on my dealing with Private Soafer, it is my opinion that he is not a truthful person, and I would not believe him concerning a matter of importance.

Q: Would you believe Private Soafer if he testified under oath?

A: I would not believe Private Soafer under oath or any other circumstances unless I checked it out myself beforehand.

DC: No further questions.

[NOTE: In rebuttal the government calls Special Agent Yoder, CID.]

TC: SA Yoder, how long have you been with the CID?

A: About thirteen years.

Q: What are your primary duties?

A: I investigate drug offenses.

Q: During the past six months have you had an opportunity to become acquainted with a Private Soafer?

A: Yes, he has worked for me since last July.

Q: How often do you see Private Soafer?

A: At least once a day. He is my liaison to the 1st Battalion; he keeps me posted on what's going on down there with respect to drug traffic. We talk quite a bit.

Q: As a result of this daily contact have you formed an opinion as to Private Soafer's truthfulness?

A: Yes, I believe him to be a truthful person.

Q: Would you believe Private Soafer under oath.

A: Yes sir, I would.

TC: No further questions.

DC: Mr. Yoder, do you know that Private Soafer was busted for selling heroin to members of his unit seven months ago?

A: Yes, I do.

DC: Isn't it true that you were instrumental in having those charges dropped?

A: Yes.

DC: And isn't it also true that a condition of having the charges dropped was that Private Soafer would work for you as an undercover agent.

A: Yes.

DC: Knowing all of this, you still believe that Private Soafer is a truthful person and should be believed?

A: Yes.

EXAMPLE (BIAS)

Q: Isn't it true that you and the accused, Private Ellen Williams, have been friends since high school?

A: Yes, its been about five years now.

Q: Isn't it also true that you entered the Army together?

A: Yes sir, it is.

Q: Took basic training together?

A: Yes sir.

Q: And both of you asked to be stationed here at the Fulda Gap together?

A: Yes sir.

Q: Isn't it also true that last night you told the first sergeant that you loved Private Williams and would do anything to protect her?

A: Yes sir, but I was just kidding around with the first sergeant at the time.

EXAMPLE (MOTIVE)

[**NOTE**: Defense counsel is cross-examining a larceny victim.]

DC: Private Schaffer, isn't it true that you purchased the radio you now claim was stolen when you were in

Thailand, and not in Killeen, as you reported to the MPs?

A: That is possible, I'm not sure; I've had a lot of TDY recently.

Q: Isn't it true that you originally told the MPs the radio was worth $200, but then changed your story and told them it was only worth $110?

A: No sir, I didn't change my story. I was just a little confused, that's all.

Q: Isn't it true that over the last six months you have had to borrow money from half the members of your platoon in order to eat?

A: No sir, not half.

Q: Isn't it true that you owe $110 to your roommate and have been unable to pay her back for six months.

A: Yes sir.

Q: Isn't it true, then, that your radio isn't really worth the $110 you told the MPs it was, but is actually only worth the $45 you paid for it in Thailand?

A: I'm not sure.

Q: Isn't it also true that the only reason you reported the radio's theft was because you needed some money to pay back those loans, and figured submitting a false claim would be an easy way to get it?

A: No sir!

Q: Isn't it true that you sold the radio in question to Private Marrow just before she left for Korea last week.

A: I don't remember.

[**NOTE**: This problem also presented counsel with the opportunity to impeach the witness with prior statements the witness made to the MPs. See Mil. R. Evid. 613 and 801].

4-31. Mil. R. Evid. 609

This provision concerns counsel's ability to impeach all witnesses, including the accused, with evidence of certain previous convictions. In order to be properly understood and applied, all six subparagraphs of this Rule must be understood. For ease of discussion they are divided here into three sections. Subparagraphs (a) and (b) make up the first section and concern a conviction's "qualifying criteria." Specifically, 609(a)(1) states that in order for a "non crimen falsi" conviction to be admissible the impeaching offense must have carried a maximum punishment of more than one year's confinement under the law under which the witness was convicted, a dishonorable discharge, or death. If the conviction is to be used "against the accused," its probative (impeachment) value must simply outweigh its unfair prejudicial effect (to the accused). However, convictions of a nonaccused witness may be admitted unless the unfair prejudicial effect (to the accused) substantially outweighs its probative (impeachment) value. All of these criteria are absent in 609(a)(2). There, a conviction is admissible if it was for "dishonesty or false statement, regardless of punishment." This latter category of offense has been interpreted very narrowly, generally to include only crimes which require untruthfulness, or "crimen falsi," in their perpetration. For example, perjury and false official statement will qualify for admission under 609(a)(2), even if the maximum punishment applicable to them is less than one year's confinement, a dishonorable discharge, or death.

The second qualifying criterion is found in 609(b). It provides that a conviction will generally not be admitted if it is more than 10 years old. While the drafter's intended this Rule to keep most "remote"

convictions from reaching the finder of fact, the Rule should not be interpreted as an absolute limitation. It provides that convictions more than 10 years old may be admitted if: (1) the proponent gives advance written notice of his intention to do so; (2) "the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect;" and (3) the judge believes such evidence is required in the interest of justice. See also Mil. R. Evid. 102. The 10-year clock begins to run on the date of conviction or at the end of confinement, whichever is later. Mil. R. Evid. 609(b).

The second category of criteria may exclude an otherwise admissible conviction. Subparagraph (c)(1) provides that even when the conviction is admissible under (a) and (b), it may not be admitted if the witness has rehabilitated himself and can demonstrate that result on the record. Similarly, pursuant to (c)(2), the conviction will not be admissible if it has been annulled, the accused has been pardoned, or a similar event based on a determination of innocence has occurred.

Finally, category three defines how and when a criminal proceeding will qualify as a "conviction." Subparagraph (f) states that the conviction is admissible as soon as a "sentence has been adjudged." Further defining this criteria, 609(e) states that the pendency of an appeal will not prohibit the impeaching conviction's admission.

If evidence of a prior conviction is admissible, it may be obtained in either of two ways: Counsel may simply introduce documentary evidence establishing the conviction; or counsel may ask the witness whether or not he has been convicted for the offense. An example of the latter technique follows.

EXAMPLE

Q: Private Orobnic, isn't it true you once lived in El Paso, Texas?

A: Yes.

Q: In fact you lived there during July 19XX. Isn't that true?

A: Yes.

Q: Isn't it also true that on 30 July 19XX, you were convicted in the United States District Court in El Paso, for importing heroin?

A: Yes.

Q: And that is a felony, isn't it?

A: I'm not sure.

Q: You received 18 months confinement, didn't you?

A: Yes.

4-32. Mil. R. Evid. 406

Mil. R. Evid. 406 is a unique provision. It permits counsel to establish that an individual acted in a certain fashion at a particular time because it is that individual's habit to so act. The Rule similarly permits an organization's activities to be established through proof of that organization's past routine practices. The common law rejected the notion that an individual's past conduct or character could be used to demonstrate his actions on a specific date. In fact, Mil. R. Evid. 404, 405, 608, and 609 embrace this view.

Because Rule 406 is a unique provision, counsel must do more than merely allege that an individual has a certain habit and the habit was followed on the day in question. Counsel must meet a higher standard when applying Mil. R. Evid. 406, or face having their evidence suppressed as inadmissible character testimony. The following example may help clarify this requirement.

EXAMPLE

[NOTE: The accused, Private Burgess, is charged with having stolen $100 worth of stereo albums from SFC Press, his platoon sergeant. SFC Press and the accused live in the same barracks. Press has already testified that when he returned from duty on the day in question several of his records were missing. Subsequent investigation revealed that the albums were located in the accused's wall locker. The defense will present the following evidence in an attempt to demonstrate that Private Burgess did not obtain or possess the records in question with the specific intent to permanently deprive SFC Press of his property.]

DC: Private Ono, how long have you known Private Burgess?

A: About seven months. We both arrived at A Company on the same day. We have lived in the same barracks during this period.

Q: How many people live in this barracks?

A: About 20 people sir, mostly E-2's and E-3's. SFC Press, the platoon sergeant, also lives in the building.

Q: Would you describe the physical layout of the barracks?

A: It is an old building, just one story high. There are no individual rooms; the building is in an open bay arrangement. Each man has a bunk, a footlocker, and a wall locker. Because SFC Press is the platoon sergeant, his area is separated by a movable partition, no doors or anything, just a partition.

Q: How long have you known the other men in the bay?

A: About six months. We all got to the unit about the same time; we are part of a training cycle.

Q: Is Private Burgess part of this cycle?

A: Yes. He's been with us the whole time.

Q: How well do you know Private Burgess?

A: Real well. As a matter of fact the twenty of us in the barracks are all pretty good friends. It's a good unit and we get along fine.

Q: How about SFC Press, how well do you know him?

A: Not too well; he just got here a month ago, actually it was only a couple of days before this thing with the records started.

Q: Based on your knowledge of Private Burgess, do you know if he has any special interests or hobbies?

A: Yes sir, he is a real stereo freak. He's the only guy in the barracks with a stereo tape deck and turntable.

Q: Do you know what Private Burgess uses his tape deck for?

A: Yes sir. It's a cassette recorder, and he is always going around taping everybody's albums. As a matter of fact he's borrowed records from me at least ten times.

Q: Under what circumstances?

A: Well, if I'm in the area, he'll ask me if he can borrow the records. But if I'm not, he'll just take the ones he wants, record them, and return them as soon as he's done. He'll then explain why he didn't ask you first. I've seen him do this with almost everybody in the barracks, probably at least fifty times. Nobody really minds. Burgess has such a good stereo we all like hearing his tapes of our records. Even SFC Press listens.

Q: Have you or any of your bunk mates ever failed to get your records back?

A: No, Private Burgess always returns them on his own and always explains why he took them.

Q: Do you know if anyone in the barracks has had their records stolen?

A: No one that I know has had their records stolen.

[**NOTE**: Defense counsel should call other witnesses to help substantiate Burgess' habit. Naturally Burgess should also testify on the issue.]

Section XIV
Selected Hearsay Issues

4-33. Mil. R. Evid. 801

Mil. R. Evid. 801(d) concerns statements which are made out of court but may nonetheless be offered for their truth. These statements may therefore be considered for substantive purposes. The Rule simply exempts the type of statements which are listed from the hearsay rules; therefore, to be admissible, they do not have to meet a hearsay exception.

a. Mil. R. Evid. 801(d)(1)(A)

Mil. R. Evid. 801(d)(1)(A) allows a prior inconsistent statement of the witness to be admitted if the prior statement was given under oath subject to the penalty of perjury at a trial, hearing, or other similar proceeding, or in a deposition. The person who made the prior inconsistent statement must testify at the court-martial and be available for cross-examination concerning the prior statement. The key to the use of this exemption is satisfying the requirement for the witness to have given the prior statement at a trial, hearing, or other similar proceeding, or in a deposition.

Statements to law enforcement personnel will generally not meet this requirement.

EXAMPLE

DC: Captain Witness, you just stated on direct examination that you saw the accused, PFC Jones, that night leaving the barracks with a television under his arm, isn't that true?

A: Yes.

DC: You also testified that you got a good look at him, didn't you?

A: Yes.

DC: You previously testified at an Article 32 investigation regarding this case, didn't you?

A: Yes.

DC: The day you testified, you took an oath to tell the truth, didn't you?

A: Yes.

DC: You knew that if you did not tell the truth in that proceeding that you could be subject to the penalty for perjury, isn't that true?

A: Yes.

DC: Captain Witness, I hand you what has been marked Defense Exhibit A for Identification, a copy of which has been provided to the prosecution, and I ask you to look at it.

DC: Captain Witness, Defense Exhibit A for Identification is a verbatim transcript of your testimony at the Article 32 hearing, isn't that true?

A: It appears to be, yes.

DC: Your honor, the defense offers Defense Exhibit A for Identification into evidence as Defense Exhibit A.

TC: Objection, your honor. May we approach the bench.

MJ: Counsel, accused, and reporter approach the bench.

TC: Your honor, the government objects to the court admitting Defense Exhibit A for Identification into evidence on the basis of hearsay.

DC: Your honor, Defense Exhibit A for Identification is being offered as a prior inconsistent statement under Mil. R. Evid. 801(d)(1)(A). The statement meets the criteria for that exemption to the hearsay rule and should be admitted.

MJ: Show me Defense Exhibit A for Identification. Defense counsel, I will admit Defense Exhibit A for identification as Defense Exhibit A. You may not show it to the panel members, however, and they may not take it with them during their deliberations. Further, you will only be allowed to read that portion of Defense Exhibit A which I have marked within brackets and initialed on page 2. You may return to counsel tables.

MJ: Members of the panel, Defense Exhibit A for Identification is admitted as Defense Exhibit A and the defense counsel will now read the pertinent portion of that document.

DC: Q: Can you describe the person you saw that night?

A: It was pretty dark, and I didn't get a very good look at him. I'm not sure if I could recognize him if I saw him again.

Q: Can you give a general description?

A: He was medium height and build and was wearing a hat.

Q: Could you see his face?

A: Not very well. I really can't tell you much about his face.

b. Mil. R. Evid. 801(d)(2)(B)

Mil. R. Evid. 801(d)(2)(B) excludes from the hearsay rule statements which are offered against a party which the party has adopted as being true. A party may adopt a statement either expressly or by silence. For those statements where the party has expressly adopted the statement the proponent's burden is easily carried. For example, if a co-accused made an admission which was also against the accused's interests and the accused said "Yes, that is correct," the express adoption of the statement will allow the government to offer the co-accused's statement against the accused. The more difficult case arises when the alleged adoption of the statement is accomplished with silence. When a statement is made in the presence of a party and the statement is against the party, silence will mean adoption if a dissent in ordinary experience would have been expressed if the statement was not correct. See United States v. Stanley, 21 M.J. 249 (C.M.A. 1986).

EXAMPLE

TC: PFC Smith, directing your attention to 1 March 19XX at approximately 1700 hours, did you have an occasion to see the accused at that time?

A: Yes I did.

TC: What were the circumstances of that meeting?

A: I was sitting in the CID witness waiting room, and he and a PFC Jones were also there.

TC: Did PFC Jones make a statement?

A: Yes, he did.

TC: Where was the accused in relation to PFC Jones when he made his statement?

A: He was sitting next to him on a bench.

TC: Was anyone other than you, PFC Jones, and the accused in the CID witness waiting room at the time?

A: No.

TC: Was there any noise in the room other than your conversation?

A: No.

TC: Did you speak to the accused while he was on the bench with PFC Jones?

A: Yes.

TC: How did the accused react?

A: He responded to my questions.

TC: Was there anything which would have caused the accused to not hear the statement by PFC Jones?

A: No. The accused could hear PFC Jones just fine.

TC: Why do you say that?

A: Because at one point they were talking to each other.

TC: What did PFC Jones tell you?

DC: Objection your honor, hearsay. May we approach the bench?

MJ: Counsel, accused, and reporter approach the bench.

DC: Your honor, the government is offering the statement of a co-accused in this case which is hearsay. The co-accused is not a party in this case, and the statement should not be admitted.

TC: Your honor, PFC Jones made a statement to PFC Smith, the substance of which should have been denied by the accused. PFC Jones said that he held the victim and that the accused stabbed the victim with a knife. A reasonable person would have denied that statement, and since the accused remained silent, his silence means that he adopted the statement.

DC: Your honor, the silence of my client does not signify adoption. His silence was ambiguous at best, and the statement should be excluded.

MJ: Defense, your objection is overruled. Trial counsel may proceed. Return to counsel tables.

TC: PFC Smith, I ask you again, what did PFC Jones tell you?

A: PFC Jones told me that he held the victim while the accused stabbed the victim with a knife.

TC: What did the accused say at that point?

A: He didn't say anything.

c. Mil. R. Evid. 801(d)(2)(E)

Mil. R. Evid. 801(d)(2)(E) allows statements of co-conspirators to be admitted at trial without being subject to the hearsay rule. Two requirements must be met before a co-conspirator's statement may be admitted against an accused. First, the statement must have occurred during the conspiracy, and second, the statement must have been in the furtherance of the conspiracy. Courts generally have little difficulty determining whether a statement was made in the furtherance of the conspiracy. Statements in the furtherance of the conspiracy are generally any statements made by the co-conspirators before the conspiracy has been terminated by apprehension or by the completion of the act. The more difficult question involves whether the statement was made during the conspiracy, as the proponent must establish that a conspiracy existed. The main issue in establishing that a conspiracy existed is how much independent evidence of the conspiracy must be presented. The Supreme Court, in Bourjaily v. United States, 483 U.S. 171 (1987), and the Army Court of Military Review, in United States v. Evans, 31 M.J. 927 (A.C.M.R. 1990), later proceeding, 34 M.J. 165 (C.M.A. 1991), changed the prior rule, which required sufficient independent evidence of a conspiracy by a preponderance of evidence,

when it held that the declarant's statement itself may be considered in determining whether a conspiracy existed. The Court did not decide the issue of whether the statement of the declarant alone would be sufficient.

EXAMPLE

[The issue in this case is whether the accused had the requisite intent to be found guilty of possession with intent to distribute marijuana.]

TC: Military Police Investigator Smith, do you know the accused in this case, PVT Jones?
A: Yes sir, I do.
TC: How do you know him?
A: I was working undercover, and I bought some alleged drugs from him on three occasions.
TC: Do you know PFC Williams?
A: Yes sir, I do.
TC: How do you know him?
A: He was with the accused on several occasions when I met with him.
TC: Directing your attention to 10 March 19XX, did you see the accused and PFC Williams that day?
A: Yes sir, I did.
TC: Describe the circumstances under which you met.
A: I was to meet the accused at Joe's Bar off post to buy some drugs, and I saw the accused and PFC Williams in the parking lot. They called me over to Williams' car, and we were standing under a lamp post. Williams popped his trunk and the accused pulled a small bag of alleged marijuana from a large bag which contained several other small bags which were just like the one I was buying. Later we

discovered that there were 22 small bags like the one I got.

TC: Did the accused say anything to you?

A: Yes, he handed me the bag and said, "That will be 20 bucks."

TC: Did PFC Williams say anything?

DC: Objection your honor, hearsay. May we approach the bench?

MJ: Counsel, accused, and reporter approach the bench?

DC: Your honor, the government is trying to introduce a statement from Williams which is hearsay. It doesn't meet any exception or exemption to the hearsay rule.

TC: Your honor, the witness will testify that Williams said to the accused, "Ask your buddy if he knows any more customers. We need to move this stuff by payday." From the words in the statement, it is clear that PFC Williams and the accused were working in concert, and the statement constitutes a statement by a co-conspirator. In addition to the words in the statement, the accused and Williams were present when the accused sold drugs on other occasions, and when summoned to Joe's Bar to buy drugs from the accused, Williams was present and the drugs were in the back of Williams' car. Even without the statement there is sufficient evidence to show that a conspiracy existed and that the statement was in the furtherance of the conspiracy.

DC: Your honor, the evidence presented by the government is not sufficient and the statement should be excluded.

MJ: Defense counsel, your objection is overruled. You may return to counsel tables.

TC: MPI Smith, I ask you again, did PFC Williams say anything?

A: Yes sir, he said to the accused, "Ask your buddy if he knows any more customers. We need to move this stuff by payday," or words to that effect.

4-34. Mil. R. Evid. 803

Mil. R. Evid. 803 provides 24 exceptions to the hearsay when the availability of the declarant is immaterial. The statements which fall under this rule are thought to be reliable because of the special circumstances which must be shown by laying a proper foundation. If the foundation can be established, the declarant need not be called to testify, even if available, as the statements are believed to be reliable. The likelihood that confrontation issues will arise has been diminished by White v. Illinois, 112 S.Ct. 736 (1992), in which the Supreme Court held that the prosecution was not required to produce a four year-old victim of a sexual assault at trial, nor to demonstrate her unavailability as a witness before admitting her hearsay statements as spontaneous declarations or as statements made for purposes of medical diagnosis.

a. Mil. R. Evid. 803(2)

Mil. R. Evid. 803(2) allows excited utterances to be excepted from the rule against hearsay. These statements are believed to possess inherent reliability due to the absence of time to fabricate. There are three elements which must be shown to make the statement an excited utterance: (1) there must have been an exciting or startling event; (2) there must have been an absence of time to fabricate, or the declarant must still have been under the stress of the excitement; and (3) the statement must relate to the startling event. Courts use a subjective test to determine if a declarant was subject

to an exciting or startling event. United States v. Miller, 32 M.J. 843 (N.M.C.M.R. 1991), aff'd, 36 M.J. 124 (C.M.A. 1992). It is not enough that a reasonable person may have been excited or startled. If the person was not actually startled or excited, this exception will not apply. See United States v. Ansley, 24 M.J. 926 (A.C.M.R. 1987).

EXAMPLE

TC: SGT Smith, directing your attention to 7 March 19XX at 2230 hours, where were you?

A: Sir, I was CQ for my company that evening.

TC: Do you know the alleged victim in this case, PFC Jones?

A: Yes sir, she is a mechanic in my company.

TC: Did you have an occasion to see PFC Jones while you were on duty the night of 7 March 19XX?

A: Yes sir, I did. She lives in the barracks, and she came running into the CQ's area about 2230 hours.

TC: Describe her condition.

A: Well sir, she was wearing jeans and a sweatshirt; her hair was messed up; she was crying; and she was winded. She seemed very upset, and she was shaking as she tried to speak to me.

TC: Did she say anything to you?

DC: Objection your honor, hearsay.

TC: Your honor, may we approach the bench?

MJ: Counsel, accused, and reporter approach.

DC: Your honor, the trial counsel is trying to bring inadmissible hearsay into this proceeding. Any statements made by PFC Jones to this witness should be excluded.

TC: Your honor, the statement which PFC Jones made to SGT Smith is an excited utterance and should be

admitted under Mil. R. Evid. 803(2). The statement that she made to SGT Smith was, "Please help me, I was just attacked in my room by PFC Lewis." The victim has already testified that she was attacked in her room by the accused and that she managed to escape the attack by running away. She stated that the assault occurred at about 2230 hours. Clearly, all the elements of the foundation have been laid for the admission of this evidence as an excited utterance. PFC Jones was subjected to an exciting or startling event; there was no time for her to fabricate; and her statement relates to the startling event.

MJ: Defense counsel, your objection is overruled. Return to counsel tables.

TC: SGT Smith, I ask again, did PFC Jones say anything to you?

A: Yes sir, she said, "Please help me, I was just attacked in my room by PFC Lewis."

b. Mil. R. Evid. 803(4)

Mil. R. Evid. 803(4) provides an exception to the hearsay rule for statements made for the purposes of medical diagnosis or treatment. The statements must describe medical history, past or present symptoms or sensations, and must also be pertinent to diagnosis. The key to admissibility under this exception is that the patient has some expectation of promoting his or her well-being and thus has incentive to be truthful. See United States v. Dean, 31 M.J. 196 (C.M.A. 1990); United States v. Nelson, 25 M.J. 110 (C.M.A. 1987). Proof of this expectation is often relaxed when the declarant is a child. See United States v. White, 25 M.J. 50 (C.M.A. 1987).

EXAMPLE

TC: CPT Smith, what are your duties at the post hospital?

A: I am a nurse. I usually work in the emergency room.

TC: Directing your attention to 25 February 19XX, at about 1900 hours, were you on duty?

A: Yes. I was working in the emergency room that night.

TC: Do you know the alleged eight-year-old child victim in this case, Sally Jones?

A: Yes, I do.

TC: How do you know her?

A: I assisted in treating her when she came into the emergency room at about 1900 hours on 25 February 19XX.

TC: What are your duties when working in the emergency room.

A: My duties include seeing patients to determine the extent of their needs. I take their vital signs and obtain any relevant patient history which may assist in treating the patient.

TC: When you saw Sally Jones on 25 February, what did you do?

A: Well, Sally was cut above her eye, and she had a bruise on her left cheek. As part of my initial examination, I also noticed some bruises on her arms and back which were obviously several days old as indicated by their color. I asked her several questions about the injuries.

TC: What questions did you ask?

A: I asked how she had obtained her cut over her eye and the bruise on her cheek, and I also asked about the older injuries.

TC: Why did you ask those questions?

A: The questions were important to determine a proper treatment and assist in diagnosis. It was important to know the possible extent of the injuries to her head, and it was also important to learn the possible existence of internal injuries from the older bruises.

TC: Was she able to answer your questions?

A: At first she seemed reluctant, but I talked to her and convinced her that we wanted to help her and she should tell us what happened.

TC: What did Sally tell you?

DC: Objection your honor, hearsay.

TC: Your honor, may we approach the bench?

MJ: Counsel, accused, and reporter approach.

DC: Your honor, the statements of Sally are hearsay and should not be admitted.

TC: Your honor, the statements are being offered under Mil. R. Evid. 803(4) and should be admitted. The witness will testify that she was told by Sally that she had been pushed against a wall and had been struck in the face causing the cut and the bruise on the cheek. She will also state that Sally said the older bruises had been received by her arm being squeezed and her back being struck with a belt. These statements corroborate her testimony and rebut the pretrial statement of the accused which was earlier admitted in which he stated that Sally had received all of her injuries from falling down in a playground.

MJ: Defense counsel, your objection is overruled. Return to counsel tables.

TC: Again, CPT Smith, what did Sally tell you?

A: She told me that the cut and bruise on her face had been caused when she was pushed against a wall and struck. She also stated that the older bruises on

her arm were caused by her arm being squeezed and her back being struck with a belt.

4-35. Mil. R. Evid. 804

Unlike exceptions to the hearsay rule under Mil. R. Evid. 803, where the availability of the declarant is immaterial, a prerequisite to using exceptions under Mil. R. Evid. 804 is a showing of the declarant's unavailability. Mil. R. Evid. 804 provides all of the same methods of showing unavailability as Federal Rule of Evidence 804 and adds unavailability due to military necessity as a further method. While unavailability must be shown to meet the foundational requirements under this rule, there may be further issues regarding confrontation which must be addressed. Confrontation issues will not be addressed in this discussion.

a. Mil. R. Evid. 804(b)(1)

Once unavailability has been established, Mil. R. Evid. 804(b)(1) allows a declarant's former testimony to be admitted. To be admissible, the former testimony must have been made under oath at the same or different proceeding, or in a deposition. The testimony must be verbatim, and the rule requires the opponent to have had an opportunity and similar motive to develop the testimony when previously given. The opponent need not, however, have exercised the right to cross-examine if the opponent had an unrestricted opportunity to cross-examine the witness. See United States v. Hubbard, 28 M.J. 27 (C.M.A. 1989); United States v. Connor, 27 M.J. 378 (C.M.A. 1989).

EXAMPLE

TC: Your honor, the government offers into evidence Prosecution Exhibit 4 for Identification, a copy of which has been provided to the defense.

DC: Objection your honor, may we approach?

MJ: Counsel, accused, and reporter approach.

DC: Your honor, Prosecution Exhibit 4 for Identification is a copy of PVT Smith's Article 32 testimony. It doesn't satisfy any exception to the hearsay rule.

TC: Your honor, Prosecution Exhibit 4 for Identification is a verbatim transcript of PVT Smith's testimony, taken under oath, at the Article 32 investigation in this case. PVT Smith is now absent without leave and the government has been unable to locate him. Investigators have gone to his parent's home, his sister's home, and the home of his girlfriend, and have not been able to locate him. Further, PVT Smith was available for cross-examination at the Article 32 hearing. This testimony should be admitted under Mil. R. Evid. 804(b)(1).

DC: Your honor, the defense agrees that this is PVT Smith's verbatim testimony, but Mil. R. Evid. 804(b)(1) requires that the opponent have had an opportunity and similar motive to develop the testimony and in this case PVT Smith was not questioned for the express purpose of preserving this issue at trial.

TC: Your honor, United States v. Connor, 27 M.J. 378, a 1989 Court of Military Appeals case, held that requirement would be met if the opponent had an unrestricted opportunity to cross-examine the declarant at the prior hearing. That requirement has been met in this case.

MJ: Defense counsel, your objection is overruled, you may return to counsel tables.

MJ: Prosecution Exhibit 4 for Identification is admitted as Prosecution Exhibit 4.

b. Mil. R. Evid. 804(b)(3)

Statements against interest are admissible under Mil. R. Evid. 804(b)(3). The rule requires corroboration if a statement against interest is being offered to exculpate an accused. Corroboration can be argued as a requirement for statements offered to inculpate the accused. See United States v. Evans, 31 M.J. 927 (A.C.M.R. 1990) later proceeding, 34 M.J. 165 (C.M.A. 1991); United States v. Robinson, 16 M.J. 766 (A.C.M.R. 1983).

EXAMPLE

[Trial counsel has shown through the CID agent that PVT Smith executed a sworn statement after waiving his rights.]

TC: Your honor, the government offers into evidence Prosecution Exhibit 4 for Identification, a copy of which has been provided to the defense.

DC: Objection your honor, may we approach?

MJ: Counsel, accused, and reporter approach.

DC: Your honor, Prosecution Exhibit 4 for Identification is a copy of a statement to CID by PVT Smith, who is currently absent without leave. This statement is hearsay and cannot meet any hearsay exception.

TC: Your honor, Prosecution Exhibit 4 for Identification is being offered as a statement against interest. The sworn statement to CID states that PVT Smith

witnessed the assault by the accused against the victim. PVT Smith was in a position to witness the assault as he was selling drugs to a person who was with the victim when the accused stabbed him. This statement is clearly against PVT Smith's penal interests as he admitted to selling drugs.

DC: Your honor, the government must corroborate this statement by independent evidence to be admissible.

TC: Your honor, the victim has already testified that the accused stabbed him. He also testified that PVT Smith was in the area when the assault took place. Further, the statement was made under oath and voluntarily given to CID after PVT Smith was read his rights.

MJ: Defense counsel, your objection is overruled, you may return to counsel tables.

MJ: Prosecution Exhibit 4 for Identification is admitted as Prosecution Exhibit 4.

4-36. Mil. R. Evid. 803(24) and 804(b)(5)

The so called residual or catch-all exceptions to the hearsay rule allow for hearsay statements to be admitted even though they do not meet the requirements for one of the other hearsay exceptions. Circumstantial guarantees of trustworthiness equivalent to those required for other hearsay exceptions must be shown by the proponent of such statements. The rules further require that the military judge find that: (1) the statement is offered as evidence of a material fact; (2) the statement is more probative of the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (3) the general purposes of the rules and the interest of justice will best be served by admission of the statement into evidence. These exceptions have been used most frequently in child abuse

cases, but their application is not limited to such cases.

Proponents of statements under the residual hearsay exceptions should be prepared to repel attacks based on the Confrontation Clause of the Sixth Amendment of the Constitution. Although the hearsay rules and the Confrontation Clause are generally designed to protect similar values, the courts are reluctant to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. Thus, the Confrontation Clause bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule.

Admission of an out-of-court statement meets the requirements of the Confrontation Clause if the statement bears "particularized guarantees of truthworthiness." A statement admitted under the residual hearsay clause must be so trustworthy that adversarial testing would add little to its reliability. Adequate indicia of reliability must be found in reference to circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act. Idaho v. Wright, 497 U.S. 805 (1990). Contra United States v. Hines, 23 M.J. 125 (C.M.A. 1986) (corroborating evidence such as the accused's confession can be used to demonstrate that a declarant's statement bears sufficient "indicia of reliability"). In determining whether a statement has sufficient indicia of reliability the courts should look at factors which relate to whether the witness was likely to be telling the truth at the time the statement was made - the totality of the circumstances surrounding the making of the statement. For example, in the case of child sex abuse, the courts could consider the following factors in determining whether a hearsay statement made by a child witness has

sufficient indicia of reliability to satisfy the Confrontation Clause: spontaneity and consistent repetition; mental state of the declarant; use of terminology unexpected of a child of similar age; and lack of motive to fabricate. These factors are not exclusive and the courts have considerable leeway in their consideration of appropriate factors. The focus for the courts should be whether the factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made. Idaho v. Wright, supra.

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