52ND MILITARY JUDGE COURSE

SELF-INCRIMINATION

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SELF-INCRIMINATION

Outline of Instruction

Open Confession is good for the soul

- Old Scottish Proverb

I. BACKGROUND.

A. Introduction.

In the military, the law of self-incrimination embraces Article 31, UCMJ, the Fifth Amendment, the Sixth Amendment, and the Voluntariness doctrine. Each source of law provides unique protections, triggered by distinct events. When analyzing a self-incrimination issue, therefore, it is imperative to categorize the analysis. First determine the relevant source of law in issue. Next, evaluate the situation and decide if the protections afforded under the source of law have been triggered. If so, determine if there has been a violation of those protections. Typically, a challenge to a confession involves more than one source of self-incrimination law, and therefore, several steps of analysis. The confession or admission is admissible when the rights afforded under each source of law applicable have been observed.

B. Sources of Law.

1. The Fifth Amendment.

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

2. Article 31(a), UCMJ.

"No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."

3. The Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence."

4. The Voluntariness Doctrine

Looking at the totality of the circumstances, was the confession the product of an essentially free and unconstrained choice by its maker, or was the accused's will overborne and his capacity for self-determination critically impaired.

5. The collected law of *Privilege Against Self-Incrimination* (PASI) principles, statutes, and decisions is embodied in the MCM at Mil. R. Evid. 301, 304-305.

C. Definitions. **Mil R. Evid. 304(c).**

1. **Confession**—"A 'confession' is an acknowledgement of guilt."

2. **Admission**—"An 'admission' is a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory."

D. Scope of the Protection.

1. Standard for Protection

Mil. R. Evid. 301(a): ". . . **evidence of a testimonial or communicative nature**." "Article 31, like the Fifth Amendment, focuses on testimonial compulsion." *United States v. Williams*, 23 M.J. 362 (C.M.A. 1987).

2. Applying the Standard

a. Oral or written statements are generally protected.

Pennsylvania v. Muniz, 496 U.S. 582 (1990). Drunk driving suspect's slurred speech and other evidence showing his lack of

muscular coordination constituted nontestimonial and, therefore, admissible aspects of his unwarned responses to police questioning. In contrast, the suspect's answer to police questioning about the date of his sixth birthday was testimonial and should have been suppressed. "Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the 'trilemma' of truth, falsity, or silence and hence the response (whether based on truth or falsity) contains a testimonial component."

b. Verbal acts (physical act which is the equivalent of speaking) are generally protected.

(1) *United States v. Whipple*, 4 M.J. 773 (C.G.C.M.R. 1978). The accused's verbal act of handing over drugs in response to officer's request was found to be a protected "statement."

(2) *Fisher v. United States*, 425 U.S. 391 (1976). Accounting documents used to prepare tax returns were not protected because they were prepared voluntarily, long before any prosecution was being considered. Additionally, the act of turning over the documents was not testimonial because it conveyed no factual information that the government did not already have.

(3) *United States v. Hubbell*, 120 S.Ct. 2037 (2000). The Supreme Court held that the act of turning over documents in response to a subpoena *duces tecum* and a grant of immunity was a testimonial act because the prosecutor did not know of the location or even existence of the documents. The defendant had to use mental and physical steps to inventory the documents, and his production of the documents communicated their existence, possession, and authenticity.

(4) *United States v. Swift*, 53 M.J. 439 (2000). A divorce decree turned over by the accused was not testimonial evidence because it was voluntarily prepared before he was ordered to produce it by his command. Additionally, the act of turning over the decree was not testimonial because the existence and location of the document was a "foregone conclusion" and added "little or nothing to the sum total of the Government's information." Finally, the Court stated that even if the act was testimonial, it fell under the "required records exception," since the decree was maintained for "legitimate administrative purposes."

c. Physical characteristics are not protected.

(1) Dental Impressions for bite mark comparisons not protected. *United States v. Martin*, 9 M.J. 731 (N.C.M.R. 1979), *aff'd on other grounds* 13 M.J. 66 (C.M.A. 1982).

(2) Handwriting sample not protected; dicta on voice sample. *United States v. Harden*, 18 M.J. 81 (C.M.A. 1984).

(3) Voice samples not protected. *United States v. Akgun*, 24 M.J. 434 (C.M.A. 1987).

(4) Body fluids not protected.

(a) Blood sample is not testimonial. *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980).

(b) Urine specimen not protected. *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).

(c) Note however, that under Mil. R. Evid. 304(h)(4), if an accused refuses a lawful order to submit for chemical analysis a sample of his or her blood, breath, urine, or other body substance, evidence of such refusal may be admitted into evidence on:

(i) A charge of violating an order to submit such a sample; or

(ii) Any other charge on which the results of the chemical analysis would have been admissible.

d. Identification is generally not protected by PASI. *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County, et al.*, 542 U.S. 177 (2004). A request for identification during a *Terry* stop did not fall within the scope of protection afforded by the Fifth Amendment and Miranda. The Court held that to qualify as incriminating, the individual must reasonably believe that his communication could be used in a criminal prosecution against him or could provide a link to other evidence that might be so used. Providing personal identification is normally insignificant, and would be incriminating in only the most unusual circumstances. In this case, the defendant failed to show that his refusal to comply with the officer's requests was based on a real fear that his identity would incriminate him or lead to evidence that could be used against him. However, the Court left open the possibility that there may be a circumstance where furnishing identification might lead to evidence needed to convict the witness of a separate offense, and therefore be protected by the Fifth Amendment. *See also Pennsylvania v. Muniz*, 496 U.S. 582 (1990) and *United States v. Tubbs*, 34 M.J. 654 (A.C.M.R. 1992) (questioning to identify a suspect during "booking" process does not require a testimonial response).

e. Duty to report—partially protected. PASI is violated if a regulatory duty to report misconduct will directly lead to, or is, evidence of one's own misconduct.

(1) *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986), *cert. denied*, 479 U.S. 1011 (1986). Regulation requiring airmen to report drug abuse of other airmen is valid, but the PASI protects against conviction for dereliction of duty where "at the time the duty to report arises, the witness to drug abuse is already an accessory or principal to the illegal activity that he fails to report. . . ."

(2) United States v. Sanchez, 51 M.J. 165 (1999). Conviction for misprison of a serious offense upheld where accused failed to report an aggravated assault. Court said if accused had immediately reported the offense, he would not have committed misprison.

(3) *United States v. Medley*, 33 M.J. 75 (C.M.A. 1991), *cert. denied*, 112 S.Ct. 1473 (1992). Court declined to extend *Heyward* exception to cases where a social relationship between drug users is so interrelated that it would be impossible to reveal one incident without potentially incriminating the accused on a separate incident. *See also United States v. Bland*, 39 M.J. 921 (N.M.C.M.R. 1994).

(4) *U.S. v. Hammond*, 60 M.J. 512 (Army Ct. Crim. App. 2004). The Army court held that a conviction of fleeing the scene of an intentional collision does not violate the Fifth Amendment or Article 31, UCMJ. Balancing "the important governmental purpose in securing . . . information against the right of the servicemember to be protected from compulsory self–incrimination," the service court found that "although staying at the scene may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence."

II. FIFTH AMENDMENT & *MIRANDA*.

"No person…shall be compelled in any criminal case to be a witness against himself…" U.S. Const. amend. V.

In 1966, with the case *Miranda v. Arizona*, the Supreme Court held that prior to any custodial interrogation, a subject must be warned that he has a right: (1) to remain silent, (2) to be informed that any statement made may be used as evidence against him, and (3) to the presence of an attorney. The goal of *Miranda* was to put in place a procedural safeguard that would counter the inherently coercive environment of a police-dominated, incommunicado interrogation. In 1967, the Court of Military Appeals applied *Miranda* to military interrogations in *United States v. Tempia*. The Supreme Court reaffirmed that *Miranda v. Arizona* is a constitutional decision that the Congress is not permitted to "overrule." The Supreme Court also implicitly reaffirmed all the exceptions to *Miranda*. *Dickerson v. United States*, 120 S.Ct. 2326 (2000).

The trigger for *Miranda* warnings is "custodial interrogation." The test for custody is an objective examination, from the perspective of the subject, of whether there was a formal arrest or restraint or other deprivation of freedom of action in any significant way. The test for an interrogation is also an objective test, but from the perspective of the person asking the questions, i.e., the police officer. The query is whether the comments made are those reasonably likely to elicit an incriminating response. For both, the subjective views harbored by either the interrogating officer or the person being questioned are irrelevant.

A. The *Miranda* Warnings.

Per *Miranda v. Arizona*, 384 U.S. 436 (1966), prior to any custodial interrogation, a subject must be warned:

1. That he/she has a right to remain silent,

2. That any statement made may be used as evidence against him/her, and

3. That he/she has a right to the presence of an attorney, either retained or appointed.

B. Application to the Military.

1. **Mil. R. Evid. 305(d)(1).** "When evidence of a testimonial or communicative nature . . . is sought or is a reasonable consequence of an interrogation, an accused or a person suspected of an offense is entitled to consult with counsel . . .."

2. *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967). *Miranda* applies to military interrogations.

C. The *Miranda* Trigger.

The requirement for *Miranda* warnings is triggered by initiation of **custodial interrogation**.

1. What is the test for custody?

a. A person is in custody if he is taken into custody, could reasonably believe himself to be in custody, or otherwise deprived of his freedom of action in any significant way. *See* **Mil. R. Evid. 305(d)(1)(A).**

b. Custody is evaluated based on an **objective test** from the perspective of a "reasonable" subject.

c. In 1994, the Supreme Court reaffirmed that the test for custody under *Miranda* is an objective examination of whether there was formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The subjective views harbored by either the interrogating officer or the person being questioned are irrelevant. *Stansbury v. California*, 114 S.Ct. 1526 (1994).

Why? It was the coercive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time of the questioning, which led to imposition of the *Miranda* requirements.

d. *United States v. Miller*, 46 M.J. 80 (1997). Court applied the following "mixed question of law and fact" analysis in determining custody: 1) what were the circumstances surrounding the interrogation (question of fact), and; 2) given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave (question of law). Applying this **objective standard**, the court found no custody where the accused (1) was not under formal arrest; (2) voluntarily accepted an invitation to talk with an officer about the alleged misconduct; (3) voluntarily participated in the interview; (4) was treated cordially by the officer, and; (5) was left alone in the station house for a short period of time.

e. *United States v. Miller*, 48 M.J. 49 (1998). After receiving a report about a gang robbery, an MP detained the accused to ascertain his identity and whereabouts during the evening. The CAAF determined that *Miranda* warnings were not required because the accused was not in custody.

2. Situation and location factors for determining custody.

a. Roadside stops.

Berkemer v. McCarty, 468 U.S. 420 (1984). Highway patrol stopped a car that was weaving and, without giving *Miranda* warnings, asked the driver if he had used intoxicants. Court found no custody for *Miranda* purposes because: (1) motorist expects detention will be brief, and (2) stop is in "public" and less "police dominated." "[T]he safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Policeman's initially

uncommunicated decision to arrest driver does not bear on whether "in custody." *See also United States v. Rodriquez*, 44 M.J. 766 (N.M. Ct. Crim. App. 1996) (questioning of suspect about illegal gun sales during roadside stop was noncustodial).

b. In the bedroom.

Orozco v. Texas, 394 U.S. 324 (1969). Suspect was "in custody" for *Miranda* purposes where he was questioned in his bedroom and an officer testified the suspect was not free to go, but was "under arrest."

c. Age is not a factor.

Yarborough v. Alvarado, 541 U.S. 652 (2004). The Supreme Court overruled the 9th Circuit's determination that *Miranda* required courts to consider a defendant's age and his lack of a prior criminal history in determining custody. The Court noted that *Miranda* established an objective test for custody. Age and prior criminal experience are individual characteristics of a suspect, which if required for a custody determination, would create a subjective test.

d. Military status as factor in custody evaluation.

United States v. Jordan, 44 C.M.R. 44 (C.M.A. 1971). Questioning by a superior is not *per se* custodial, but "questioning by a commanding officer or military police or investigators at which the accused is given an Article 31 warning, strongly suggests that an accused is also entitled to a right to counsel warning under *Miranda* and *Tempia*."

e. Coercive environment.

Illinois v. Perkins, 496 U.S. 292 (1990). "[A]n undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response" about an uncharged offense. "*Miranda* forbids coercion, not strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner."

3. Interrogation.

Mil R. Evid. 305(b)(2). "'Interrogation' includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." Note: the term "interrogation" has the same meaning under the Fifth Amendment as it does for Article 31(b). (see Sec. IV. G. 4. [When must warnings be given?] of this outline).

D. The "Public Safety" Exception.

New York v. Quarles, 467 U.S. 649 (1984). After apprehending a suspect with an empty shoulder holster in a grocery store, officer did not read rights warnings, but asked where gun was. Rehnquist: "overriding considerations of public safety justify the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon."

E. Who can invoke the 5th Amendment Privilege?

1. *Ohio v. Reiner*, 532 U.S. 17 (2001). The Supreme Court held that an individual could invoke his Fifth Amendment rights even if he believed he was innocent. All that is necessary for a valid invocation of the privilege against self-incrimination is that it be "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." The court further recognized "that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth."

2. *Hoffman v. United States*, 341 U.S. 479 (1951). Privilege not only extends to answers that would in themselves support a conviction, but also apply to those responses which "would furnish a link in the chain of evidence needed to prosecute the claimant."

3. *McKune v. Lile,* 536 U.S. 24 (2002). As part of a sexual abuse treatment program, qualifying inmates can be required to complete and sign an "Admission of Responsibility" form, in which they accept responsibility for the crimes for which they have been sentenced, and complete a sexual history form detailing all prior sexual activities, or face a reduction of their prison privileges for noncompliance. The Supreme Court held that the state had a legitimate penological interest in rehabilitating inmates, and the de minimus adjustment of prison restrictions served this proper prison goal. *See also U.S. v. McDowell*, 59 M.J. 662 (A.F. Ct. Crim. App. 2004), *pet. denied*, 60 M.J. 127 (2004) (holding that a naval brig's policy of encouraging participation in its sex offender treatment program and conditioning relatively minor privileges on such participation does not violate a prisoner's Fifth Amendment privilege against self–incrimination).

III. SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The *Miranda* counsel warning requirement must be distinguished from the Sixth Amendment counsel warning.[1] Whereas *Miranda* concerns assistance of counsel in determining whether to exercise the PASI, under the Sixth Amendment an individual has the right to assistance of counsel for his defense in all criminal prosecutions. Although an individual's exercise of his 6th Amendment right may have the ancillary effect of invoking the PASI, the trigger and scope of the rights are different. Under the Sixth Amendment, a right to counsel is triggered by initiation of the adversarial criminal justice process. In the civilian sector, the trigger point is reached upon indictment. In the military, it is triggered by the preferral of charges.

A. Under **Mil. R. Evid. 305(d)(1)(B)**, the Sixth Amendment right to counsel warning is required for interrogations by a person subject to the code acting in a law enforcement capacity, conducted subsequent to preferral of charges (not the imposition of pretrial restraint under RCM 304), where the interrogation concerns the offenses or matters that were the subject of the preferral.[2]

[1] Issuing *Miranda* warnings has been found sufficient to satisfy the 6th Amendment right to counsel warning requirement. *Patterson v. Illinois*, 487 U.S. 285 (1998).

[2] The Analysis to Mil. R. Evid. 305(d) notes it may be possible under unusual circumstances for the courts to find the 6th Amendment right attaches prior to preferral. *See United States v. Wattenbager*, 21 M.J. 41 (C.M.A. 1985) (pretrial confinement and clear movement toward prosecution found to trigger 6th Amendment counsel right).

That being said, mere confinement is not enough to trigger 6th Amendment protections. A request for counsel at an RCM 305(i) hearing (hearing to review pretrial restraint) before charges have been preferred neither

B. Sixth Amendment Provisions limited to Law Enforcement Activity.

There was no violation of the Sixth Amendment where, following preferral, a state social services worker who had an independent duty under state law to investigate child abuse interviewed the accused. The social worker never contacted the government before or after the interview until subpoenaed. If a non-law enforcement official is not serving the "prosecution team", he is not a member of the "prosecutorial forces of organized society" and thus is not barred from contacting an accused based on a prior 6th Amendment invocation. *United States v. Moreno*, 36 M.J. 107 (C.M.A. 1992).

C. Neither custody nor "coercive influences" are required to trigger Sixth Amendment Protections.

1. Once formal proceedings begin, police may not "deliberately elicit" statements from an accused without an express waiver of the right to counsel. Mil. R. Evid. 305(g). This is true whether the questioning is in a custodial setting by persons known by the accused to be police, *Brewer v. Williams*, 430 U.S. 387 (1977); surreptitiously by a co-accused, *Maine v. Moulton*, 474 U.S. 159 (1985); through police monitored radio transmissions. *Massiah v. United States*, 377 U.S. 201 (1964); or when police ask questions of an indictee about his drug use and affiliations, *Fellers v. United States*, 540 U.S. 519 (2004).

2. Mere presence as a listening post does not violate Sixth Amendment rights. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (defendant's cellmate instructed only to listen and report). However, if an informant initiates contact and conversation after indictment for express purpose of gathering information about charged activities, statements made by defendant are obtained in violation of accused's 6th Amendment right to counsel and may not be used in government's case-in-chief. *United States v. Henry*, 447 U.S. 264 (1980); *United States v. Langer*, 41 M.J. 780 (A.F.Ct.Crim.App. 1995).

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invokes a Sixth Amendment right to counsel, because the hearing is not an adversarial proceeding, nor invokes a Fifth Amendment right to counsel, because the hearing is not the functional equivalent of a custodial interrogation. *United States v. Hanes*, 34 M.J. 1168 (N.M.C.M.R. 1992).

D. Questioning must relate to the charged offense.

Texas v. Cobb, 532 U.S. 162 (2001). Appellant's 6th Amendment right to counsel was not violated when police questioned him, without his counsel being present, about a murder that occurred during a burglary, after he had previously been arraigned for the underlying burglary offense. The Supreme Court stated that the Sixth Amendment right to counsel attaches only to charged offenses and to those offenses that would be "considered the same offense under the *Blockburger*[3] test," even if not formally charged.

IV. ARTICLE 31, UCMJ.

While the plain meaning of the statute would appear to answer these questions, 25 years of litigation and judicial interpretation have made it clear that virtually nothing involving Article 31 has a "plain meaning."

Fredric Lederer, 1976

A. Introduction.

In 1950, Congress enacted Article 31(b) to dispel a service member's inherent compulsion to respond to questioning from a superior in either rank or position. As a result, the protections under Article 31(b) are triggered when a suspect or an accused is questioned (for law enforcement or disciplinary purposes) by a person subject to the UCMJ who is acting in an official capacity, and perceived as such by the suspect or accused. Questioning refers to any words or actions by the questioner that he should know are reasonably likely to elicit an incriminating response. A suspect is a person who the questioner believes, or reasonably should believe, committed an offense. An accused is a person against whom a charge has been preferred.

B. Content of the warning. *See also* **Mil R. Evid. 305(c)**.

A person subject to the code who is required to give warnings under Article 31(b) may not interrogate or request any statement from an accused or suspect without first informing him/her:

1. of the nature of the accusation;

[3] *Blockberger v. United States*, 284 U.S. 299 (1932). "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

2. that he/she has the right to remain silent; and

3. that any statement he/she does make may be used as evidence against him/her.

(Note: Unlike *Miranda* warnings, there is no right to counsel.)

C. General Notice Requirement.

Article 31(b) may be satisfied by a general recitation of the three elements described above. For example, Article 31(b) was satisfied when state child protective services social worker advised the accused: he was suspected of sexually abusing his daughter; he did not have to speak with her or answer any questions; and anything he said could be repeated by her in court if subpoenaed. *United States v. Kline*, 35 M.J. 329 (C.M.A. 1992).

D. Nature of the accusation.

1. An individual must be provided a **frame of reference** for the impending interrogation by being told generally about all known offenses. "It is not necessary to spell out the details . . . with technical nicety." Informing the accused that he was suspected of larceny of ship's store funds was held sufficient to cover wrongful appropriation of store funds during an earlier period. *United States v. Quintana*, 5 M.J. 484 (C.M.A. 1978). *See also United States v. Rogers*, 47 M.J. 135 (1997) (informing of "sexual assault" of one victim held sufficient to orient the accused to the offense of rape of a separate victim that occurred 4 years earlier).

2. *United States v. Kelley*, 48 M.J. 677 (Army Ct. Crim. App. 1998). Advising the accused that he was going to be questioned about rape implicitly included the offense of burglary. The Army Court determined that the burglary was part of the accused's plan to commit the rape. Therefore, by informing the accused that he was suspected of rape, he was sufficiently oriented to the particular incident, even though it involved several offenses.

3. Whether the stated warning sufficiently provided notice of the accusation is tested on the basis of the totality of the circumstances. For example, in *United States v. Erie*, 29 M.J. 1008 (A.C.M.R. 1990), a rights warning for suspected use of hashish was judged sufficient to cover distribution of hashish and cocaine. The court found that the rights warning oriented accused to that fact that the investigation was focused on controlled substances. *See also United States v. Pipkin*, 58 M.J. 358 (2003). (Warning covering distribution of a controlled substance was sufficient to cover conspiracy to distribute).

4. The requirement to advise a suspect/accused concerning the nature of the accusation is a continuing responsibility. If, during the course of an interrogation, the questions will address offenses not described in the initial warning, an additional warning must be provided. For example, in *United States v. Huelsman*, 27 M.J. 511 (A.C.M.R. 1988), an initial warning that the accused was suspected of "larceny by uttering worthless checks" was not sufficient to cover offenses involving possession and distribution of marijuana. When agent learned that the reason for writing the checks related to drugs, the accused became a suspect for drug offenses and was entitled to an additional Article 31(b) warnings. *But see United States v. Kelley*, 48 M.J. 677 (Army Ct. Crim. App. 1998). (investigators did not have to halt the interrogation and renew rights warnings when the accused stated that he had provided false information. The questioning centered on the rape and the burglary, and not the false statements.)

5. *United States v. Simpson*, 54 M.J. 283 (2000). Advising the appellant that he was suspected of indecent acts or liberties with a child was held sufficient to focus him toward the circumstances surrounding the event and to inform him of the general nature of the allegations, to include rape, indecent assault, and sodomy of the same child. When determining whether the nature of the accusation requirement has been met, the court will examine: whether the conduct is part of a continuous sequence of events; whether the conduct was within the frame of reference supplied by the warnings; and whether the interrogator had previous knowledge of an unwarned offense.

E. Right to remain silent.

1. The main PASI aspect of the Article 31(b) warning is practically the same as its *Miranda* warning counterpart.

2. The most significant area of concern regarding this prong of the warning is the occasional improper qualification of the PASI when the investigator recites the warning. In *United States v. Allen*, 48 C.M.R. 474 (A.C.M.R. 1974), the accused was advised he could remain silent only if he was in fact involved in the suspected misconduct. He was also told that if he knew who was involved in the robbery under investigation and remained silent, he could be found guilty. Both of these statements were held improper. A suspect has an "absolute right to silence".

F. Statements may be used as evidence.

1. The "Use" aspect of the Article 31 warning is identical to its *Miranda* warning counterpart.

2. As with the right to silence provision described above, problems with the "Use" provision generally arise when interrogators accompany the warning with provisos or disclaimers concerning the prospective use of the subject's statements. It is well settled that such comments may negate the validity of the entire warning. *United States v. Hanna*, 2 M.J. 69 (C.M.A. 1976)(subsequent assurance of confidentiality negates the effectiveness of otherwise proper Article 31 warning; "[B]etween you and me, did you do it?").

G. Triggering the Warning Requirement.

1. Statutory Requirement.

a. "No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing . . . ." Article 31(b).

b. The phrasing of Article 31(b) supplies a framework for analyzing situations which may trigger the Article 31 warning requirement:[4] Beyond consideration of the content of the warning, the following questions must be considered:

[4]This type of analysis was first suggested by Professor Maguire in 1958. Maguire, *The Warning Requirement of Article 31(b): Who Must do What to Whom and When?*, 2 Mil. L. Rev. 1 (1958). The analysis was examined and explained in light of *Miranda* and ten years of its progeny by Professor (then Captain) Lederer in 1976. Lederer, *Rights Warnings in the Armed Services*, 72 Mil. L. Rev. 1 (1976).

(1) Who must warn?

(2) When must the warning be provided?

(3) Who must be warned?

2. Who must warn?

a. The literal language of Article 31(b) seems to require warnings during any criminal interrogation of a suspect/accused by a person subject to the UCMJ. Over time, however, judicial interpretations have both expanded and contracted the scope of the statute's literal language to conform to the practicalities of the military as well as the courts' various views of the drafter's intent.

b. In the years following the enactment of the UCMJ, military courts applied both an "official questioning" test and a "position of authority" test to narrow the broad "Person subject to this chapter" language of Article 31. Key elements of these tests were merged by the C.M.A. in *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981)[5].

c. Failure to provide warnings when required could result in a violation of Article 98, Noncompliance with Procedural Rules.

[5]The foundation for what we now know as "the *Duga* test" was laid 27 years earlier in *United States v. Gibson*, 14 C.M.R. 164 (C.M.A. 1954). In *Gibson*, the court also provides a review of Article 31's purpose and legislative history.

d. The current standard:

(1) In *Duga*, the C.M.A. held Article 31(b) applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. Accordingly, the court set forth a two-pronged test to determine whether a person is "a person subject to this chapter" for the purposes of Article 31. The points of analysis are:

(a) Was the questioner subject to the Code acting in an official capacity in the inquiry or was the questioning based on personal motivation?; *and*

(b) Did the person questioned perceive the inquiry as involving more than a casual conversation?

(2) The *Duga* version of the official questioning standard was further defined by the court in *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990). The *Loukas* court held that Article 31(b) warnings were not required prior to an aircraft crew chief's questioning of a crew member about drug use, where the questions were limited to those needed to "fulfill operational responsibilities, and there was no evidence suggesting his inquiries were designed to evade constitutional or codal rights." Now Article 31 "requires warnings only when questioning is done during an official law-enforcement investigation or disciplinary inquiry."[6]

[6]Analysis of whether questioning is part of an official law enforcement investigation or disciplinary inquiry is governed by an objective test. An investigation is law enforcement or disciplinary when, based on all the facts and circumstances at the time of the interview, "the military questioner was acting or could reasonably be considered as acting in an official law enforcement or disciplinary capacity." *United States v. Good*, 32 M.J. 105 (C.M.A. 1991).

Dicta in both *Loukas* and *Good* indicate that when a military supervisor in the subject's chain of command conducts the questioning, there is a rebuttable presumption that the questioning was done for disciplinary purposes.

e. Law enforcement or disciplinary inquiry: *The Primary Purpose Test.*

(1) *United States v. Cohen*, 63 M.J. 45 (2006). Air Force IG's conversations with a servicemember filing a complaint extended beyond the boundaries necessary to fulfill his administrative duties and should have been proceeded by an Article 31 rights warning. While the IG's responsibilities were primarily administrative, they were not exclusively so under the applicable Air Force Instructions. Under the circumstances of the case the IG had disciplinary responsibilities and should have suspected the complainant of an offense and advised him of his Article 31 rights prior eliciting incriminating statements from him.

(2) *United States v. Pittman*, 36 M.J. 404 (C.M.A. 1993). Accused's section leader, and friend, was required to escort him off-post. Unaware of the child abuse allegations, the escort asked the accused what was going on. Accused admitted hitting his stepson. Trial court held this questioning was motivated out of personal curiosity and not interrogation or a request for a statement within the meaning of Article 31(b). C.M.A. affirmed, citing *Duga*. *See also United States v. Jones*, 24 M.J. 367 (C.M.A. 1987); *United States v. Williams*, 39 M.J. 758 (A.C.M.R. 1994).

(3) *United States v. Guron*, 37 M.J. 942 (A.F.C.M.R. 1993). Interviews by accounting and finance personnel to determine eligibility for pay and allowances, but not for purposes of disciplinary action or criminal prosecution, do not require Article 31 warnings be given.

(4) *United States v. Bowerman*, 39 M.J. 219 (C.M.A. 1994). Army doctor was not required to inform accused of Art. 31 rights when questioning him about child's injuries even though doctor thought child abuse was a distinct possibility.[7]

[7] *See also United States v. Brown*, 38 M.J. 696 (A.F.C.M.R. 1993); *United States v Baker*, 29 C.M.R. 129 (C.M.A. 1960) (Doctor not required to read rights before questioning appellant during a physical about needle marks on his arms).

(5) *United States v. Dudley*, 42 M.J. 528 (N.M. Ct. Crim. App. 1995). Statement by accused to psychiatrist was admissible, even though psychiatrist had not given accused Article 31 warnings and knew of charges against accused. Accused was brought to psychiatrist by investigator who feared that accused might be suicidal and the psychiatrist asked questions for diagnostic purposes in order to determine whether accused was a suicide risk.

(6) *United States v. Bell*, 44 M.J. 403 (1996). Article 31 requirement for warnings does not apply at trial or Article 32 investigations because they are "judicial proceeding[s]; not disciplinary or law enforcement tools within the context of Article 31." However, R.C.M. 405(f)(7) requires that warnings be given to the accused at an Art 32 hearing. *See also* Mil. R. Evid. 301(b)(2) regarding military judges' obligation to provide witnesses warnings.

(7) *United States v. Moses*, 45 M.J. 132 (1996). Naval Criminal Investigative Service agents engaged in an armed standoff with the accused were not engaged in a law enforcement or disciplinary inquiry when they asked the accused what weapons he had inside the house. Rather, the questioning was considered negotiations designed to bring criminal conduct to an end peacefully.

(8) *United States v. Payne*, 47 M.J. 37 (1997). Defense Investigative Service (DIS) agents conducting background investigation were not engaged in law enforcement activities, therefore, they did not have to warn the accused of his rights under Article 31. *See also United States v. Tanksley*, 50 M.J. 609 (N.M. Ct. Crim. App. 1999) (Naval Criminal Investigative Service (NCIS) agents conducting background investigation).

(9) *United States v. Bradley*, 51 M.J. 437 (1999). A commander, questioning his soldier about whether the soldier had been charged with criminal conduct in order to determine whether the accused's security clearance should be terminated, was not required to give Art 31(b) warnings, since the purpose of the questioning was not for law enforcement of disciplinary purposes. The Court recognized an "administrative and operational exception" that may overcome the presumption that "a superior in the immediate chain of command is acting in an investigatory or disciplinary role" when questioning a subordinate about misconduct.

(10) *United States v. Norris*, 55 M.J. 209 (2001). The appellant was friends with the family of the victim. When the father (E-7) of the victim asked the appellant (E-4) about the relationship, he admitted that he had kissed and performed oral sex on her. The conversation lasted two hours, during which neither man referred to each other by rank. The court concluded that the victim's father was not asking questions for a disciplinary or law enforcement purpose, but rather sought out the appellant to clarify the matter.

(11) *United States v. Guyton-Bhatt*, 56 MJ 484 (2002). A legal assistance attorney was required to give Art. 31 warnings to a debtor of his client, where the attorney suspected the debtor of committing forgery, planned to pursue criminal action against the debtor as a way to help his client, and used the authority of his position when he called the debtor to gather information. The CAAF concluded that the legal assistance attorney was "acting as an investigator in pursuing this criminal action."

(12) *United States v. Benner*, 57 M.J. 210 (2002). A chaplain was required to give warnings when he abandoned his clerical role and was acting solely as an Army officer. He did this when he breached the "communications to clergy" privilege by informing the appellant that he would have to report the appellant's child sexual abuse incident to authorities if the appellant did not.

(13) *United States v. Smith,* 56 M.J. 653 (Army Ct. Crim. App. 2001) President of prison's Unscheduled Reclassification Board was not required to read Art 31 rights to an inmate prior to asking him if he would like to make a statement about his recent escape, since the purpose of the board was to determine if the inmate's custody classification should be tightened.

(14) Defense counsel not required to read Art 31 rights when conducting an interview of a witness on behalf of his client, even if he suspects the witness committed a criminal offense. TJAG's PRC Opinion 90-2; *United States v. Howard*, 17 C.M.R. 186 (C.M.A. 1954); *United States v. Marshall*, 45 C.M.R. 802 (N.C.M.R. 1972); *but see United States v. Milburn*, 8 M.J. 110 (C.M.R 1979).

f. Civilian interrogations.

(1) General Rule. The plain language of the statute seems to limit the class of people who must provide Article 31(b) warnings to those who are subject to the UCMJ themselves. Mil. R. Evid. 305(b)(1) provides, however, that a "[p]erson subject to the code . . . includes a person acting as a knowing agent . . . ." Additionally, the courts have rejected literal application of the statute and provide instead that in those cases where military and civilian agents are working in close cooperation with each other for law enforcement or disciplinary purposes, civilian interrogators are "persons subject to the chapter" for the purposes of Article 31.

(2) Tests. Civilian agents may have to provide Article 31 warnings when, under the "totality of the circumstances" they are either acting as "instruments" of military investigators, or where the military and civilian investigations have "merged."

(a) The merger test: (1) Are there different purposes or objectives to the investigations?; and (2) Are the investigations conducted separately? Additionally, the test to determine the second prong is: (a) Was the activity coordinated between military and civilian authorities?; (b) Did the military give guidance or advice?; (c) Did the military influence the civilian investigation?

(b) The instrumentality test: (1) Is the civilian agent employed by, or otherwise subordinate to, military authority?; (2) Is the civilian under the control, direction, or supervision of military authority?; and (3) Did the civilian acted at the behest of military authority or, instead, had an independent duty to investigate?[8]

(3) *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). Civilian intelligence agents were not required to read Article 31 warnings to Marine suspected of espionage because (1) their investigation had not merged into an "indivisible entity" with the military investigation, and (2) the civilian investigators were not acting in furtherance of any military investigation or as an instrument of the military.[9]

(4) *United States v. Quillen*, 27 M.J. 312 (C.M.A. 1988). A civilian PX detective was required to advise a soldier suspected of shoplifting of his Article 31 rights before questioning him. The detective was an "instrument of the military" whose conduct in questioning the suspect was "at the behest of military authorities and in furtherance of their duty to investigate crime." Furthermore, the suspect perceived the detective's questioning to be more than casual conversation. *See also United States v. Ruiz*, 54 M.J. 138 (2000).

(5) *United States v. Moreno*, 36 M.J. 107 (C.M.A. 1992). State social services worker who had an independent duty under state law to investigate child abuse was not required to provide Article 31 or *Miranda* warnings prior to interviewing the accused. The court found no investigative merger or agency relationship. "[O]ne of the prime elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent."

[8] *United States v. Grisham*, 16 C.M.R. 268 (C.M.A. 1954).

[9] *United States v. Oakley, Jr.*, 33 M.J. 27 (C.M.A. 1991). A military policeman was present when civilian police questioned appellant regarding civilian fraud charges. The military policeman, acting as a military liaison, advised the appellant that he should cooperate with the civilian police and even asked a few questions of appellant during the interrogation. The Court of Military Appeals denied appellant's motion to suppress, holding that the civilian police investigation had not merged with a military investigation.

(6) *United States v. Raymond*, 38 M.J. 136 (C.M.A. 1993). Social worker, subject to AR 608-18's reporting requirements, was not acting as an investigative agent of law enforcement when he counseled the accused with full knowledge that the accused was pending charges for child sexual abuse. CMA also ruled that health professionals engaged in treatment do not have a duty to provide Article 31(b) warnings.[10]

(7) *United States v. Brisbane*, 63 M.J. 106 (2006). Family Advocacy representative was acting as an "investigative agent of law enforcement" and should have provided the accused an Article 31 warning when she questioned him after a Family Advocacy committee meeting which included a legal officer and a military investigator. The Court found that the Family Advocacy representative worked in close coordination with law enforcement before and after her questioning of the accused, that she suspected the accused of an offense at their first meeting, and that evidence of her investigatory purpose could be seen in her first question ("Did you do it?").[11]

(8) *United States v. Payne*, 47 M.J. 37 (1997). The court held that Defense Investigative Service (DIS) agents conducting a background investigation per the request of the accused were not acting under the direction of military authorities and were not, therefore, subject to the UCMJ. Accordingly, the DIS agents did not have to warn the accused of his rights under Article 31.

g. Foreign police interrogations.

[10]Diagnostic questioning had been previously placed outside the scope of Article 31 in *United States v. Fisher*, 44 C.M.R. 277 (CMA 1972). *Raymond* is significant in that it upheld the concept of diagnostic questioning in spite of the regulatory reporting requirement.

[11] The Court noted that the "cooperative effort" between law enforcement and other members of the military community required by Air Force Regulations "does not render every member of the military community a criminal investigator or investigative agent," but that this particular Family Advocacy representative's actions were more akin to an investigative agent than a social worker. *Brisbane*, 63 M.J. at 112.

(1) The rule for interrogations by foreign police agents is similar to that set forth for U.S. civilian police agents. **Mil. R. Evid. 305(h)(2)** provides that no warnings are required unless the foreign police interrogation is "conducted, instigated, or participated in by military personnel or their agents . . . ." An interrogation is not "participated in" merely because U.S. agents were "present," "acted as interpreter," or took steps to mitigate harm.[12]

(2) *United States v. Coleman*, 25 M.J. 679 (A.C.M.R. 1987). "Cooperative assistance" between CID and German police investigating a murder did not turn the German interrogation into a U.S. interrogation, since the German interrogation "was, in no way 'conducted, instigated, or participated in' by the CID" nor was there "subterfuge" or any violation of due process voluntariness. *Affirmed*, 26 M.J. 451 (C.M.A. 1988), *cert. denied*, 488 U.S. 1035 (1989).

(3) *United States v. French*, 38 M.J. 420 (C.M.A. 1993). Accused was questioned by British police in presence of his 1SG and an OSI agent. Despite OSI's knowledge of the investigation, their presence during the interview, an agent's comment during interview that it would be better for accused to remain silent than to continue lying, and brief use of OSI agent's handcuffs during arrest, "participation" of military agents did not reach level which would require Article 31 and *Miranda* rights.

(4) *United States v. Pinson III*, 56 MJ 489 (2002). Icelandic police were not required to give appellant Art 31 warnings prior to questioning him as part of an investigation, where the Icelandic police did not ask NCIS agents for information or leads, NCIS did not ask Icelandic police to ask certain questions, and the two governments conducted separate investigations. The Court found that the interrogation was "purely for the benefit of the Icelandic" authorities.

[12] *See United States v. Plante*, 32 C.M.R. 266, 273 (C.M.A. 1962) (holding that no Article 32(b) warnings required where MP accompanied service member to French police headquarters, but where MP did not take part in the interrogation); *United States v. Jones*, 6 M.J. 226 (C.M.A. 1979) (holding no Article 31(b) warnings required when German police interrogated accused in American CID headquarters building solely for the benefit of the German authorities where no American's were present).

3. When must warnings be given?

a. Under **Mil. R. Evid. 305(b)(2)**, action that triggers the requirement for Article 31 (or *Miranda*) warnings includes "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." This includes direct questioning or action that amounts to the functional equivalent of questioning, and is evaluated based on an **objective test** from the perspective of a reasonable police officer/investigator.

b. Words or actions reasonably likely to elicit an incriminating response.

(1) *Brewer v. Williams*, 430 U.S. 387 (1977). "Christian burial speech" was intended to elicit incriminating information and was tantamount to interrogation where police knew accused was "deeply religious," and the speech was directed to him.

(2) *Rhode Island v. Innis*, 446 U.S. 291 (1980). "'Interrogation' under *Miranda* refers . . . to express questioning, . . . [and] also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are *reasonably likely to elicit an incriminating response . . . .*" Conversation between police while transporting suspect to station that children from nearby school for handicapped might find the shotgun and hurt themselves was held *not* an interrogation, since it was not directed to suspect and no reason to believe he was susceptible to such remarks.

(3) *United States v. Byers*, 26 M.J. 132 (C.M.A. 1988). "Interrogate" for purposes of Article 31(b) corresponds with United States Supreme Courts' interpretation of "interrogation" in applying *Miranda* warning requirement. An OSI agent's 20-40 minute pre-warning commentary was interrogation. The agent could tell the suspect that "the suspicion results from a positive drug test. To go further violates Article 31(b)." Taint attenuated, however, and statement admitted.

(4) *United States v. Guron*, 37 M.J. 942 (A.F.C.M.R. 1993). A 9-minute pre-warning conversation about a variety of subjects having nothing to do with the BAQ fraud investigation, the purpose of which was to relax the subject and get acquainted, was not the functional equivalent of interrogation.

(5) *United States v. Young*, 49 M.J. 265 (1998). Investigator's comment: "I want you to remember me, and I want you to remember my face, and I want you to remember that I gave you a chance," directed to the accused after the accused invoked his right to counsel may have been an interrogation. Judge Cox, in a concurring opinion, firmly believes that it was. The court affirmed the admissibility of the subsequent confession on other grounds.

(6) *United States v. Muldoon*, 10 M.J. 254 (C.M.A 1981). The "time-honored technique to elicit a statement -- namely, informing the suspect that he has been implicated by someone else," is interrogation.

c. Not "interrogation."

(1) Subjects who begin a statement in a spontaneous fashion do not need to be stopped and warned. The appropriate rights warning, however, must precede any follow-up interrogation. *See* Analysis to **Mil. R. Evid. 305(c)**.

(2) *United States v. Warren*, 47 M.J. 649 (Army Ct. Crim. App. 1997). Asking the accused to put his spontaneous statement in writing was not an interrogation. An interrogation began, however, when the investigator asked the accused to elaborate and explain portions of the statement.

(3) *United States v. Turner*, 48 M.J. 513 (Army Ct. Crim. App. 1998). Telling the accused that he was AWOL and would be turned over to a particular military law enforcement authority did not constitute an interrogation. The Army Court viewed these comments as statements regarding the nature of evidence against the accused and not an interrogation.

(4) *United States v. Vitale*, 34 M.J. 210 (C.M.A. 1992). 1SG warned accused not to discuss the matter and to let OSI handle it because she did not want to get involved. Accused was previously interviewed by another NCO following an improper rights advice. Held: 1SG's conduct was not the "functional equivalent of interrogation," and accused's subsequent unsolicited statements were uttered spontaneously, voluntarily, and without coercion.

(5) *United States v. Lichtenhan*, 40 M.J. 466 (C.M.A. 1994). An investigator (Inv.) considered the accused a suspect in a series of thefts, and intended to question him regarding a related matter. The investigator approached the accused and initiated the following interchange:

Inv.: "[Y]ou got a minute to talk?"
Accused: "Sure, chief, but there's something I need to talk to you about first."

Inv.: "Go ahead."

The accused proceeded to make a series of incriminating remarks.

CMA ruled the investigator's approach and comments did not amount to questioning such that Article 31 requirements were triggered.

(6) *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992). Suspect invoked right to silence. Several hours later, suspect was re-approached by same CID agent and asked for a re-interview, whereupon the suspect made some incriminating statements. Held: Simply asking for a re-interview of an individual not in custody was not questioning designed "to elicit an incriminating" statement.

(7) *United States v. Ruiz*, 54 M.J. 138 (2000). A civilian store detective employed by AAFES, upon suspecting that the appellant had stolen store merchandise, stated to him, "[t]here seems to be some AAFES merchandise that hasn't [sic] been paid for." The appellant replied, "yes," produced the merchandise from under his coat, and said "you got me." The CAAF ruled that Article 31(b) warnings were not required because the detective did not "interrogate" the accused, but rather informed him of why he was stopped and why he was asked to accompany the detective back to the store's office.

(8) *United States v. Allen*, 54 M.J. 854 (A.F. Ct. Crim. App. 2001). During the reading of his charges by his commander, the appellant appeared pale and shocked, and near the end of the reading stated, "The fourth one is true, or partially true." The court concluded that the reading of the charges in this case was not the functional equivalent of an interrogation. The court placed special emphasis on the circumstances surrounding the reading of the charges. Specifically, that the appellant was not asked any questions before being read his charges, the accused was not in confinement, and he was a LTC.

(9) Consent to search.

(a) *United States v. Burns*, 33 M.J. 316 (C.M.A. 1991). Requesting consent to search and also conducting a urine test did not violate the Fifth Amendment even though the accused previously requested counsel. Asking the accused questions during the search of his residence did violate the Fifth Amendment, but were nonprejudicial errors.

(b) *United States v. Vassar*, 52 M.J. 9 (1999). While in the hospital, the accused signed a written consent form and gave a urine sample, which tested positive for drugs. The CAAF held that the consent was voluntary and that there is no requirement to give Article 31(b) warnings before asking for consent to search.

d. Continuous or successive interrogations.

(1) The general rule is that if the warnings were given properly at the first interrogation session and that the time elapsed between the first and subsequent sessions is sufficiently short as to constitute one entire continuous interrogation, separate warnings need not be given. On the other hand, if the time interval is long enough to contain separate and distinct interrogation sessions, then each session must be prefaced by Article 31(b) warnings. No firm guidance can be given as to what the minimum time interval will result in a determination that the sessions constituted continuing interrogation.

(2) Military courts have decided these matters on an ad hoc basis. *United States v. Schultz*, 41 C.M.R. 311 (C.M.A. 1970) (Second interrogation by same agents about 6 hours after initial warnings does not require new warnings) *Accord United States v. Thompson*, 31 M.J. 781 (A.C.M.R. 1990)(Seven hours between interrogations).

(3) *United States v. Jefferson*, 44 M.J. 312 (1996). Re-interrogation of accused four days after initial interrogation was not preceded by rights warning, but rather with question if he remembered his previous rights warning. Reminder was held to be sufficient warning under the facts of the case.

e. Perception of the person questioned; was it more than casual conversation?

(1) *United States v. Parrillo*, 31 M.J. 886 (A.F.C.M.R. 1990) *aff'd on other grounds*, 34 M.J. 112 (C.M.A. 1992). Air Force sergeant acting as agent of OSI was not required to read Article 31 warnings before questioning lieutenant about drugs. Although questioning was official, lieutenant perceived it as casual conversation because of prior sexual relationship with the sergeant.

(2) *United States v. Harvey*, 37 M.J. 140 (C.M.A. 1993). Accused, after invoking her rights, arranged 3 meetings with co-accused to discuss pending government investigation. The meetings were taped by the co-accused with OSI assistance. Court found no Article 31(b) violation because the accused could not have perceived it as an inquiry by a person acting in an official capacity.

(3) *United States v. Price*, 44 M.J. 430 (1996). A subordinate of the accused questioned the accused several times about suspected drug use without advising the accused of his Art. 31 rights. The court found that even if one assumes that the subordinate was acting as an OSI agent, the second prong of the *Duga* test was not present. The court focused on the following facts: 1) the accused was senior; 2) the environment where the conversations took place was non-coercive; and 3) the accused was not aware that the subordinate had contacted OSI.

(4) *United States v. Rios*, 48 M.J. 261 (1998). The accused's commander directed him to telephone his daughter whom he was suspected of sexually abusing. The call was being recorded. Although the accused testified that he thought the call was being recorded, Article 31(b) warnings were not required because the accused perceived the call to be a casual conversation. *See also United States v. White*, 48 M.J. 251 (1998). (A telephone call between the accused and his accomplice, which was arranged and monitored by government investigators, was viewed as a casual conversation)

(5) *United States v. Aaron*, 54 M.J. 538 (A.F. Ct. Crim. App. 2000). Rights warnings were not required to be given to the suspect prior to a conversation between him and his daughter, whom he was suspected of having a sexual relationship with, in a hotel room that was arranged and taped by AFOSI agents. Concluding that the meeting between the appellant and his daughter was not a custodial interrogation nor could appellant perceive it as "official questioning", the court held that neither the 5th Amendment nor Article 31 were violated.

4. Who must be warned?

a. Article 31 warning requirements apply only to members of the armed forces. Within this subset, warnings must be provided only to accused or persons suspected of an offense. Mere witnesses are not entitled to Article 31 protections.

b. An accused is a person against whom a charge has been preferred.

c. A person is a suspect if, considering all facts and circumstances at the time of the interview, the government interrogator believed, or reasonably should have believed, that the one being interrogated committed an offense. *United States v. Morris*, 13 M.J. 297 (C.M.A. 1982). Note that this test has both a subjective and objective prong. The interrogator's subjective belief that the subject has committed an offense will trigger the warning requirement. Even if there is not subjective belief, however, if the totality of the circumstances would cause a reasonable person to believe that the subject had committed an offense, the warnings will be required. *United States v. Leiffer*, 13 M.J. 337 (C.M.A. 1982.

d. *United States v. Swift*, 53 M.J. 439 (2000). The accused was a suspect where his wife called the command and alleged that she was contacted by a woman also claiming to married to the accused, and the command then consulted the chief of military justice and the Manual for Courts-Martial about possible bigamy charges before questioning the accused.

e. *United States v. Murphy*, 33 M.J. 323 (C.M.A. 1991). Accused became a suspect once commander received a specific report that she had illegally used cocaine and the commander then prepared to ask specific questions suggested by law-enforcement agents.

f. *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993), *aff'd on other grounds*, 114 S. Ct. 2350. The CMA holds that the accused was not a suspect and no Article 31(b) warnings were required prior to the initial interview, despite several facts narrowing the investigation's focus onto him and several others.

g. *United States v. Brown*, 40 M.J. 152 (C.M.A. 1994). Unknown and unknowable future criminal proclivities of the accused cannot transform leadership counseling into a criminal interrogation such that Article 31(b) requirements were triggered. Accused's commander neither suspected, nor reasonably should have suspected, accused of criminal misconduct at time of formal counseling regarding dishonored checks.

h. *United States v. Meeks*, 41 M.J. 150 (C.M.A. 1994). Accused was not a suspect at the time his commander met with him in attempt to persuade him to deploy, even though commander knew sergeant had missed a mobility meeting and had a hunch that accused might ultimately choose not to deploy. At time of meeting, commander thought there might be legitimate reason for accused's missing the meeting, and until the accused informed his commander that he would not deploy, no offense had been committed.

i. *United States v. Schlamer,* 47 M.J. 670 (N.M. Ct. Crim. App. 1997). Before unwarned questioning, NCIS agents were informed that the accused was seen in the area where a murder occurred. The Court held that the accused was one of hundreds of individuals who the investigators believed might have helpful information and was, therefore, not a suspect requiring Article 31(b) warnings.

j. *United States v. Miller*, 48 M.J. 49 (1998). After receiving a report about a gang robbery, an MP stopped the accused to ascertain his identity and whereabouts during the evening. The accused answered the questions without being warned of his rights under *Miranda* or Article 31. Even though the accused matched the general description of one of the assailants, the CAAF found that the investigation had not sufficiently narrowed to make the accused a suspect and, therefore, Article 31(b) was not triggered. *See also United States v. Henry*, 44 C.M.R. 152 (C.M.A. 1971).

k. *United States v. Muirhead,* 51 M.J. 94 (1999). The accused was a suspect, and investigators were required to advise him of his rights under Article 31(b) when they questioned him during a permissive search of his residence. Prior to the search, a physician had told investigators that he suspected child abuse based on his examination of the victim.

l. *United States v. Duncan,* 48 M.J. 797 (N.M. Ct. Crim. App. 1998). Asking the accused questions about alleged misconduct his roommate committed was not an interrogation, since the accused was not yet a suspect.

5. The "Public Safety" Exception for Article 31 warnings?

a. *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990). "Whether a [public safety] exception to Article 31 exists for military superiors acting in a command disciplinary function when questioning a suspect who is not in custody is an issue beyond the facts of this case." However, the court considered the "unquestionable urgency of the threat and the immediacy of the crew chief's response" in deciding that there was a "legitimate operational nature of his questions" that obviated the need for Article 31 warnings.

b. *United States v. Shepard*, 34 M.J. 583 (A.C.M.R. 1992). The accused told platoon sergeant (PltSgt) that he had killed his wife. PltSgt questioned accused, absent rights warnings, about his wife's condition and location. Trial court admitted statements under "Public Safety Exception" because the PltSgt was motivated by concerns for the wife's health and safety. ACMR found no abuse of discretion. *Aff'd*, 38 M.J. 408 (C.M.A. 1993) (court affirms on other grounds but indicates in dicta that there might be a public safety exception to Article 31).

c. *United States v. Jones*, 19 M.J. 961 (A.C.M.R. 1984). Applying a "rescue doctrine," the Court held that the questioning of a suspect, who had not had right warnings, was not error where the purpose of the questions was to locate a possibly critically injured victim.

V. RIGHTS WARNINGS CHART.

	Art 31(b)	Miranda (5th Amend.)	6th Amend.
Purpose	To dispel a service member's inherent compulsion to respond to questioning from a superior in rank or position.	To provide protection against an inherently intimidating and coercive interrogation environment	To provide accused the assistance of counsel during critical stages of the criminal process.
Who must warn?	1) Person subject to the code 2) Acting in official capacity 3) For law enforcement or disciplinary purposes	Law Enforcement Officer	Government agent acting in law enforcement capacity
Test:	1) Was the military questioner acting, or could reasonably be considered as acting, in an official law enforcement or disciplinary capacity, and 2) Did the person questioned perceive it as official questioning?		
Who must be warned?	Accused or Suspect	Person subject to custodial interrogation	Accused
Test:	Did the questioner believe, or reasonably should have believed, that the person committed an offense?		
When warnings required?	Questioning where an incriminating response is either sought or is a reasonable consequence.	Custodial interrogation	Questioning after the preferral of charges on matters related to the charged offense(s)
Test:	Would a reasonable interrogator see the questions as ones likely to elicit an incriminating response?	Custodial – Would a reasonable person in the subject's position feel that they were under arrest or significant restraint? Interrogation – Would a reasonable interrogator see the questions as ones likely to elicit an incriminating response?	Right to counsel attaches only to charged offenses and to those offenses that would be "considered the same offense under the *Blockburger* test," even if not formally charged.
Content of warnings	1) Nature of offense 2) Right to silence 3) Use of statement	1) Right to silence 2) Use of statement 3) Right to counsel	1) Right to counsel
Effect of invocation:			
Right to silence	Temporary respite from interrogation.	Temporary respite from interrogation	Not applicable
Right to counsel	Not applicable	Questioning ceases until: 1) Counsel made available (for continuous custody, counsel must be present; if break in custody, real opportunity to seek legal advice required), or 2) Subject re-initiates and valid waiver obtained.	Questioning about charged offense ceases until: 1) Counsel present, or 2) Subject re-initiates and valid waiver obtained.

VI. EFFECT OF IMPLEMENTING THE RIGHTS.

Whenever a subject invokes a right in response to an Article 31(b) or 5th or 6th Amendment warning, the first thing that must happen is the same: the interrogation must stop immediately. What may happen next is dependent on what source of self-incrimination law applies and what right has been invoked.

If the subject invokes the right to remain silent under Article 31(b) or *Miranda*, he is entitled to a temporary respite from questioning that the government must scrupulously honor. Once honored, the government may re-approach the subject for further questioning.

If the subject invokes the right to counsel under the 5th Amendment, the subject cannot be questioned further unless: (1) counsel is made available; or (2) the subject re-initiates questioning. In a continuous custody setting, counsel is made available when counsel is present. When there is a break in custody, however, counsel is made available when the subject has had a real opportunity to seek legal advice, otherwise, counsel must be present. If the subject re-initiates the questioning, the investigator must obtain a valid waiver of rights before continuing the interrogation.

If the subject invokes the right to counsel under the 6th Amendment, the subject cannot be questioned further unless: (1) counsel is present; or (2) the subject re-initiates questioning. For purposes of the 6th Amendment, continuous custody or a break in custody is irrelevant.

A questioner must clarify any ambiguous invocation of rights before questioning may begin. However, if the subject initially waives his rights and begins making a statement, any subsequent invocation of his rights must be unambiguous. Ambiguous requests do not have to be clarified by the questioner and the interrogation may proceed.

A. The Right to Remain Silent (*Miranda* or Art. 31(b)).

1. A subject may invoke any or all of his/her rights either prior to or during an interrogation. Whether invoked in response to an Article 31(b) or *Miranda* warnings, the right to remain silent entitles a subject to a temporary respite from interrogation. There is no *per se* prohibition against re-approaching a suspect following invocation of the right to remain silent.

2. Factors to consider in determining if the PASI has been violated include: which right was invoked, who initiated communication, subject matter of the communication, when the communication took place, where the communication took place, and the time between invocation of the right and the second interview. *See generally Michigan v. Mosley*, 423 U.S. 96 (1975)(Suspect's "right to cut off questioning" and remain silent was "scrupulously honored" when first officer stopped questioning on robbery after suspect invoked *Miranda* right to silence and second officer, after a lapse of over two hours, re-advised the suspect of his rights and questioned him on unrelated murder).

3. *United States v. Watkins*, 34 M.J. 344 (C.M.A. 1992). CID "scrupulously honored" the accused's Fifth Amendment "right to cut off questioning," (*i.e.*, right to silence) when the agent immediately ended the interview, permitted the accused to leave the CID office, and waited more than 2 hours before attempting to re-interview him.

4. *United States v. Doucet*, 43 M.J. 656 (N.M. Ct. Crim. App. 1995). Under the circumstances of the case, appellant's request to go home and refusal to sign a prepared written statement constituted an invocation of his right to remain silent, even though he had made prior oral admissions and had agreed to work on a written statement.

5. *United States v. Rittenhouse*, 62 M.J. 509 (Army Ct. Crim. App. 2005). Once a suspect waives the right to silence, interrogators may continue questioning unless and until the suspect unequivocally invokes the right to silence. If a suspect makes an ambiguous or equivocal invocation of his right to remain silent, law enforcement agents have no duty to clarify the suspect's intent and may continue with questioning. *See also Davis v. United States*, 512 U.S. 452 (1994).

B. The Fifth Amendment (*Miranda*) Right to Counsel.

1. **Mil. R. Evid. 305(e)(1); 305(g)(2)(B).**

2. The *per se* rule of *Edwards.*

a. When a subject has invoked his right to counsel in response to a *Miranda* warning, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. "Having expressed his desire to deal with the police only through counsel, the subject is not subject to further interrogation... until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477 (1981); *See also United States v. Harris*, 19 M.J. 331 (C.M.A. 1985) (*Edwards* applies to military interrogations).

b. There is no exception to *Edwards* for police-initiated, custodial interrogations relating to a separate investigation once a suspect has invoked his right to counsel under the Fifth Amendment. "As a matter of law, the presumption raised by a suspect's request for counsel - that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance - does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." Additionally, the fact that the officer conducting the second interrogation does not know of the request for counsel is of "no significance." Knowledge of the suspect's invocation is imputed to other officers. *Arizona v. Roberson*, 486 U.S. 675 (1988).

c. The *Edwards* requirement that counsel be "made available" means more than an opportunity to consult with an attorney outside the interrogation room. In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Supreme Court held "that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." [13] *But see McNeil v. Wisconsin*, 501 U.S. 171 (1991). (Apparently limits *Minnick* holding regarding *Edwards* rule to periods of continuous custody.)

[13] *See* Mil. R. Evid. 305(e)(1). In 1994, this subdivision was amended to conform military practice with the Supreme Court's decision in *Minnick.*

d. *United States v. Mitchell*, 51 M.J. 234 (1999). After a clear invocation of his Fifth Amendment right to counsel, the accused was asked by his work supervisor during a brig visit if it was worth committing the alleged misconduct. Even though the accused's supervisor was not a law enforcement official, the CAAF held that the questioning of the accused in custody, after invocation of his Fifth Amendment right to counsel, violated the protections of *Edwards v. Arizona*, 451 M.J. 477 (1981).

e. *United States v. Gray*, 51 M.J. 1 (1999). At trial, the prosecutor introduced the accused's statements that were made as part of a separate state plea agreement. Prior to making the statements, the accused unambiguously invoked his right to counsel, however, since counsel was present during the interview, the CAAF held that there was no violation of the Fifth Amendment.

3. Limits of the *Edwards* rule.

a. Counsel "made available."

(1) *United States v. Schake*, 30 M.J. 314 (C.M.A. 1990). Accused who requested counsel during police interrogation could be re-interrogated following a 6-day break in continuous custody and a complete rights advisement where accused had a "real opportunity to seek legal advice" during his release. *See also United States v. Vaughters*, 44 M.J. 377 (1996) (re-interrogating accused who had been released from custody for 19 days provided meaningful opportunity to consult with counsel).

(2) *United States v. Faisca*, 46 M.J. 276 (1997). During a CID custodial interrogation concerning the theft of government property, the accused invoked his right to counsel. The CID agents conducting the interrogation immediately ceased their questioning. Six months later, a CID agent initiated contact with the accused and arranged for another interrogation. During the later interrogation, the accused affirmatively waived his self-incrimination rights and made a statement. The court found no *Edwards* violation.

(3) *United States v. Young*, 49 M.J. 265 (1998). A two-day release from custody after the accused invoked his right to counsel was a sufficient break to overcome the *Edwards* barrier. As such, it was not improper for the government investigator to re-interrogate the accused. The court stated that the two-day break afforded the accused the opportunity "to speak to his family and friends."

(4) *United States v. Mosley*, 52 M.J. 679 (Army Ct. Crim. App. 2000). A twenty-hour release from custody after the accused invoked his right to counsel was a sufficient break to overcome the *Edwards* barrier. Once the government demonstrates by a preponderance of the evidence that the accused had a reasonable break in custody, a presumption exists that during the break the accused had a meaningful opportunity to consult with counsel. The defense then has the burden to overcome the presumption.

b. Re-initiation by the accused.

(1) *Edwards* does not foreclose finding a waiver of Fifth Amendment protection after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities. *Minnick v. Mississippi*, 498 U.S. 146 (1990).

(2) *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). Accused reinitiated communication with police "relating generally to the investigation" by asking, "What is going to happen to me now?" But routine requests such as "for a drink of water" or "to use a telephone" "cannot be fairly said to represent a desire [for] a more generalized discussion relating directly or indirectly to the investigation."

(3) *United States v. Bonilla*, 66 M.J. 654 (C.G. Ct. Crim. App. 2008). While in custody the accused invoked his Fifth Amendment right to counsel and to remain silent. Coast Guard Office of Special Investigations agents later entered the interview room and discussed the case between themselves hoping that the accused would re-initiate conversations about the case. This tactic was successful. The CGCCA ruled this was not an interrogation or functional equivalent of an interrogation. No threats were made, there were no compelling pressure put on the Appellant beyond custody, or pleas to conscience or other ploys the agents knew or were reasonably likely to elicit an incriminating response.

(4) *United States v. Watkins*, 32 M.J. 1054 (A.C.M.R. 1991). Accused reinitiated conversation by asking CID if he should get a civilian attorney and how much time the agent thought the accused might get. *Aff'd*, 34 M.J. 344 (C.M.A. 1992).

(5) *United States v. McDavid*, 37 M.J. 861 (A.F.C.M.R. 1993). Despite previous invocation of his right to counsel, accused initiated the conversation with AFOSI agents by asking if he could explain something.

c. Waiver after Re-initiation by the Accused.

(1) *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). If initiation by the accused is found, then a separate inquiry must be made whether, on the totality of the circumstances, the accused voluntarily waived his rights.

(2) *United States v. McLaren*, 38 M.J. 112 (C.M.A. 1993), *cert. denied*, 114 S.Ct. 1056 (1994). In reinitiating conversation with interrogators by answering a question asked before his rights invocation, accused impliedly waived previously invoked Fifth Amendment right to counsel.

d. Foreign Police Exception.

(1) *Edwards* protections are not triggered by request for counsel to a foreign official because there is an overseas exception to *Edwards* rule. In review of cases in this area, the CAAF has focused on the suspect's state of mind, just as the Supreme Court did in *Roberson*. A suspect may be willing to cooperate without counsel during an American interview, while added intimidation in a foreign interview may make him unwilling to do so.

(2) In *United States v. Coleman*, 26 M.J. 451 (C.M.A. 1988) *cert. denied*, 488 U.S. 1035 (1989). American investigators had actual knowledge that Coleman had requested counsel during questioning by the German police, but *Edwards* did not apply to initial interrogation by American authorities. There must be, however, a complete rights advisement and waiver before the American interrogation.[14]

4. When are requests for counsel effective?

a. Premature invocations.

(1) The right to counsel arises upon initiation of custodial interrogation.

(2) But, where a suspect is in custody and requests counsel from a person in apparent authority shortly before initiation of the interrogation, "it is artificial to draw a distinction between the formal interview . . . and these events which led up to it."[15]

(3) *McNeil v. Wisconsin*, 501 U.S. 171 (1991). In dicta, Justice Scalia opines that peremptory counsel elections are invalid. "We have never held that a person can invoke his *Miranda* rights 'anticipatorily' in a context other than custodial interrogation."

[14]*See also United States v. Dock*, 40 M.J. 112 (C.M.A. 1994)(Accused's pretrial statements to American military investigators were admissible after he requested American counsel while under German custody even though American investigators were present when accused requested counsel during German interrogations); *United States v. Hinojosa*, 33 M.J. 353 (C.M.A. 1991).

[15]*United States v. Goodson*, 18 M.J. 243 (C.M.A. 1984), *vacated*, 471 U.S. 1063 (1985)(remanded "for further consideration in light of *Smith v. Illinois*, 469 U.S. 91 (1984)), *rev'd per curiam*, 22 M.J. 22 (C.M.A. 1986), *modified*, 22 M.J. 247 (1986), *on remand*, 22 M.J. 947 (A.C.M.R. 1986).

(4) *United States v. Schroeder*, 39 M.J. 471 (C.M.A. 1994). Even though under arrest (civilian law enforcement agents), accused's request to speak to an attorney before non-consensual urinalysis was "too little and too early" to qualify as invocation of his *Miranda* right to counsel. Accused had not been read his *Miranda* warnings or subjected to custodial interrogation.

(5) *United States v. Kendig*, 36 M.J. 291 (C.M.A. 1993). Electing to consult counsel during Art. 15 proceeding: 1) does not constitute invoking Fifth Amend. right to counsel; 2) does not invoke a Sixth Amend. right to counsel; and 3) does not require notice to counsel under Mil. R. Evid. 305(e), since subsequent interview concerned unrelated offenses. *See also United States v. Thomas*, 39 M.J. 1094 (A.C.M.R. 1994) (advising interrogator of representation by civilian attorney on unrelated matter does not trigger *Edwards* requirements).

b. Ambiguous Request = Equivocal Request = No *Edwards* Protection.

(1) Once a suspect **initially waives** his *Miranda* rights and agrees to submit to custodial interrogation without the assistance of counsel, only an unambiguous request for counsel will trigger the *Edwards* requirements.

(2) *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993), *aff'd*, 512 U.S. 452 (1994). Following an initial waiver, Davis stated to Naval Criminal Investigative Service (NCIS) agents: "Maybe I should talk to a lawyer." CMA ruled this ambiguous comment failed to invoke Fifth Amend. right to counsel, and NCIS agent properly clarified ambiguous comment before continuing. Supreme Court ruled that clarification of ambiguous counsel requests is not legally required. The invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed as an expression of a desire for the assistance of an attorney. If a suspect makes a reference to an attorney that is ambiguous or equivocal, questioning need not be terminated. A request is ambiguous if a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel.[16]

(3) *United States v. Morgan*, 40 M.J. 389 (C.M.A. 1994). Following initial waiver of Article 31 and counsel rights, accused made statement, but then asked "Can I still have a lawyer or is it too late for that?" CMA rules that the accused's statement was an equivocal or ambiguous request for counsel.

(4) *United States v. Vandewoestyne*, 41 M.J. 587 (A.F.Ct.Crim.App. 1994), *rev. denied*, 43 M.J. 145 (1995). Evidence established under a totality of the circumstances, that accused made a knowing and intelligent waiver of his right to counsel and the right to remain silent at the initiation of the interview. Accused's asking investigators if they thought he needed a lawyer was not a sufficiently clear statement that could have been understood as a request for counsel. Investigators nevertheless clarified the request, and accused then waived his right to counsel.

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[16]A statement either is an assertion to the right to counsel, or it is not. In *Smith v. Illinois*, 469 U.S. 91 (1984), the Court found that the following interchange contained a request for counsel, stating that "An accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself."

Q: You have a right to a lawyer.
A: Uh, yeah, I'd like to do that.
Q: If unable to pay, one will be appointed. Do you want a lawyer?
A: Yeah and no, uh, I don't know what's, really.

(5) *United States v. Nadel*, 46 M.J. 682 (N.M. Ct. Crim. App. 1997). CID interrogated the accused about indecent acts he allegedly committed. After an initial valid waiver of Art. 31(b) and *Miranda* counsel rights, the accused told CID investigators that he would not like to discuss oral sodomy without first receiving advice from a lawyer, but would be willing to answer questions concerning anything else without assistance of counsel. CID did not question Nadel about sodomy but did question him about indecent assault. Thereafter, Nadel made a written confession of the indecent assault. The court found that Nadel's request for a lawyer was "not a clear assertion of the right to have counsel present during the interview." Since it was an ambiguous request for counsel, the CID investigator had no duty to stop the interrogation or clarify Nadel's equivocal request. (*citing Davis v. United States*, 512 U.S. 452 (1994)).

(6) *United States v. Henderson*, 52 M.J. 14 (1999). German police apprehended the accused as a suspect in a stabbing incident. While in custody, the German police advised the accused of his rights (under both German law and Article 31(b)), obtained a waiver, and interrogated the accused. The accused denied involvement in the stabbing and eventually asked to continue the interview in the morning. The German police immediately stopped the questioning. Shortly thereafter, while the accused remained in custody, the CID observer, who was present during the initial interview, spoke to the accused in private. He emphasized the importance of telling the truth and that the accused had "nothing to worry about." The accused indicated he wanted to "tell the truth," but wanted to talk to a lawyer. Eventually, the accused agreed to make a statement and talk to a lawyer the morning. During the interview, the accused admitted to stabbing one of the victims. Citing to *Davis*, the CAAF held that the accused's request to talk to a lawyer in the morning was an ambiguous request for counsel and did not invoke the protections of *Miranda* and *Edwards*.

(7) *United States v. Ford*, 51 M.J. 445 (1999). An explosive devise was found in the accused's barracks room during an inspection. Without giving warnings, an investigator questioned the accused at the barracks. When the accused "asked to have a lawyer present, or to talk to a lawyer, " the investigator stopped the questioning. The investigator transported the accused to the CID office and, after obtaining a waiver of rights, questioned the accused again. The accused eventually gave a written confession. During the interview, however, the accused said that he didn't want to talk and thought he should get a lawyer. The investigator sought clarification and the accused responded that he wanted a lawyer if the investigator continued accusing him of lying. After further clarification, the accused agreed to continue with the questioning. The CAAF found that the accused did not invoke his Fifth Amendment right to counsel during the barracks' questioning. Further, the court held that accused's comment about a lawyer during the CID office interrogation was an ambiguous request for a lawyer and did not invoke the *Miranda* or *Edwards* protections.

(8) **Practice tip:** Clarification of ambiguous requests is probably still a good idea. Clarification will preclude later disputes over whether request was ambiguous as a matter of law.

C. Sixth Amendment Counsel Rights. The Sixth Amendment counsel right does not invoke *Edwards.*

1. **Mil. R. Evid. 305(e)(2); 305(g)(2)(C).**

2. *McNeil v. Wisconsin*, 501 U.S. 171 (1991). Sixth Amendment right to counsel is offense specific. Therefore, police may approach a suspect, who has counsel for a charged offense, about a different uncharged offense. Invocation of the Fifth Amendment right to counsel cannot be inferred from the invocation of the Sixth Amendment right in light of the differing purposes and effects of the two rights.

3. *United States v. Sager*, 36 M.J. 137 (C.M.A. 1992). Representation by civilian counsel on child sex abuse charges pending in civilian court did not constitute invocation of right to counsel with respect to later questioning by CID concerning unrelated child sex abuse offenses on a military installation.

4. *United States v. Kendig*, 36 M.J. 291 (C.M.A. 1993). Court held that exercising option to consult counsel during Art. 15 proceeding: 1) did not constitute invoking Fifth Amendment right to counsel; 2) did not create a Sixth Amendment right to counsel; and 3) did not require notice to counsel under Mil. R. Evid. 305(e) since subsequent interview concerned unrelated offenses.

5. *United States v. Hanes*, 34 M.J. 1168 (N.M.C.M.R. 1992). "(A) request for counsel at an RCM 305(i) hearing before charges have been preferred neither invokes a Sixth Amendment right to counsel because the hearing is not an adversarial proceeding nor invokes a Fifth Amendment right to counsel because the hearing is not the functional equivalent of a custodial interrogation."

VII. WAIVER OF RIGHTS.

Before the government can introduce statements of the accused in its case in chief, it must prove a knowing, intelligent, and voluntary waiver of the accused's applicable rights.

A. **Mil. R. Evid. 305(g).**

B. Implied Waiver.

1. Although an express waiver is not required, courts generally will not presume a waiver from a subject's silence or subsequent confession alone. Implied waiver scenarios are rare and limited to the facts of the case.

2. If the right to counsel is not declined affirmatively, the "prosecution must demonstrate by a preponderance . . . that the individual waived the right to counsel." Mil. R. Evid. 305(g)(2).

3. *North Carolina v. Butler*, 441 U.S. 369 (1979). An express statement of waiver of the *Miranda* right to counsel is not invariably necessary. Waiver was established where accused was advised of rights, said he understood them, refused to sign waiver, but agreed to talk.[17]

4. *United States v. Vangelisti*, 30 M.J. 234 (C.M.A. 1990). "Mil. R. Evid. 305(g)(2) does not create an exception to the requirement that an accused must intentionally relinquish his right to counsel, rather it permits proof of the waiver by evidence other than the accused's own expression that he knows of his right to counsel, understands his right, and intentionally elects to relinquish that right." *Id.* at 241 (Cox. J., concurring).

C. "Intelligent" and "Knowing" Waiver.

1. *Moran v. Burbine*, 475 U.S. 412 (1986). Neither the police failure to inform a suspect of an attorney's efforts to reach him, nor the police misinforming the attorney of their plans to interrogate the suspect undercuts an otherwise valid waiver by the suspect of his *Miranda* rights.

[17]In *Butler*, the Court made a distinction between an express written or oral statement of waiver and a waiver clearly inferred from the actions and words of the person interrogated. However, both types of waiver were deemed sufficient for purposes of waiver of the right to counsel after appropriate advice.

2. *Colorado v. Spring*, 479 U.S. 564 (1987). Accused was arrested for selling stolen firearms, was advised of his rights, which he waived, and questioned on the sales and also about a prior murder the police had not previously mentioned. "We hold that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." "Spring's decision to waive his . . . privilege was voluntary. He alleges no 'coercion . . . by physical violence or other deliberate means calculated to break [his] will.'" His waiver was "knowingly and intelligently made: that is, that Spring understood that he had the right to remain silent and that anything he said could be used as evidence against him."

3. *Connecticut v. Barrett*, 479 U.S. 523 (1987). In response to rights warnings, accused stated he would not give a written statement unless his attorney was present, but he would give an oral statement. Held: waiver was effective; "The fact that some might find Barrett's decision illogical is irrelevant, for we have never 'embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness.'"

4. *United States v. Thornton*, 22 M.J. 574 (A.C.M.R. 1986), *petition denied*, 23 M.J. 179 (C.M.A. 1986). Accused's consumption of 6 to 18 beers prior to interrogation did not invalidate otherwise proper rights waiver.

D. Voluntariness of Waiver.

1. The Government must prove by a preponderance of the evidence that a suspect waived his applicable rights. In order to prove a **valid waiver**, the Government must show:

a. that the relinquishment of the defendant's rights was voluntary, and

b. that the defendant had a full awareness of the right being waived and of the consequences of waiving that right. *See Moran v. Burbine*, 475 U.S. 412 (1986).

E. Presence of Counsel as a Predicate to Waiver.

1. **Custodial Interrogation [Mil. R. Evid. 305(e)(1)]**.[18] Absent a valid waiver of counsel under Mil. R. Evid. 305(g)(2)(B),[19] when an accused or person suspected of an offense is subjected to custodial interrogation under circumstances described under Mil. R. Evid. 305(d)(1)(A)[20] of this rule, and the accused or suspect requests counsel, counsel must be present before any subsequent custodial interrogation may proceed.

United States v. Finch, 64 M.J. 118 (2006). The *McOmber* rule requiring notification of counsel prior to questioning a suspect who has previously asserted his right to counsel under the Fifth Amendment is overruled. Military Rule of Evidence 305(e) provides for only two situations where counsel must be present, absent waiver: (1) custodial interrogations (e.g., *Edwards* rule) and (2) post-preferral interrogation (where the suspect's 6th Amendment right to counsel has been invoked and the questions concern the offense(s) charged).

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[18]The present Mil. R. Evid. 305 essentially replaced the old notice to counsel provisions that sprang from *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976). Under *McOmber* (as implemented by the old Rule 305(e)), when an investigator intended to question an accused regarding an offense and knew or reasonably should have known the accused had counsel with respect to that offense, counsel had to be notified and given a reasonable time in which to attend. This notice to counsel provision was viewed as totally non-waivable until the COMA decision in *United States v. LeMasters*, 39 M.J. 490 (C.M.A. 1994).

In *LeMasters*, the court held that the *McOmber* rule was designed to protect the right to counsel when the police initiate the interrogation. Accordingly, if the suspect initiates discourse and prosecution can show the suspect was aware of his right to have his counsel notified and present, but that he affirmatively waived those rights, then a valid waiver can be found. This case left open the question of whether police initiated questioning was permitted in light of the Supreme Court decisions in *Minnick v. Mississippi*, 498 U.S. 146 (1990), *McNeil v. Wisconsin*, 501 U.S. 171),and the 1994 modification of M.R.E. 305 that removed the language requiring notification of counsel whenever a represented suspect was questioned.

The case of *United States v. Finch* put the *McOmber* notification rule to rest, presumably once and for all. Neither *McOmber, LeMasters*, nor the current Mil. R. Evid. 305(e) addresses the ethical implications of dealing with "represented" parties.

[19] If an accused or suspect is interrogated by a person required to give Article 31 warnings and the accused or suspect is in custody, or reasonably believes himself to be in custody, or is otherwise deprived of his freedom of action in any way, and request counsel, any subsequent waiver of the right to counsel obtained during custodial interrogation concerning the same or different offense is invalid unless the prosecution can demonstrate by a preponderance of the evidence that: (1) the accused or suspect initiated the communication leading to waiver; or (2) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver.

[20] Id.

2. **Post-Preferral Interrogation [Mil. R. Evid. 305(g)(2)(c)]** provides that if a person makes a valid request for counsel subsequent to the preferral of charges (*i.e.,* Sixth Amendment request for counsel), any subsequent waiver of that right is invalid unless the prosecution can show that the accused initiated the communication leading to the waiver.

a. The rules concerning invocation of the Sixth Amendment right to counsel set limits on subsequent interrogation concerning the charged offense or offenses.

b. However, the 6th Amendment right to counsel is "offense specific." Law enforcement may question a suspect on an offense that has not been preferred/indicted. The test to determine whether there are two different offenses is whether each provision requires proof of a fact that the other does not (i.e., the *Blockburger* test). *Texas v. Cobb*, 532 U.S. 162 (2001).

F. Waiver of PASI at Trial.

1. "When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies." Mil. R. Evid. 301(e).

2. By testifying on direct examination about an offense for which he is being tried, an accused **does not**, however, waive his privilege against self-incrimination with respect to uncharged misconduct at an entirely different time and place. *United States v. Castillo*, 29 M.J. 145 (C.M.A. 1989).

3. Claiming the privilege during cross-examination.

a. **Mil. R. Evid. 301(f)(2)**: "If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct . . . , in whole or in part, unless the matters to which the witness refuses to testify are purely collateral."[21]

[21]The Analysis to the rule describes collateral matters as "evidence of minimal importance"("usually dealing with a rather distant fact solicited for impeachment").

b. If matters to which the witness refuses to testify during cross-examination are purely collateral, there is no right to have the witness's direct testimony stricken. *United States v. Evans*, 33 M.J. 309 (C.M.A. 1991).

c. *United States v. Matthews*, 66 M.J. 645 (A.C.C.A. 2008). While credibility issues regarding a witness are not collateral, no adverse inference may be made by the military judge, or panel, when a witness decides to invoke his Fifth Amendment privilege. When faced by this situation, the military judge must use M.R.E. 301 (and not M.R.E. 512) to determine whether to grant a request to strike some or all of a witness's testimony.

d. *United States v. Moore*, 36 M.J. 329 (C.M.A. 1993). Military judge was within his discretion to strike the entire direct testimony of a defense witness following assertion of right against self-incrimination on cross-examination.

e. *United States v. Lawless*, 13 M.J. 943 (A.F.C.M.R. 1982). A government witness testified he had assisted accused in weighing and packing marijuana but refused to testify about who had supplied the baggies and other packaging equipment. The military judge properly refused to strike the direct testimony since the information about the source of the equipment was collateral to the core of the direct.

4. **Confessional Stipulations.** *United States v. Craig*, 48 M.J. 77 (1998). Entering into a confessional stipulation does not waive the accused's constitutional rights against self-incrimination, to a trial of the facts, and to confront and cross-examine the witnesses against her.

5. **The Impact of a Guilty Plea on the Privilege Against Self-Incrimination.**

a. Trial counsel are permitted to use a guilty plea to a lesser-included offense to establish elements common to both the greater and lesser crimes of a single specification. *United States v. Rivera*, 23 M.J. 89 (C.M.A. 1986); *See also* Rule for Courts-Martial 920(e). They may not, however, reach back to the providency inquiry to find evidence to condemn the accused from his own mouth on a separate offense. *United States v. Craig*, 63 M.J. 611, (A.F.C.M.R. 2006).

b. *Mitchell v. United States*, 119 S.Ct. 1307 (1999). The Supreme Court held that in the federal criminal system, a guilty plea does not waive the self-incrimination privilege at sentencing. The Court found that the protection of the Fifth Amendment privilege applies equally to the sentencing phase of trial as it does to the guilt phase, and that negative inferences cannot be drawn by the accused's election to remain silent during the sentencing phase.

VIII. VOLUNTARINESS.

The concept of voluntariness entails elements of the voluntariness doctrine, due process, and compliance with Article 31(d).[22] Whether or not *Miranda* is implicated, a confession must be voluntary to be valid. Thus, a confession deemed coerced must be suppressed despite a validly obtained waiver in the first instance. In determining whether a confession is voluntary, it is necessary to look at the totality of the circumstances concerning whether the accused's will was overborne and whether the confession was the product of an essentially free and unconstrained choice by its maker. Some factors to consider in assessing the totality of the circumstances include the age, education, and intelligence of the accused, whether the accused has been informed of his constitutional rights, the repeated and prolonged nature of the questioning, and the use of physical punishment, such as the deprivation of food or sleep.

A. The Test.

1. "The principles for determining whether a pretrial statement was [involuntary] is essentially the same whether the challenge is based on the Constitution, Article 31(d), or Mil. R. Evid. 304." *United States v. Bubonics*, 45 M.J. 93 (1996).

[22] *See generally*, Lederer, *The Law of Confessions - The Voluntariness Doctrine*, 74 Mil. L. Rev. 67 (1976).

Article 31(d) provides:

> No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

The Analysis to Mil. R. Evid. 304(c)(2) lists examples of involuntary statements as those resulting from: coercion, unlawful influence, and unlawful inducement, to include infliction of bodily harm, deprivation of food, sleep, or adequate clothing; threats of bodily harm; confinement or deprivation of privileges because a statement was not made, or threats thereof; promises of immunity or clemency; promises of reward or benefit, or threats of disadvantage.

2. "If the confession is the product of an essentially free and unconstrained choice by its maker, it may be used against him. If his will has been overborne and his capacity for self-determination critically impaired, the confession may not be used against him."[23]

3. In applying a totality of the circumstances test to determine if the government has shown by a preponderance of the evidence that the accused will was not overborne in the making of a confession, the court will consider: (1) the characteristics of the accused, (2) conditions of the interrogation, and (3) conduct of the law enforcement officials.[24]

4. *United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008). Despite AFOSI agent conduct that included a ten-hour interview, two polygraphs, lies about the existence of the suspect's fingerprints at the crime scene and threats to turn the suspect over to civilian law enforcement if he did not confess, the subsequent confession was not involuntary under the totality of the circumstances.

5. *United States v. Lichtenhan*, 40 MJ 466, 470 (CMA 1994). While a cleansing warning is not a requirement for admissibility, an earlier unwarned statement coupled with the lack of a cleansing warning before a subsequent statement are all part of the "totality of the circumstances" in determining if the subsequent statement was made voluntarily.

[23] In *Bubonics*, the court found that while "Mutt and Jeff" techniques and threat of civilian prosecution interrogation techniques do not amount to *per se* coercion, based on the facts of the case, the interrogators improperly coerced Bubonic's statement. *See also Ledbetter v. Edwards*, 35 F.3d 1062 (6th Cir. 1994) (finding that the accused's confession was voluntary, the court considered the following factors: 1) no physical punishment or threats had been used; 2) no deprivation of physical necessities, such as food and drink or bathroom privileges; 3) short interrogation (3 hours); 4) informed of his *Miranda* warnings three different times; 5) clear indication Ledbetter understood his rights and did not appear under the influence of drugs or alcohol or otherwise unable to comprehend those rights; 6) did not express a reluctance to talk; 7) no request for the presence of an attorney.

[24] *United States v. Vandewoestyne*, 41 M.J. 587 (A.F.Ct.Crim.App. 1994) (Totality of the circumstances established accused's confession was knowing and voluntary, even though he was ultimately persuaded to confess because of fear that a failure to cooperate might lead to deportation of his wife if her complicity in offenses was ever known to the INS); *See also* United *States v. Wheeler*, 22 M.J. 76 (C.M.A. 1986), *cert. denied*, 479 U.S. 827 (1986); *United States v. Norfleet*, 36 M.J. 129 (C.M.A. 1992); *United States v. Doucet*, 43 M.J. 656 (N.M.C. Ct. Crim. App. 1995); *United States v. Briggs*, 39 M.J. 600 (A.C.M.R. 1994); *United States v. Gill*, 37 M.J. 501 (A.F.C.M.R. 1993).

6. *United States v. Griffith*, 50 M.J. 278 (1999). At trial, the prosecutor introduced a confession the accused made to Defense Investigative Service (DIS) agents during a security clearance update interview. The CAAF upheld the military judge's decision to admit the confession. In doing so, the court stated that "the voluntariness of a confession is determined by examining the totality of the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." The court also determined that the military judge's decision to exclude defense expert testimony about false confessions was proper.

7. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In determining whether a confession has been elicited by means that are unconstitutional, it is necessary to look at the totality of the circumstances concerning "whether the defendant's will was overborne in a particular case." Factors to consider in assessing the totality of the circumstances include the age, education, and intelligence of the accused; whether the accused has been informed of his constitutional rights; the length of the questioning; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food or sleep.

8. *United States v. Henderson*, 52 M.J. 14 (1999). In deciding that the confession was voluntary, the Court gave significant weight to the fact that the accused couched his admissions in an exculpatory manner in the hopes of avoiding trouble.

9. *United States v. Ford*, 51 M.J. 445 (1999). Based on the totality of the circumstances, the CAAF held that the accused's written confession was voluntary, and was not tainted by an earlier unwarned, yet not coerced, interrogation.

B. Use of Deception.

1. Any evidence that the accused was threatened, tricked, or cajoled **into a waiver** will show that the defendant did not voluntarily waive his privilege. *Miranda*.

2. After a proper waiver, deception is permissible in the interrogation process as long as the artifice is not likely to produce an untrue confession. *United States v. Davis*, 6 M.J. 874 (A.C.M.R. 1979).

3. *United States v. Jones*, 34 M.J. 899 (N.M.C.M.R. 1992). NIS agent falsely stated that co-accused had "fingered" the accused as the sole perpetrator. This misrepresentation, though relevant to a determination of voluntariness, does not render an otherwise voluntary statement involuntary.

4. *United States v. Thrower*, 36 M.J. 613 (A.F.C.M.R. 1992). When accused continued to deny involvement in ATM card theft, another OSI agent was introduced as "Dr. Paul," a psychologist/psychic with a special power to know when he was being told a lie by looking into his crystal ball. Accused eventually made admissions to "Dr. Paul." Court considered the "cornball ruse" as nothing more than an adjuration to the accused to tell the truth and did not render confession involuntary.

5. *United States v. Sojfer*, 47 M.J. 425 (1998). During an interrogation, the NCIS agent stated a proposition that he knew was false. In response, the accused corrected the agent with incriminating information. Applying a totality of the circumstance analysis, the CAAF denied the accused's claim that the statement was involuntary, i.e., the product of "fraud and trickery."

C. Due Process/Unlawful Inducements.

1. Official coercion is a necessary element in showing a violation of due process. *Colorado v. Connelly*, 479 U.S. 157 (1986). In *Connelly*, the defendant, who was later diagnosed as mentally ill, approached a police officer and confessed to a murder. Despite testimony that his mental illness interfered with his free will, the Court found the confession was voluntary because there was no evidence of coercion by the police. The Court noted that the defendant's mental condition would be an important consideration when police use subtle psychological methods of coercion, but rejected the idea "that a defendant's mental condition, by itself and apart from it's relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness.'"

2. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). To render an inducement unlawful under Article 31(d), "[the] inducement must be made by someone acting in a law enforcement capacity or in a position superior to the person making the confession." A promise of confidentiality from U.S. Intelligence agent (non-police agent) did not constitute unlawful inducement; therefore, the accused's confession was voluntary.

3. *United States v. Campos*, 48 M.J. 203 (1998). Five weeks after a serious car accident, while the accused was medicated and in the hospital recovering from injuries, NCIS agents questioned him about wrongful use and distribution of methamphetamine. Prior to the questioning, the accused was advised of his rights under Article 31(b) and *Miranda.* The court held that the actions of the NCIS agents did not rise to "government overreaching," and that the accused's mental state was not such as to render the confessions involuntary. The court stated that the accused's mental state is just a factor in determining the voluntariness of a confession and is only considered if there is a governmental due process violation due to overreaching.

4. *United States v. Morris*, 49 M.J. 227 (1998). An investigator telling the accused during an interrogation that "If you help us, we will help you", did not amount to unlawful inducement.

5. *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991). Senior law enforcement noncommissioned officer's admonishments to cooperate did not overbear the suspect's freely drawn conclusion that it was in his own best interest to cooperate.

6. *United States v. Murphy*, 18 M.J. 220 (C.M.A. 1984). Trial counsel's advice that cooperation with Japanese police could result in a more lenient sentence merely provided the accused information with which to make an informed, tactical judgment as to his making a statement.

D. Coercion/Threats.

1. **Mil. R. Evid. 304(c)(3)** defines inadmissible involuntary statements as those obtained in violation of the self-incrimination privilege *or* due process clause of the Fifth Amendment *or* Article 31 *or* though use of coercion, unlawful influence, or unlawful inducement. The drafters' analysis for this provision states:

The language governing statements obtained through the use of 'coercion, unlawful influence, and unlawful inducement,' found in Article 31(d) makes it clear that a statement obtained by any person, regardless of status, that is the product of such conduct is involuntary. Although it is unlikely that a private citizen may run afoul of the prohibition of unlawful

influence or inducement, such a person clearly may coerce a statement and such coercion will yield an involuntary statement.[25]

2. *United States v. Ellis*, 57 M.J. 375 (2002). The appellant was subjected to several hours of interrogation during which he was accused of killing his two-year-old child. During the interrogation, the appellant was told that there was enough evidence to arrest him and his wife (who was also being subjected to interrogation). He was also told that his children would be taken away and put in foster care if he and his wife were arrested. The appellant and his wife met for fifteen minutes; after the meeting the appellant confessed to slamming his son's head on the ground on two different occasions. The court concluded that although the detective's statement regarding the possible removal of appellant's children may have contributed to his confession, the statement was still the product of an essentially free and unconstrained choice by the appellant, and thus was voluntary. *See also United States v. Bresnahan*, 62 M.J. 137 (2005).

3. *Arizona v. Fulminante*, 499 U.S. 279 (1991). The accused was befriended by another inmate, an FBI informant, who promised to protect the accused from other inmates if he would tell what happened concerning the murder of the accused's 11-year-old daughter. Under "totality of the circumstances" the subsequent confession was involuntary. The Court found that a credible threat of physical violence existed unless the accused confessed. "Coercion can be mental as well as physical, and ... the blood of the accused is not the only hallmark of an unconstitutional inquisition." Other factors that may have been relevant in determining whether the accused's will has been overborne include: accused's intelligence, physical stature, prior prison experiences, and relationship with the informant.

[25] Although written well before Connelly, the drafters' analysis is probably still a correct interpretation of the law. From the perspective of a due process analysis, statements are excluded as the result of governmental misconduct. The Supreme Court observed in Connelly, however, that even if a confession is constitutionally voluntary, due to the absence of government misconduct, it might still be proved unreliable as a matter of law. In this regard, the admissibility of a statement is governed by the evidentiary laws of the forum, and not by the Due Process Clause. As implemented by Mil. R. Evid. 304, statutory protection of servicemembers under Article 31, clearly contemplates not only an analysis of due process voluntariness, but also consideration of voluntariness as a matter of fundamental reliability. Accordingly, statements coerced by private citizens may still be held inadmissible under Mil. R. Evid. 304.

4. *United States v. Martinez*, 38 M.J. 82 (C.M.A. 1993). Confession during polygraph examination could be found involuntary as result of psychological coercion, even though accused had waived his rights and was free to leave motel room. Accused testified that his will was overborne. Coercive factors considered included duration of interrogation, the nature of the interrogation techniques, and the accused's frustrated attempts to obtain assistance of counsel during the investigation.

5. *United States v. Benner*, 57 M.J. 210 (2002). Appellant's confession to CID was involuntary, since the appellant was faced with the "Hobson's choice" of either confessing on his own, or having the chaplain inform CID of his earlier admissions to child sexual abuse while seeking counseling from the chaplain.

6. *Haynes v. Washington*, 373 U.S. 503 (1963). Petitioner's written confession violated due process because it was obtained through the use of threats and isolation techniques by police. Failure to inform petitioner of his rights was another relevant factor in determining whether the confession was voluntary. The court further observed that the refusal to allow petitioner to communicate with his attorney or his wife was a misdemeanor under state law.

7. *United States v. O'Such*. 57 M.J. 137 (C.M.A. 1967) The fact that appellant was deprived of sleep, had threats made against his family during the interrogation, and was threatened with being charged with misprision of a felony if he continued to remain silent led to his coerced oral admissions.

8. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) A thirty-six hour interrogation was determined to be so "inherently coercive" as to render a resulting confession automatically involuntary. The Court seems to further indicate that the longer the interrogation, the less important the other factors become when evaluating the totality of the circumstances.

IX. ADMITTING CONFESSIONS MADE AFTER IMPROPER POLICE CONDUCT.

Generally, a confession obtained after an illegal search, arrest, or prior confession is inadmissible, unless the government can show sufficient attenuation of the taint. If the prior illegality is a result of procedural defects, it will be easier for the government to show attenuation of the taint. If, however, the prior illegality resulted from a constitutional violation (i.e., coercion) then it is unlikely the government will prevail.

A. After an Illegal Arrest or Search.

1. *Brown v. Illinois*, 422 U.S. 590 (1975). *Miranda* warnings alone are insufficient to cure taint of arrest made without probable cause or warrant. Factors to consider on attenuation of the taint: (1) *Miranda* warnings; (2) "temporal proximity" of the illegal arrest and the confession; (3) "intervening circumstances"; and (4) "purpose and flagrancy of the official misconduct".

2. *Wong Sun v. United States*, 371 U.S. 471 (1963). Statements made by appellant in his bedroom at the time of his unlawful arrest were the fruits of the agents' unlawful action, and they should have been excluded from evidence. However, since the appellant was later lawfully arraigned and released on his own recognizance and had returned voluntarily several days later when he made his unsigned statement, the connection between his unlawful arrest and the making of this later statement was so attenuated that the unsigned statement was not the fruit of the unlawful arrest and, therefore, it was properly admitted in evidence.

3. *United States v. Washington*, 39 M.J. 1014 (A.C.M.R. 1994). Unlawful search tainted statements made by accused where first statement was taken immediately after search and discussed items found during search. While a rights warning is a relevant factor in attenuating a statement from prior official misconduct, a warning alone cannot always break the casual connection. *See also New York v. Harris*, 495 U.S. 14 (1990) (Where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the use of a statement made by the defendant outside of his home, even though the statement is taken after an illegal warrantless arrest made in the home); *United States v. Khamsouk*, 57 M.J. 282 (2002) (Although appellant was seized during an illegal search, his continued custody at the police station was based on probable cause, therefore, his subsequent warned statement to police was properly admitted).

4. *United States v. Mitchell*, 31 M.J. 914 (A.F.C.M.R. 1990). *Harris* applied. Statement made to police who entered accused's motel room based on probable cause, but without a warrant or his consent should have been suppressed, but written statement given three days later was admissible.

5. *United States v Campbell*, 41 M.J. 177 (CMA 1994). Illegality of urinalysis precluded admission of accused's statements, where urinalysis results were delivered to accused on day he made his initial confession, accused was directed to bring form notifying him of positive results to the criminal investigative division office, and positive results of the challenged urinalysis were the sole basis for the accused's questioning by the military police. (Note, no cleansing warning given)

B. After an Inadmissible Confession.

1. Question First Tactic. Missouri v. Seibert, 542 U.S. 600 (2004). Police engaged in a common interrogation tactic of questioning the suspect. Once they obtained the confession, they would read the suspect her rights, get a waiver, and then obtain a second confession. The Supreme Court held that the warned confession was inadmissible, since the police's deliberate tactic of withholding Miranda warnings elicited an initial confession that was used to undermine the "comprehensibility and efficacy" of the subsequent Miranda warnings. Under the circumstances of the case, the Court concluded that it would have been reasonable for the suspect to regard the two phases of the interrogation as a continuum, especially since the officer referred back to the earlier admissions. The mere recital of Miranda warnings in the middle of this continuous interrogation was not sufficient to separate the two phases in suspect's mind. Therefore, she would have concluded that it would be unnatural for her not to repeat the same information she had just given. She would not have understood that she had a choice about continuing to talk.

2. *Oregon v. Elstad*, 470 U.S. 298 (1985). "A suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." "Administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible." However, no cleansing warning required. *See also United States v. Lichtenhan*, 40 MJ 466, 470 (CMA 1994).

3. *United States v. Phillips*, 32 M.J. 76 (C.M.A. 1991). An unwarned statement obtained without actual coercion does not presumptively taint a subsequent, warned statement. Government must prove by a preponderance of the evidence, however, that the warned statement was voluntary and was not obtained by using the earlier statement. If the initial statement is the product of *actual* coercion, duress, or inducement, it **does** presumptively taint subsequent warned statements. Cleansing warnings, although not legally required, will help show voluntariness. *Cf. U.S. v. Torres*, 60 M.J. 559 (A.F. Ct. Crim. App. 2004).

4. *United States v. Steward*, 31 M.J. 259 (C.M.A. 1990). Mere "technical violations of Article 31(b)" do not presumptively taint subsequent warned statements. The appropriate legal inquiry in these types of cases is whether his subsequent confession was voluntary considering all the facts and circumstances of the case, including the earlier technical violation of Article 31(b).

5. *United States v. Phillips*, 32 M.J. 76 (C.M.A. 1991). An unwarned statement obtained without actual coercion does not presumptively taint a subsequent, warned statement. Government must prove by a preponderance of the evidence, however, that the warned statement was voluntary and was not obtained by using the earlier statement. If the initial statement is the product of *actual* coercion, duress, or inducement, it **does** presumptively taint subsequent warned statements. Cleansing warnings, although not legally required, will help show voluntariness. *Cf. U.S. v. Torres*, 60 M.J. 559 (A.F. Ct. Crim. App. 2004).

6. *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006). Where an earlier statement is "involuntary" only because the accused has not been properly warned of his Article 31(b), UCMJ, rights, the voluntariness of the second statement is determined by the totality of the circumstances. The earlier unwarned statement is a factor in this total picture, but it does not presumptively taint the subsequent statement. If a **"cleansing warning"** has been given -- where the accused is advised that a previous statement cannot be used against him -- that statement should be taken into consideration. If a cleansing statement is not given, however, its absence is not fatal to a finding of voluntariness.

7. *United States v. Gardinier II*, 65 M.J. 60 (2007). Suspect provided two incriminating statements to civilian investigators following a proper Miranda rights warning. Immediately after making these statements, a CID agent entered the interview room, identified himself, and obtain a third incriminating statement without advising the suspect of his Article 31 rights. Four days later, the suspect was called to the CID office and advised that his prior statement was given with what "may not have been a proper rights advisement." The suspect was then asked whether he would be willing to make another statement. He did. While the court suppressed the first (unwarned) statement to CID, the second statement was found to be voluntary under the totality of the circumstances despite the fact the accused had not been specifically informed that his first statement to CID might be inadmissible.

8. *United States v. Young*, 49 M.J. 265 (1998). A two-day period was enough to purge the taint from the previous inadmissible confession. *See also United States v. Ford*, 51 M.J. 445 (1999); *U.S. v. Allen*, 59 M.J. 478 (2004); *U.S. v Cuento*, 60 M.J. 106 (2004).

9. *Michigan v. Tucker*, 417 U.S. 433 (1974). Police failure to advise appellant of his right to appointed counsel did not require that the testimony of a witness identified in appellant's statement be suppressed.

X. THE EXCLUSIONARY RULE.

No statement obtained in violation of Article 31,[26] *Miranda*,[27] Sixth Amendment,[28] or due process may be received in evidence in the case in chief in a trial by court-martial against the subject of the violation. Evidence resulting from "mere" procedural violations may be allowed to impeach the testimony of the accused. Rationale for allowing impeachment use is that in an impeachment situation, the search for the truth in a criminal case outweighs the deterrence value of the exclusionary rule. Coerced statements are inadmissible for *all* purposes, to include impeachment of the accused. Otherwise inadmissible statements may also be admissible in a later prosecution against the accused for perjury, false swearing, or making of a false official statement.

A. The General Rule: **Mil. R. Evid. 304(a).**

> "[A]n involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule."

B. The Inevitable Discovery Exception.

1. **Mil. R. Evid. 304(b)(2) and (3)** provide that:

a. Evidence that was obtained as a result of an involuntary statement may be used when the evidence would have been obtained even if the involuntary statement had not been made.

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[26]Mil. R. Evid. 304(b)(1): "Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) or (f), or the requirements concerning counsel under Mil. R. Evid. 305(d), 305(e), or 305(g), this rule does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused. . . ."

[27]*Harris v. New York*, 401 U.S. 222 (1971); *accord Oregon v. Haas*, 420 U.S. 714 (1975).

[28]*Michigan v. Harvey*, 494 U.S. 344 (1990)(Statement given in response to police-initiated interrogation following attachment of accused's 6th Amendment right to counsel, although not admissible in the prosecution's case-in-chief, may be used to impeach the defendant's testimony, at least when the defendant gives a knowing and voluntary waiver of his right to counsel); *United States v. Langer*, 41 M.J. 780 (A.F.Ct.Crim.App. 1995)(Statements made by accused after preferral of drug charges against him to person recruited as drug informant by government agents were obtained in violation of accused's 6th Amendment right to counsel and could not be used in government's case-on-chief. Although informant may have been intended to act as a passive listening post, person in fact initiated contact and conversations with accused for the express purpose of gathering information about illegal drug activity. Statements could be used in rebuttal if such information became relevant to impeach accused's testimony).

b. Evidence challenged as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the evidence would have been obtained even if the statement had not been made.

2. *United States v. Kline*, 35 M.J. 329 (C.M.A. 1992). Accused, on his own initiative, contacted his commander and stated, "I have just turned myself in for sexually molesting my daughter." Court found admission was not inadmissible involuntary derivative evidence, despite suppression of a similar admission made to a military social worker hours earlier.

C. Statements Incriminating Others.

1. Exclusionary rule does not apply to coerced or unadvised witness statements that incriminate someone else. Instead, evidence of coercive or illegal investigatory tactics employed by the Government to secure such evidence or subsequent testimony based thereon may be presented to the fact-finder for purposes of determining the weight to be afforded this evidence.

2. *United States v. McCoy*, 31 M.J. 323 (C.M.A. 1990) No due process violation where trial counsel deliberately advised CID agents not to advise suspects of their Article 31 rights, suspects later gave immunized testimony against accused, and accused had a full opportunity to present this improper conduct to the members through cross-examination, witnesses, and argument.

D. False Official Statement Charge

United States v. Swift, 53 M.J. 439 (2000). The government may only use a statement taken in violation of Article 31 in a later prosecution for false official statement, where the accused has taken the stand in an earlier prosecution, thereby "open[ing] the door to consideration of the unwarned statement by his or her in-court testimony."

E. Derivative Physical Evidence (Difference between Military Rules of Evidence and Supreme Court jurisprudence).

1. **Mil. R. Evid. 304(a)** states that "[A]n involuntary statement or *any derivative evidence therefrom* may not be received in evidence . . ." Therefore, in the military, the fruit of the poisonous tree doctrine applies to evidence derived from inadmissible statements.

2. *But see United States v. Patane*, 542 U.S. 630 (2004). After arresting the defendant at his house and before completely giving him *Miranda* warnings, the police asked him where his pistol was. The defendant told the officers the location of the pistol, and then, per their request, gave the officers permission to enter and seize it. The Supreme Court held that the pistol was admissible. A plurality of the Court concluded that the Self-Incrimination Clause of the Fifth Amendment protects individuals from being compelled to testify against themselves in a criminal proceeding. Thus, the Clause cannot be violated by admitting nontestimonial evidence obtained through the use of unwarned, yet voluntary statements. Creating a blanket suppression rule for such evidence does not serve the Fifth Amendment's goals of "assuring trustworthy evidence" or deterring police misconduct. Additionally, the protections of *Miranda* are not violated when officers fail to give warnings, regardless of whether the failure is negligent or intentional. Instead, *Miranda's* protections are violated when unwarned statements are admitted against the declarant at trial. Suppression of unwarned statements is a complete remedy to protect this fundamental "trial right." Therefore, the "fruit of the poisonous tree" doctrine does not apply to evidence derived from *Miranda* violations.

XI. MENTION OF INVOCATION AT TRIAL.

A. Silence at trial.[29]

1. Comment by the prosecutor on the accused not testifying violates the Fifth Amendment and due process. *Griffin v. California*, 380 U.S. 609 (1965).

[29]Mil. R. Evid. 301(f) sets forth the general rule:

> (1) "fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the government."
>
> * * *
>
> (3) "fact that the accused during official questioning and in exercise of rights . . . remained silent, refused to answer . . . , requested counsel, or requested that the questioning be terminated is inadmissible against the accused."

2. *Portundo v. Agard*, 529 U.S. 61 (2000). A prosecutor's comments about the defendant's opportunity to watch other witnesses testify before he took the stand and to tailor his testimony accordingly, did not amount to a constitutional violation, but were instead a fair comment on factors effecting the defendant's credibility. The Supreme Court said that, "when [a defendant] assumes the role of a witness, the rules that generally apply to other witness — rules that serve the truth-seeking function of the trial — are generally applicable to him as well."

3. Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin* holds that the privilege against compulsory self-incrimination is violated. But where the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, there is no violation of the privilege. *United States v. Robinson*, 485 U.S. 25 (1988).

4. *United States v. Cook*, 48 M.J. 64 (1998). During closing argument, trial counsel asked the members to consider the accused's yawning during trial as being indicative of his guilt. The CAAF held that it was improper for the trial counsel to comment about the courtroom demeanor of the accused, but found the error to be harmless. The Court determined that the accused's acts were non-testimonial and therefore not protected by the Fifth Amendment. Regardless, the acts were not relevant to the issue of guilt or innocence. *See also United States v. Gray*, 51 M.J. 1 (1999).

5. *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991). Trial counsel asked rhetorical questions directed to accused during argument on findings, and then answered them himself in manner calculated to bring the accused's silence to the members' attention. "[A] trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense." Harmless error despite legally inappropriate comments. *Aff'd*, 36 M.J. 34 (C.M.A. 1992) (Summary Disposition), *cert. denied*, 113 S.Ct. 596 (1992).

6. *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Trial counsel improperly described nontestifying accused's demeanor as "The iceman." Comments on a non-testifying accused's demeanor are objectionable on three grounds: 1) argues facts not in evidence; 2) violates Mi. R. Evid. 404(a) by using character evidence solely to prove guilt; and 3) violates Fifth Amendment. DC only objected on third ground, cured by instruction. Other grounds were waived and not plain error. *See also United States v. Jackson*, 40 M.J. 820 (N.M.C.M.R. 1994). (Trial counsel's argument on findings that accused's tears in court were tears of remorse and guilt was harmless error though accused's courtroom behavior off witness stand was legally irrelevant to question of guilt).

7. *United States v. Carter*, 61 M.J. 30 (2005). The CAAF held that the trial counsel's repeated comments about the "uncontroverted" and "uncontradicted" evidence during findings argument constituted an impermissible reference to the accused's exercise of his Fifth Amendment right not to testify. The trial counsel's comments on the defense's failure to present contradicting evidence were not tailored to address any weaknesses in the defense's cross-examination of the victim or the defense's efforts to impeach her; rather, since only the accused could controvert the victim, the trial counsel's comments in effect repeatedly drew the members' attention to the accused's failure to testify.

B. Silence <u>after</u> warnings.

1. Use of accused's silence after *Miranda* warning to impeach later trial testimony as a fabrication violates due process. *Doyle v. Ohio*, 426 U.S. 610 (1976).

2. *United States v. Riley*, 47 M.J. 276 (1997). Under the circumstances of the case (no defense objection, no instruction to members regarding improper introduction of evidence, and weak evidence), admission of testimony by an investigator regarding the accused's invocation of the privilege against self-incrimination during questioning constituted plain error.

3. *United States v. Sidwell*, 51 M.J. 262 (1999). When asked by the trial counsel what statements the accused made, the witness testified that the accused invoked "his rights." Defense counsel immediately objected and moved for a mistrial. Although the military judge denied the defense motion, he did strike the witnesses testimony, gave several curative instructions, and questioned the members to ensure they understood the instructions. The CAAF determined that error occurred, but considering the corrective action taken by the military judge and the facts of the case, the error was harmless. *Cf. United States v. Riley*, 47 M.J. 276 (1997).

4. *United States v. Miller*, 48 M.J. 811 (N.M. Ct. Crim. App. 1998). Relying on *Riley*, the Navy Court held that the admission of the investigator's testimony that the accused terminated the interrogation materially prejudiced the substantial rights of the accused. The court also noted that the military judge failed to take the necessary steps to remedy the prejudice.

C. Silence <u>before</u> warnings.

1. **Mil. R. Evid. 304(h)(3).**

"Certain admissions by silence. A person's failure to deny an accusation of wrongdoing [while] . . . under official investigation . . . does not support an inference of an admission of the truth of the accusation."

2. *United States v. Cook,* 48 M.J. 236 (1998). After being arrested and questioned by OSI investigators about a rape allegation, the accused went to a friend's house. The friend asked the accused if he committed the rape. The accused did not respond. At trial, the prosecution introduced this evidence and argued that the accused's failure to deny the allegation indicated guilt. The CAAF held that this evidence was irrelevant under M.R.E. 304(h)(3), even when the one asking the questions was a friend who was inquiring out of personal curiosity. The Court also held that the start of the OSI investigation was the triggering event for the M.R.E. 304(h)(3) protections.

3. *United States v. Alameda,* 57 M.J. 190 (2002). Appellant's silence upon being informed that he was being apprehended for an "alleged assault" was not relevant since appellant had a history of domestic violence, including an incident two weeks prior to the attempted murder incident, therefore his failure to deny one or more of the "alleged assaults" to the arresting officer does not support an inference of guilt and is therefore not relevant. Since the military judge's admission into evidence of the appellant's silence was error, trial counsel's use of it in his closing argument was also error. Additionally, the military judge's instructions to the panel were "off the mark," since they only dealt with the appellant's silence at trial, and may have actually exacerbated the problem by indicating to panel members, by omission, that they could draw an adverse inference from appellant's silence during his apprehension.

4. *United States v. Ruiz,* 50 M.J. 518 (A.F. Ct. Crim. App. 1999). During cross-examination of the accused, the trial counsel questioned him about his failure to proclaim his innocence when confronted by investigators. The Air Force Court held that under the circumstances, the questioning by trial counsel did not violate M.R.E. 304(h), because it was designed to highlight the differences between the testimonies of the prosecution witnesses and of the accused.

5. Use of accused's pre-arrest, pre-*Miranda* warning silence to impeach later trial testimony on self-defense is permissible.[30]

6. Use of accused's post-arrest, pre-*Miranda* warning silence to impeach trial testimony on self-defense is permissible; rules of evidence may address. *See Fletcher v. Weir*, 455 U.S. 603 (1982).

[30] *Jenkins v. Anderson*, 447 U.S. 231 (1980)(accused failed to inform police about his self-defense claim for at least two weeks after murder. Prosecutor used this silence in his cross-examination of the defendant and in his closing arguement); *Brecht v. Abrahamson*, 113 S.Ct. 1710 (1993)(defendant failed to tell anyone that the victim's shooting was an accident prior to receipt of the warnings). *See also State v. Easter*, 130 Wash.2d 228, 922 P.2d 1285 (Wash. 1996) (finding that the accused's pre-arrest silence cannot be used against him). In *Easter*, the accused was questioned at the accident scene, but he refused to answer any questions (not a custodial interrogation). During trial, the prosecutor argued that the accused's silence indicated he was being evasive to avoid alcohol detection. The Washington Supreme Court held that an accused's pre-arrest silence cannot be used against him/her. The court found that the right to silence is derived from the Fifth Amendment and not *Miranda*, and applies before an accused is in custody or is the subject of an investigation.

D. Invoking the right to counsel.

United States v. Gilley, 56 M.J. 113 (2001). The standard for determining whether mentioning an accused's invocation of his right to counsel is improper is the same standard used for mentioning an accused's invocation of his right to remain silent. Here, no reversible error where: 1) defense counsel first elicited evidence of his client's invocation on cross-examination and did not object to the witness's response; 2) defense's theory "invited response" from trial counsel about accused's invocation; and 3) invocation was not used as substantive evidence against accused.

E. Remedy for impermissible comments at trial.

1. *United States v. Garrett*, 24 M.J. 413 (C.M.A. 1987). TC erred by eliciting testimony from CID agent that accused had terminated their interview and asked for an attorney, but a mistrial was properly denied and the error cured by the judge's instructions.[31]

2. *United States v. Palumbo*, 27 M.J. 565 (A.C.M.R. 1988), *pet. denied*, 28 M.J. 265 (C.M.A. 1989). CID agent revealed to the court that accused asserted rights and declined to be interviewed. MJ properly denied a mistrial and corrected the error by (1) immediately instructing members to disregard evidence and that accused had properly invoked rights; (2) obtaining affirmative response from court members that they understood and could follow instructions; (3) having defense counsel participate in drafting curative instruction; and (4) finding TC inadvertently introduced evidence.[32]

F. The right extends through sentencing.

1. *Estelle v. Smith*, 451 U.S. 454 (1981). "We can discern no basis to distinguish between the guilt and penalty phases . . . so far as the protection of the Fifth Amendment privilege is concerned."

[31]A good example of a curative instruction is contained in *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991).

[32]When defense does not request it, there is no need to reiterate instruction during final instructions. *See also United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990).

2. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992). "We must emphasize that trial counsel can only argue that an accused lacks remorse when that inference can be fairly derived from evidence before the court-martial. It can not arise solely from an accused's exercise of his or her rights."

XII. PROCEDURE.

A. Discovery.

Mil. R. Evid. 304(d)(1): "*Disclosure*." "Prior to arraignment, the prosecution shall disclose to the defense the contents of *all statements*, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces."

Mil. R. Evid. 304(d)(2)(B): If not disclosed, judge may make such orders as required in the "interests of justice."

B. Litigating the Issues.

1. General Procedure.

a. *Motions and objections*. Defense must raise prior to plea or waive; good cause must be shown for an exception. M.R.E. 304(d)(2)(A).

b. *Specificity*: Judge may require defense to specify the grounds. M.R.E. 304(d)(3)

c. *Evidence*. The defense may present evidence to support its motion, including the testimony of the accused for the limited purpose of the motion. The accused may be cross-examined only on the matter to which he testified. Nothing said by the accused, either in direct or cross-examination, may be used against him for any purpose other than in a prosecution for perjury, false swearing, or false official statement. M.R.E. 304(f)

d. *Burden*. Once a motion or objection is raised by the defense, the prosecution has the burden of proving that the statement was voluntary by a preponderance of the evidence. M.R.E. 304(e)

e. If a statement is admitted into evidence, the defense shall be allowed to present evidence as to the voluntariness of the statement in an attempt to reduce the weight that the fact finder will give to it. M.R.E. 304(e)(2)

f. *Rulings*. Shall be ruled on prior to plea, unless good cause. Judge shall state essential findings of fact.[33]

g. Guilty plea waives all.

2. **Standing to Challenge Self-Incrimination Issues.** *United States v. Jones*, 52 M.J. 60 (1999). To perfect its case against the accused, the government negotiated with three "minor offenders" to testify against the accused. These witnesses did not have a formal grant of immunity. The unwritten agreement was that the government would not prosecute them if they accepted Article 15 punishment, paid restitution, and testified against the accused. On appeal, the accused argued that the government violated the witness's self-incrimination rights, and therefore, their testimony should not have been admissible. The CAAF held that the accused did not have standing to challenge procedural violations of the self-incrimination rights of the witnesses, but may challenge statements that are involuntary due to "coercion and unlawful influence." The court further determined that the even though the government's actions "smelled bad" and resulted in *de facto* immunity, they did not constitute the requisite showing of prejudice.

3. Warnings and waivers at trial.

a. **Mil. R. Evid. 301(b)(2):** The military judge *should* advise a witness of the right to decline to make an answer if the witness appears likely to incriminate himself.

[33]Although the timing of essential findings is not specified by the MCM, they "should be" entered contemporaneously with a ruling on a suppression motion. *United States v. Doucet*, 43 M.J. 656 (N.M. Ct. Crim. App. 1995).

b. Right against self-incrimination is a "fundamental constitutionally-mandated procedural right that can be waived only by an accused on the record." Waiver will not be presumed by a silent or inadequate record.[34]

4. Burden of proof.

Mil. R. Evid. 304(e): The burden of proof is on the prosecution by a preponderance of the evidence. It extends only to grounds raised.

5. Defense evidence on motions.

Mil. R. Evid. 304(f): "*Defense evidence*." Accused may testify for limited purpose.

6. Corroboration.

a. **Mil. R. Evid. 304(g):** "An admission or a confession . . . may be considered as evidence . . . only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted sufficiently to justify an inference of their truth. . . ." "If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence . . . only with respect to those essential facts . . . that are corroborated. . . ."

b. Procedure.

Corroborating evidence is usually introduced before the confession or admission is introduced, but the military judge may admit evidence subject to later corroboration.

[34]*United States v. Adams*, 28 M.J. 576 (A.C.M.R. 1989), *petition denied*, 29 M.J. 439 (C.M.A. 1989)(Judge's failure to advise accused of his constitutional rights rendered guilty plea improvident).

c. *United States v. Rounds*, 30 M.J. 76 (C.M.A. 1990), *cert. denied*, 498 U.S. 846 (1990). Independent evidence of each and every element of the confessed offense is not required as a matter of military law. Generally speaking, it must "establish the trustworthiness of the" confession. Confession was sufficiently corroborated without independent evidence of ingestion of drugs when independent evidence showed accused had access and opportunity to ingest drugs at time and place where he confessed to using drugs.[35]

d. *United States v. Duvall*, 47 M.J 189 (1997). A conviction cannot be based solely on a confession. Rather, some corroborative evidence must be introduced to the trier of fact pursuant to M.R.E. 304(g).

e. *United States v. Hall*, 50 M.J. 247 (1999). In a military judge alone trial, the trial counsel did not offer the same corroborating evidence on the merits that he did during proceedings on a defense motion to suppress the accused's confession. In affirming its holding in *Duvall* (corroborating evidence must be submitted to the trier-of-fact), the CAAF found that the government satisfied M.R.E. 304(g) and the confession was sufficiently corroborated, since the judge acknowledged that he considered the corroborating evidence for both the motion and the merits.

f. *United States v. Swenson*, 51 M.J. 522 (A.F. Ct. Crim. App. 1999). Members convicted the accused of attempting to use LSD. The conviction was based upon a confession that was corroborated by a previous admission of LSD use. The Air Force Court held that corroborating the accused's confession with a prior admission was proper so long as the prior admission was a statement of anticipated future conduct and not an admission of past criminal conduct. A statement of future criminal misconduct does not need to be corroborated, as such, it can be used to corroborate a confession.

[35] *See also United States v. Lawrence*, 43 M.J. 677 (A.F.Ct.Crim.App. 1995)(confession to cocaine use of four occasions sufficiently corroborated by recent urinalysis); *United States v. Maio*, 34 M.J. 215 (C.M.A. 1992), *cert. denied*, 113 S.Ct. 196 (1992); *United States v. Williams*, 36 M.J. 785 (A.C.M.R. 1993).

g. *United States v. Cottrill*, 45 M.J. 485 (1997). The corroborating evidence must raise only an inference of truth as to the essential facts admitted, which must be shown by a preponderance of the evidence. In *Cottrill*, there was sufficient independent physical evidence to corroborate the accused's pretrial admissions that he sexually assaulted his daughter. *See also United States v. O'Rourke*, 57 M.J. 636 (Army Ct. Crim. App. 2002)

h. *United States v. Howe*, 37 M.J. 1062 (N.M.C.M.R. 1993). Trial counsel has a duty to withdraw charge based on uncorroborated admission or else inform military judge there is insufficient evidence to support it.

i. *United States v. McCastle*, 40 M.J. 763 (A.F.C.M.R. 1994). Corroboration was enough where the place the accused admitted to purchasing drugs was a well-known trafficking location, accused's description of the dealer matched the description of a known dealer at that location, and the dealer was frequently observed by authorities using the described vehicle to conduct drug sales.

j. *United States v. Baldwin*, 54 M.J. 464 (2001). In the confession, the appellant stated that his wife had walked in on him while he was assaulting his daughter (although she did not see anything) and that he immediately sought professional help through the chaplain and a therapist. In finding adequate corroboration, the court relied on the following facts: the appellant's wife saw the appellant in their daughter's room on the night he confessed to sexually assaulting her; the appellant gave his wife "a strange look that she had never seen before;" the appellant left the bedroom and went in the living room where he began crying and talking about his own history of being sexually abused; and two days after being caught, the appellant went to the chaplain and then to a therapist. It was not necessary to provide independent evidence of all the elements of the offense. The court also emphasized that the government only had to establish an inference of truth as to the essential facts by a preponderance of the evidence.

7. Defense Evidence on Voluntariness.

a. *Crane v. Kentucky*, 476 U.S. 683 (1986). Due process and Sixth Amendment concerns require that the accused be permitted to challenge the reliability of a statement before the fact-finder, even though the judge may have found the statement "voluntary."

b. *United States v. Miller*, 31 M.J. 247 (C.M.A. 1990). Mil. R. Evid. 304(e) adopts the orthodox rule for determining the voluntariness of confessions. The judge alone determines the admissibility of confessions and that ruling is final. Although the members must consider the confession in determining guilt or innocence, the accused is free to argue the confession was involuntary in order to reduce the weight the members give it. Judge must hold a hearing and make findings as to voluntariness only if the defense raises the issue by a motion to suppress or a timely objection at trial. The Constitution does not require a voluntariness hearing unless use of the confession is challenged.

8. Joint Trials: Redaction of Confessions.

Gray v. Maryland, 118 S.Ct. 1151 (1998). A co-defendant's confession that substituted either a blank space or the word "deleted" in place of the accused's name was inadmissible in a joint trial. As redacted, the Court held that the jury would clearly infer the confession refers to the accused. The Court opined that there were other acceptable ways to redact the accused's name from the confession. *See also United States v. Bruton,* 391 U.S. 123 (1968); **Mil. R. Evid. 306**.

XIII. IMMUNITY.

A grant of immunity overcomes the privilege against self-incrimination by removing the consequences of a criminal penalty. If a servicemember is given immunity, the government can compel him to make a statement, but cannot use that compelled statement against him in trial. The statement can, however, be used if the servicemember commits perjury, false statement, or false swearing. Only the General Court-Martial Convening Authority (GCMCA) can grant immunity. There are circumstances in which immunity may be implied (*de facto* immunity), even though the GCMCA did not grant immunity.

A. Types of Immunity.

1. **Transactional**. Immunity from trial by court-martial for one or more offenses under the code.

2. **Testimonial**. "Use immunity" for testimony and any derivative evidence. Mil. R. Evid. 301(c)(1) and *Kastigar v. United States*, 406 U.S. 441 (1972).

3. RCM 704 & Mil. R. Evid. 301.

B. Authority to Grant Immunity.

1. General Rule: Only GCMCA can grant immunity.

2. To whom:

a. Persons subject to the UCMJ.

(1) Must relate to court-martial, not federal district court prosecution. RCM 704(c)(1).

(2) Insure DOJ has no interest in the case. AR 27-10, para. 2-4 and 2-7.

b. Persons not subject to the UCMJ.

(1) GCMCA can grant only with approval of U.S. Attorney General. RCM 704(c)(2).

(2) Procedures. AR 27-10, para. 2-4.

c. Delegation of authority not permitted. RCM 704(c)(3).

C. Procedure.

1. Decision to Grant Immunity.

a. Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the GCMCA.

b. If a defense request to grant immunity has been improperly denied, the military judge may, upon motion by the defense, grant appropriate relief by directing that the proceedings against the accused be abated.

c. R.C.M. 704(e): The military judge may grant such a motion upon findings that:

(1) The witness intends to invoke the right against self-incrimination . . . if called to testify; *and*

(2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government through its own overreaching, has forced the witness to invoke the privilege . . .; *and*

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses.

d. *United States v. Richter*, 51 M.J. 213 (1999). The accused was one of many actors in a larceny scheme. Prior to trial, the defense asked the convening authority to grant a defense witness immunity. The convening authority denied the defense request, but granted immunity to five prosecution witnesses. The CAAF held that the military judge did not abuse his discretion when he denied the defense motion to abate the court-martial. The court relied on the three-prong test under RCM 704(e) in reaching its decision. Specifically, the court stated that the three prongs must be read in the conjunctive. Since the defense witness was a prosecution target, the second prong of the rule was not met.

2. Order to Testify/Grant of Immunity.

a. RCM 704(d).

b. AR 27-10, Military Justice, Chapter 2 (Procedures for Coordination with DoJ).

D. Notice to the Accused.

1. Mil. R. Evid. 301(c)(2). Written grant shall be served on accused prior to arraignment or within a reasonable time before witness testifies.

2. Remedy: continuance, prohibit or strike testimony, or other order as required.

E. Scope of the Immunity.

1. Prosecution After Testimonial Immunity.

a. Independent Evidence.

(1) Government must show that evidence used to prosecute accused is completely independent of immunized testimony. Tips to avoid problems: (1) screen all immunized data from the trial team; (2) catalogue or seal all data to provide a paper trail; (3) personnel who had access to the immunized testimony should have no contact with the prosecution team. *See United States v. England*, 30 M.J. 1030 (A.F.C.M.R. 1990), *aff'd*, 33 M.J. 37 (C.M.A. 1991).

(2) Government can use neither the immunized testimony nor its fruits, to include any investigatory leads. It is a question of fact whether the government has a legitimate, independent source for its evidence. In *United States v. Boyd*, 27 M.J. 82 (C.M.A. 1988), the findings and sentence were set aside and charges dismissed because testimony of a witness (Wills) against the accused was derived from the prior immunized testimony of the accused against Wills. Government did not meet its burden of showing that the accused's testimony did not contribute to Wills' decision to make a statement against the accused. *See also United States v. Mapes*, 59 MJ 60 (2003); *But see United States v. McGeeny*, 44 M.J. 418 (1996).

b. Non-Evidentiary Use of Immunized Statements.

(1) *United States v. Kastigar*, 406 U.S. 441 (1972). The Supreme Court held that prosecutorial authorities are prohibited from using testimony that is compelled by grants of immunity. In *United States v. Kimble*, 33 M.J. 284 (C.M.A. 1991), CMA held that immunity protection described in *Kastigar* also extend to "nonevidentiary uses" of immunized statements, such as the decision to prosecute. *See also United States v. Mapes*, 59 MJ 60 (2003).

(2) Accordingly, the impact of testimonial immunity goes beyond the admissibility of certain statements. Government must show by preponderance of the evidence that the decision to prosecute was untainted by evidence received as a result of immunity grant. *See United States v. McGeeny*, 41 M.J. 544 (N.M.C. Ct. Crim. App. 1994); *See also Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992).

(3) If the Government cannot show that the decision to prosecute the accused was made **before** immunized statements were provided by accused, the Government may not prosecute unless it can show, by a preponderance of the evidence, that the prosecutorial decision was untainted by the immunized testimony. *See United States v. Olivero*, 39 M.J. 264 (C.M.A. 1994).

(4) *United States v. Olivero*, 39 M.J. 246 (C.M.A. 1994). The convening authority gave appellant testimonial immunity regarding his knowledge of other airman's (TSgt S) drug use. Government did not certify, seal, or memorialize any evidence of appellant's own drug use prior to this grant. Contrary to his oral, unsworn statement initially provided after immunity grant, appellant testified at TSgt S's Article 32 hearing that he had never used drugs with TSgt S. Four days later, Olivero charged with drug use and perjury. At trial, Olivero moves to dismiss claiming decision to prosecute was wrongly based on his immunized statements. CMA agrees. Conviction set aside.

Two practice points should be taken from *Olivero*:

(a) If possible, prior to providing a grant of immunity, any evidence that will be used in a subsequent prosecution of the grantee should be segregated and sealed to foreclose later issues regarding improper non-evidentiary use of immunized statements; and,

(b) Trial and defense counsel and military judges should make distinctions in their arguments, motions, and rulings between evidentiary and non-evidentiary uses of disputed immunized statements.

(5) *Olivero* is consistent with *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992), where CAAF ruled that prosecutions may not "result from" statements taken in violation of Article 31(d).

(6) *United States v. Youngman*, 48 M.J. 123 (1998). In response to a defense motion, the military judge dismissed only those charges derived directly from the accused's immunized statement. The CAAF held that the military judge abused his discretion by not determining if the accused's immunized statement and evidence derived therefrom played "any role" in the decision to prosecute ***all*** of the offenses.

2. Immunity does not supplant the attorney-client privilege. A witness, testifying under a grant of immunity can still assert an attorney-client (A/C) privilege. Further, disclosure of attorney-client confidences while testifying under a grant of immunity does not constitute a voluntary waiver of the A/C privilege. *See United States v. Romano*, 46 M.J. 269 (1997).

F. Use of Immunized Testimony "Against" the Witness.

1. *Impeachment*. Immunized testimony from prior court-martial cannot be used to impeach an accused in later court-martial. *United States v. Daley*, 3 M.J. 541 (A.C.M.R. 1977).

2. *Post-Trial Matters*. Immunized testimony can be used by an SJA to refute claims in a clemency petition that the terms of the immunity agreement were breached. CMA termed these "matters ... collateral to a criminal trial." *United States v. Vith*, 34 M.J. 277 (C.M.A. 1992) (Judge Gierke, concurring in the result, disagreed, finding this limited use violated the 5th Amendment).

3. *Subsequent Prosecutions*. Neither type of immunity bars prosecution for perjury, false swearing, false official statement, or failure to comply with an order to testify. RCM 704(b); Mil. R. Evid. 301(c)(1).

G. Standing to Object to Immunity Grants.

United States v. Martinez, 19 M.J. 744 (A.C.M.R. 1984) *petition denied*, 21 M.J. 27 (C.M.A. 1985). Unless the accused is denied due process or a fair trial, he is without standing to challenge a grant of immunity to those who testify against him.

H. Inadvertent Immunity.

1. *De Facto* Immunity.

a. A person other than GCMCA may create a situation of de facto immunity when he or she:

(1) manifests apparent authority to grant immunity;

(2) makes a representation that causes the accused to honestly and reasonably believe that he will not be prosecuted if he fulfills a certain condition;

(3) has at least the tacit approval of the GCMCA; and

(4) the accused relies to his or her detriment on the representations. An accused may complete the creation of a *de facto* grant of immunity when he relies on the representation to his detriment by actually fulfilling the condition suggested by the government.

b. Analysis.

(1) Where an accused honestly and reasonably believes that an official has promised him transactional immunity and that official has the lawful authority to do so, then the promise is the functional equivalent of a grant of immunity.[36]

(2) However, statements by an official will not provide a foundation for a claim of *de facto* immunity absent some measure of detrimental reliance by the accused.[37]

(3) Despite a showing of detrimental reliance, remedial measures by the military judge at trial may still permit prosecution. [38]

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[36]*Samples v. Vest*, 38 M.J. 482, 487 (C.M.A. 1994); *See also Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982)(SJA oral promise of immunity to officer suspected of espionage enforced on grounds of due process); *United States v. Wagner*, 35 M.J. 721 (A.F.C.M.R. 1992) (Unit commander's agreement not to prosecute accused if he refrained from further child sex abuse and got treatment created *de facto* immunity that was not breached even though accused discontinued counseling after 15 months); *United States v. Jones*, 52 M.J. 60 (1999). (*De facto* transactional immunity resulted when the Chief of Military Justice and DSJA entered into an unwritten agreement with three co-accused that the government would not court-marital them if they accepted Article 15 punishment, paid restitution, and testified against the accused.)

An early discussion of *de facto* immunity was set forth in *United States v. Churnovic*, 22 M.J. 401 (C.M.A. 1986). Representations by a ship's senior NCO that ship's XO had promised no adverse action would be taken against person who gave information about or turned in drugs was an unlawful inducement that rendered the accused's statements and all derivative evidence inadmissible under Art. 31(d). In dicta, Chief Judge Everett's lead opinion stated that "No reason exists why a promise of immunity cannot be enforced if it was made with express or tacit authorization from the ship's captain, who would convene special court-martial to try members of his crew." The defense in *Churnovic* failed to meet burden of showing immunity was in fact promised. Note: RCM 704(c) discussion indicates "equitable immunity" is possible.

[37] *United States v. Conklan*, 41 M.J. 800 (Army Ct. Crim. App. 1995). Representations by a battalion CO, indicating that the Army would not prosecute accused for carnal knowledge offense, did not constitute offer of *de facto* transactional immunity, in light of CO's failure to call upon accused to fulfill any condition in exchange for whatever benefit was conferred. Representation was merely gratuitous statement of present intent subject to change in sole discretion of CA. The Accused's reenlistment after CO's statement was not sufficient detrimental reliance to give rise to *de facto* immunity; reenlistment was not bargained for or otherwise contemplated as a condition of government's initial decision not to prosecute.

[38] *United States v. McKeel*, 63 M.J. 81 (2006). Accused admitted to a military investigator that he engaged in sexual intercourse with a female shipmate when she was too intoxicated to consent. When the investigative report was forwarded to the chief petty officer (CPO) who served as the ship's senior enlisted person responsible for military justice matters he promised the accused that if he accepted nonjudicial punishment and waived his right to an administrative discharge board there would no court-martial and the accused would be administratively separated from the military. The accused agreed and pled guilty to various charges, including rape, during a nonjudicial punishment proceeding. He was then processed for administrative separation and he waived his right to a separation board. When the administrative separation packet was received by the GCMCA, who had no prior knowledge of the charges against the accused, the GCMCA declined to approve the separation, and initiated proceedings that resulted in the accused's GCM.

2. Unlawful inducement - Article 31(d).

a. A situation akin to equitable testimonial immunity arises following violations of Article 31(d).

b. To be an unlawful inducement under Article 31(d), the improper action must be undertaken by someone acting in a law enforcement capacity or in a position superior to the person making the confession.[39]

3. Regulatory Immunity.

DoD and DA Family advocacy regulations generally **do not** create a bar to prosecution against self-referred child abusers. Further, consideration and adherence to regulatory policies and criteria set out in these regulations are not conditions precedent to disposition by courts-martial. Although DoD and DA policy may be internally inconsistent in that they both encourage and deter self-referral, they do not infringe on any rights recognized by the Constitution, the UCMJ or CMA decision.[40]

XIV. CONCLUSION.

At trial, the defense moved to dismiss the charges based upon a promise of immunity. The trial judge denied the motion, but ruled that (1) the statements made by the accused during the NJP proceeding could not be admitted, (2) the prosecution could not introduce evidence of the accused's decision to waive his right to a board or other matters related to his administrative separation and, (3) that the accused would receive full sentence credit under Pierce for punishment received as a result of the earlier NJP proceedings. CAAF upheld the conviction because the accused had not demonstrated detrimental reliance in the face of the remedial actions taken at trial.

[39]*United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992)(Civilian U.S. Govt. intelligence agents interviewed the accused. Their interviews were not subject to an unlawful inducement analysis under Art. 31(d)).

On the other hand, a USMC Commander's (O-6) assurances to two accused - "they had done nothing wrong and should provide testimony before an investigative board" did amount to unlawful inducement in *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992). The accused's subsequent waivers were found to be without effect. The Colonel's action rendered the accused's statements, and all evidence derived therefrom, inadmissible.

[40]*United States v. Corcoran*, 40 M.J. 478 (C.M.A. 1994); *See also United States v. Martindale*, 40 M.J. 348 (CMA 1994) (Evidence of accused incriminating statements not barred by SecNavInst 1752.3, The Family Advocacy Program); *But see United States v. Bell*, 30 M.J. 168 (C.M.A. 1990) (directive language of USMC policy regarding rehabilitation and retention of sexual offenders necessitated documented pretrial diversion consideration).