52ND MILITARY JUDGE COURSE

FINDINGS AND SENTENCING

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FINDINGS AND SENTENCING

I. FINDINGS – RULE FOR COURTS-MARTIAL 918.

A. General Findings in the Military – **RCM 918**(a) – As to a Specification and Charge:

1. Guilty;

2. Not Guilty;

3. Guilty by Exceptions (with or without substitutions);

4. Guilty of Lesser Included Offense (LIO). **RCM 918(a)(1) Discussion.**

a) This rule permits a plea of "not guilty to an offense as charged, but guilty of a named lesser included offense."

b) When plea to an LIO is entered, defense counsel should provide a written revised specification. Revised specification should be an appellate exhibit.

c) Related amendment to RCM 918(a)(1) allows findings of guilty to be entered to named LIO. This applies to both contested and guilty plea cases.

d) There is no Manual provision for alternative or conjunctive findings, and it was error for military judge to find accused guilty of two different UCMJ articles for single specification. *United States v. Rhodes*, 47 M.J. 790 (Army Ct. Crim. App. 1998). *(Finding: "Of the Specification of Charge III: Guilty, as well as guilty of a violation of Article 134 with respect to that specification.")*

5. Not Guilty Only by Reason of Lack of Mental Responsibility.

B. What May / May Not Be Considered in Reaching Findings? **RCM 918(c)**.

1. Matters properly before the court (*e.g.*, testimony of witnesses, real and documentary evidence). *United States v. McCarthy*, 37 M.J. 595 (A.F.C.M.R. 1993). Does not include documents provided *ex parte* to the military judge.

2. Specialized knowledge – *i.e.*, gained by member from source outside court-martial – may not be considered.

a) *United States v. Davis*, 19 M.J. 689 (A.C.M.R. 1984). Improper for court member to visit the crime scene to determine quality of lighting. Convening authority should have ordered an evidentiary hearing to determine whether the accused was prejudiced.

b) *United States v. Johnson*, 23 M.J. 327 (C.M.A. 1987). During deliberations, demonstration by member with martial arts expertise did not constitute extraneous prejudicial information where the demonstration was merely an examination and evaluation of evidence already produced.

3. Member may NOT communicate with witnesses.

a) *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991). Blood expert witness had dinner with the members. Extensive *voir dire* established the lack of taint.

b) *United States v. White*, 36 M.J. 284 (C.M.A. 1993). Although any contact between witnesses and members gives rise to perceptions of unfairness, it is not automatically disqualifying. In this case the *voir dire* disclosed in full the innocuous nature of the contact.

4. Members may NOT seek information that is not available in open court. *United States v. Knight*, 41 M.J. 867 (Army Ct. Crim. App. 1995). Three members repeatedly quizzed bailiff/driver about matters presented in court out of presence of members, and sought his medical opinion – he was also an EMT – about bruising, which was a key issue in sexual assault prosecution.

5. Split Plea. Unless the defense requests (or offenses stand in greater – LIO relationship), panel members may not consider, and should not be told, that the accused earlier plead guilty to some offenses. *United States v. Kaiser*, 58 M.J.

146 (2003). MJ erred by advising panel members, prior to their deliberations on findings, that the accused previously plead guilty to two specifications of violating a command policy and two specifications of adultery. Accused plead not guilty to the following: two specifications of violating the same command policy to which he previously plead guilty, three specifications of maltreatment of a subordinate, two specifications of consensual sodomy, one specification of indecent assault and one specification of adultery. He was convicted, contrary to his pleas, of an additional command policy violation and adultery; findings as to contested offenses and sentence – set aside.

6. Use of providence inquiry statements in mixed plea cases.

a) Admissions in a plea of guilty to one offense cannot be used as evidence to support a finding of guilty of an essential element of a separate and different offense, but the elements established by the guilty plea inquiry and stipulation of fact may be considered in trial on contested charges, if the pled to charge is LIO of the contested charge. *United States v. Abdullah*, 37 M.J. 692 (A.C.M.R. 1993) (relying on *United States v. Caszatt*, 29 C.M.R. 521, 522 (1960)). *See also United States v. Rivera*, 23 M.J. 89, 95 (C.M.A. 1986) (guilty plea to one offense can only be considered on findings when the plea is to a lesser included offense of the same specification as to which the plea is being offered into evidence).

b) Plea of guilty may be used to establish common facts and elements of a greater offense within the same specification, but may not be used as proof of a separate offense. The elements of a LIO established by guilty plea (but not the accused's admissions made in support of that plea) can be used to establish common elements of the greater offense. *United States v. Ramelb,* 44 M.J. 625 (Army Ct. Crim. App. 1996).

c) *United States v. Grijalva,* 55 M.J. 223 (2001). Admissions concerning the elements of the LIO made during providence inquiry can be considered insofar as the admissions relate to common elements of the greater offense, but it was error for the military judge to consider the accused's admissions that pertained to different elements of the greater offense.

7. Matters taken into the deliberation room may be considered. **RCM 921(b)**.

a) Notes of the court members.

b) Exhibits admitted into evidence.

(1) Stipulations of fact are taken into the deliberation room. (Note however, CAAF found material prejudice to the accused's substantial rights occurred when the military judge (in a judge alone case) failed to sufficiently ensure that the accused understood the effect of the stipulation of fact entered into with the Government. CAAF stated that the record did not provide a sufficient basis to determine that the accused knowingly consented to the use of the stipulation and the adjoining exhibits in the Government's case on the merits of the greater charge, *US v. Resch*, 65 MJ 233 (2007)).

(2) Testimonial substitutes (depositions, stipulations of expected testimony) do not go into the deliberation room. *See United States v. Austin*, 35 M.J. 271 (C.M.A. 1992). Verbatim transcript of alleged victim's testimony at pretrial investigation was not an "exhibit" that members could take into the deliberation room.

8. Fact finder may not consider submitted Chapter 10. *United States v. Balagna*, 33 M.J. 54 (C.M.A. 1991). Character witness acknowledged (upon prodding in open court by MJ) that he could not vouch for accused because had seen a "report." When asked by the MJ what that report was, the witness responded "a request for Chapter 10." Court finds no "extraordinary circumstances" requiring the declaration of a mistrial since the "adverse impact can be neutralized by other means." *Id.* at 57. The MJ twice instructed the members that the evidence was inadmissible and prior to findings advised the members that it was to be "completely disregarded." *See also United States v. Vasquez*, 54 M.J. 303 (2001).

9. Findings worksheet is used to assist members in putting findings in order. *See* Appendix 10, Manual for Courts-Martial, Forms of Findings.

C. Deliberations and Voting on Findings. **RCM 921**.

1. Basic rules and procedures.

a) Deliberations. **RCM 921(a) and (b)**.

(1) Only members present. RCM 921(a).

(2) No superiority in rank used to influence other members. RCM 921(a).

(3) May request reopening of court to have record read back or for introduction of additional evidence. RCM 921(b).

b) Voting. **RCM 921(c)**.

(1) By secret written ballot, with all members voting.

(2) Guilty only if at least 2/3 vote for guilty.

(3) Fewer than 2/3 vote for guilty, then finding of not guilty results.

c) Procedure. **RCM 921(c)(6)**.

2. Straw polls.

a) *United States v. Fitzgerald*, 44 M.J. 434 (1996). Specifications alleged multiple discrete acts of sodomy and indecent acts. As to discrete acts alleged in specifications, MJ suggested straw vote on specification as charged, then treating individual discrete acts separately as lesser included offenses. Instructions likely inured to benefit of accused, and brought no objection from counsel. Court found waiver by defense, no plain error, and affirmed findings and sentence.

b) *United States v. Lawson*, 16 M.J. 38 (C.M.A. 1983). Straw polls, *i.e.*, informal non-binding votes, are not specifically prohibited, but are discouraged. Cannot be used directly or indirectly to allow superiority of rank to influence opinion.

D. Instructions on Findings. **RCM 920**.

1. *United States v. Hardy*, 46 M.J. 67 (1997). MJ cannot direct panel to accept findings of fact, or to return verdict of guilty. In non-capital case, panel returns only general verdict. In answering panel question regarding required finding, MJ

refused trial counsel request to instruct that proof beyond reasonable doubt as to all elements meant panel must find accused guilty.

2. *United States v. Gibson*, 58 M.J. 1 (2003). MJ erred by failing to give defense requested accomplice instruction. Three prong test to determine if failure to give requested instruction is reversible error: (1) was requested instruction accurate; (2) was requested instruction substantially covered by the instructions given; and (3) if not substantially covered, was the instruction on such a vital point that it (failure to give) deprived the accused of a defense or seriously impaired its effective presentation. If one through three are met, the burden of persuasion shifts to the Government to show that the error was harmless, that is, failure to give the instruction did not have a "substantial influence on the findings." If it had a substantial influence or the court is left in "grave doubt" as to the validity of the findings, reversible error has occurred.

3. *United States v. Hibbard*, 58 M.J. 71 (2003). MJ did not err by failing to give mistake of fact instruction in rape case where defense theory throughout trial, to include cross examination of victim, was that no intercourse occurred.

4. *United States v. Lewis*, 65 M.J. 85 (2007). MJ erred by giving an incomplete instruction regarding self-defense by failing to instruct the members that a mutual combatant could regain the right to self-defense when the conflict is escalated or, is unable to withdraw in good faith. "When the instructional error raises constitutional implications, the error is tested for prejudice using a "harmless beyond a reasonable doubt" standard." *US v Lewis*, 65 M.J. 85, __ (2007) citing *United States v. Wolford*, 62 M.J. 418, 420 (2006).

E. Announcement of Findings. **RCM 922**.

1. *United States v. Jones*, 46 M.J. 815 (N-M. Ct. Crim. App. 1997). In mixed plea case, MJ failed to announce findings of guilty of offenses to which accused had pled guilty, and as to which MJ had conducted providence inquiry. Upon realizing failure to enter findings, MJ convened post-trial Article 39(a) hearing and entered findings consistent with pleas of accused. Though technical violation of RCM 922(a) occurred, MJ commended for using post-trial session to remedy oversight.

2. *United States v. Perkins*, 56 M.J. 825 (Army Ct. Crim. App. 2002). MJ's failure to properly announce guilty finding as to Spec 3 of Charge II (MJ Announced Guilty to Spec 3 of Charge III) did not require court to set aside appellant's conviction of Specification 3 of Charge II when it was apparent from the record that the MJ merely misspoke and appellant had actually plead guilty to

Specification 3 of Charge II. Court notes that a proceeding in revision UP of RCM 1102 would have been an appropriate course of action had the MJ or SJA caught the mistake.

F. Reconsideration of Findings. **UCMJ art. 52**, **RCM 924**.

1. Members may reconsider any finding before such finding is announced in open session. RCM 924(a).

a) *United States v. Thomas*, 39 M.J. 626 (N.M.C.M.R. 1993), *rev'd in part* 46 M.J. 311 (1997). (CAAF affirmed the findings and reversed the sentence due to a sentencing instruction error). Accepted practice is to instruct prior to deliberation on findings that if any member desires to reconsider a finding, the MJ should be notified so that reconsideration instructions may be given in open court. Instruction on reconsideration is required **only** if a court member indicates desire to reconsider.

b) *United States v. Jones*, 31 M.J. 908 (A.F.C.M.R. 1990). Appellate court orders rehearing on sentence. Can the second panel reconsider findings? HELD: No. RCM 924(a) states "Members may reconsider any finding <u>reached by them</u>." Also, the appellate court had already affirmed the findings of guilty. Once affirmed, "they are no longer subject to reconsideration."

2. Judge alone. MJ may reconsider guilty finding any time before announcement of sentence. RCM 924(c).

G. Defective Findings.

1. Concerns: Sufficient basis for court to base its judgment and protect against double prosecution.

2. *United States v. Walters*, 58 M.J. 391 (2003). Appellant charged with drug use on divers occasions. The evidence put on by the government alleged six separate periods. The panel returned a finding by exceptions and substitutions (excepting the words "divers occasions" and substituting the words "one occasion"), but did not specify the time frame. The CAAF held that the findings were ambiguous, setting aside the findings and sentence. The court noted that where a specification alleges acts on divers occasions, the members must be

instructed that any findings by exceptions and substitutions must reflect the specific instance of conduct on which the modified findings are made.

3. *United States v. Mantilla*, 36 M.J. 621 (A.C.M.R. 1992). After findings of guilty have been announced, MJ may seek clarification any time before adjournment, and error in announcement of findings may be corrected by new announcement before final adjournment of court-martial. Such correction is not reconsideration; accused, however, should be given opportunity to present additional matters on sentencing.

4. *United States v. Teffeau*, 58 M.J. 62 (2003). Modification of a lawful general order charge from "wrongfully providing alcohol to [JK]" to "wrongfully [ ] engaging in and seeking [ ] a nonprofessional, personal relationship with [JK], a person enrolled in the Delayed-Entry Program" held to be a material variance; finding of guilty to the Charge and Specification set aside. Variance can not change the nature of the offense or increase the seriousness of the offense or its maximum punishment.

5. *United States v. Perez*, 40 M.J. 373 (C.M.A. 1994). President's disclosure of members' unanimous vote that overt act alleged in support of conspiracy specification had not been proven, during discussion of proposed findings as reflected on findings worksheet, was not announcement of finding of not guilty and had no legal effect. MJ had authority to direct reconsideration of the inconsistent verdict. Alternatively, MJ could have advised members that findings amounted to a finding of not guilty and advised them of their option to reconsider.

6. *United States v. Pryor*, 57 M.J. 821 (N-M. Ct. Crim. App. 2003). MJ erred by not entering guilty findings by exceptions and substitutions when the evidence in the stipulation of fact and the accused's providence inquiry narrowed the period of the accused's criminality. By simply entering findings of guilty to the specifications as written, the appellant was prejudiced by a court-martial record that "indicates a pattern of criminal conduct occurring over a greater period of time than actually took place." The court provided relief by modifying the findings and reassessing the sentence based on the modified findings.

7. *United States v. Harman*, 66 M.J. 710 (Army Ct. Crim. App. 2008). MJ erred by accepting a verdict from the panel that specifically incorporated the bill of particulars. ACCA amended the specification and charge to implement the panel's clear intent.

H. Impeachment of Findings. **RCM 923**.

1. Strong policy against the impeachment of verdicts.

a) Promotes finality in court-martial proceedings.

b) Encourages members to fully and freely deliberate.

2. General rule: Deliberative privilege – court deliberations are privileged (MRE 509).

3. Exceptions: Court members' testimony and affidavits cannot be used after the court-martial to impeach the verdict except in three limited situations. RCM 923; MRE 606. *See United States v. Loving*, 41 M.J. 213 (C.M.A. 1994).

a) Outside influence (*e.g.*, bribery, jury tampering).

b) Extraneous prejudicial information.

(1) *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983). Improper court member visit to crime scene.

(2) *United States v. Almeida*, 19 M.J. 874 (A.F.C.M.R. 1985). No prejudice where court member talked to witness about Thai cooking during a recess in the trial.

(3) *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991). Blood expert witness had dinner with the members. Extensive *voir dire* established the lack of taint.

c) Unlawful command influence.

(1) *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984). Unlawful command control for president to order a re-vote after a finding of not guilty had been reached. MJ should build a factual record at a post-trial Article 39(a) session.

(2) *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985). President of court can express opinions in strong terms and call for

a vote when discussion is complete or further debate is pointless. It is improper, however, for the president to use superiority of rank to coerce a subordinate to vote in a particular manner.

d) Possible voting irregularity not enough. *United States v. Brooks*, 42 M.J. 384 (1995). Deliberative privilege precludes MJ from entering a finding of not guilty when he concludes that members may have come to guilty finding as a result of improperly computing their votes.

e) *United States v. Hardy*, 46 M.J. 67 (1997). "[T]he protection of the deliberative process outweigh[s] the consequences of an occasional disregard of the law by a court-martial panel." *Id*. at 74.

4. Discovery of impeachable information.

a) Polling of court members is prohibited. RCM 922(e). May not impeach findings with post-trial member questionnaires. *See United States v. Heimer*, 34 M.J. 541 (A.F.C.M.R. 1991). MRE 606 establishes the only three permissible circumstances to impeach a verdict. Post-trial questionnaires improperly "sought to impeach each panel member's subjective interpretation of the evidence – the precise material the rule seeks to protect." *Id*. at 546.

b) *United States v. Ovando-Moran*, 48 M.J. 300 (1998). Gathering information to impeach a verdict is not a proper basis for post-trial interviews by counsel of panel members. Information in counsel's post-trial affidavit that members improperly considered testimony and were impacted by military judge's comments during trial fell outside bounds of MRE 606(b) to impeach findings of court-martial.

c) Additional cases involving impeachment: *United States v. Hance*, 10 M.J. 622 (A.C.M.R. 1980*); United States v. Higdon*, 2 M.J. 445 (A.C.M.R. 1975); *United States v. Harris*, 32 C.M.R. 878 (A.F.B.R. 1962).

5. Evidence introduced at sentencing for the sole purpose of impeaching the findings is inadmissible. *See infra United States v. Johnson*, 62 M.J. 31 (2005).

II. PRESENTENCING PROCEDURES. RCM 1001.

A. Basic Procedures. **RCM 1001(a)(1)**.

1. Matters to be presented by the government. The Trial Counsel's case in "aggravation." **RCM 1001(b)**. Counsel may present:

a) Service data relating to the accused from the charge sheet.

b) Personnel records reflecting the character of the accused's prior service.

c) Prior convictions.

d) Circumstances directly relating to or resulting from the offense(s).

e) Opinion evidence regarding past duty performance and rehabilitative potential.

2. Defense counsel presents the case in extenuation and mitigation. **RCM 1001(c)**.

3. Rebuttal and surrebuttal. **RCM 1001(d)**.

4. Additional matters. **RCM 1001(f)**.

5. Arguments. **RCM 1001(g)**.

6. Rebuttal argument at MJ's discretion. **RCM 1001(a)(1)(F)**.

B. Matters Presented by the Prosecution. **RCM 1001(b)**.

1. Service data relating to the accused taken from the charge sheet. **RCM 1001(b)(1)**.

a) Name, rank and unit or organization.

b) Pay per month.

c) Current service (initial date and term).

d) Nature of restraint and date imposed.

Note: Personal data is ALWAYS subject to change and should be verified PRIOR to trial and announcement by the Trial Counsel in open court. Consider promotions, reductions, time-in-grade pay raises, calendar year pay changes, pretrial restraint, etc.

2. Personnel records reflecting character of prior service. **RCM 1001(b)(2).**

a) "*Under regulations of the Secretary concerned*, trial counsel may obtain and introduce from the personnel records of the accused evidence of . . . character of prior service" (emphasis added). These records may include personnel records contained in the Official Military Personnel File (OMPF) *or located elsewhere*, unless prohibited by law or other regulation. Army Regulation (AR) 27-10, para. 5-28*b* implements RCM 1001(b)(2).

b) AR 27-10, para. 5-28*a* illustrates, in a non-exclusive manner, those items qualifying for admissibility under RCM 1001(b)(2) and (d).

c) Personnel records are NOT limited to matters contained in a service member's Military Personnel Records Jacket (MPRJ), OMPF or Career Management Information File (CMIF). AR 27-10, para. 5-28*b*. The rule of *United States v. Weatherspoon*, 39 M.J. 762 (A.C.M.R. 1994) (holding that personnel records are only those records in the OMPF, MPRJ, and CMIF) is no longer good law. The key is whether the record is maintained IAW applicable departmental regulations.

(1) *United States v. Davis*, 44 M.J. 13 (1996). By failing to object at trial, appellant waived any objection to the admissibility of a Discipline and Adjustment (D&A) report created and maintained by the United States Disciplinary Barracks in accordance with a local regulation. The Court of Appeals for the Armed Forces (CAAF) did *not* decide whether the report was admissible under RCM 1001(b)(2).

(2) *United States v. Fontenot*, 29 M.J. 244 (C.M.A. 1989). Handwritten statements attached to appellant's DD Form 508s (Report of/or Recommendation for Disciplinary Action) made during the appellant's pretrial confinement not admissible under RCM 1001(b)(2). The miscellaneous pieces of paper that accompanied the DD 508s were not provided for in the applicable departmental regulation, AR 190-47. The Court of Military Appeals (CMA) did not decide whether the DD 508s themselves were admissible. *Id*. at 248 n.2.

(3) *United States v. Ariail*, 48 M.J. 285 (1998). National Agency Questionnaire, DD Form 398-2, completed by accused and showing history of traffic offenses, was admissible under RCM 1001(b)(2), where it did not meet admission criteria under RCM 1001(b)(3) [prior conviction].

(4) *United States v. Douglas, III*, 57 M.J. 270 (2002). A stipulation of fact from a prior court-martial as evidence of a prior conviction was properly admissible under RCM 1001(b)(2) *not* RCM 1001(b)(3) as part of a personnel record.

(5) *United States v. Lane,* 48 M.J. 851 (A.F. Ct. Crim. App. 1998). AF Form 2098 (reflecting the current AWOL status of the accused who was tried *in absentia*) was admissible pursuant to RCM 1001(b)(2).

(6) *United States v. Reyes*, 63 M.J. 265 (2006). During the sentencing phase, the trial counsel offered into evidence Prosecution Exhibit (PE) 6, which was represented to be "excerpts" from Reyes's Service Record Book. Apparently, neither the defense counsel nor the military judge checked PE 6 to make sure it was free of any defects, as it was admitted without objection. There were a variety of unrelated documents "[t]ucked between the actual excerpts" from the Service Record Book. Such documents included the entire military police investigation, the pretrial advice from the SJA, inadmissible photographs, and appellant's pretrial offer to plead guilty to charges on which the members had just acquitted appellant. The sentence was set aside and a rehearing authorized.

d) Article 15s.

(1) Ordinarily, to be admissible in sentencing, the proponent must show that that the accused had opportunity to consult with counsel and that accused waived the right to demand trial by court-martial. *United States v. Booker*, 5 M.J. 238 (C.M.A. 1978); *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980). Absent objection by defense counsel, however, Military Rule of Evidence (MRE) 103 does *not* require the military judge to affirmatively determine whether an accused had an opportunity to consult with counsel and that the accused waived the right to demand trial by court-martial before admitting a record of nonjudicial punishment (NJP) (an accused's "*Booker*" rights). Absent objection, a military judge's ruling admitting evidence is subject plain error analysis. *See United States v. Kahmann*, 59 M.J. 309, 313 (2004). *See also United States v. Dyke*, 16 M.J. 426 (C.M.A. 1983) (suggesting without holding that MRE 103 applies to MJ's determination of admissibility of NJP records).

(2) *United States v. Edwards*, 46 M.J. 41 (1997). Whether a vessel is operational affects the validity of an Article 15 for its subsequent use at a court-martial. If the vessel is not operational, for a record of prior NJP to be admissible, the accused must have had a right to consult with counsel regarding the Article 15.

(3) *United States v. Dire*, 46 M.J. 804 (C.G. Ct. Crim. App. 1997). Accused was awarded Captain's Mast (NJP) for wrongful use of marijuana and lysergic acid diethylamide. He was later charged for several drug offenses, including the two subject of the earlier NJP. He was convicted of several of the charged offenses, including one specification covering the same offense subject to the NJP. Defense counsel failed to object to personnel records with references to a prior NJP. That failure to object waived any objection.

(4) *United States v. Rimmer*, 39 M.J. 1083 (A.C.M.R. 1994) (per curiam). Exhibit of previous misconduct containing deficiencies on its face is not qualified for admission into evidence. Record of NJP lacked any indication of accused's election concerning appeal of punishment, and imposing officer failed to check whether he conducted an open or closed hearing.

(5) *United States v. Godden*, 44 M.J. 716 (A.F. Ct. Crim. App. 1996). Accused objected to the admission of a prior record of NJP based on government's failure to properly complete the form

(absence of the typed signature block of the reviewing attorney and the dates the form was forwarded to other administrative offices for processing). The Air Force Court concluded that the omissions were "administrative trivia" and did not affect any procedural due process rights.

(6) *United States v. Gammons*, 51 M.J. 169 (1999). The accused was court-martialed for various offenses involving the use of illegal drugs. The accused had already received an Article 15 for one of those offenses. At the outset of the trial, the trial counsel offered a record of NJP. Defense counsel had no objection and, in fact, intended to use the Article 15 themselves. The court pointed out that under Article 15(f) and *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989), the defense had a gate keeping role regarding the Article 15. If defense says the Article 15 is going to stay out, it stays out.

(7) *United States v. LePage*, 59 M.J. 659 (N-M. Ct. Crim. App. 2003). Military judge erred by admitting PE 3, an NJP action which was stale by § 0141 of the JAGMAN because it predated any offenses on the charge sheet by more than two years. After noting that "plain error leaps from the pages of this record," the court determined that the MJ would not have imposed a BCD but for his consideration of the prior NJP.

(8) *United States v. Cary*, 62 M.J. 277 (2006). Trial counsel introduced personal data sheet of the accused erroneously indicating that the accused had received one prior Article 15. Without an objection from defense counsel, CAAF proceeded under a plain error standard. Although there may have been error and it may have been plain, the accused's rights were not materially prejudiced.

e) Letters of Reprimand.

(1) *United States v. Zakaria*, 38 M.J. 280 (C.M.A. 1993). Applying MRE 403, the court held that the MJ erred in admitting LOR given the accused for sexual misconduct with his teenage stepdaughter and other teenage girls where accused was convicted of larceny of property of a value less than $100.00. "[The reprimand's] probative value as to his military character was significantly reduced because of its obvious reliability problems. In addition, it

is difficult to imagine more damaging sentencing evidence to a soon-to-be sentenced thief than also brandishing him a sexual deviant or molester of teenage girls." *Id*. at 283.

(2) *United States v. Williams*, 47 M.J. 142 (1997). Pursuant to a pretrial agreement, the prosecution withdrew a previously referred additional charge and specification alleging similar misconduct to original charge. The accused's commander then issued a memorandum of reprimand for the same misconduct as contained in the withdrawn charge. The CAAF held lack of objection at trial constituted waiver absent plain error, and found none "given the other evidence presented in aggravation." Court notes matter in letter of reprimand became uncharged misconduct on basis of mutual agreement, *i.e.*, pretrial agreement, and does not address the propriety of trying to "back door" evidence of uncharged misconduct.

(3) *United States v. Clemente*, 50 M.J. 36 (1999). Two letters of reprimand in accused's personnel file properly admitted pursuant to RCM 1001(b)(2), even though letters were for conduct dissimilar to charged offenses. The CAAF noted there was no defense challenge to the accuracy, completeness or proper maintenance of the letters, and the evidence directly rebutted defense evidence. The court applied an abuse of discretion standard and held that the LORs were personnel records that did reflect past behavior and performance, and MRE 403 was not abused.

f) Caveats.

(1) No "rule of completeness." Trial counsel cannot be compelled to present favorable portions of personnel records if unfavorable portions have been introduced in aggravation. *See* analysis to RCM 1001(b)(2).

(2) RCM 1001(b)(2) cannot be used as a "backdoor means" of admitting otherwise inadmissible evidence. *United States v. Delaney*, 27 M.J. 501 (A.C.M.R. 1988) (observing that government cannot use enlistment document (e.g., enlistment contract) to back door inadmissible prior arrests; cannot then use police report to rebut accused's attempted explanations of arrests). *Compare with Ariail*, 48 M.J. 285 (1998) (holding that information

on NAQ that had information on prior convictions was admissible under RCM 1001(b)(2)).

(3) *United States v. Vasquez*, 54 M.J. 303 (2001). Plea-bargaining statements are not admissible (MRE 410) even if those statements relate to offenses that are not pending before the court-martial at which they are offered. It was error for the judge to admit into evidence a request for an administrative discharge in lieu of trial by court-martial. *See also United States v. Anderson*, 55 M.J. 182 (2001).

g) Defects in documentary evidence.

(1) *United States v. Donohue*, 30 M.J. 734 (A.F.C.M.R. 1990). Government introduced document that did not comply with AF Reg. requiring evidence on the document or attached thereto that accused received a copy and had an opportunity to respond. ISSUE: May Government cure the defect with testimony that accused did receive a copy and was offered an opportunity to respond? "The short answer is no." Why – because the applicable AF Reg. required evidence on the document itself. Absent a specific regulatory requirement such as that in *Donahue*, live testimony could cure a documentary/procedural defect. *See also, United States v. Kahmann*, 58 M.J. 667 (N-M. Ct. Crim. App. 2003), *aff'd*, 59 M.J. 309 (2004) *supra*.

(2) *United States v. Hill*, 62 M.J. 271 (2006). During the defense sentencing case, several witnesses were called to testify about appellant's rehabilitative potential. One witness was appellant's battalion commander who testified, "[i]f I was sitting in that panel box over there as a juror, would I allow him to remain in the Army? No." Moreover, following the trial in a "Bridge the Gap"[1] session, the military judge commented, "I was thinking of keeping him until his commander said he didn't want him back," or words to that effect. The record did not establish whether the trial judge was referring to: (1) the testimony of the battalion commander that he wouldn't want appellant back in his unit as a clinician, or (2) the battalion commander's remarks about not retaining appellant in the Army if he was on the panel. The defense bears the burden of establishing the second alternative, if it deems relief is warranted.

[1] "Bridging the Gap" sessions, are informal post-trial meetings intended to be used as professional and skill development for trial and defense counsel. *See United States v. Copening*, 34 M.J. 28, 29 (C.M.A. 1992).

With respect to the second alternative, the trial judge promptly stated that the battalion commander's remarks were "not responsive" and consisted of testimony "that a witness is not allowed to make."

(3) MJ must apply MRE 403 to RCM 1001(b)(2) evidence. *See United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991) (suppressing a prior "arrest" that was documented in the accused's personnel records). *See also United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993); and *United States v. Zakaria*, 38 M.J. 280 (C.M.A. 1993).

3. Prior convictions - civilian and military. **RCM 1001(b)(3).**

a) There is a "conviction" in a court-martial case when a sentence has been adjudged. RCM 1001(b)(3)(A). **2002 Amendment to RCM 1001(b)(3)(A):** "In a civilian case, a 'conviction' includes any disposition following an initial judicial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or **plea of nolo contendere**, regardless of the subsequent disposition, sentencing procedure, or final judgment. However, a 'civilian conviction' does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated or pardoned because of errors of law or because of subsequently discovered evidence exonerating the accused."

(1) *United States v. Caniete*, 28 M.J. 426 (C.M.A. 1989). Convictions obtained between date of offense for which accused was on trial and date of trial were "prior convictions" per RCM 1001(b)(3)(A).

(2) Juvenile adjudications are not convictions within the meaning of RCM 1001(b)(3) and are therefore inadmissible in aggravation. *United States v. Slovacek*, 24 M.J. 140 (C.M.A. 1987).

b) Use of prior conviction.

(1) *United States v. Tillar*, 48 M.J. 541 (A.F. Ct. Crim. App. 1998). At sentencing, trial counsel offered evidence of 18-year-old

special court-martial conviction for larceny of property of value less than $100.00. MJ allowed evidence, but instructed panel not to increase sentence solely on basis of prior conviction. The Air Force Court upheld admission of the conviction, noting only time limitation is whether such evidence is unfairly prejudicial (MRE 403).

(2) *United States v. White*, 47 M.J. 139 (1997). Accused who testified during sentencing about prior bad check convictions waived issue of proper form of admission of such prior convictions under RCM 1001(b)(3). TC offered in aggravation four warrants for bad checks that indicated plea in civilian court of "*nolo*" by accused. Accused then testified she had paid the required fines for the offenses shown on the warrants. There was also no indication by the defense that accused would not have testified to such information if the MJ had sustained the original defense objection to the warrants when offered by the TC.

(3) *United States v. Cantrell*, 44 M.J. 711 (A.F. Ct. Crim. App. 1996). "The proper use of a prior conviction . . . is limited to the basic sentencing equation. Evidence is admissible in sentencing either because it shows the nature and effects of the crime(s) or it illumines the background and character of the offender." *Id*. at 714.

c) Military judge must apply the MRE 403 balancing test. *United States v. Glover*, 53 M.J. 366 (2000).

d) Pendency of appeal. RCM 1001(b)(3)(B).

(1) Conviction is still admissible.

(2) Pendency of appeal is admissible as a matter of weight to be accorded the conviction.

(3) Conviction by **summary court-martial or special court-martial without a military judge** is not admissible until review under UCMJ Article 64 or 66 is complete.

e) Authentication under Section IX of MRE required.

f) "MCM provides only for consideration of *prior convictions*, and not of *any* prior criminal record in sentencing." *United States v. Delaney*, 27 M.J. 501 (A.C.M.R. 1988).

g) Methods of proof.

(1) DA Form 2-2 (Insert Sheet to DA Form 2-1, Record of Court Martial Convictions).

(2) DD Form 493 (Extract of Military Records of Previous Convictions).

(3) Promulgating order (an order is not required for a SCM (RCM 1114(a)(3))).

(4) Record of trial. DD Form 490 (Record of Trial) or 491 (Summarized Record of Trial) for special and general courts-martial and DD Form 2329 for SCM.

(a) So long as only relevant portions are used and the probative value outweighs the prejudicial effect. *United States v. Wright*, 20 M.J. 518 (A.C.M.R. 1985).

(b) A trial judge may, in his discretion, allow both parties to present evidence that explains a previous conviction, including the stipulation of fact from the record of trial of the accused's prior court-martial. *United States v. Nellum*, 24 M.J. 693 (A.C.M.R. 1987).

(c) *United States v. Kelly*, 45 M.J. 259 (1996) (holding that it was improper for court-martial to consider SCM conviction on sentencing when there was no evidence accused was ever advised of the right to consult with counsel or to be represented by counsel at his SCM).

(5) Arraignment calendar.

(a) *United States v. Prophete*, 29 M.J. 925 (A.F.C.M.R. 1989). Properly authenticated computer print-out of

calendar (reflecting guilty plea by accused) can provide proof of a civilian conviction for purposes of RCM 1001(b)(3)(A).

(b) *United States v. Mahaney*, 33 M.J. 846 (A.C.M.R. 1991). Civilian conviction is not self-authenticating because not under seal.

(6) State agency records. *United States v. Eady*, 35 M.J. 15 (C.M.A. 1992). Proof of conviction in form of letter from police department and by indictment and offer to plead guilty not prohibited under the MRE.

(7) Use of personnel records of the accused. *United States v. Barnes*, 33 M.J. 468 (C.M.A. 1992). Government may use Department of Defense Form 1966/3 to prove accused's prior conviction IAW:

(a) MRE 803(6), records of regularly conducted activity; or

(b) MRE 801(d)(2), admission by party opponent.

4. Aggravation Evidence. **RCM 1001(b)(4).** A military judge has broad discretion in determining whether to admit evidence under 1001(b)(4). *United States v. Rust*, 41 M.J. 472, 478 (1995); *United States v. Wilson*, 47 M.J. 152, 155 (1997); *United States v. Gogas*, 58 M.J. 96 (2003).

a) ". . . [E]vidence as to any aggravating circumstances *directly relating to or resulting from* the offenses of which the accused has been found guilty" (emphasis added). See *United States v. Hardison*, 64 M.J. 279 (2007)

b) Three components – "Evidence in aggravation includes, but is not limited to":

(1) Victim-Impact: "[E]vidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of the offense committed by the accused."

(2) Mission-Impact: "[E]vidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense."

(3) Hate-Crime Evidence: "[E]vidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."

c) *United States v. Nourse*, 55 M.J. 229 (C.A.A.F. 2001). The CAAF held that it was permissible to admit evidence of other uncharged larcenies of property from the same victim by the accused because such evidence "directly related to the charged offenses as part of a continuing scheme to steal from the . . . [victim]." This evidence showed the "full impact of appellant's crimes" upon the victim. *See also United States v. Shupe*, 36 M.J. 431 (C.M.A. 1993); *United States v. Mullens*, 29 M.J. 398 (C.M.A. 1990).

d) *United States v. Patterson*, 54 M.J. 74 (C.A.A.F. 2000). Testimony by government expert regarding patterns of pedophiles, to include "grooming" of victims, admissible where the expert did not expressly testify that the accused was a pedophile. *But see United States v. McElhaney*, 54 M.J. 120 (2000) (holding that the military judge erred when he allowed a child psychiatrist to testify about future dangerousness).

e) *United States v. Maynard*, 66 M.J. 242 (C.A.A.F. 2008). Absent defense objection, the court will apply the plain error test to determine if a military judge erred in admitting aggravation evidence.

f) *United States v. Palomares*, No 200602496, 2007 CCA LEXIS 319 (N-M. Ct. Crim. App. Aug. 23, 2007) (unpublished). Military Judge properly allowed the commander to testify to specific problems the unit faced due to the illegal use of Valium by the accused and others in the unit.

g) *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004). The court affirmed the MJ's decision to permit the TC to introduce portions of a Senate report detailing its findings related to child pornography (appellant convicted of various offenses related to child pornography). The excerpt specifically addressed the impact of child pornography on the children involved, particularly the physical and psychological harm they experience. The court observed that the children depicted are victims for RCM 1001(b)(4) purposes and the information in the report was sufficiently direct to qualify for admission as impact evidence under the same rule. "The increased predictable risk that child pornography victims may develop psychological or behavioral problems is precisely the kind of information the sentencing authority needs to fulfill" its function of discerning a proper sentence.

h) *United States v. Sittingbear*, 54 M.J. 737 (N-M. Ct. Crim. App. 2001). Victim's testimony that she sustained a rectal tear during a rape is admissible even where a sodomy charge had been withdrawn and dismissed.

i) *United States v. Cameron*, 54 M.J. 618 (A.F. Ct. Crim. App. 2000). Uncharged false statements about charged offenses, as a general rule, are not proper evidence in aggravation. *But see United States v. Driver*, 57 M.J. 760 (N-M. Ct. Crim. App. 2002). False official statement to NCIS agent relating to conspiracy to commit arson and arson charge admissible in aggravation despite appellant's acquittal of the Article 107 offense provided: there is sufficient evidence that the act (i.e., false official statement occurred); the MJ properly does an MRE 403 balancing; and the sentencing authority is fully aware of the acquittal on the charged offense.

j) *United States v. Alis*, 47 M.J. 817 (A.F. Ct. Crim. App. 1998). Accused's awareness of magnitude of crime, and remorseless attitude toward offenses, is admissible in sentencing.

k) *United States v. Sanchez*, 47 M.J. 794 (N-M. Ct. Crim. App. 1998). Victim's testimony about assault, extent of injuries suffered, hospitalization, and general adverse effects of assault admissible against accused found guilty of misprision of offense. TC also offered pictures of wounds and record of medical treatment of victim. Navy-Marine Court noted this evidence in aggravation under RCM 1001(b)(4) did not *result from* misprision conviction, but did *directly relate* to the offense and was therefore admissible.

l) *United States v. Wilson*, 47 M.J. 152 (1997). Accused convicted of disrespect for commenting to another party that, "Captain Power, that f_____g b____h is out to get me." Officer testified at sentencing to "concern" statement caused her. The CAAF held that the testimony was properly admissible.

m) *United States v. Jones*, 44 M.J. 103 (1996). HIV-positive accused charged with aggravated assault and adultery; convicted only of latter in judge alone trial and sentenced to the maximum punishment. In imposing his sentence, the MJ criticized the accused's "disregard for the health and safety of an unknown victim and this purposeful conduct committed immediately after being made aware of the circumstances . . . ." The CAAF held medical condition was a fact directly related to the offense under RCM 1001(b)(4) and essential to understanding the circumstances surrounding the offense.

n) *United States v. Zimmerman*, 43 M.J. 782 (Army Ct. Crim. App. 1996). Evidence that accused was motivated by white supremacist views when he wrongfully disposed of military munitions to what he believed was a white supremacist group constituted aggravating circumstances directly related to the offense.

o) *United States v. Gargaro*, 45 M.J. 99 (1996). Evidence that civilian drug dealer triggered the investigation when he was arrested with an AK-47 that he said he obtained from a Fort Bragg soldier showed the extent of the conspiracy and the responsibility of the accused's commander. Any unfair prejudice stemming from the fact that the weapon was found in the hands of a drug dealer was outweighed by the probative value showing the facts and circumstances surrounding the investigation of the charged offenses.

p) *United States v. Hollingsworth*, 44 M.J. 688 (C.G. Ct. Crim. App. 1996). Testimony of child victim to offense which was the basis of a withdrawn specification admissible when it showed extent of scheme with evidence of other transactions. Also, testimony of expert child psychologist that sexual abuse victim's recovery was affected or hindered by the pendency of legal proceedings admissible where defense raised factors affecting a victim's recovery rate and expert's testimony provided a "more complete" explanation of the victim's prognosis.

q) *United States v. Scott*, 42 M.J. 457 (1995). Initial findings to involuntary manslaughter and assault with a dangerous weapon set aside

r) *United States v. Terlep*, 57 M.J. 344 (2002). Appellant, initially charged with burglary and rape, plead to unlawful entry and assault. On sentencing, victim testified she awoke from what she thought was a "sex dream" only to discover the appellant on top of her. She testified, in part, that "when I told him to get off of me, he had to take his private part out of me and get off. . . ." She also testified "He admitted—he said what he had done. He said, 'I raped you.'" The CAAF found that the victim's testimony did not constitute error. The court noted that although the appellant entered into a pretrial agreement to lesser offenses, the victim could testify to "her complete version of the truth, as she saw it" limited only by the terms of the pretrial agreement and stipulation of fact. Neither the pretrial agreement nor the stipulation of fact limited the evidence the government could present on sentencing. The court noted that "absent an express provision in the pretrial agreement or some applicable rule of evidence or procedure barring such evidence, this important victim impact evidence was properly admitted." RCM 1001(b)(4) provides for "accuracy in the sentencing process by permitting the judge to fully appreciate the true plight of the victim in each case."

s) *United States v. Marchand*, 56 M.J. 630 (C.G. Ct. Crim. App. 2001). Expert testimony describing impact of child pornography upon minors depicted in images admissible notwithstanding that expert did not establish that the particular victims in the images viewed by accused actually suffered any adverse impact, only that there was an increased risk to sexually abused minors generally of developing complications from abuse.

t) *United States v. Smith*, 56 M.J. 653 (Army Ct. Crim. App. 2001). Unwarned testimony by appellant to U.S.D.B. Custody Reclassification Board where appellant said "'it's an inmates duty to try and escape, especially long-termers" and that he is "'an escape risk and always will be'" admissible on aggravation.

u) *United States v. Gogas*, 58 M.J. 96 (2003). Letter from accused to his Congressman complaining about being prosecuted for LSD use admissible under 1001(b)(4) as directly related to the offense of drug use. The letter highlighted the appellant's "indifference to anything other than his own

pleasure." The court did not rule on whether the evidence was also admissible on the issue of rehabilitative potential.

v) *United States v. Dezotell*, 58 M.J. 517 (N-M. Ct. Crim. App. 2003). Witness' testimony that appellant's unauthorized absence and missing movement adversely affected ship's mission and efficiency during a period of heightened responsibilities proper testimony despite the fact that the appellant, at the time, was not working for the witness and the witness' testimony was not subject "to precise measurement or quantification." All that is required is a "direct logical connection or relation between the offense and the evidence offered."

w) *United States v. Pertelle*, No. 9700689 (Army Ct. Crim. App., Jun. 30, 1998) (unpub.). Testimony of accused's company commander that he intended to publicize results of court-martial in company did not constitute proper evidence in aggravation. Such evidence related only to prospective application of sentence, and did not "directly relate to or result from the accused's offense."

x) *United States v. Powell*, 45 M.J. 637 (N.M. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 360 (1998). Uncharged misconduct that accused lost government property, was financially irresponsible, and passed worthless checks was **not** directly related to offenses of which convicted - *i.e.*, failure to report to work on time and travel and housing allowance fraud - and therefore not admissible at sentencing under RCM 1001(b)(4). The court also noted that "MRE 404(b) does not determine the admissibility of evidence of uncharged misconduct during sentencing . . . admissibility of such evidence is determined solely by RCM 1001(b)(4) . . . ." *Id*. at 640.

y) *United States v. Rust*, 41 M.J. 472 (1995). Prejudicial error to admit suicide note in aggravation phase of physician's trial for dereliction of duty and false official statement. The murder-suicide was too attenuated *even if* the government could establish link between accused's conduct and murder-suicide, and clearly failed MRE 403's balancing test.

z) *United States v. Davis*, 39 M.J. 281 (C.M.A. 1994). Victim's testimony as to how he would feel if the accused received no punishment not admissible as evidence of impact evidence under RCM 1001(b)(4) or as evidence regarding accused's rehabilitative potential under RCM 1001(b)(5).

aa) *United States v. Lowe*, 56 M.J. 914 (N-M. Ct. Crim. App. 2002). During the sentencing phase of trial, the MJ relaxed the rules of evidence for defense admitting DE A, a letter from a Navy psychologist which assessed appellant, concluding "'in my professional opinion, he does not present a serious threat to society.'" In rebuttal, the MJ admitted over defense objection PE 3, a seventeen-page incident report with twenty-eight pages of attached statements alleging that appellant harassed and assaulted various women, only one of whom was the victim of an offense for which appellant was convicted. The MJ also admitted the evidence as aggravation evidence. Held – admission of PE 3 by the MJ was an abuse of discretion since the evidence did not directly relate to or result from the offenses. It involved different victims and did not involve a continuing course of conduct with the same victim. The court also found that despite the MJ's relaxation of the rules of evidence, the introduction of PE 3 was not proper rebuttal evidence. "Inadmissible aggravation evidence cannot be introduced through the rebuttal 'backdoor' after the military judge relaxed the rules of evidence for sentencing." *Id*. at 917. Specific instances of conduct are admissible on cross-examination to test an opinion, however, extrinsic evidence as to the specific instances is not.

bb) *United States v. Pope*, 63 M.J. 68 (2006). Air Force recruiters who received training at "Recruiter Technical School" received a letter signed by the Commander of the Air Force Recruiting Service, stating that if they failed to treat applicants respectfully and professionally, they "should not be surprised when, once you are caught, harsh adverse action follows." During the sentencing phase of appellant's trial, the Government moved to admit in aggravation this letter. The sentence was set aside and a rehearing on sentence was authorized. The CAAF reviews a military judge's decision to admit evidence on sentencing for a clear abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (2004). In the present case, CAAF was not convinced beyond reasonable doubt that the members were not influenced by the letter.

cc) *United States v. Bungert*, 62 M.J. 346 (2006). After appellant's misdeeds of drug use and distribution were discovered, he offered to identify other drug users with whom he worked in exchange for "a deal." Appellant implicated eleven individuals, and in doing so, launched an extensive investigation by the Coast Guard Investigative Service that uncovered no evidence. During presentencing, two witnesses testified primarily about the nature and scope of the investigation brought about as a result of Appellant's allegations. Defense counsel mad no objection. Applying a plain error standard, CAAF found that Appellant offered no evidence that he was prejudiced in any substantial way by the testimony of the Government's sentencing witnesses.

dd) *United States v. Hardison*, 64 M.J. 279 (2007). The CCA erred in concluding that the military judge had not committed plain error in admitting evidence of Appellant's preservice drug use and a service waiver for that drug use. Admissible evidence in aggravation must be "directly related" to the convicted crime.

5. Opinion evidence regarding past duty performance and rehabilitative potential. **RCM 1001(b)(5).**

a) What does "rehabilitative potential" mean?

(1) The term "rehabilitative potential" means potential to be restored to "a useful and constructive place in *society*." **RCM 1001(b)(5).**

(2) *United States v. Williams*, 41 M.J. 134 (C.M.A. 1994). Psychiatric expert's prediction of future dangerousness was proper matter for consideration in sentencing under rule providing for admission of evidence of accused's potential for rehabilitation under RCM 1001(b)(5).

(3) *United States v. Davis*, 39 M.J. 281 (C.M.A. 1994). Victim's testimony as to how he would feel if the accused received no punishment was not admissible as evidence of accused's rehabilitative potential under RCM 1001(b)(5).

b) Foundation for opinion testimony. **RCM 1001(b)(5)(B).**

(1) The witness must possess sufficient information and knowledge about the accused's "character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offenses" in order to offer a "helpful," rationally based opinion. **RCM 1001(b)(5)(B)**, codifying *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

(2) *United States v. Powell*, 49 M.J. 460 (1998). In laying a foundation for opinion evidence of an accused's rehabilitative potential, a witness may not refer to specific acts.

(3) Quality of the opinion depends on the foundation. *United States v. Boughton*, 16 M.J. 649 (A.F.C.M.R. 1983). Opinions expressed should be based on personal observation, but may also be based on reports and other information provided by subordinates.

(4) *United States v. Sylvester*, 38 M.J. 720 (A.C.M.R. 1994). Opinion evidence regarding rehabilitative potential is not *per se* inadmissible merely because defense counsel establishes on cross-examination that witness's assessment goes only to potential for military service. Once proper foundation for opinion has been established, such cross examination goes to weight to be given evidence, not to its admissibility.

(5) *United States v. McElhaney*, 54 M.J. 120 (2000). Error for the military judge to allow testimony of psychiatrist regarding future dangerousness of the accused as related to pedophilia, where witness had not examined the accused or reviewed his records, and had testified that he was unable to diagnose the accused as a pedophile. *Compare with United States v. Patterson*, 54 M.J. 74 (2000).

c) What's a proper bases of opinion testimony? **RCM 1001(b)(5)(C).**

(1) Opinion evidence of rehabilitative potential may *not* be based solely on the severity of the offense; must be based upon relevant information and knowledge possessed by the witness of the accused's personal circumstances. RCM 1001(b)(5)(C); *United States v. Horner*, 22 M.J. 294 (C.M.A. 1986).

(2) *United States v. Armon*, 51 M.J. 83 (1999). Accused wrongfully wore SF tab, SF combat patch, CIB, and combat parachutist badge. COL answered negatively the question, "based upon what you've seen of the accused, if you were jumping into combat tomorrow, would you want him around?" COL did not know accused and was not familiar with his service record. The CAAF held testimony may have violated 1001(b)(5) but was not plain error and would be permissible in this context (to show the detrimental effect this misconduct had on other soldiers) under 1001(b)(4).

d) What's the proper scope of opinion testimony? **RCM 1001(b)(5)(D).**

(1) The scope "is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit."

(2) It is improper for a witness to use a euphemism for a punitive discharge in commenting on an accused's rehabilitative potential. *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).

(a) *United States v. Aurich*, 31 M.J. 95 (C.M.A. 1990). The commander's opinion that he does not want the accused back in his unit "proves absolutely nothing."

(b) *United States v. Yerich*, 47 M.J. 615 (Army Ct. Crim. App. 1997). Senior NCO testified that he could "form [an opinion] as to his military rehabilitation," and that accused did not have any such rehabilitative potential. The Army Court noted difficulty of grappling with claimed "euphemisms." Whether the words used by a witness constitute a euphemism depends on the circumstantial context. The court also noted that a noncommissioned officer is normally incapable of exerting improper command influence over an officer panel.

(c) *United States v. Warner*, 59 M.J. 590 (C.G. Ct. Crim. App. 2003). On cross-examination of appellant's supervisor (whom the defense called to establish that the appellant had rehabilitation potential), the government asked the witness about the appellant's rehabilitative potential "*in the Coast Guard*, given his drug abuse." The government's were improper because they linked the witness' opinion on rehabilitative potential with award of a punitive discharge.

e) Same rules may apply to the defense? "The mirror image might reasonably be that an opinion that an accused could 'continue to serve and contribute to the United States Army' simply is a euphemism for, 'I do not believe you should give him a punitive discharge.'" *United States v. Ramos*, 42 M.J. 392, 396 (1995).

(1) *United States v. Hoyt*, No. ACM 33145, 2000 CCA LEXIS 180 (A.F. Ct. Crim. App. July 5, 2000), *pet. denied*, 54 M.J. 365 (2000), held that defense witnesses cannot comment on the inappropriateness of a punitive discharge. *But see United States v. Bish*, 54 M.J. 860 (A.F. Ct. Crim. App. 2001) (noting that since the rule prohibiting euphemism falls under prosecution evidence (RCM 1001(b)(5)(D)), "it does not appear to prohibit the defense from offering evidence that a member of the accused's unit wants him back."

(2) *United States v. Griggs*, 61 M.J. 402 (2005). Appellant tried and convicted of various drug-related offenses. On sentencing, the DC offered six letters with opinions on to appellant's rehabilitative potential in the Air Force rather than as a productive member of society. The TC objected on the grounds that the statements were recommendations for retention and would confuse the members. The military judge ordered the disputed language redacted. The AFCCA held that the MJ did not abuse his discretion by ordering the redaction and, even if he did, the error was harmless (i.e., there was no prejudice to the appellant). The court cited confusion in this area of law as to whether such evidence is proper from the *accused* as a basis for its conclusion. The court also noted that the DC conceded that RCM 1001(b)(5) applied to the defense letters. CAAF granted review and concluded "the better view is that R.C.M. 1001(b)(5)(D) does not apply to defense mitigation evidence, and specifically does not preclude evidence that a witness would willingly serve with the accused again." However, CAAF further restated, as in *Aurich*, "if an accused 'opens the door' by bringing witnesses before the court to testify that they want him or her backing the unit, the Government is permitted to prove that that is not a consensus view of the command." 31 M.J. at 96-97.

(3) *United States v. Hill*, 62 M.J. 271 (2006). During the defense sentencing case, the appellant's battalion commander was called to testify about his rehabilitative potential. Before a military judge alone, he testified that he did not think he could come back to the unit as a physician's assistant. He further testified, "[i]f I was sitting in that panel over there as a juror would I allow him [Appellant] to remain in the Army? No-." The military judge promptly stated that the battalion commander's remarks were "not responsive" and consisted of testimony "that a witness is not allowed to make." However, following trial during a "Bridge the Gap" session, the military judge commented, "I was thinking of

keeping him until his commander said he didn't want him back," or words to that effect. The CAAF determined from the record that the military judge was referring to back as a "physician's assistant" as opposed to "back in the Army."

f) Specific acts? RCM 1001(b)(5)(E) and (F).

(1) On direct, government may not introduce specific acts of uncharged misconduct that form the basis of the opinion. *See United States v. Rhoads*, 32 M.J. 114 (C.M.A. 1991).

(2) If the defense opens the door during cross-examination, on redirect the trial counsel should also be able to address specific incidents of conduct. *United States v. Clarke*, 29 M.J. 582 (A.F.C.M.R. 1989). *See also United States v. Gregory*, 31 M.J. 236 (C.M.A. 1990) (RCM 1001(b)(5) witness cannot testify about specific instance of misconduct as basis for opinion until cross-examined on specific good acts).

g) Future Dangerousness.

(1) *United States v. Williams*, 41 M.J. 134 (C.M.A. 1994). Psychiatric expert's prediction of future dangerousness was proper matter for consideration in sentencing under rule providing for admission of evidence of accused's potential for rehabilitation under RCM 1001(b)(5).

(2) *United States v. Scott*, 51 M.J. 326 (1999). During the presentencing phase of trial, the government offered an expert to testify about the accused's future dangerousness. Defense objected to the witness on the basis that the witness had never interviewed his client so he lacked an adequate basis to form an opinion. The judge overruled the objection. Defense's failure to object at trial that there was a violation of the accused's Fifth and Sixth Amendment rights at trial forfeited those objections, absent plain error. Although there was no evidence to indicate that the government witness had examined the full sanity report regarding the accused, the court concluded there was no plain error in this case where the doctor testified that based on the twenty offenses the accused had committed in the last two years, he was likely to re-offend.

(3) *United States v. George*, 52 M.J. 259 (2000). A social worker testified that the "accused's prognosis for rehabilitation was 'guarded' and 'questionable.'" The CAAF noted that evidence of future dangerousness is a proper matter under RCM 1001(b)(5).

h) Rebuttal Witnesses. *United States v. Pompey*, 33 M.J. 266 (C.M.A. 1991). The *Ohrt/Horner* rules apply to government rebuttal witnesses to keep unlawful command influence out of the sentencing proceedings (a rational basis for expressing opinion is still required). *But see United States v. Aurich*, 32 M.J. 95 (C.M.A. 1990) (observing that where defense witnesses testify they want accused back in unit, the government may prove that that is not a consensus of the command).

i) Absence of rehabilitative potential is a factor for consideration in determining a proper sentence; that absence is NOT a matter in aggravation. *United States v. Loving*, 41 M.J. 213 (C.M.A. 1994), *aff'd*, 517 U.S. 748 (1996). MJ's characterization of accused's disciplinary record and his company commander's testimony about accused's duty performance as aggravating circumstances was error since lack of rehabilitative potential is not an aggravating circumstance.

6. Matters admitted into evidence during findings. **RCM 1001(f)**.

a) **RCM 1001(f)(2).** The court-martial may consider any evidence properly introduced on the merits before findings, including evidence of other offenses or acts of misconduct even if introduced for a limited purpose.

b) Statements from providence inquiry.

(1) *United States v. Figura*, 44 M.J. 308 (1996). There is no demonstrative right way to introduce evidence from the providence inquiry, but MJ should permit parties to choose method of presentation.

(2) *United States v. English*, 37 M.J. 1107 (N.M.C.M.R. 1993). MJ does not have authority to consider statements of accused made during providence inquiry, absent offering of statements, and defense opportunity to object to consideration of any or all of providence inquiry.

(3) *United States v. Irwin*, 39 M.J. 1062 (A.C.M.R. 1994). The accused must be given notice of what matters are going to be considered and an opportunity to object to all or part of the providence inquiry. Tapes of the inquiry are admissible.

(4) *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988). Sworn testimony given by the accused during providence inquiry may be received as admission at sentencing hearing.

(5) How to do it: authenticated copy of trial transcript, witness, tapes. *See United States v. Irwin*, 42 M.J. 479 (1995). Admissibility of various portions of providence inquiry should be analyzed in same manner as any other piece of evidence offered by the government under RCM 1001.

7. "Aggravation evidence" in stipulations of fact.

a) *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988).

(1) Inadmissible evidence may be stipulated to (subject to RCM 811(b) "interests of justice" and no government overreaching).

(2) Stipulation should be unequivocal that all parties agree stipulation is "admissible."

b) *United States v. DeYoung*, 29 M.J. 78 (C.M.A. 1989). Military judge must affirmatively rule on defense objections, even if the stipulation states that the contents are admissible. Parties cannot usurp the MJ's role.

c) *United States v. Vargas*, 29 M.J. 968 (A.C.M.R. 1990). The stipulated facts constitute uncharged misconduct not closely related to the facts alleged; therefore, they were "generally" inadmissible. BUT, the accused agreed to permit their use in return for favorable sentence limits, and there was no evidence of government overreaching.

8. **Three-step process for analyzing sentencing matter presented by the prosecution per RCM 1001(b):**

a) Does the evidence fit one of the enumerated categories of RCM 1001(b)?

b) Is the evidence in an admissible form? *United States v. Bolden*, 34 M.J. 728 (N.M.C.M.R. 1991).

c) Is the probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? MRE 403. *See United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991); *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985).

9. Evidence inadmissible under one theory (e.g., prior conviction under 1001(b)(4)) may be admissible under another theory (e.g., personnel record under 1001(b)(2)). *See e.g.*, *United States v. Ariail*, 48 M.J. 285 (1998); *United States v. Douglas*, 57 M.J. 270 (2002); *United States v. Gogas*, 58 M.J. 96 (2003).

C. The Case in Extenuation and Mitigation. **RCM 1001(c)**.

1. Matters in extenuation. **RCM 1001(c)(1)(A).**

a) Explains circumstances surrounding commission of the offense, including those reasons that do not constitute a legal justification or excuse.

b) *United States v. Loya*, 49 M.J. 104 (1998). Evidence of quality of medical care was relevant evidence in extenuation and mitigation for an accused convicted of negligent killing, inasmuch as such evidence might reduce the appellant's blame.

2. Matters in mitigation. **RCM 1001(c)(1)(B).**

a) Personal factors concerning the accused introduced to lessen the punishment; *e.g.*, evidence of the accused's reputation or record in the service for efficiency, fidelity, temperance, courage, etc.

b) *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993). Counsel should pay particular attention to awards and decorations based on combat service.

c) *United States v. Perry*, 48 M.J. 197 (1998). The CAAF upheld military judge's decision not to instruct panel that accused stood to be found liable for $80,000 recoupment by USNA of accused's education expenses, when separated from service prior to completion of five year commitment due to misconduct, as too collateral in this case.

d) *United States v. Simmons*, 48 M.J. 193 (1998). The military judge's prohibition on the accused from offering evidence of a civilian court sentence for the same offenses that were the basis of his court-martial was error. Civilian conviction and sentence for same misconduct may be aggravating or mitigating, but defense counsel is in the best position to decide.

e) *United States v. Bray*, 49 M.J. 300 (1998). Proper mitigation evidence under RCM 1001(c) included the possibility that the accused suffered a psychotic reaction as a result of insecticide poisoning. Such evidence might lessen the adjudged sentence, and is therefore relevant.

f) Retirement benefits.

(1) *United States v. Washington*, 55 M.J. 441 (2001). At time of trial, accused was a senior airman (E-4) who could retire during her current enlistment. The military judge excluded defense evidence that estimated the accused's retirement pay if she retired after twenty years in the pay grades of E-4 and E-3. The military judge erred by refusing to admit a summary of expected lost retirement of approximately $240,000.00 if accused was awarded a punitive discharge.

(2) *United States v. Boyd*, 55 M.J. 217 (2001). The military judge declined to give a requested defense instruction on the loss of retirement benefits that could result from a punitive discharge. The accused had fifteen and a half years active service. The court held that there was no error in this case, but stated "we will require military judges in all cases tried after the date of this opinion (10 July 2001) to instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction and a party requests it."

(3) *United States v. Luster*, 55 M.J. 67 (2001). The military judge erred when she prevented defense from introducing evidence that would show the financial impact of lost retirement resulting from a

(4) *United States v. Becker*, 46 M.J. 141 (1997). The MJ erred when he refused to allow accused with 19 years and 8-1/2 months active duty service at time of court-martial to present evidence in mitigation of loss in retired pay if discharged. "The relevance of evidence of potential loss of retirement benefits depends upon the facts and circumstances of the individual accused's case."

(5) *United States v. Greaves*, 46 M.J. 133 (1997). The military judge should give some instructions when the panel asks for direction in important area of retirement benefits. Accused was nine weeks away from retirement eligibility and did not have to reenlist.

(6) *United States v. Sumrall*, 45 M.J. 207 (1996). The CAAF recognized right of retirement-eligible accused to introduce evidence that punitive discharge will deny retirement benefits, and with proper foundation, evidence of potential dollar amount subject to loss.

(7) *But see United States v. Henderson*, 29 M.J. 221 (C.M.A. 1989). The military judge correctly denied defense introduction of financial impact data about accused's loss of retirement benefits if reduced in rank or discharged (accused was 3+ years and a reenlistment away from retirement eligibility). "[T]he impact upon appellant's retirement benefits was not 'a direct and proximate consequence' of the bad-conduct discharge."

(8) *United States v. Polk*, 47 M.J. 116 (1997). No Fifth Amendment due process violation where Master Sergeant lost substantial retired pay as result of bad-conduct discharge. Accused with twenty-three years of service proffered no other evidence of loss of retirement benefits, but in unsworn statement addressed loss if discharged. DC multiplied half of base pay times thirty years to argue severe penalty.

3. Statement by the accused. **RCM 1001(c)(2).**

a) Sworn statement. **RCM 1001(c)(2)(B).**

(1) Subject to cross-examination by trial counsel, military judge, and members.

(2) Rebuttable by:

(a) Opinion and reputation evidence of character for untruthfulness. RCM 608(a).

(b) Evidence of bias, prejudice, or any motive to misrepresent. RCM 608(c).

(c) Extrinsic evidence of prior inconsistent statements. RCM 613.

b) Unsworn statement by accused. **RCM 1001(c)(2)(C).**

(1) May be oral, written, or both.

(2) May be made by accused, counsel, or both.

(3) Matters covered in unsworn statement.

(a) *United States v. Grill*, 48 M.J. 131 (1998). The right of an accused to make a statement in allocution is not wholly unfettered, but must be evaluated in the context of statements in specific cases. It was error to sustain the government's objection to the accused making any reference to his co-conspirators being treated more leniently by civilian jurisdictions (*i.e.*, not prosecuted, deported, probation). "The mere fact that a statement in allocution might contain matter that would be inadmissible if offered as sworn testimony does not, by itself, provide a basis for constraining the right of allocution."

(b) *United States v. Jeffery*, 48 M.J. 229 (1998). An accused's rights in allocution are broad, but not wholly

unconstrained. The mere fact, however, that an unsworn statement might contain otherwise inadmissible evidence – *e.g.*, the possibility of receiving an administrative rather than punitive discharge – does not render it inadmissible.

(c) *United States v. Britt*, 48 M.J. 233 (1998). There are some limits on an accused's right of allocution, but "comments that address options to a punitive separation from the service . . . are not outside the pale." Error for the military judge to redact portion of the accused's unsworn statement telling panel that commander intended to discharge him administratively if no punitive discharge imposed by court-martial.

(d) *United States v. Tschip*, 58 M.J. 275 (2003). Appellant, in his unsworn, told the panel "I know my commander can discharge me even if I do not receive a bad conduct discharge today." The military judge advised the panel that an unsworn was an authorized means of conveying information; they were to give the appellant's comments regarding an administrative discharge the consideration they believed it was due, to include none; administrative discharge information is generally not admissible at trial; and they were free to disregard any reference to the appellants comment made by counsel. The court held that the instruction was appropriate because the judge placed the appellant's comments "in context" for the decision makers. The court noted that the instruction was proper in light of appellant's "unfocused, incidental reference to an administrative discharge." The court left for another day whether it would be proper if the unsworn was specific and focused.

(e) *United States v. Sowell*, 62 M.J. 150 (2005). A military judge's decision to restrict an accused's sentencing statement is reviewed for abuse of discretion. In following *United States v. Grill*, 48 M.J. 132, although the right of allocution is "*generally* considered unrestricted," it is not "*wholly* unrestricted." However, CAAF distinguished this case, citing the Government's argument on findings opened the door to proper rebuttal during Appellant's unsworn statement on sentencing. The Court focused on the fact that trial counsel was aware of FC3 Elliott's acquittal the previous week. Her references to FC3 Elliott as a co-

conspirator, implying criminal liability, during her findings argument indicated that FC3 Elliott was guilty of the same offense as Appellant, and therefore had a motive to lie.

(f) *United States v. Johnson*, 62 M.J. 31 (2005). Prior to trial, Appellant took a privately administered polygraph examination arranged by the defense. The examiner concluded that appellant was not deceptive when denied knowing that he transported marijuana. During the sentencing hearing he sought to refer to his "exculpatory" polygraph test during his unsworn statement. The military judge ruled that the test results were inadmissible. The CAAF found that polygraph evidence squarely implicates its own admonition against impeaching or relitigating the verdict on sentencing. Furthermore, the court was not persuaded that exculpatory polygraph information qualifies as extenuation, mitigation, or rebuttal under R.C.M. 1001(c).

(g) *United States v. Barrier*, 61 M.J. 482 (2005). The military judge did not err when, over defense objection, he gave the "Friedmann" instruction. During appellant's unsworn statement, he called the panel members' attention to the sentence received in an unrelated similar case. The military judge gave an instruction which essentially told the panel members that that part of the accused's unsworn statement was irrelevant and that they should not consider it in determining an appropriate sentence.

(4) When the accused makes an unsworn statement, he does not become a witness:

(a) Not subject to cross-examination. *See United States v. Grady*, 30 M.J. 911 (A.C.M.R. 1990) (noting that it was improper for MJ to question the unsworn accused).

(b) *United States v. Martinsmith*, 42 M.J. 343 (1995). No prejudicial error where MJ did not permit accused in unsworn statement to respond to member's question concerning whereabouts of money which accused admitted stealing. Further, the judge did not abuse discretion in denying defense

(c) *United States v. Adame*, 57 M.J. 812 (N-M. Ct. Crim. App. 2003). Error for military judge to conduct extensive inquiry regarding accused's desire for a punitive discharge in his unsworn where inquiry got into attorney-client communications. The court described the MJ's inquiry as "invasive," however, found no prejudice.

(5) *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000), *pet. denied*, 54 M.J. 425 (2001). Proper for military judge to provide sentencing instruction to clarify for the members comments made in the accused's unsworn statement.

(6) *United States v. Satterley*, 55 M.J. 168 (2001). Defense counsel requested to reopen the defense case to answer a court member's question via an unsworn statement by the accused. The military judge denied the request but stated he would allow the defense to work out a stipulation of fact, or allow the accused to testify under oath. The court concluded that the military judge did NOT abuse his discretion in refusing to allow accused to make an additional, unsworn statement. The court did note, however, that "there may be other circumstances beyond legitimate surrebuttal which may warrant an additional unsworn statement . . . . Nevertheless, whether such circumstances exist in a particular case is a matter properly imparted to the sound discretion of the trial judge."

c) The defense may **not** present evidence or argument that challenges or re-litigates the prior guilty findings of the court. *United States v. Teeter*, 16 M.J. 68 (C.M.A. 1983).

d) If accused made an unsworn statement, government may only rebut statements of fact.

(1) *United States v. Manns*, 54 M.J. 164 (2000). "I have tried throughout my life, even during childhood, to stay within the laws and regulations of this country," was held to be a statement of fact and could be rebutted by evidence of the accused's admission to marijuana use.

(2) *United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996), *aff'd*, 46 M.J. 258 (1997). Government allowed to rebut accused's expression of remorse with inconsistent statements made previously by accused on psychological questionnaire and audio tape of telephone message to brother of victim.

(3) *United States v. Cleveland*, 29 M.J. 361 (C.M.A. 1990). "Although I have not been perfect, I feel that I have served well and would like an opportunity to remain in the service. . . ." The court determined that the statement was more in the nature of an opinion, "indeed, an argument;" therefore, not subject to rebuttal.

(4) *United States v. Thomas*, 36 M.J. 638 (A.C.M.R. 1992). Unsworn, accused commented on his upbringing, pregnant girlfriend, reasons for enlisting in the Army, the extenuating circumstances surrounding his offenses. The accused also apologized to the Army and the victim. The court held that it was improper rebuttal to have the 1SG testify that the accused was not truthful since character for truthfulness was not at issue.

e) Relaxed rules of evidence. **RCM 1001(c)(3)**. *United States v. Saferite*, 59 M.J. 270. The rules of evidence apply at sentencing, but the MJ may relax the rules of evidence. A relaxation of the rules, however, goes more toward whether evidence is reliable and authentic; otherwise inadmissible evidence is still not admitted (citing *United States v. Boone*, 49 M.J. 187, 198 n.14 (1998)). *See also United States v. Steward*, 55 M.J. 630 (N-M. Ct. Crim. App. 2001) (observing that relaxed rules of evidence is not limited to only documentary evidence).

4. Right to a "Complete Sentencing Proceeding." *United States v. Libecap*, 57 M.J. 611 (C.G. Ct. Crim. App. 2002) [*Libecap I*]. On appeal, the appellant argued that a term of his pretrial agreement that required him to request a punitive discharge was both a violation of RCM 705 and contrary to public policy. The court agreed, setting aside the sentence and authorizing a rehearing on sentence. The court found that the provision violated RCM 705(c)(1)(B) because "as a practical matter, it deprived the accused of a complete sentencing proceeding." The court also found that the provision was contrary to public policy.

5. Mental Impairment. *United States v. Doss*, 57 M.J. 182 (2002). Noting that defense counsel was ineffective for failing to present "extant" psychological evidence.

6. Rebuttal. **RCM 1001(d)**. Government rebuttal evidence must actually "explain, repel, counteract or disprove the evidence introduced by the opposing party." *United States v. Wirth*, 18 M.J. 214, 218 (C.M.A. 1984).

a) *United States v. Hursey*, 55 M.J. 34 (C.A.A.F. 2001). The military judge abused his discretion when he admitted the testimony of NCOIC of the base Military Justice Division to testify that the accused was late for his court-martial as rebuttal to defense evidence of the accused's dependability at work (where NCOIC unable to say whether the accused was at fault or whether his being late was unavoidable). Testimony had little probative value, was potentially misleading, and time wasting.

b) *United States v. Reveles*, 41 M.J. 388 (C.A.A.F. 1994). Accused is not entitled to present his sentencing case free from the chilling effect of legitimate government evidence (if DC introduces too much evidence of the accused's life then military judge might allow government to introduce victim life video).

c) *United States v. Edwards*, 39 M.J. 528 (A.F.C.M.R. 1994). Air Force Regulation 111-1 prohibits admission of records of NJP at courts-martial if the record is over five years old as of the date the charges were referred. Accordingly, admission of a five year-old NJP was error, even though it properly rebutted matter submitted by the defense.

d) *United States v. Dudding*, 37 M.J. 429 (C.M.A. 1993). A Licensed Clinical Social Worker (LCSW) testified that accused was good candidate for group therapy and recommended eighteen months of group treatment. A government witness, from USDB, testified that accused would be exposed to more treatment groups if sentenced to ten years versus five years. The defense interposed no objection. The court held not plain error.

e) *United States v. Roth*, 52 M.J. 187 (C.A.A.F. 1999). The defense sought to call a witness to testify that there was no gang problem in the housing area discussed by the CID agent. The witness had been in the courtroom during the testimony of the CID agent. The judge held that the defense had violated the sequestration rule and refused to let the witness testify. The CAAF held that the military judge abused her discretion. The court noted that the ultimate sanction of excluding a witness should ordinarily be used to punish intentional or willful disobedience of a military judge's sequestration order.

f) *Horner* and *Ohrt* apply to government rebuttal witnesses. *See United States v. Pompey*, 32 M.J. 547 (A.F.C.M.R. 1990).

g) When to allow rebuttal? *United States v. Tilly*, 44 M.J. 851 (N-M. Ct. Crim. App. 1996). The military judge began to deliberate on sentence, then granted trial counsel motion to reopen sentencing to allow rebuttal with newly-discovered evidence. The court found that the judge had begun to deliberate was not a bar to reopening the taking of evidence for rebuttal.

h) *United States v. Henson*, 58 M.J. 529 (Army Ct. Crim. App. 2003). During the presentencing case, the defense presented good military character evidence which the government rebutted by offering extrinsic evidence of bad acts: evidence of the wrongful taking and pawning of a microwave; evidence of racially insensitive acts by appellant in the barracks; evidence of substandard performance and appearance; evidence of uniform violations; and evidence of an unkempt room. The military judge abused his discretion when, over defense's objection, he allowed extrinsic evidence to rebut the good character and reputation evidence presented by the defense. The Army Court found, however, that the error did not prejudice a material right of the appellant especially in light of the clemency recommendation made by the military judge and the convening authority's following that recommendation. The court did, however, reduce the appellant's period of confinement by one month to "moot any claim of possible prejudice." *Id*. at 533.

i) *United States v. Saferite*, 59 M.J. 270 (C.A.A.F. 2004). The appellant was charged and convicted of various offenses including larceny, and faced over 230 years confinement. After arraignment but before trial, the appellant escaped from confinement and was tried *in absentia*. The defense called the appellant's spouse to talk about him as a husband and father. In rebuttal, the government offered two sworn statements that implied that the appellant's spouse was complicit in the appellant's escape, an escape already known to the panel and for which the military judge gave an instruction on sentencing that the appellant was NOT to be sentenced for the escape. The government offered the two statements to show the witness' bias. The court held that the judge abused his discretion, under MRE 403, in admitting the statements. The court found that the government's theory of complicity was "tenuous at best" and the government improperly focused its argument on the two statements and the spouse's alleged complicity in the escape.

j) *United States v. Bridges*, 66 M.J. 246 (C.A.A.F. 2008). Under Article 59(a) UCMJ an error of law regarding the sentence does not provide a

basis for relief unless the error materially prejudiced the substantial rights of the accused.

7. Surrebuttal. **RCM 1001(d)**. *United States v. Provost*, 32 M.J. 98 (C.M.A. 1991). After government rebuttal to accused's first unsworn statement, accused was entitled to make a second unsworn statement. *But see United States v. Satterley*, 55 M.J. 168 (2001).

8. Witnesses. **RCM 1001(e)**.

a) Who must the government bring?

(1) *United States v. Mitchell*, 41 M.J. 512 (A.C.M.R. 1994). The military judge did not err by denying accused's request for Chief of Chaplains as character witness. While acknowledging accused's right to present material testimony, court upheld judge's exercise of discretion in determining the form of presentation. Proffered government stipulation of fact detailed the witness's background, strong opinions favoring the accused, and the government's refusal to fund the witness's travel.

(2) *United States v. Briscoe*, 56 M.J. 903 (A.F. Ct. Crim. App. 2002). The appellant alleged the military judge erred by not ordering the government to produce the appellant's father as a sentencing witness. The court held that there was no evidence of "extraordinary circumstances" that required the production of a live witness; therefore, the military judge's ruling, in light of the government's offer to enter into a stipulation of fact, was not an abuse of discretion.

D. Argument. **RCM 1001(g)**.

1. *United States v. Bolkan*, 55 M.J. 425 (2001). In sentencing argument, the defense counsel asked the panel not to give the accused confinement or a punitive discharge, and that if the panel must choose between confinement and a discharge, then it should give the accused a discharge. The CAAF reiterated the rule that when an accused asks the sentencing authority to remain on active duty, it is error for the defense counsel to concede the appropriateness of a punitive discharge. The court assumes that the military judge erred in not inquiring into whether the counsel's argument properly reflected the accused's desire, but finds harmless error.

2. *United States v. Paxton*, 64 M.J. 484 (2007). As a general rule, the prosecution may not comment on an accused's lack of remorse or on his decision to refuse to admit guilt after findings unless there is testimony form the accused, an unsworn statement, or other evidence properly before the court to support the comment. An accused's refusal to admit guilt after findings may be an appropriate factor for the members' consideration in their sentencing on rehabilitation potential but only after a proper foundation is raised. Other evidence can give rise, but the inference cannot be from the accused's decision not to testify or from his not guilty plea.

3. *United States v. Pineda*, 54 M.J. 298 (2001). During sentencing argument, the defense counsel stated, "perhaps a bad-conduct discharge, and I don't like asking for one, but I'm practical it's going to happen . . . [is] appropriate in this particular case." The CAAF found it was error for the counsel to concede the appropriateness of a bad-conduct discharge, but found, after applying a *Strickland v. Washington*, 466 U.S. 668 (1984), ineffective assistance of counsel analysis, that the accused failed to prove he was prejudiced by this improper argument.

4. *United States v. Jenkins*, 54 M.J. 12 (2000). During sentencing argument, the TC argued that the accused "lied on the stand" and "has no rehabilitative potential" repeatedly referring to him as a "thief" and a "liar." Because the defense counsel did not object to the argument, the CAAF applied a "plain error" analysis, finding no plain error. The military judge's limiting instruction on the accused mendacity, cured any possible error.

5. *United States v. Baer*, 53 M.J. 235 (2000). The Assistant Trial Counsel (ATC) asked the members to "imagine being [the victim] sitting there as these people are beating him," and "imagine the pain and agony . . . you can't move. You're being taped and bound almost like a mummy. Imagine as you sit there as they start binding." The defense objected on the grounds of improper argument. The CAAF stated that such "Golden Rule arguments" are impermissible, however, when viewing the ATC's argument in its entirety, the court found "no basis for disagreeing with the lower court's conclusion that the . . . argument was not calculated to inflame the members' passions." The majority opinion also warned that "trial counsel who make impermissible Golden Rule arguments and military judges who do not sustain proper objections based upon them are risking reversal." In a concurring opinion, Judge Effron (joined by Judge Sullivan) believed the argument, viewed in context, was improper and that the military judge erred in allowing it.

6. *United States v. Garren*, 53 M.J. 142 (2000). Trial counsel argued at sentencing – after the accused's unsworn statement asserted he did not believe he had anything to do with offenses – that the accused "is not accepting responsibility for what he has done." Trial counsel's comment on the evidence, the charges, and the accused's unsworn statement were fair comment.

7. *United States v. Stargell*, 49 M.J. 92 (1998). Trial counsel argued the accused, with nineteen and a half years, will get an honorable retirement unless the panel gave him a BCD. Military judge provided curative instruction to panel.

8. *United States v. Erickson*, 65 M.J. 221 (2007). The TC did not commit plain error when during his sentencing argument in a judge alone case, he compared the accused with Hitler, Saddam Hussein, and Osama bin Laden, and described the accused as a demon belonging in hell. CAAF stated that the "comments were made in the context of a permissible theme – that unseen evil is worse than open and obvious evil…While we do not condone the references, in this context, and in view of the limited number of references in a lengthy argument, we do not consider the misconduct to be "severe."

9. *United States v. Weisbeck*, 48 M.J. 570 (Army Ct. Crim. App. 1998), *rev'd on other grounds*, 50 M.J. 461 (1999). An accused is only to be sentenced at a court-martial for the offenses of which he is convicted, and not for uncharged or other offenses of which he is acquitted. It is improper argument for trial counsel to refer the panel to other acts of child molestation, of which the accused was tried and acquitted at a previous court-martial. The prior incidents, although admissible on the merits under MRE 404(b), were not a proper basis for which to increase the accused's sentence.

10. *United States v. Fortner*, 48 M.J. 882 (N-M. Ct. Crim. App. 1998). Trial counsel reference in closing argument to Navy core values did not constitute improper reference to higher authority, as prohibited in RCM 1001(g). Such values are aspirational concepts that do not require specific punishment for failure to comply.

11. *United States v. Thomas*, 44 M.J. 667 (N-M. Ct. Crim. App. 1996). Trial counsel argued "CNO . . . has zero tolerance policy for anyone who uses . . . drugs." The court examined for plain error and found none in light of

lenient sentence imposed. BUT, the court admonished that given different facts, it would not hesitate to take corrective action when necessary.

12. *United States v. Hampton*, 40 M.J. 457 (C.M.A. 1994). Stipulation of expected testimony admitted during presentencing stated that in witness' opinion, accused did not have any rehabilitative potential. During sentencing argument, trial counsel stated that the expected testimony was that accused "doesn't have rehabilitative potential, doesn't deserve to be in the Army." Citing *Ohrt*, CMA held that even if trial counsel's misstatement is characterized as a reasonable inference drawn from the expected testimony, such argument is still improper.

13. *United States v. Cantrell*, 44 M.J. 711 (A.F. Ct. Crim. App. 1996). Trial counsel argued accused had not been influenced by previous punishments in series of prior court-martial and civilian convictions. The court found no improper use of civilian convictions as they were used to show character of accused.

14. *United States v. Terlep*, 57 M.J. 344 (2002). Appellant, charged with burglary and rape, pled to LIOs of the unlawful entry and battery. In his argument, trial counsel noted that the victim had to undergo a rape protocol kit at the hospital and suffer the feelings of being "violated" and "contaminated" on the night the appellant entered her home. In rebuttal, the trial counsel stated: "[the victim] has weathered the storm of this whole incident with dignity and with a courageous spirit to get up there and tell you what happened that night, to tell you the truth." On appeal, the CAAF found that the trial counsel's argument did not constitute plain error. The court noted that the argument did not personally vouch for the victim's credibility in general or with respect to her allegation of rape.

15. *United States v. Adame*, 57 M.J. 812 (N-M. Ct. Crim. App. 2003). Error for military judge to conduct extensive inquiry regarding accused's desire for a punitive discharge in his unsworn where inquiry got into attorney-client communications. The court described the judge's inquiry as "invasive," however, found no prejudice.

16. *United States v. Barrazamartinez*, 58 M.J. 173 (2003). Trial counsel's argument mentioned America's "war on drugs" and referred to the appellant as "almost a traitor." The defense counsel did NOT object to the TC's argument. The CAAF held that the "war on drugs" comment did not inject the command into the deliberation room; America's war on drugs was a matter of common knowledge. As for the traitor comment, after

noting that the "Trial Counsel's reference to Appellant as 'almost a traitor' gives us pause," the court found that the TC said "almost" and the term "traitor," which was used only once, was done so in the common (i.e., one who abuses a trust), not Constitutional, sense; therefore, there was no error.

17. *United States v. Melbourne*, 58 M.J. 682 (N-M. Ct. Crim. App. 2003). Trial counsel's argument asking sentencing authority to imagine the victim's "fear, pain, terror, and anguish as victim impact evidence" was not improper. *Compare United States v. Baer*, 53 M.J. 235 (2000) (improper to ask the sentencing authority to place themselves in the shoes of the victim).

18. *United States v. Rodriguez*, 60 M.J. 87 (2004). During her sentencing argument, the TC stated, "These are not the actions of somebody who is trying to steal to give bread so his child doesn't starve, sir, some sort of a [L]atin movie here. These are actions of somebody who is showing that he is greedy." The DC objected to the TC's use of the term "steal" and on the ground that TC was commenting on pretrial negotiations. The DC did not object to the reference to "[L]atin movie." The Navy-Marine Court could discern no logical basis for the comment and found the comment improper and erroneous. The court also stated that the comment was a gratuitous reference to race, but not an argument based on racial animus, nor likely to evoke racial animus. The court then tested for prejudice and found none. Based on the specific facts of the case, including the nature of the improper argument and that it occurred before a MJ alone during sentencing, there was no prejudice to a substantial right of the appellant. While race is different, the CAAF declines the appellant's invitation to adopt a *per se* prejudice rule in cases of argument involving unwarranted references to race.

19. *United States v. Garcia*, 57 M.J. 716 (N-M. Ct. Crim. App. 2002), *reversed on other grounds*, 59 M.J. 447 (2004). The appellant was convicted of conspiracy to commit robbery, robbery and countless other related offenses and sentenced to 125 years confinement. During the trial counsel's sentencing argument, the TC recommended specific periods of confinement per offense resulting in a total recommended period of confinement of 86 years. The TC also argued:

> Gentlemen, [sic] you have convicted him after his pleas of not guilty on every charge and every specification, every single one. It was not until after the government's case that Staff

> Sergeant Garcia decided to take responsibility for his actions….
>
> Go back to when you heard him take the stand. You probably noticed each other's faces. A lot of people did. Go back and capture that feeling again when you heard a Staff NCO say, "I held a gun to Chesney's head in his ear." Do you remember that? Do you remember when he said that? We were hoping against hope when he gets up on that stand to have logical explanation, something, maybe something way down deep inside everybody in this jury box was thinking, "Doggone, it's a Staff Sergeant in the Marine Corps. Give me something buddy. What have you got?"
>
> It's all a big mistake? No way….

Id. at 728-29. The defense counsel objected to the specific term of confinement per offense but otherwise failed to object. On appeal, the appellant argued that the itemization was improper and the quoted language amounted to improper comment on constitutional right to plead not guilty. The court found no error in the itemization. As for the quoted language, applying a plain error standard of review, the court found no error, characterizing the argument as "a comment about the appellant's explanation for his actions and his true criminal character." Additionally, the court noted that the TC was "simply pointing out that appellant had no excuse or justification for his criminal behavior."

E. Permissible Punishments. **RCM 1003**.

1. Reprimand. **RCM 1003(b)(1).** "A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority [CA]." The reprimand, when issued, is placed in the CA's action.

2. Forfeiture of pay and allowances. **RCM 1003(b)(2).**

a) Adjudged Forfeitures. At a general court-martial (GCM), the court may adjudge forfeiture of ALL pay and allowances (a.k.a., "total forfeitures"). At a special court-martial (SPCM), the court may adjudge forfeiture of 2/3 pay only. Allowances at a special court-martial are NOT subject to forfeiture.

b) Automatic Forfeitures (**Art. 58b, UCMJ**). Confined soldiers from GCMs shall, subject to conditions below, forfeit all pay and allowances due them during confinement or parole. Soldiers confined as a result of SPCMs, subject to conditions below, shall forfeit 2/3 pay during confinement. Sentences covered are those which include:

(1) Confinement of MORE THAN 6 months, or death, or

(2) ANY confinement **AND** a punitive discharge.

c) Art. 58b, UCMJ, waiver. If an accused has dependents, the convening authority may ***waive*** any/all AUTOMATIC (i.e., Art. 58b, UCMJ) forfeitures for a period not to exceed six (6) months, with money waived to be paid to the dependents of the accused. Adjudged forfeitures may NOT be waived. See also, RCM 1101(d).

d) Effective date of forfeitures (**Art. 57(a), UCMJ**). ANY forfeiture of pay or allowances (or *adjudged* reduction) in a court-martial sentence takes effect on the earlier of:

(1) fourteen (14) days after sentencing, or

(2) the date on which the CA approves the sentence.

e) Deferment of forfeitures. On application of accused, CA may ***defer*** forfeiture (and reduction and confinement) until approval of sentence; but CA may rescind such deferral at any time. Deferment ceases automatically at action, unless sooner rescinded. Rescission prior to action entitles accused to minimal due process. See RCM 1101(c).

f) *United States v. Short*, 48 M.J. 892 (A.F. Ct. Crim. App. 1998). The court finds ineffective assistance of counsel when DC failed to make timely request for deferment or waiver of automatic forfeitures, notwithstanding recommendation of military judge that convening authority waive such forfeitures. Defense counsel relied on SJA office to process action for deferment and waiver.

g) *United States v. Clemente*, 46 M.J. 715, 719 (A.F. Ct. Crim. App. 1997). The CA has broad discretion in deciding to waive forfeitures, and

need not explain his decision to an accused. Unlike a request for deferment of confinement, an accused does not have standing to challenge the CA's decision as to waiver of forfeitures.

h) *United States v. Zimmer*, 56 M.J. 869 (Army Ct. Crim. App. 2002). Error for the CA to deny the defense deferment request in a one-sentence action without providing reasons for the denial. Court set aside four months of confinement and the adjudged forfeitures.

i) *United States v. Dewald*, 39 M.J. 901 (A.C.M.R. 1994). Forfeitures may not exceed two-thirds pay per month during periods of a sentence when an accused is not in confinement. Accordingly, during periods that adjudged confinement is suspended, forfeitures are limited to two-thirds pay per month. *See* RCM 1107(d)(2), discussion.

j) Partial forfeitures. Unless total forfeitures are adjudged (i.e., forfeiture of ALL pay and allowances), partial forfeitures MUST be stated in whole dollar amounts for a specific number of months and the number of months the forfeitures will last. RCM 1003(b)(2).

k) Forfeitures are calculated at reduced pay grade WHETHER suspended or not. *United States v. Esposito*, 57 M.J. 608 (C.G. Ct. Crim. App. 2002). *See also* RCM 1003(b)(2).

l) *United States v. Stewart*, 62 M.J. 291 (2006). Where a sentence to forfeiture of all pay and allowances is adjudged, such sentence shall run until such time as the servicemember is discharged or returns to a duty status, whichever comes first, unless the sentencing authority expressly provides for partial forfeitures post-confinement.

3. Fine. **RCM 1003(b)(3).**

a) *United States v. Tualla*, 52 M.J. 228 (2000). A special court-martial is not precluded from imposing a sentence that includes both a fine and forfeitures as long as the combined fine and forfeitures do not exceed the maximum two-thirds forfeitures that can be adjudged at a special court-martial. A 2002 amendment to RCM 1003(b)(3) reflects this holding.

b) *United States v. Williams*, 18 M.J. 186 (C.M.A. 1984). Other than limits on cruel and unusual punishment, there are no limits on the amount

of fine. Provision that fines are "normally for unjust enrichment" is directory rather than mandatory. Unless there is some evidence the accused was aware that a fine could be imposed, a fine cannot be imposed in a guilty plea case.

c) *United States v. Morales-Santana*, 32 M.J. 557 (A.C.M.R. 1990). "Because a fine was not specifically mentioned in the pretrial agreement and the military judge failed to advise the accused that a fine might be imposed, the accused may have entered a plea of guilty while under a misconception as to the punishment he might receive." The court disapproved the fine.

d) *United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992). The military judge's failure to mention fine in oral instructions did not preclude court-martial from imposing fine, where sentence worksheet submitted to court members with agreement of counsel addressed the issue.

e) *United States v. Smith*, 44 M.J. 720 (Army Ct. Crim. App. 1996). Accused pled guilty to kidnapping, rape and felony murder of child. Sentenced by MJ to DD, confinement for life, total forfeitures, reduction to E-1, and fine of $100,000.00. The military judge included a fine enforcement provision as follows: "In the event the fine has not been paid by the time the accused is considered for parole, sometime in the next century, that the accused be further confined for 50 years, beginning on that date, or until the fine is paid, or until he dies, whichever comes first." The Army Court found fine permissible punishment, but found the fine enforcement provision not "legal, appropriate and adequate." Fine enforcement provision void as matter of public policy, so court approved sentence, including fine, but without enforcement provision.

f) *United States v. Phillips*, 64 M.J. 410 (2007). Accused found guilty of various charges and was sentenced to a reprimand, 5 years, dismissal, and $400,000 fine. The military judge included a contingent confinement provision that if the fine was not paid, Phillips would serve an additional 5 year confinement. The Convening Authority reduced the fine to $300,000 and suspended for 24 months execution of the sentence adjudging a fine in excess of $200,000. Upon Phillips failure to pay the fine, the commanding general ordered a fine enforcement hearing. After the hearing, Phillips was ordered to serve an additional 5 years for willful failure to pay the unsuspended fine. CAAF held that the CG who executed the contingent confinement provision was authorized to do so and he was not required to consider alternatives to contingent confinement

after concluding that Phillips was not indigent. Fine is due on the date that the Convening Authority takes action on the sentence.

4. Reduction in grade. **RCM 1003(b)(4); UCMJ art. 58a.**

a) "Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, that includes

(1) a dishonorable or bad conduct discharge;

(2) confinement; or

(3) hard labor without confinement,

reduces that member to pay grade E-1."

b) ARMY. The automatic reduction to pay grade E-1 mandated by Article 58a applies only to enlisted soldiers with an approved sentence, whether or not suspended, that includes EITHER a punitive discharge OR confinement of more than 180 days (if adjudged in days) or six months (if adjudged in months). AR 27-10, para. 5-28*e*.

c) NAVY. The Navy and Marine Corps' implementing regulation provides for automatic reduction to the grade of E-1 on conviction at court-martial and sentence that includes, whether suspended or not, EITHER a punitive discharge OR confinement in excess of ninety days or three months. JAGMAN, 0152c(1).

d) AIR FORCE. Requires, as part of the approved sentence, a reduction AND either confinement, a punitive discharge, or hard labor without confinement before an airman is "automatically reduced" HOWEVER only reduced to the grade approved as part of the adjudged sentence (i.e., there is no automatic reduction to the grade of E-1). AFI 151-201, para. 9.10 (26 Nov 03).

e) COAST GUARD. As a matter of policy does NOT permit an automatic reduction. Military Justice Manual, Commandant Instruction M5810.1D, Chapter 4, Para. 4.E.1.

f) *United States v. Combs*, 47 M.J. 330 (1997). Punishment to reduction in rank, when unlawfully imposed, warrants sentence relief. The accused's court-martial sentence included reduction to the grade of E-1, but was subsequently set aside. Pending rehearing on sentence, the accused's chain of command ordered that he wear E-1 rank on his uniform and that he get a new identification card showing his grade as E-1. The court awarded the accused twenty months sentence credit, equal to the period of time he was ordered to wear reduced rank pending a rehearing.

g) Rank of retiree, in Army, may not be reduced by court-martial, or by operation of law. *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

5. Restriction. **RCM 1003(b)(5)**. No more than 2 months; confinement and restriction may be adjudged in the same case but together may not exceed maximum authorized confinement (where 1 month confinement equals 2 months restriction).

6. Hard labor without confinement. **RCM 1003(b)(6)**. No more than 3 months; confinement and hard labor may be adjudged in the same case but together may not exceed maximum authorized confinement (where 1 month confinement equals 1.5 months hard labor w/o confinement); enlisted members only; court-martial does not prescribe the hard labor to be performed.

7. Confinement. **RCM 1003(b)(7)**.

a) FY98 DOD Authorization Act created new U.C.M.J. Article 56a, creating new sentence of "confinement for life without eligibility for parole." Applicable to any offense occurring after 18 Nov 97 that carries possible punishment of life. *United States v. Ronghi*, 60 M.J. 83 (2004) (holding that confinement for life without eligibility for parole was authorized punishment for accused who committed premeditated murder on January 13, 2000, which was before the President amended the MCM to incorporate Executive Order dated April 11, 2002). Sentence subject to modification only by the convening authority, or the military appellate courts, the President, or the Supreme Court.

b) *United States v. Andrade*, 32 M.J. 520 (A.C.M.R. 1990). Consecutive and concurrent sentences ("life plus five years") have never been part of military law.

c) Instruction on *Allen* Credit. *United States v. Balboa*, 33 M.J. 304 (C.M.A. 1991). Proper for military judge to instruct panel that accused would get sixty-eight days *Allen* credit. Panel adjudged a BCD, confinement for twelve months *and sixty-eight days*.

d) Contingent Confinement. *United States v. Palmer*, 59 M.J. 362 (2004). Appellant convicted of larceny of government property valued in excess of $100,000 and was sentenced to a BCD, thirty months confinement, total forfeitures, reduction to E-1, a $30,000 fine, and an additional twelve months confinement if the fine was not paid. The court held that the evidence sported a finding of "no indigency," that the appellant was afforded the process due under RCM 1113, and that the appellant's "untimely unilateral efforts to make partial payments" after the time for said payments expired did not create any obligation on the part of the CA to accept the payment or amend his action remitting the outstanding balance of the fine and ordering the appellant into confinement.

8. Punitive Separation. **RCM 1003(b)(8)**.

a) Dismissal.

(1) Applies to commissioned officers and warrant officers who have been commissioned. *United States v. Carbo*, 37 M.J. 523 (A.C.M.R. 1993).

b) DD is available to non-commissioned warrant officers or enlisted.

c) BCD is available <u>only</u> to enlisted.

9. Death. **RCM 1003(b)(9).**

a) Death may be adjudged in accordance with RCM 1004 (mechanics, aggravating factors, votes). *Loving v. United States*, 517 U.S. 748 (1996).

b) Specifically authorized for thirteen different offenses, including aiding the enemy, espionage, murder, and rape.

c) Requires the concurrence of all the members as to: (1) findings on the merits of capital offense, (2) existence of at least one aggravating factor under RCM 1004(c), (3) extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including aggravating factors, and (4) sentence of death.

d) *Loving v. Hart*, 47 M.J. 438, 444 (1998). In denying extraordinary writ to set aside death penalty, the CAAF held "that the aggravating factor in RCM 1004(c)(8) – that appellant was the 'actual perpetrator of the killing' – is constitutionally valid on its face, provided that it is understood to be limited to a person who kills intentionally or acts with reckless indifference to human life."

e) *United States v. Simoy*, 50 M.J. 1 (1998). Lower court approved sentence of death where accused convicted of felony murder, notwithstanding accused did not actually commit murder. On appeal, the CAAF set aside the sentence and ordered a rehearing because the military judge committed plain error in advising the panel to vote on death before life. On rehearing, accused sentenced to DD, life, and reduction to E-1. *United States v. Simoy, ACM 30496, 2000 CCA LEXIS 183 (unpub. op, July 7, 2000).*

f) Panel Membership. UCMJ art. 25a. For offenses committed after 31 December 2002 – no less than twelve members for a death sentence. "In a case in which the accused may be sentenced to a penalty of death, the number of members shall be not less than 12, unless 12 members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five, and the court may be assembled and the trial held with not less than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available."

10. Maximum Punishment. *See* Manual for Courts-Martial, Appendix 12.

a) Generally – lesser of jurisdiction of court or punishment in Part IV.

b) Offenses not listed in the Table of Maximum Punishments.

(1) Included or related offenses.

(2) United States Code.

c) Habitual offenders. **RCM 1003(d).**

(1) Three or more convictions within one year – DD, TF, one year confinement.

(2) Two or more convictions within three years – BCD, TF, three months confinement.

(3) Two or more offenses which carry total authorized confinement of 6 months automatically authorizes BCD and TF.

11. Article 133 punishment. *United States v. Hart*, 32 M.J. 101 (C.M.A. 1991). In mega-article 133 specification, the maximum possible punishment is the largest maximum punishment for any offense included in the mega-specification.

12. Prior NJP for same offense.

a) *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989). Accused must be given credit for prior Article 15 punishment for same offense: day for day, dollar for dollar, and stripe for stripe.

b) *United States v. Edwards*, 42 M.J. 381 (1995). When accused has received NJP for same offense, the military judge may, on defense request, give *Pierce* credit, obviating need for CA to do so.

c) *United States v. Flynn*, 39 M.J. 774 (A.C.M.R. 1994). When military judge is the sentencing authority, he is to announce the sentence and then state on the record the specific credit given for prior nonjudicial punishment in arriving at the sentence.

d) *United States v. Zamberlan*, 45 M.J. 491 (1997). Accused tested positive for THC, causing commander to vacate suspended Art. 15 punishment and also to prefer court-martial charge. Defense counsel requested instruction to panel that they must consider punishment already imposed by virtue of vacation action taken by commander with regard to suspended Art. 15 punishment. The court noted, "vacation of a suspension of nonjudicial punishment is not itself nonjudicial punishment."

e) *United States v. Bracey*, 56 M.J. 387 (2002). Appellant convicted at a special court-martial of, among other offenses, disrespect to a superior commissioned officer and was sentenced to forfeiture of $630.00 pay per month for six months, reduction to E-1, confinement for six months and a BCD. Appellant argued, for the first time on appeal, that the disobedience handled at the Article 15 and the disrespect charge arose out of the same incident thus entitling him to *Pierce* credit. The CAAF held that the appellant was not entitled to *Pierce* credit since the offenses in question resulted from separate and distinct incidents despite their occurrence close in time and involving the same officer (i.e. victim). *See also United States v. Anastacio*, 56 M.J. 830 (C.G. Ct. Crim. App. 2002).

f) *United States v. Minyen*, 57 M.J. 804 (C.G. Ct. Crim. App. 2002). The appellant convicted of unauthorized absence and missing movement; sentenced to eighty days confinement and a bad conduct discharge. One of the two unauthorized absence specifications was for a four and a half month absence for which the accused previously received nonjudicial punishment, specifically thirty days restriction, thirty days extra duty, and reduction to E-1. At trial, the military judge awarded the appellant thirty-three days of *Allen* credit (pretrial confinement credit) and thirty days of *Pierce* credit (prior nonjudicial punishment credit). The military judge advised the appellant that the sixty-three days credit would be deducted from the adjudged eighty day sentence. On appeal, the court noted that although the judge failed to follow the CAAF's "guidance" in *United States v. Gammons*, 51 M.J. 169, 184 (1999), by failing to state on the record how he arrived at the specific *Pierce* credit awarded, *Gammons* was nonetheless satisfied by the award of the thirty days of *Pierce* credit (fifteen days for the restriction and fifteen for the extra duty). As for the action's failure to specify the credit awarded, the court found no error, finding that the action complied with RCM 1107(f). The court did go on, however, to again recommend that a Convening Authority expressly state all applicable credits in his or her action.

13. Prior board proceedings. *United States v. Blocker*, 30 M.J. 1152 (A.C.M.R. 1990). Accused entitled to credit for consequences of administrative board proceedings arising from same misconduct that is the subject of the court-martial.

F. Instructions. **RCM 1005**.

1. *United States v. Boyd*, 55 M.J. 217 (2001). Military judges must instruct on the impact of a punitive discharge on retirement benefits, if there is an evidentiary predicate for the instruction and a party requests it.

2. *United States v. Hopkins*, 55 M.J. 546 (A.F. Ct. Crim. App. 2001), *aff'd*, 56 M.J. 393 (2002). The military sustained government's objection to the defense counsel's request that the judge instruct the members that they should consider the accused's expression of remorse as a matter in mitigation. The Air Force Court held that RCM 1005(e) lists the required instructions that must be given on sentencing and that case law "does not require the military judge to list each and every possible mitigating factor for the court members to consider."

3. *United States v. Rush*, 54 M.J. 313 (2001). Following the sentencing instructions to the members that included the standard bad-conduct discharge instruction, the defense counsel requested the ineradicable stigma instruction. The judge, without explanation as to why, refused to give the requested instruction. The CAAF held that while the military judge abused his discretion when he failed to explain why he refused to give the standard sentencing instruction after a timely request by the defense, there was no prejudice.

4. *United States v. Duncan*, 53 M.J. 494 (2000). The members interrupted their deliberations to ask the military judge if rehabilitation/therapy would be required if the accused were incarcerated, and if parole or good behavior were available to someone with a life sentence. Instructions on collateral consequences are permitted, but need to be clear and legally correct. It is appropriate for the judge to answer questions if he/she can draw upon a reasonably available body of information which rationally relates to sentencing considerations (here the panel members questions related to both aggravation evidence (heinous nature of the crimes) and rehabilitation potential (his potential unreformed release into society).

5. *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000), *review denied*, 54 M.J. 425 (2001). During his unsworn statement, the accused told the members that others received Article 15s and general discharges for the same misconduct and to permit his commander to administratively discharge him. The military judge provided a sentencing instruction seeking to clarify for the members the administrative discharge process and the irrelevance of using sentencing comparisons to adjudge an appropriate sentence. It was not error for the judge to give the instruction.

6. *United States v. Stargell*, 49 M.J. 92 (1998). Court found proper curative instruction by military judge in response to trial counsel argument that accused with nineteen and a half "will get an honorable retirement unless you give him a BCD." In response to defense objection, judge instructed members that their decision "is not a vote to retain or separate the member but whether or not to give the accused a punitive discharge as a form of punishment." The majority cited to common knowledge in the military that an accused at twenty years is eligible to retire, usually under honorable conditions, and if processed for administrative discharge following court-martial would be entitled to special consideration.

7. *United States v. Perry*, 48 M.J. 197 (1998). The court upheld the military judge's decision not to instruct the panel that the accused stood to be found liable for an $80,000 recoupment by the U.S. Naval Academy for educational costs. The defense requested an instruction at sentencing, based on evidence of the practice of recoupment of the cost of education when separated prior to completion of a five year commitment due to misconduct. The defense did not, however, offer any evidence of likelihood of such recoupment in this case.

8. *United States v. Simmons*, 48 M.J. 193 (1998). Absent direct evidence that the accused was "emotionally or physically abused during his childhood," there was no requirement for the military judge to give an instruction to the panel to consider such information. The court noted a dispute over whether the accused actually suffered such abuse. Therefore, the instruction required modification so the members *could*, not *must*, consider such evidence *if* they found the accused had in fact been abused.

9. *United States v. Hall*, 46 M.J. 145 (1997). Failure of defense to object at trial to military judge's instruction regarding collateral benefits constitutes waiver. Accused captain was dependent of Air Force retiree. At sentencing phase of her court-martial, panel asked effect of dismissal on her benefits as dependent. The judge answered that neither conviction nor sentence would have any effect on benefits she would receive as a dependent. No objection by the defense to this correct instruction by the MJ.

10. *United States v. Thompson*, 43 M.J. 703 (A.F. Ct. Crim. App. 1995). Accused introduced evidence of child's upcoming surgery, and offered medical testimony that accused should be present for surgery and a few weeks thereafter. In response to member question, the military judge informed panel that CA has discretion to defer confinement. No abuse of discretion or improper advice to panel on collateral matters where assisted panel in making informed decision.

11. *United States v. Burt*, 56 M.J. 261 (2002). Accused, at time of trial, was retirement eligible (i.e., 225 mos. of active service). The military judge asked the defense if they wanted an instruction, which covered the Service Secretary's authority to allow the accused to retire even if a punitive discharge was awarded. The defense objected to the instruction. The panel ultimately adjudged a BCD, which the CA approved. The CAAF rejected an IAC attack noting that the decision to object to the instruction was a reasoned tactical decision.

12. *United States v. Blough*, 57 M.J. 528 (A.F. Ct. Crim. App. 2002). Defense counsel requested a specific, detailed instruction that focused the panel on the appellant's age, performance report, lack of prior disciplinary actions, his character as reflected in several defense, the testimony of the defense witnesses, and the appellant's expressed desire to remain in the Air Force. The military judge denied the defense request and gave the panel general guidance on what they should consider on sentencing consistent with *United States v. Hopkins*, 55 M.J. 546 (A.F. Ct. Crim. App. 2001), *aff'd*, 56 M.J. 393 (2002). The military judge did NOT instruct the panel that a guilty plea (mixed plea case) was a matter in mitigation. A military judge is not required to detail each piece of evidence that may be considered by the panel in arriving at a sentencing. Rather, the judge need only give general guidelines to the members on the matters they should consider on sentencing (e.g., extenuation and mitigation such as good character, good service record, pretrial restraint, mental impairment, etc.). Also, absent plain error, failure to request an instruction or to object to an instruction as given waives any issue. The court noted that perhaps counsel had a valid tactical reason for not requesting the instruction. Finally, the court noted that even if there were error, any error was harmless.

13. *U.S. v Rasnick*, 58 M.J. 9 (2003). The military judge did not err in failing to give the "punitive discharge is an 'ineradicable' stigma" instruction despite a specific request by defense counsel when the instruction advised the members that a punitive discharge was severe punishment, that it would entail specific adverse consequences, and that it would affect appellant's future with regard to his legal rights, economic opportunities, and social acceptability. The instructions were sufficient to require the members to consider the enduring stigma of a punitive discharge." *See also United States v. Greszler*, 56 M.J. 745 (A.F. Ct. Crim. App. 2002) (observing that judge's decision to use other terms to describe a punitive discharge other than "ineradicable" not error; instruction must convey that a punitive discharge is severe punishment and other terminology may be used).

14. *United States v. Miller*, 58 M.J. 266 (2003). The military judge erred by failing to advise panel to consider appellant's pretrial confinement (three days) in arriving at an appropriate sentence. It is a mandatory instruction, therefore, waiver did not apply. The judge also failed to give a defense requested pretrial confinement sentence credit instruction. This failure was not error because

although the requested instruction was correct and not covered by the other instructions, it was not on so vital a point as to deprive the appellant of a defense or seriously impair its presentation.

G. Sentence Credit.

1. *United States v. Rock*, 52 M.J. 154 (1999). The CAAF held the military judge did not err in applying the sentence credit received by the accused for illegal pretrial punishment against the accused's adjudged sentence rather than the approved sentence (accused was awarded 240 days credit against his adjudged confinement as a result of pretrial conditions on his liberty not amounting to confinement; the military judge credited the 240 days against the accused's adjudged sentence not the approved sentence; the accused was sentenced to sixty-one months of confinement, thus the judge only gave the accused fifty-three months; the accused's pretrial agreement further reduced the sentence to thirty-six months, minus three days of actual pretrial confinement). The court distinguished between actual or constructive confinement credit and pretrial punishment credit. Actual confinement credit and constructive confinement credit are administrative credits that come off of the approved sentence. Pretrial punishment credit for something other than confinement (like restrictions on liberty that do not rise to the level of being tantamount to confinement) is generally judicial credit and thus comes off of the adjudged sentence. If the military judge determines that *Allen*, *Mason*, or *Suzuki* credit is warranted, that sentence credit will be tacked on to the sentence after the pretrial agreement is considered.

2. *United States v. Rosendahl*, 53 M.J. 344 (2000). The accused's original approved sentence included a BCD, four months confinement, and suspended forfeitures of $150 per month for four months and suspended reduction below the grade of E-4 for six months. On rehearing, he was sentenced to a BCD and reduction to the lowest enlisted grade. The convening authority approved this sentence, again suspending reduction below the grade of E-4 for six months. The accused argued he was entitled to credit (in the form of disapproval of his BCD) for the 120 days confinement he served as a result of his first sentence. The CAAF disagreed stating that reduction and punitive separations are qualitatively different from confinement and, therefore, credit for excess confinement has no "readily measurable equivalence" in terms of reductions and separations. NOTE: The CAAF declined to address whether a case involving lengthy confinement might warrant a different result. It also distinguished this situation from the "unrelated issue of a convening authority's clemency power to commute a BCD to a term of confinement."

3. *United States v. Smith*, 56 M.J. 290 (2002). No requirement that accused be given credit for lawful pretrial confinement when no confinement is adjudged.

4. *United States v. Chapa III*, 57 M.J. 140 (2002). Failure to raise RCM 305(k) credit waives the issue, absent plain error.

5. *United States v. King*, 58 M.J. 110 (2003). Failure to raise *Mason* credit (i.e., pretrial restriction tantamount to confinement) waives the issue, absent plain error.

6. *United States v. Coreteguera*, 56 M.J. 330 (2002). When placed into PTC, the appellant was forced to run to several windows yelling he "couldn't get it right," was made to sing the Air Force song or "song of choice," and was asked by a cadre member whether he wanted to pawn "this" jewelry while being shown a pair of shackles. The appellant was in pretrial confinement for, in part, pawning government computers. Additionally, appellant was made to perform duties similar to post-trial inmates BUT not with the inmates. The military judge denied the defense's motion for additional credit under Article 13. The judge found no intent to punish on the part of the cadre, the conditions of confinement were not unduly harsh or rigorous, and the actions of AF personnel were not excessively demeaning or of a punitive nature. The CAAF held that discomforting administrative measures and "de minimis" imposition on detainees, even if unreasonable, do not warrant credit under Article 13. As for the work, the court looked to the nature, duration, and purpose of the work to determine whether it was punitive in nature – it was not, therefore, no credit. The court noted that although the judge did not err in denying the credit, the court did not "condone" the actions of the AF personnel.

7. *United States v. Mosby*, 56 M.J. 309 (2002). Solitary confinement, in and of itself, does not equal an intent to punish warranting additional credit under Article 13, UCMJ.

8. *United States v. Bracey*, 56 M.J. 387 (2002). Appellant was not entitled to *Pierce* credit since the offenses in question resulted from separate and distinct incidents despite their occurrence close in time and involving the same officer (i.e., victim). The CAAF, in holding that the appellant was not entitled to *Pierce* credit stated: "Neither the Constitution nor the UCMJ precludes a person from being convicted for multiples offenses growing out of the same transaction, so long as the offenses are not multiplicious . . . . Likewise, although *Pierce* precludes double punishment for the same offense, it does not preclude multiple punishments for multiple offenses growing out of the same transaction when the offenses are not multiplicious."

9. *United States v. Spaustat*, 57 M.J. 256 (2002). Accused sentenced to reduction to the grade of E-1, ten months confinement, and a BCD. The accused's PTA had

a confinement limitation of eight months. At trial, the accused successfully brought an Article 13 motion for his treatment while in pretrial confinement and was awarded ninety-two days Article 13 credit (day-for-day) as well as 102 days *Allen* credit, all of which the judge applied against the lesser sentence provided for in the PTA. In announcing the sentence, the judge initially announced a sentence, after incorporating the Article 13 credit of 202 days and then announced another sentence of 212 days after he was advised by the TC that the Article 13 violations did not begin until after day ten of the accused's placement into pretrial confinement, thus reducing the Article 13 credit from 102 days to ninety-two days. Appellant argued that the judge, in increasing the sentence from 202 days to 212 days, unlawfully reconsidered the sentence. The CAAF held that the judge did not unlawfully reconsider the sentence. The sentence was always ten months. All that the judge did was correct his calculation of sentence credits and clarify his calculations. Further, the judge did not err in applying the sentence credit to the lesser sentence provided for in the PTA. Recognizing the confusion created by its *Rock* decision, the court established a bright line rule for use by all courts effective 30 August 2002:

> *[I]n order to avoid further confusion and to ensure meaningful relief in all future cases after the date of this decision, this Court will require the convening authority to direct application of all confinement credits for violations of Article 13 or RCM 305 and all Allen credit against the approved sentence, i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement, as further reduced by any clemency granted by the convening authority, unless the pretrial agreement provides otherwise.*

10. *United States v. Josey*, 58 M.J. 105 (2003). Service member spent thirty months and twenty-eight days in post-trial confinement before the findings in his case was partially set aside. On reassessment, the CA only approved forfeiture of $600 pay/month for four months and reduction from E-8 to E-6. Appellant argued he was entitled to sentence credit against both forfeitures and the reduction. The CAAF disagreed, finding that "reprimands, reductions in rank, and punitive separations are so qualitatively different from other punishment that conversion is not required as a matter of law." *See also United States v. Stirewalt*, 58 M.J. 552 (C.G. Ct. Crim. App. 2003); *United States v. Rosendahl*, 53 M.J. 344 (2000).

11. *United States v. Rendon*, 58 M.J. 221 (2003). RCM 305(k) credit for non-compliance with RCM 305(f), (h), (i), or (j) does NOT apply to restriction tantamount to confinement UNLESS restriction rises to the level of physical restraint depriving appellant of his or her freedom (i.e., equivalent of actual confinement) (abrogating *United States v. Gregory*, 21 M.J. 952 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition)).

12. *United States v. Oliver*, 56 M.J. 779 (A.F. Ct. Crim. App. 2002). A day of pretrial confinement warrants *Allen* credit unless that day is the day the accused is sentenced, then the day counts as post-trial confinement.

13. *United States v. Sherman*, 56 M.J. 900 (A.F. Ct. Crim. App. 2002). Time spent in civilian confinement for offenses forming the basis of a subsequent court-martial warrant confinement credit under *Allen*. *See also United States v. West*, 56 M.J. 626 (C.G. Ct. Crim. App. 2001).

14. *United States v. Inong*, 58 M.J. 460 (2003). "[F]ailure at trial to raise the issue of illegal pretrial punishment waives that issue for purposes of appellate review absent plain error," overruling *United States v. Huffman*, 40 M.J. 225 (C.M.A. 1994). Additionally, *United States v. Southwick*, 53 M.J. 412 (2000) and *United States v. Tanksley*, 54 M.J. 169 (2000) were overruled to the extent that they establish a "'tantamount to affirmative waiver rule' in the Article 13 arena."

15. *United States v. Regan*, 62 M.J. 299 (2006). After the third positive test, Regan's commander gave her the choice of voluntarily admitting herself for inpatient treatment or going into pretrial confinement. The military judge concluded that appellant was really given no choice at all and based on the "totality of the conditions imposed" and "the facts and circumstances" of the case, the time appellant was in the treatment facility (twenty-one days) amounted to restriction tantamount to confinement and determined that appellant was entitled to *Mason* credit. However, the military judge denied the defense motion for additional credit under R.C.M. 305(k) for failure to comply with the requirements of R.C.M. 305. Affirmed.

H. Deliberations and Voting. **RCM 1006**.

1. What May be Considered. **RCM 1006.**

a) Notes of the members.

b) Any exhibits.

c) Any written instructions.

(1) Instructions must have been given orally.

(2) Written copies, or any part thereof, may also be given to the members unless either party objects.

d) Pretrial agreement (PTA) terms.

(1) RCM 705(e). Except in a court-martial without an MJ, no member of a court-martial shall be informed of the existence of a PTA.

(2) *United States v. Schnitzer*, 41 M.J. 603 (Army Ct. Crim. App. 1994), *aff'd* 44 MJ 380 (1996). Mention of sentencing limitation in co-actor's PTA constituted unlawful command influence and plain error. Rehearing on sentencing required. *See United States v. Royster*, 9400201 (Army Ct. Crim. App. 15 June 1995) (unpub.), limiting *Schnitzer* to its facts.

2. Deliberations and Voting on Sentence. **UCMJ art. 52, RCM 1006.**

a) Number of votes required:

(1) Death – unanimous.

(2) Confinement for more than ten years – at least three-fourths of the members.

(3) All other sentences – at least two-thirds of the members.

b) *Garrett v. Lowe*, 39 M.J. 293 (C.M.A. 1994). Members must vote on sentences in their entirety. Accordingly, it was error for the court to instruct jurors that only two-thirds of the members were required to vote for sentence for felony murder, where that sentence must, by law, include confinement for life.

c) *United States v. Weatherspoon*, 44 M.J. 211 (1996). Court-martial panel asked if must impose confinement for life, or merely vote for life, in premeditated murder conviction. The military judge advised the members that sentence must include confinement for life, but then could, collectively or individually, recommend clemency. The judge made clear individual rights of members to recommend clemency.

d) *United States v. Thomas*, 46 M.J. 311 (1997). In capital sentencing procedures under RCM 1004(b)(7), the President extended to capital cases the right of having a vote on the least severe sentence first. At sentencing phase of accused's capital court-martial, the judge instructed the panel first to vote on a death sentence, and if not unanimous, then to consider a sentence of confinement for life and other types of punishments. The CAAF held RCM 1006(d)(3)(A) required voting on proposed sentences "*beginning with the least severe*." *See also United States v. Simoy*, 50 M.J. 1 (1998) (holding that the military judge committed plain error when he fails to advise a panel to vote on the sentences in order of least severe to most severe).

I. Announcement of sentence. **RCM 1007**.

1. Sentence worksheet is used to put the sentence in proper form (*See* Appendix 11, MCM, Forms of Sentences).

2. President or military judge makes announcement.

a) *United States v. Dodd*, 46 M.J. 864 (Army Ct. Crim. App. 1997). Announcement by court-martial president of sentence did not include bad conduct discharge, and court adjourned. When president notified the military judge of incorrect announcement within two minutes of adjournment, judge convened a proceeding in revision to include bad conduct discharge. The Army Court noted that proceeding in revision inappropriate where it increases severity of sentence, no matter how clear that announcement was erroneous. NOTE: Court commends to trial judges practice of enforcing requirement that president mark out all inapplicable language on findings and sentence worksheets, rather than pursuing own means to clarify intended sentence of court.

b) *United States v. Goddard*, 47 M.J. 581 (N-M. Ct. Crim. App. 1997). (Upon a rehearing the N-M CT Crim App set aside appellant's conviction for maltreatment because the evidence was legally and factually insufficient, but affirmed a conviction for the lesser-included offense of a simple disorder, the court then reassessed appellant's sentence. 54 M.J. 763 (N-M Ct. Crim. App. 2000). In case alleging maltreatment and fraternization, judge, in announcing finding of guilty, stated offense against one victim was "tantamount to rape." The court noted comments of judge were mere surplusage on findings, but raised concern that the judge may have based sentence on more serious crime of rape, than maltreatment alleged. The ordered a rehearing on sentence.

c) *United States v. Stewart*, 62 M.J. 291 (2006). Where a sentence to forfeiture of all pay and allowances is adjudged, such sentence shall run until such time as the servicemember is discharged or returns to a duty status, whichever comes first, unless the sentencing authority expressly provides for partial forfeitures post-confinement.

3. Polling prohibited (MRE 606; RCM 1007(c)).

J. Impeachment of Sentence. **RCM 1008**.

1. Policy: Strong policy against the impeachment of verdicts.

a) Promotes finality.

b) Encourages full and free deliberation.

2. General rule: Deliberative privilege – court deliberations are privileged (MRE 509). *United States v. Langer*, 41 M.J. 780 (A.F.C.C.A. 1995) (observing that post-trial questionnaire purportedly intended for feedback to counsel improperly invaded members' deliberative process).

3. Exceptions: Court members' testimony or affidavits cannot be used to impeach the verdict except in three limited situations. RCM 1008; MRE 606. *See United States v. Loving*, 41 M.J. 213 (C.M.A. 1994).

a) Outside influence (e.g. bribery, jury tampering).

b) Extraneous prejudicial information.

(1) *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983) (holding that it was improper for court member visit to crime scene).

(2) *United States v. Almeida*, 19 M.J. 874 (A.F.C.M.R. 1985) (finding no prejudice where court member talked to witness about Thai cooking during a recess in the trial).

(3) *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991) (holding that blood expert witness who had dinner with the members was not err because extensive *voir dire* established the lack of taint).

(4) *United States v. McNutt*, 62 M.J. 16 (2005). The military judge improperly considered the collateral administrative effect of the "good-time" policy in determining Appellant's sentence and this error prejudiced Appellant. "Courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration." *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1998). The general preference for prohibiting consideration of collateral consequences is applicable to the military judge's consideration of the Army "good-time" credits.[2]

c) Unlawful command influence.

(1) *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984) (holding that it was unlawful command control for president to order a re-vote after a finding of not guilty had been reached).

(2) *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985) (observing that president of court can express opinions in strong terms and call for a vote when discussion is complete or further debate is pointless; but improper for him to use superiority of rank to coerce a subordinate to vote in a particular manner).

(3) *United States v. Dugan*, 58 M.J. 253 (2003). Post-trial, member submitted RCM 1105/6 memorandum to defense counsel expressing several concerns, two of which raised potential UCI during the sentencing phase: that some members believed a punitive discharge was "a given" and that mention was made of a commanders call and that the commander (i.e., convening authority) would all review the sentence in the case and know what they decided to do. On receipt of the memorandum, the defense counsel sought a post-trial 39a session, which the military judge denied, citing the deliberative privilege, and finding no UCI. The lower court affirmed. The CAAF directed a *DuBay* hearing to

[2] *See United States v. Howell*, 16 M.J. 1003 (A.C.M.R. 1983) (Naughton, J. concurring) (finding it improper for the trial counsel to argue that the appellant would not serve the full confinement time adjudged by the members because "good-time" credit).

examine the allegation of UCI in the sentencing phase with the following limitations: questions regarding the objective manifestation of the members during deliberations was permitted whereas questions surrounding the subjective manifestations were not.

4. Threshold relatively high. *See United States v. Brooks*, 41 M.J. 792 (Army Ct. Crim. App. 1995) (observing that there must be colorable allegations to justify judicial inquiry, and even then the judge must be very cautious about inquiring into voting procedures).

5. *United States v. McConnell*, 46 M.J. 501 (A.F. Ct. Crim. App. 1997). To impeach a sentence that is facially proper, the claimant must show that extraneous prejudicial information, outside influence, or command influence had an impact on the deliberations. Accused asserted in post-trial submissions that the panel was confused over how the period of confinement and BCD would affect his retirement. The court noted unique personal knowledge of a court member might constitute extraneous prejudicial information, but "general and common knowledge that a court member brings to deliberations is an intrinsic part of the deliberative process."

6. *United States v. Combs*, 41 M.J. 400 (C.M.A. 1994). Court member's statement that accused would have received a lighter sentence if there had been evidence of cooperation did not reflect consideration of extraneous prejudicial information which could be subject of inquiry into validity of sentence.

K. Reconsideration of Sentence. **RCM 1009**.

1. Time of reconsideration.

a) May be reconsidered any time before the sentence is announced.

b) After announcement, sentence may not be increased upon reconsideration <u>unless</u> sentence was less than mandatory minimum.

c) *United States v. Jennings*, 44 M.J. 658 (C.G. Ct. Crim. App. 1996). Error in sentence may be corrected if announced sentence not one actually determined by court-martial. But confusion of military judge's intended sentence and application of *Allen* credit arose from comments by judge

after court closed. If ambiguity exists on record as to sentence, must be resolved in favor of accused.

2. Procedure for reconsideration.

a) Any member may propose reconsideration.

b) Proposal to reconsider is voted on in closed session by secret written ballot.

3. Number of votes required.

a) With a view to increasing sentence – may reconsider only if at least a majority votes for reconsideration.

b) With a view to decreasing sentence – may reconsider if the following vote:

(1) For death sentence, only one vote to reconsider required.

(2) For sentence of life or more than tem years, more than one-fourth vote for reconsideration.

(3) For all other sentences, more than one-third vote for reconsideration.

4. Objections Required. *United States v. Moreno*, 41 M.J. 537 (N-M. Ct. Crim. App. 1994). Rule for Courts-Martial 1109 does not permit members to consider increasing a sentence when a request for reconsideration has been made with a view to decreasing the sentence and accepted by the affirmative vote of less than a majority of the members. The judge erred when he indicated that the members could "start all over again" and consider the full spectrum of authorized punishments once any request for reconsideration had been accepted, without regard to whether it was with a view to increasing or decreasing the sentence.

L. Appellate Review. Under Article 59(a) UCMJ an error of law regarding the sentence does not provide a basis for relief unless the error materially prejudiced the substantial rights of the accused. *United States v. Bridges*, 66 M.J. 246 (C.A.A.F. 2008).

III. CONCLUSION.