A VERDICT WORTHY OF CONFIDENCE?[1] PETITIONING FOR A NEW TRIAL BEFORE AUTHENTICATION BASED ON NEW EVIDENCE

MAJOR MICHAEL R. STAHLMAN[2]

Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.

—Judge Learned Hand[3]

Captain (CPT) Wood broke out in a cold sweat as he listened to the unfamiliar voice on the other end of the phone. He was overjoyed but

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1. Kyles v. Whitley, 514 U.S. 419, 434 (1995). Although *Kyles* involved the failure of the prosecution to reveal favorable evidence to the defense, a key aspect of the Court's analysis was the effect the absence of the favorable evidence had on the trial. This article will not look at the prosecution's duty regarding *disclosure* of favorable evidence. However, this article will address whether evidence discovered after trial would produce a more favorable result for the accused, like in *Kyles*. A major focus in cases involving new evidence is whether the accused received a fair trial (absent the favorable evidence). *See* United States v. Singleton, 41 M.J. 200, 207 (C.M.A. 1994) (concluding that the appellant did not enjoy a full and complete trial based on the trial judge's denial of his petition for a new trial).

2. Judge Advocate, United States Marine Corps. Presently assigned to The Judge Advocate General's School, United States Army, Charlottesville, Virginia. B.S., *with distinction*, 1985, United States Naval Academy, Annapolis, Maryland; J.D., 1993, California Western School of Law, San Diego, California; LL.M., 2000, Judge Advocate Officer Graduate Course, The Judge Advocate General's School, Charlottesville, Virginia. Formerly assigned as Senior Defense Counsel, 1997-99, and Chief Review Officer, 1996-97, Legal Services Support Section, Second Force Service Support Group, Camp Lejeune, North Carolina; Deputy Staff Judge Advocate, 1996, Third Force Service Support Group, Okinawa, Japan; Chief Trial Counsel, 1994-96, and Officer-in-Charge, Legal Assistance, 1993-94, Legal Services Support Section, Third Force Service Support Group, Okinawa, Japan; RF-4B Reconnaissance System Operator and Aviation Maintenance Officer, 1988-90, VMFP-3, Marine Aircraft Group 11, Third Marine Aircraft Wing, El Toro, California; RF-4C Weapon Systems Operator, 1987-88, 45th Tactical Reconnaissance Training Squadron, Bergstrom Air Force Base, Austin, Texas. This article was submitted in partial completion of the Master of Laws degree requirements of the 48th Judge Advocate Officer Graduate Course.

3. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

unsure what to do so he just took notes as he listened. He was speaking with the only eyewitness in a case CPT Wood thought was over more than a month ago. The eyewitness had not testified at trial and no one knew he even existed, until now.

Captain Wood defended the accused at trial. The victim was stabbed numerous times with a knife in a parking lot near a popular bar. The victim's identification of the accused at trial was the only evidence connecting the accused to the crime. From the day he was arrested and interrogated, the accused denied any involvement but acknowledged he was in the area of the assault at about the same time. The trial ended in a finding of guilty and a hefty sentence.

The eyewitness called because he saw an article in the local newspaper describing the facts of the trial and the result. He never came forward because he did not want to get involved. After several sleepless nights, he decided to call. What the eyewitness saw that night was exactly what the accused told CPT Wood. He did not know the accused, but he knew the real assailant very well and clearly saw him stab the victim multiple times. He remembered that night clearly. Stunned, CPT Wood hung up the phone. It seemed like an unreal dream . . . .

Captain Wood quickly regained his senses and cracked open his dog-eared *Manual for Courts-Martial* (*MCM*). In seconds he found Rule for Courts-Martial (RCM) 1210 in the index under "new trial" but saw that it did not apply until after the convening authority took action. After looking at case law, he became even more confused. Dismayed, CPT Wood asked himself, "Where do I go now?"[4]

I. Introduction

As a whole, the military justice system is fair and effective.[5] Although some commentators have expressed concern about certain aspects of the system, most believe it works.[6] However, there will always be room for improvement.[7] The fictional fact-pattern above depicts one such area. CPT Wood will soon discover he can submit a petition for a new

4. Captain Wood has several other options. Depending on the credibility of the eyewitness and other corroborating evidence, the convening authority could disapprove findings or provide other relief. Captain Wood could also request to reopen the case or ask for a rehearing. However, the focus of this article is the "new trial" route; other options will not be discussed in detail.

trial to the military judge. However, he will also discover there is little case law to assist him on his "new trial" journey. Even worse, the case law that does exist lacks any meaningful guidance to practitioners in the field.[8]

Applying RCM 1210(f) to new evidence discovered during this period—after trial and before authentication of the record of trial—is not the solution.[9] It would be contrary to both the intent of the drafters of the UCMJ and the text of the current rule, and it has led to error in a large number of cases. In short, RCM 1210(f) should not be applied during this period because it will negatively impact upon the fairness of the military justice system.

The accused carries a heavy burden when petitioning for a new trial based on newly discovered evidence.[10] This is true even when the petition is filed before the convening authority takes action under RCM 1107.[11]

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5. *See* United States v. Weiss, 510 U.S. 163, 194 (1994) (Ginsberg, J., concurring) (commenting on the current military justice system that is more sensitive to due process concerns); Professor David A. Schlueter, *Military Justice in the 1990's: A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 6 (1991) (stating that the military justice system is fair and just).

6. *See* Brigadier General (Retired) John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., Mar. 2000, at 4 (commenting on military justice challenges for the Judge Advocate General's Corps in the new century but noting that the system overall "is working reasonably well"); Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 107 (1998) (criticizing the military for stubbornly clinging to selection of members by the sovereign but acknowledging that military justice "exceeds the expectations of traditional civilian justice" and it "provides greater due process than many civilian jurisdictions").

7. One prominent commentator believes the military justice system as a whole is effective but it "is not perfect, [and] there is room for change—for improvement." Schlueter, *supra* note 5, at 9.

8. See *infra* Part IV.A for discussion of the result. In short, error has been committed in a significant number of cases involving application of RCM 1210(f) to new evidence discovered after trial.

9. Although this article focuses on the period ending with authentication, the period from authentication to action by the convening authority could be included. The only practical difference between the two periods relates to who has the power or authority to act on a request for relief based on the discovery of new evidence.

10. United States v. Niles, 45 M.J. 455, 456 (1996). *See* United States v. Bacon, 12 M.J. 489, 491 (C.M.A. 1982) (stating that "the burden is heavier than that borne by an appellant during the normal course of appellate review").

11. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000) [hereinafter MCM].

Although the *MCM* does not address petitions filed before action is taken, military courts have looked to RCM 1210 for the standard to apply.[12]

When a petition is submitted before authentication of the record of trial, the military judge has the authority to conduct a post-trial hearing.[13] After authentication of the record of trial, the convening authority has "[t]he power to order a rehearing, or to take other corrective action."[14] Regardless of when or to whom the petition is made, military appellate courts have consistently expressed the opinion that "requests for a new trial . . . are generally disfavored."[15] This is for good reason. The cost, time, and effort associated with trying a case again can be enormous. However, these concerns must be balanced against the interests in guaranteeing an accused a fair trial.

The current evidentiary standard for the decision to grant (or deny) a new trial can be difficult to apply since there has been little direction from military appellate courts. This has led to a wide variety of results. Despite the apparent confusion with application of the rule, military appellate courts have been reluctant to give clear guidance.[16]

This article first examines the history of the new trial standard under Article 73 and RCM 1210(f). It then discusses the method by which the new trial standard is currently applied and the problems associated with its application. Next, the article shows that the drafters of the UCMJ did not intend the standard to apply before the convening authority's action, that courts in a significant number of cases have misapplied the standard, and that specific reasons have caused courts to misapply the standard. Finally, this article proposes a solution. It articulates why the proposed solution is

12. *See, e.g.*, United States v. Scaff, 29 M.J. 60, 64-65 (C.M.A. 1989).

13. *Id.*; MCM, *supra* note 11, R.C.M. 1102(a) and (b)(2).

14. MCM, *supra* note 11, R.C.M. 1107(c)(2) discussion.

15. United States v. Williams, 37 M.J. 352, 356 (C.M.A. 1993).

16. *See, e.g.*, United States v. Fisiorek, 43 M.J. 244, 248 (1995) (stating that "[w]e decline the opportunity, however, to fashion a particular rule to guide military judges in exercising discretion on whether to permit a party to reopen his or her case [to consider newly discovered evidence]"). This case is a good example of why there is confusion in applying RCM 1210(f) to newly discovered evidence. *See* discussion *infra* Part IV.A.

better than the current standard, explains what military judges think of the solution, and explores potential problems with the change.[17]

II. Petition for a New Trial Standard: An Overview

A. Origins of RCM 1210 and Legislative History

The military justice system is unique.[18] Its roots pre-date the Constitution by more than several centuries. However, only in the last half-century has it become more aligned with civilian criminal courts. Although there are critics on each side of the debate over the "civilianization" of the military justice system, all would agree that there has been a dramatic change in the system over the last fifty years.[19] In a "due process" sense, this change has greatly improved the rights of an accused. The petition for new trial based on newly discovered evidence is just one of the many new rights codified following the end of the last World War.

The end of World War II and the return of many who served in the armed forces during the war began a new period of reform in the military justice system. Many war veterans, disgruntled by their experience with the system, brought their concerns before Congress.[20] The result was a code of military justice for all services and a manual for practitioners. Specifically, the new uniform code included Article 73, dealing with newly discovered evidence, which was applied through rules found in a manual

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17. The proposed solution is to not apply RCM 1210(f) to new evidence discovered after trial and before authentication of the record or before action is taken by the convening authority on the sentence. The proposed solution, however, would apply the guidance from the CAAF in *Fisiorek*, 43 M.J. at 248.

18. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURES 2-5 (5th ed. 1999) (providing a concise discussion of why the military justice system is unique).

19. *See generally* Cooke, *supra* note 6, at 2-4 (providing a concise history of the UCMJ over the last half century which has been marked by "balancing the role of the commander with an increasingly independent and sophisticated judicial system"); Schlueter, *supra* note 5, at 6-11 (discussing problem areas that need greater scrutiny but acknowledging that there have been significant improvements in the military system since the unification of military justice); Glazier, *supra* note 6, at 107-08 n.433 (discussing the civilianization of military law with examples of changes in the military system from 1806 to the present).

20. *See* JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950, 127-49 (1992) (discussing the groundswell of support to change the military justice system following World War II, particularly in the Navy).

for courts-martial. The rules eventually led to RCM 1210, the current provision for new trial petitions.

Rule for Courts-Martial 1210 is based on paragraphs 109 and 110 of the 1969 *Manual for Courts-Martial*[21] and Article 73 of the Uniform Code of Military Justice (UCMJ).[22] The concept of a "new trial" based on newly discovered evidence first appeared in the Articles of War in 1949.[23] That same year, the House Committee on Armed Services was holding hearings on the UCMJ. The major focus of the hearings was to produce a code that would apply to all the services.[24]

The hearings show that Congress intended that the provisions of the code mirror practice in federal civilian courts.[25] This included Article 73. One of the drafters of the code, Mr. Larkin, commented as follows:

> I think the newly discovered evidence will be surrounded by the practices and procedures in the Federal court that govern that motion [sic] such as—oh, that the newly discovered evidence is not cumulative; that if it had been presented to the jury it at least would have changed its mind; and various other rules that circumscribe the use of that type of motion.[26]

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21. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶¶ 109, 110 (1969) [hereinafter 1969 MANUAL].

22. MCM, *supra* note 11, R.C.M. 1210 analysis, app. 21, at A21-89. Uniform Code of Military Justice Article 73 was first codified in 1950 and read:

> At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more, the accused may petition The Judge Advocate General for a new trial on grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before the board of review or before the Court of Military Appeals, The Judge Advocate General shall refer the petition to the board or court, respectively, for action. Otherwise The Judge Advocate General shall act upon the petition.

UCMJ art. 73 (1950).

23. LEE S. TILLOTSON, THE ARTICLES OF WAR, ANNOTATED 177 (5th ed. 1949). In a note following the full text of Article 53 of the Articles of War, there is a comment that "[t]he former code contained no provision for a Petition for New Trial." *Id.*

24. S. REP. NO. 81-486, at 1-2 (1949), *reprinted in* 1950 U.S. Code Cong. Serv. 2222-23.

A good example of this intent to mirror federal practice was the removal of the "good cause" requirement under Article 53 of the Articles of War. The purpose was two-fold. First, "good cause" had no counterpart in the civilian criminal system. Second, the drafters wanted an appellate system that was "tight, comprehensive and efficient."[27] The "good cause" showing was too broad for the drafters. They wanted to limit the grounds for granting a new trial to cases involving fraud on the court or for newly discovered evidence. Otherwise, a petition could be filed for any purpose as long as there was a showing of good cause. This focus on fraud and newly discovered evidence as grounds for a new trial was consistent with civilian practice at the time.[28]

The drafters were very concerned about the finality of courts-martial. They adopted the one-year requirement for submission of a new trial petition from Article 53, Articles of War (as amended in 1948). The concern was that, without an appropriate time limit, evidence and witnesses would be hard to obtain.[29] This could be an unnecessary windfall for the petitioner and would not serve any valid purpose. In addition, the new one-year limit ran from the date of approval of the sentence by the convening authority. Under the Articles of War, the limit was for one year from final

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25. United States v. Williams, 37 M.J. 352, 356 (C.M.A. 1993). *See* UCMJ art. 36 (2000) (stating that the President may prescribe rules "which shall . . . apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts"). An extensive analysis of the federal criminal justice system is beyond the scope of this article. At some points in the article, current federal law regarding new trials will be discussed, briefly. Generally, RCM 1210(f) is consistent with its federal counterpart, FED. R. CRIM. PROC. 33. Each rule provides a mechanism to petition for a new trial based on newly discovered evidence discovered after trial. They both require the defense to raise the issue and to carry the burden of proof. Each requires the defense to show the evidence was discovered after trial, and that the evidence would not have otherwise been discovered before the end of trial by the exercise of due diligence. Finally, both rules impose a very high burden to show that the newly discovered evidence would have produced a substantially more favorable result for the accused had the evidence been presented at trial. The major differences between the rules concern their application rather than substantive law.

26. *Hearings on H.R. 2498 Before the Subcomm. of the House Armed Services Comm. on the Uniform Code of Military Justice*, 81st Cong., 1st Sess. 1201, 1212 (1949) [hereinafter *Hearings on H.R. 2498*].

27. *Id.* at 1210 (comment by Mr. Larkin).

28. *Id.* at 1211 (comments by Mr. de Graffenried and Mr. Larkin).

29. *Id.* at 1215 (comment by Mr. Smart).

disposition of the case after initial appellate review. The drafters did not discuss the reasons for this change.

One significant problem with Article 73 remains today. Neither Article 73 nor RCM 1210 address whether a new trial petition can be filed before the convening authority's action. The legislative history is also silent. The closest the drafters came to talking about the period from the end of trial to the convening authority's action was in their discussion of collateral attacks on a conviction.[30] A related problem is the continuing use of the last sentence of the original Article 73. In short, the last sentence implies that a petition can only be made to the Judge Advocate General when the case is not pending before an appellate court.[31] This adds to the confusion regarding when and to whom a petition may be made.

B. The Current Rule

Except for minor changes to the rule, grounds for a new trial based on newly discovered evidence have remained the same since the 1968 Military Justice Act.[32] There were two major changes to Article 73. The one-year limit on filing a petition was changed to two years and the right to file a petition was extended to all cases.[33] Although the legislative history does not specifically address the reasons for these changes to Article 73, the

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30. *See id*. at 1211. The drafters were concerned with allowing post-trial attacks only in cases of fraud and newly discovered evidence. They apparently wanted a mechanism to raise these issues outside of the normal appellate review process. Mr. Larkin commented that Article 73 was meant to combine the old English writ of *coram nobis* with the *motion* for a new trial on newly discovered evidence. *Id*. (emphasis added). Assuming that he meant a "motion" in the sense of normal trial court practice, it seems that the drafters may have intended to allow such a motion to be made to the trial court (instead of just to the Judge Advocate General after the convening authority's action). Regardless, the silence of the drafters raises a question as to their intent on application of Article 73 before the convening authority's action. This issue will be addressed further in Part IV.B.1, *infra*.

31. The last sentence of UCMJ Article 73 (1950) states that "[o]therwise, the Judge Advocate General shall act upon the petition." However, the analysis section of RCM 1210 states that "[f]orwarding a new trial to the Judge Advocate General is not required just because the case was a new trial." MCM, *supra* note 11, R.C.M. 1210 analysis, app. 21, at A21-89.

32. Military Justice Act of 1968, Pub. L. No. 90-632, 1968 U.S.C.C.A.N. (82 Stat.) 1335.

33. Before the 1968 Military Justice Act, Article 73 limited petitions to cases involving sentences to death, dismissal, a punitive discharge, or a year or more confinement. UCMJ art. 73 (1950).

House floor debate included general comments on the need to reform the military system to be more in line with the federal system.[34]

The most recent amendment to the rule came in 1998 to "clarify its application consistent with interpretations of [Federal Rule of Criminal Procedure] 33 that newly discovered evidence is never a basis for a new trial of the facts when the accused has pled guilty."[35] The federal rules were changed, primarily, because it was recognized that a case involving a guilty plea was not the equivalent of a trial.[36]

III. Application of RCM 1210

A. New Trial Roadmap

Whether a petition for a new trial can be made before authentication of the record of trial (or action by the convening authority) is unclear from the language of the rule. It is clear in Article 73 and RCM 1210(a) that a petition can be filed up to two years from the date of the convening authority's action. However, the Court of Appeals for the Armed Forces (CAAF) expanded the period when it stated, "until the military judge authenticates the record of trial, he may conduct a post-trial session [under Article 39(a)] to consider newly discovered evidence."[37] Further, RCM 1102(b)(2) empowers the military judge to order a post-trial session "for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or sentence."[38] The CAAF held that the above provisions

34. 114 CONG. REC. 30,564 (1968). Mr. Philbin commented that "[t]he enactment of this legislation will permit the procedure for trials . . . to conform more closely with the procedure used in the trial of criminal cases in the U.S. district courts and will enhance the prestige and effectiveness of the [military judge]." *Id.*

35. MCM, *supra* note 11, R.C.M. 1210 analysis, app. 21, at A21-89. *See* United States v. Difusco, No. 96-01550, 1999 CCA LEXIS 37, at *6 (N-M. Ct. Crim. App. Feb. 26, 1999) (unpublished op.) (finding waiver of the right to petition for a new trial when unconditional pleas of guilty are entered).

36. MCM, *supra* note 11, R.C.M. 1210 analysis, app. 21, at A21-89. The analysis goes on to state that "it is difficult, if not impossible, to determine whether newly discovered evidence would have an impact on the trier of fact when there has been no trier of fact and no previous trial of the facts at which other pertinent evidence has been adduced." *Id*. *See* United States v. Lambert, 603 F.2d 808, 809 (10th Cir. 1979) (stating that there was no trial because the defendant plead guilty).

37. United States v. Scaff, 29 M.J. 60, 65 (C.M.A. 1989).

38. MCM, *supra* note 11, R.C.M. 1102(b)(2).

allow application of RCM 1210(f) in post-trial sessions involving newly discovered evidence.[39]

In short, the military judge has broad discretion to consider matters that arise after completion of a trial and before authentication.[40] Returning to the hypothetical stabbing case, the military judge would have the authority to hold a post-trial hearing or to deny the petition without a hearing.[41] If the judge ordered a hearing, the burden would be on the defense. The defense would have to show that the eyewitness was discovered after trial, that he would not have been discovered at the time of trial in the exercise of due diligence, and that his testimony would probably produce a substantially more favorable result for the accused.[42] If the military judge finds that CPT Wood met this burden, the judge would have authority to set aside the findings of guilty.[43]

B. Confusion in Terms: New Trial, Rehearing, or Reopen?

Military appellate courts have been consistent in holding that a military judge has the power to hold a post-trial session to consider new evidence.[44] However, courts have been inconsistent in their terminology for the post-trial proceeding. Regardless of the type or quality of the new evidence, the terms "new trial," "reopen," and "rehearing" have all been used to describe post-trial proceedings.[45] Using these terms interchangeably

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39. *See Scaff*, 29 M.J. at 65-66 (stating that a trial court would be empowered to hold a post-trial session to consider evidence discovered after trial which might be grounds for a new trial under RCM 1210(f)). *See also* United States v. Williams, 37 M.J. 352, 356 (C.M.A. 1993) (stating that "[a]pplication of this three-prong test to post-trial motions for a rehearing or reopening of the trial . . . is not inappropriate").

40. *See* Major Randy L. Woolf, *The Post-Trial Authority of the Military Judge*, ARMY LAW., Jan. 1991, at 27-28 (discussing the expansive powers of the military judge following the decision in *Scaff*). This is consistent with practice in federal courts. *See, e.g.*, United States v. Yoakam, 168 F.R.D. 41, 44 (D. Kan. 1996) (stating that when "considering a motion for new trial, the court has broad discretion that will not be disturbed on appeal absent plain abuse of that discretion").

41. MCM, *supra* note 11, R.C.M. 1210(c) (providing requirements for the form of the petition).

42. *Id.* R.C.M. 1210(f)(2).

43. *Scaff*, 29 M.J. at 66.

44. *See id.* at 65 (interpreting Article 39(a) "to authorize the military judge to take such action after trial and before authenticating the record as may be required in the interest of justice"). *See also* United States v. Brickey, 16 M.J. 258, 263-64 (C.M.A. 1983) (discussing the greater post-trial powers of the military judge since enactment of the Military Justice Act of 1968).

creates confusion, because each term has a unique meaning. Each post-trial proceeding also has different procedures. Further, if the new evidence warrants some form of post-trial remedy, the scope and potential outcomes for each proceeding vary greatly.[46]

Because the CAAF and the service courts have not attached any significance to the terms they use,[47] military judges are left scratching their heads when trying to figure out what post-trial procedure is appropriate. Although most trial practitioners and judges should be able to sort through this confusing terminology, they should not have to do so.

IV. The Problem: A Verdict Worthy of Confidence?

Fairness to the accused and the integrity of the military justice system warrant a standard that measures "new" evidence appropriately. Otherwise, public confidence and trust in the military's system of justice will be lost. Even worse, without an appropriate standard the accused's right to due process will be denied and, potentially, innocent men and women may be convicted. Absent this standard, the result will be the same as in *United States v. Singleton*, where the Court of Military Appeals stated:

> On this record, despite the best of intentions and efforts of the military judge, we cannot conclude, in a due process sense, that appellant has yet enjoyed a full and complete trial. Far too much

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45. *See, e.g.*, United States v. Singleton, 41 M.J. 200, 204 (C.M.A. 1994) (finding that new evidence warranted a new trial); United States v. Van Tassel, 38 M.J. 91 (C.M.A. 1993) (holding that a new trial was warranted but ordering a rehearing); United States v. Williams, 37 M.J. 352, 356 (C.M.A. 1993) (stating that it is not inappropriate to apply the new evidence rule to order a rehearing or to reopen a trial); *Scaff*, 29 M.J. at 66 (ordering a rehearing); United States v. Dixon, No. 96-00466, 1997 CCA LEXIS 395, at *8 (N-M. Ct. Crim. App. July 21, 1997) (unpublished op.) (discussing error in denying defense motion to reopen but setting aside findings and sentence on other grounds).

46. *See, e.g.*, United States v. Parker, 36 M.J. 269 (C.M.A. 1993) (discussing the distinction between a rehearing and a new trial). The court stated that "[t]he two proceedings may be indistinguishable once you get there, but it's how you get there that matters" and "[t]he key element is the conclusion of error in the proceedings." *Id*. at 271.

47. A discussion of the different types of post-trial sessions is beyond the scope of this article. The point made here is that there is considerable confusion in just deciding what to call a post-trial session. This confusion is part of the bigger problem of improper application of RCM 1210(f) to new evidence which is addressed *infra.* For an excellent discussion of the problem with labeling post-trial sessions, see Woolf, *supra* note 40, at 27, and Major Jerry W. Peace, *Post-Trial Proceedings*, ARMY LAW., Oct. 1985, at 20.

> of the information that needed to be evaluated by a factfinder, in order to assess appellant's culpability, was not.[48]

A. Falling Short of Its Intended Mark: Improper Application of the Standard

Aside from trial and appellate courts attaching different labels to post-trial proceedings, the real problem is applying the wrong standard or the right standard improperly.[49] Article 73 and RCM 1210 were designed for the rare and unique problem of newly discovered evidence. The drafters of Article 73 were concerned that the military justice system needed a mechanism to handle newly discovered evidence.[50] They believed that the military appellate process did not provide for review of such evidence since it would be outside the record of trial.[51] Despite their good intentions, application of the new trial standard has fallen short of its intended mark. This has occurred at both the trial and appellate court levels. This reoccurring problem indicates that a new standard is required. At the very least, practitioners need clearer guidance on applying the rule.

1. Improper Standard Applied by the Trial Court

In *United States v. Fisiorek*,[52] the accused was found guilty of using cocaine.[53] After findings were announced, the trial court recessed. During the recess, a witness approached the defense and claimed he was responsible for blowing cocaine on cookies that the accused later ate, leading to the accused testing positive in a subsequent urinalysis. The defense moved for a mistrial, offering an affidavit from the witness. The military judge denied the motion and a subsequent defense request to reopen the case.

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48. *Singleton*, 41 M.J. at 207. *Singleton* is discussed further in Part IV.A.2, *infra*.

49. Attaching the wrong label does not mean that the court applied the wrong standard. The best example is *Scaff*, 29 M.J. at 66. The court stated that the trial judge could have set aside the findings "so that a *rehearing* could take place." *Id.* (emphasis added). What the court should have said is "so that a *new trial* could take place." The court's analysis and ultimate holding suggest that this is what they meant.

50. *Hearings on H.R. 2498*, *supra* note 26, at 1211 (Mr. Larkin's comments).

51. *Id.*

52. 43 M.J. 244 (1995).

53. *Id.* at 245.

The military judge applied the new trial rule under RCM 1210(f)(2) to both the motion to dismiss and the request to reopen.[54]

Holding that the military judge abused his discretion by denying the request to reopen, the CAAF stated that "the literal and strict application of the newly-discovered-evidence rule, which implements the statutory rule found in Article 73, UCMJ, 10 USC § 873, during trial, is inappropriately severe."[55] In other words, the military judge applied the wrong legal standard.[56]

The CAAF also indirectly acknowledged that the military judge probably applied the wrong standard based on dicta from one of their own cases.[57] In his concurring opinion in *United States v. Eshalomi*,[58] Judge Cox stated:

> If the discovery [of new evidence] occurs prior to announcement of the sentence and if the accused so moves, the military judge has the option of reopening the trial for the purpose of presenting the evidence to the court-martial. In considering the motion, I would adopt the same test that is used to determine if a new trial would be warranted by the discovery of new evidence [that it would probably produce a substantially more favorable result for the accused].[59]

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54. *Id.* at 246.

55. *Id.* at 247. The court also stated that the motion for mistrial is a drastic remedy that should only be applied after other lesser remedies are considered such as allowing a party to reopen its case. *Id*.

56. However, the court declined to establish a rule for military judges to follow as to the proper legal standard that should apply when new evidence is discovered during trial. Instead, the court provided the following general guidance:

> Suffice it to say, normal rules of relevance, cumulativeness, adequacy of substitutes in the record, completeness of the record, the interests of justice, the elimination of post-trial attacks on the verdict as well as mitigation of ineffective-assistance-of-counsel claims are all considerations. But the primary consideration should be whether discovery of the new evidence is *bona fide* and whether the new evidence, if true, casts substantial doubt upon the accuracy of the proceedings; that is, a rule which is not only fair to the defendant, but fair to the prosecution as well.

Id. at 248.

57. *Id.* at 246.

58. 23 M.J. 12 (C.M.A. 1986).

59. *Id.* at 28.

In *Fisiorek*, however, the CAAF never directly stated that this guidance from *Eshalomi* was wrong.

United States v. Scaff[60] also exemplifies the confusion at the trial court level. After the accused was found guilty of using cocaine, the defense learned of a witness who claimed that someone had placed cocaine in the accused's drink without his knowledge. The defense counsel promptly notified the military judge who scheduled a post-trial Article 39(a) session. However, upon advice of his staff judge advocate, the convening authority denied the defense request to pay the witness to attend the post-trial session. Despite believing this denial was incorrect, the military judge concluded that he did not have the authority to conduct a post-trial session to consider the newly discovered evidence.[61]

The Court of Military Appeals found that the military judge did have the authority under RCM 1102(b)(2) and UCMJ Article 39(a) to "conduct a post-trial session to consider newly discovered evidence."[62] The court also recognized that Article 73 did not apply until after the convening authority took action.[63] However, the court stated that this did not limit a military judge's authority under Article 39(a) to conduct a post-trial session to consider newly discovered evidence. Although the court cleared up the question as to whether RCM 1210(f) could apply before the convening authority's action, *Scaff* is a good example of how the language is misleading in both the rule and Article 73.[64]

2. Proper Standard Misapplied by the Trial Court

In *United States v. Williams*,[65] the Court of Military Appeals found that the military judge abused his discretion in denying a defense motion for a rehearing based on new evidence discovered after trial.[66] The accused was found guilty of rape and false swearing. After trial, the

60. 29 M.J. 60 (C.M.A. 1989).

61. *Id.* at 63-64.

62. *Id.* at 65. The case was returned for a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). *Id.*

63. *Id.* at 66.

64. Misleading in the sense that the wording of each does not give authority for the military judge (or anyone) to conduct a post-trial session before the convening authority takes action.

65. 37 M.J. 352 (C.M.A. 1993).

66. *Id.*

defense discovered that the victim was having an extramarital affair with another soldier and attempted to commit suicide when the affair ended. At a post-trial Article 39(a) session, the military judge denied the defense request for a rehearing or to reopen its case on findings.[67] However, the convening authority ordered a rehearing on sentencing based on the military judge's finding that this "new evidence would affect the sentence portion of the trial."[68] At the post-trial session, the military judge applied RCM 1210(f). The Court of Military Appeals held that the military judge abused his discretion when he found that this new evidence probably would not produce a substantially more favorable result for the accused.[69]

The court also concluded the Army Court of Military Review erred when it found that the military judge "did not consider whether the evidence was discoverable prior to trial by the exercise of due diligence."[70] The Court of Military Appeals found that the record clearly established the defense's diligent attempts to ferret out this evidence; therefore, the lower court's ruling was based on "an obvious misreading of the record of trial."[71] In *Williams*, the three levels of courts looking at the same evidence reached three completely different conclusions. Regardless of which court was correct, this demonstrates the problems with the new trial standard. It is too confusing and easily misapplied.

The Court of Military Appeals arrived at a similar result in *United States v. Singleton*.[72] The accused was found guilty of rape, communicating a threat, adultery and unauthorized absence. The defense made a pretrial motion alleging command influence. The military judge granted the relief requested by the defense relating to the presence and testimony of members within the chain of command. However, after trial and before authentication of the record, a post-trial Article 39(a) session was held at the defense's request to consider new evidence of command influence. Finding command influence but no prejudice to the accused, the military judge denied the defense's motion to dismiss and a request for

67. *Id.* at 355.

68. *Id.* at 354.

69. *Id.* at 356. In other words, the military judge misapplied the third prong under the rule. The military judge also found that the first two prongs were met by the defense. The Court of Military Appeals stated that the record "discloses noncumulative, uncontradicted impeachment evidence which was relevant not only to a material issue in this case but the dispositive issue in the case—the victim's credibility." *Id.* at 357.

70. *Id.* at 357 n.3.

71. *Id.*

72. 41 M.J. 200 (C.M.A. 1994).

a new trial. The command influence issue was intertwined with the request for a new trial because several witnesses were intimidated or withheld from the defense by the command.[73]

The Court of Military Appeals found that the "military judge abused his discretion in concluding that the evidence probably would not produce a substantially more favorable result for appellant."[74] Although the court applauded the "Herculean" efforts of the military judge throughout the trial, the evidence that was not put before the members because of the command's influence kept the appellant from receiving a "full and complete trial."[75]

3. Improper Standard Applied by the Appellate Court

In *United States v. Dixon*,[76] an unpublished opinion by the Navy-Marine Corps Court of Criminal Appeals (NMCCA), the accused was found guilty of wrongful possession with the intent to distribute marijuana and wrongful distribution of marijuana.[77] The government's only evidence implicating the accused was the testimony of a co-actor. After trial, the defense moved for a new trial or to reopen its case based on newly discovered evidence consisting of several witnesses who could impeach the co-actor's testimony.[78] The military judge denied both the request to reopen and the motion for a new trial. He found that the witnesses could have been discovered before trial with the exercise of due diligence and that, had they testified, his findings would not have changed.[79]

The NMCCA set aside the findings and sentence of the trial court based on the legal and factual sufficiency of the evidence.[80] Collateral to the main decision, the NMCAA also stated that the military judge committed error by denying the motion to reopen.[81] The law does not support this

73. *Id.* at 204.

74. *Id.* at 207 (citing MCM, *supra* note 11, R.C.M. 1210(f)(2)(C); UCMJ art. 73 (2000)).

75. *Id.* at 206-07.

76. No. 96-00466, 1997 CCA LEXIS 395, at *8 (N-M. Ct. Crim. App. July 21, 1997) (unpublished op.).

77. *Id.* at *2.

78. *Id.*

79. *Id.* at *5.

80. *Id.* at *7.

81. *Id.* at *8.

collateral finding, however. The NMCAA stated that the military judge might not have been aware of the CAAF's decision in *Fisiorek*,[82] and the court concluded that the military judge should have allowed the accused to reopen his case based on the "*Fisiorek* test."[83] In *Fisiorek*, however, the request to reopen was made just after findings and before the court reconvened for sentencing. Although the *Fisiorek* court established that the new trial standard for newly discovered evidence under RCM 1210 was "inappropriately severe," the CAAF specifically stated that it was the application of the new trial standard "*during trial*" that was "inappropriately severe."[84] Thus, in *Dixon*, the NMCCA erred because the defense requested to reopen the case a month after the trial concluded.

In addition, the NMCCA was wrong in holding that the military judge "incorrectly applied the '*Williams* test' in denying the appellant's motion to reopen."[85] First, the CAAF did not announce a new standard in *Williams*. The court merely reviewed the military judge's application of RCM 1210 to newly discovered evidence. There is no "*Williams* test." Second, unlike *Fisiorek*, the defense request to reopen its case in *Williams* came after trial.[86] Although *Dixon* has no precedential value, it offers a clear example of how the new trial standard has fallen short of its mark. This area of the law is riddled with errors committed by trial and appellate courts. These errors will continue unless the new trial standard under RCM 1210 is changed or clearer guidance is provided for applying the rule.

In *United States v. Brooks*,[87] the CAAF held "that the [NMCCA] erred by failing to apply the correct legal standard to the evidence."[88] The accused was found guilty of conspiracy to distribute methamphetamines and of several other drug-related offenses. After trial, the defense filed a petition for a new trial with The Judge Advocate General of the Navy as required under RCM 1210(a).[89] The petition was sent to the NMCCA

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82. *Id.* at *9 n.4. In the footnote, the court recognizes that the trial and subsequent post-trial session occurred months before the decision in *Fisiorek* but the record of trial was not authenticated until over a month later. In other words, the court is implying that the military judge could have changed his ruling had he read the decision in *Fisiorek* before authenticating the record of trial.

83. *Id.* at *10.

84. United States v. Fisiorek, 43 M.J. 244, 247 (emphasis added).

85. *Dixon*, 1997 CCA LEXIS 395, at *8.

86. United States v. Williams, 37 M.J. 352, 354 (C.M.A. 1993).

87. 49 M.J. 64 (1998).

88. *Id.* at 70.

89. *Id.* at 68 (citing MCM, *supra* note 11, R.C.M. 1210(a)).

since the case was pending before that court.[90] The basis for the petition centered on evidence from a co-actor to the conspiracy offense. The co-actor claimed he never saw the accused at a location where a controlled drug buy allegedly occurred between the accused and several undercover agents. This testimony contradicted the observations of the undercover agents. Neither side called the co-actor to testify during the trial, mainly because he was very uncooperative. The newly discovered evidence was the co-actor's affidavit, which showed the trial counsel improperly threatened the co-actor, according to the defense's petition. The NMCCA denied the petition because the court did not believe the co-actor was threatened.[91] Based on this belief, the court apparently did not analyze the newly discovered evidence under RCM 1210.

The CAAF remanded the case to the NMCCA, directing that court to reconsider the new trial petition under RCM 1210. The CAAF implied it was remanding the case because the lower court improperly determined that the co-actor's claim was not true. The CAAF firmly established that the authority first reviewing a new trial petition does not decide whether the underlying facts of the petition are true. Instead, "[i]t merely decides if the evidence is sufficiently believable to make a more favorable result probable."[92]

Although the CAAF held that the lower court applied the wrong legal standard in denying the new trial petition, the NMCCA never reached the question of whether the new evidence satisfied the requirements of RCM 1210(f). However, the opinion is important for two reasons. First, it is another example of the difficulty encountered when handling issues of newly discovered evidence. Second, the opinion established, or at least clarified, if the reviewing authority determines the credibility of newly discovered evidence. The reviewing court is not supposed to decide whether the new evidence is true or determine the historical facts.[93] The CAAF did not elaborate on the term "historical facts." Applying the facts of the *Brooks* case, the CAAF apparently meant that the reviewing court cannot deny a new trial petition based solely on its determination that the evidence is untrue. When there are opposite and supportable positions, the reviewing court does not determine what really happened in a case. Rather, the ultimate question is whether the new evidence is "sufficiently believable"

90. *Id.* (citing MCM, *supra* note 11, R.C.M. 1210(e)).
91. *Id.* at 67.
92. *Id.* at 69.
93. *Id.*

such that it is probable that a more favorable result would have occurred had the new evidence been before the factfinder.[94]

4. Proper Standard Misapplied by the Appellate Court

The accused in *United States v. Niles*[95] was found guilty of rape and several other lesser offenses.[96] The only direct evidence presented by the government regarding the rape was testimony from the victim. Apparently, the defense filed a new trial petition with the Army Court of Criminal Appeals (ACCA).[97] The newly discovered evidence was testimony from an officer who had interviewed the victim after the rape. The officer was reviewing an adverse officer efficiency report the accused had received, and the victim had some knowledge related to the adverse report. When the officer was interviewed by the defense before trial, he could not remember very much due to the passage of several years. However, his memory of the interview with the victim improved after trial. In that interview, the officer later recalled, the victim did not say she was raped, and she never claimed that she had told the accused to stop when they had sexual intercourse.[98]

The CAAF found that the ACCA erred "in concluding that [the officer's] testimony clearly would not produce a more favorable result for appellant at a new trial."[99] The court expressed disappointment with having to review this case by stating that "in such a case where the record discloses such a dichotomy of evidence, this Court is troubled by being in the position of attempting to assess the impact of important evidence on review rather than leaving such an evaluation to the factfinder."[100] The CAAF should not be expressing concern about having to review this case.

94. *Id.*

95. 45 M.J. 455 (1996).

96. *Id.*

97. From the CAAF decision, it is unclear when the new evidence was discovered or when (and to whom) the petition was initially made.

98. *Id.* at 458.

99. *Id.* at 459 (citing United States v. Sztuka, 43 M.J. 261, 268 (1995)).

100. *Id.*

Instead, the court should be concerned that the new trial standard under RCM 1210(f) is the real problem.

In *United States v. Sztuka*,[101] the accused was found guilty of wrongful use of marijuana. Innocent ingestion was the defense theory of the case. About a month after trial, the defense discovered evidence that supported this theory. The new evidence was a witness who claimed the accused's husband admitted to the witness that he had placed marijuana in food his wife later consumed. The witness also claimed the accused's husband wanted to get back at his wife for her wanting to leave him. The defense moved for a new trial at the Air Force Court of Military Review (AFCMR) where the case was pending review. The AFCMR denied the petition, but the CAAF held that the AFCMR abused its discretion and reversed the lower court's decision.[102]

Quoting the military judge when he noted on the record that this case had become a "judicial afternoon soap opera," the CAAF stated that "[l]ike all soap operas, this one has at least one more installment to play out."[103] The basis for the court's holding was that "the court below abused its discretion when it held that the new evidence would probably not produce a substantially more favorable result for appellant."[104]

B. Criticism: Trying to Fit a Square Peg into a Round Hole

1. The Drafters' Intent

There is no language in the text of Article 73 or RCM 1210 that states, or even implies, that a new trial petition can be made before action is taken by the convening authority. A plain reading of both Article 73 and RCM 1210 leads to one conclusion: A new trial petition can only be made after action is taken by the convening authority. The legislative history of Article 73 suggests the same conclusion. The closest the drafters came to discussing the period after trial and before authentication was during hearings when they said they combined the old English writ of *coram nobis*[105] with the motion for a new trial based on newly discovered

101. *Sztuka*, 43 M.J. at 261.

102. *Id*.

103. *Id*. at 271. The findings and sentence were set aside and the record of trial returned to The Judge Advocate General of the Air Force to decide whether to order a new trial. *Id.*

104. *Id*. (citing MCM, *supra* note 11, R.C.M. 1210(f)(2)).

evidence.[106] However, a strict reading of the text leads to an interpretation that limits the period to just two years from approval of the sentence by the convening authority.[107]

On the other hand, a liberal reading of the text leads to a broader interpretation that would allow submission of a petition at any time up to two years from action by the convening authority. This reading is consistent with the concerns of the drafters for "finality" of courts-martial.[108] They never discussed a limit on how early a petition could be made; their primary concern was the cutoff time for submitting a new trial petition.[109] Regardless, if the drafters intended Article 73 to apply before action by the convening authority, they would have said so in the text of the article or at least mentioned it during the hearings.

2. What is "Not Inappropriate?"

The CAAF's opinion in *United States v. Williams* sends mixed signals.[110] The court stated that "[a]pplication of this three-prong test [RCM 1210(f)(2)] to post-trial motions for a rehearing or reopening of the trial pursuant to RCM 1102 and Article 39(a) is *not inappropriate*."[111] First, the court never made a distinction between "rehearing," "reopen," and "new trial." The court used these labels loosely in referring generally

105. Meaning "our court," "[t]he essence of [*coram nobis*] is that it is addressed to the very court which renders the judgment in which injustice is alleged to have been done, in contrast to appeals or review directed to another court." BLACK'S LAW DICTIONARY 337 (6th ed. 1990).

106. *Hearings on H.R. 2498*, *supra* note 26, at 1211 (comment by Mr. Larkin).

107. There is also support for this interpretation from the Court of Military Appeals (now the Court of Appeals for the Armed Forces). In *Dunlap v. Convening Authority*, 48 C.M.R. 751, 753 (C.M.A. 1974), the court addressed the finality of courts-martial as compared to trials in the federal system regarding speedy disposition of charges. The court stated that "[i]n the federal civilian criminal justice system, finality of verdict and sentence is established in the trial court." *Id*. However, in the military justice system, "the functions of the court-martial and those of the convening authority in the determination of guilt and in the imposition of sentence are so connected that they can be regarded as representing . . . a single stage of the proceedings against the accused." *Id*. In other words, the "trial" is not over until the convening authority takes action. Since court-martial proceedings are not over until action is taken, there is strong support for the interpretation that the drafters' intended for Article 73 to apply only after action by the convening authority.

108. *Hearings on H.R. 2498*, *supra* note 26, at 1210-12.

109. *Id*.

110. United States v. Williams, 37 M.J. 352 (C.M.A. 1993).

111. *Id*. at 356 (emphasis added).

to post-trial hearings.[112] Reopening a trial or conducting a rehearing is much different from setting aside findings and sentence in a case and then starting a new trial. Reopening a trial or conducting a rehearing may not nullify the entire trial. However, the court set aside the findings and sentence and returned the record so that a "rehearing may be ordered."[113] In short, the court ordered a new trial, not a rehearing. Although this is just a problem with semantics, it still clouds an already overcast area of the law.[114]

Second, the CAAF adds a thick fog when it says "not inappropriate." What does the court mean? Why not just say "appropriate?" The court may be telling military judges to go ahead and apply RCM 1210 but be careful because they are not sure it is the appropriate standard. At the very least, it shows that the court is not convinced that extending the rule to post-trial motions for a rehearing or reopening of the trial is a good idea.

3. Error by Trial and Appellate Courts: An Unnecessary Trend

In a span of less than ten years, application of RCM 1210(f) resulted in errors in eight cases at trial or on appeal.[115] Generally, the errors were committed by trial or appellate courts applying RCM 1210(f) when it should not have been or by applying the rule improperly. Although error in approximately one case per year may not seem alarming, the cumulative effect of the errors shows there is a problem with the rule. In short, trial and appellate courts have committed a significant number of errors in

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112. *See id*. (stating that "requests for a new trial, and thus rehearings and reopenings of trial proceedings, are generally disfavored").

113. *Id*. at 361.

114. Unfortunately, the MCM only adds to the confusion. Rule for Courts-Martial 810 discusses procedures for rehearings, new trials, and other trials without making a clear distinction between them. The rule merely lumps the different types of proceedings together. MCM, *supra* note 11, R.C.M. 810. The rule does define an "other trial" as "a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense." *Id.* R.C.M. 810(e). For a good discussion of the different types of rehearings, see Captain Susan S. Gibson, *Conducting Courts-Martial Rehearings*, ARMY LAW., Dec. 1991, at 9-10 (distinguishing "full rehearings, sentence rehearings, and limited evidentiary hearings").

115. The cases were discussed in Part IV.A, *supra*.

determining when to use the rule and how. This trend is unnecessary and, absent clear guidance, the trend will continue.

Instead of resolving problems with application of the rule case by case, a better standard needs to be established along with clear guidance as to how it should be applied.[116] This standard and guidance could be as simple as saying "do not use RCM 1210(f) for new evidence discovered after trial and before authentication." The CAAF could also provide guidance as they did in *United States v. Fisiorek*.[117] Instead of piecemeal resolution of problems with application of RCM 1210(f), it is time to provide practitioners with a better standard. An appropriate standard to measure newly discovered evidence will stop lower courts from trying to fit square pegs into round holes.[118]

V. The Solution: Do Not Apply RCM 1210(f) to New Evidence[119]

Newly discovered evidence is treated like a hot potato being tossed around in a smoke-filled room. The smoke represents the lack of a clear

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116. Aside from guidance from military appellate courts, one solution would be to give guidance to practitioners on RCM 1210(f). Adding a paragraph to the discussion section of the rule would provide practitioners with a better initial reference. The proposed language for the paragraph is discussed in Part VI, *infra*.

117. 43 M.J. 244, 248 (1995). The "guidance" provided by *Fisiorek* is discussed in Part V.A, *infra*.

118. Another problem noted by the majority in *Fisiorek* is that a ruling of lack of due diligence under RCM 1210(f)(2)(B) raises "the awesome specter of ineffective-assistance-of-counsel claims." *Id.* at 248 n.6. *See also* United States v. Childs, 17 C.M.R. 270, 275 (C.M.A. 1954) (finding a lack of due diligence clearly in the record of trial); Woolf, *supra* note 40, at 27 (stating that a failure to exercise due diligence . . . invites appellate action"). However, this concern does not mean the requirement for due diligence should be removed. The need for finality by limiting frivolous post-trial attacks from counsel who fail to do their jobs must remain part of the "new trial" equation. Otherwise, defense counsel may not diligently ferret out favorable or exculpatory evidence. Removing the requirement could potentially encourage the defense to be ineffective or at least to not zealously pursue discovery of the facts before trial. Due diligence needs to be considered in the new trial analysis but it must be balanced with the concerns of "the interests of justice . . . as well as mitigation of ineffective-assistance-of-counsel claims." *Fisiorek*, 43 M.J. at 248 n.6. This is in accord with practice in federal courts. *See, e.g.*, United States v. Gordon, 246 F. Supp. 522, 525 (D.D.C. 1965) (noting the requirement for due diligence but also stating that it means simple or ordinary diligence not "the highest degree of diligence").

119. Rule for Courts-Martial 1210(f) should still be applied to new evidence discovered after action by the convening authority. The proposed solution is to not use RCM 1210(f) for new evidence discovered before authentication or before the convening authority takes action.

standard on how to handle new evidence. The reluctance of military appellate courts to provide clear guidance makes the cloud of smoke even thicker. The hot potato (new evidence) gets tossed up the appellate chain because lower courts have no clear guidance. Currently, lower courts are being told that requests for a new trial are disfavored and relief should only be granted if a "manifest injustice would result absent a new trial . . . based on proffered newly discovered evidence."[120] Lower courts are reluctant to grant relief when new evidence is discovered because of this heavy burden and due to the concern over nullifying courts-martial proceedings. This burden and concern are appropriate when new evidence is discovered well after trial. The drafters intended application of the new trial standard after action by the convening authority, and this is evident by a plain reading of the text of Article 73 and RCM 1210.

A different standard for new evidence discovered before authentication is the solution.[121] Immediately after trial and until authentication, the inconvenience is less than it is well after trial. The evidence would still be close at hand, witnesses will still have a clear memory of the facts, and a majority of the parties to the court-martial will be nearby. The same is not true well after trial when action has been taken, evidence has been returned, the record of trial has been forwarded for appellate review, memories have started to fade, and the parties are no longer close at hand.

The main concern should not be inconvenience. What is most important is guaranteeing that an accused receives a full and complete trial. If newly discovered evidence strikes at the heart of the government's case and the defense has made a bona fide and good faith attempt to discover favorable evidence before trial, fairness dictates that a new trial must occur.

The solution is to not apply Article 73 and RCM 1210 before authentication (or action by the convening authority). Application of the current standard before authentication has led to a significant number of cases being reversed or remanded for further proceedings. There should be a distinction between petitions filed before and after authentication of the record because the concerns are different. The best solution available is to not use Article 73 and RCM 1210(f) for new evidence discovered after trial

120. United States v. Williams, 37 M.J. 352, 356 (C.M.A. 1993).

121. Although the focus of this article is on the period from the end of trial to authentication, extending the period to the date of the convening authority's action is also discussed.

and before authentication and to apply the guidance announced in *United States v. Fisiorek*.[122]

A. The *Fisiorek* Standard

Although the court in *Fisiorek* declined to provide a bright-line rule, they gave the following guidance to military judges:

> Suffice it to say, normal rules of relevance, cumulativeness, adequacy of substitutes in the record, completeness of the record, the interests of justice, the elimination of post-trial attacks on the verdict, as well as mitigation of ineffective-assistance-of-counsel claims are all considerations. But the primary consideration should be whether discovery of the new evidence is *bona fide* and whether the new evidence, if true, casts substantial doubt upon the accuracy of the proceedings; that is a rule which is not only fair to the defendant, but fair to the prosecution as well.[123]

1. Bona Fide Attempt at Discovery

The majority in *Fisiorek* did not elaborate on the meaning of "bona fide" as it applies to due diligence. In her dissenting opinion, Judge Crawford stated that "one must examine the parties' good faith, negligence in introducing or failing to introduce the evidence, and any deliberate withholding of evidence."[124] Although Judge Crawford argued that the defense did not meet the due diligence requirement, her discussion provides good guidance.

Most important is the good faith of the party proffering the evidence. A tactical decision to not present evidence only to spring it on opposing counsel after trial and asking for relief is unethical. The defense should not be rewarded for making a tactical error and then trying to cover up the mistake. The good faith requirement will prevent this from happening.[125] It will provide the military judge with a better tool to make a determination

122. 43 M.J. 244 (1995).
123. *Id*. at 248.
124. *Id*. at 249 (citing State v. Booze, 637 A.2d 1214, 1216-17, 1220 (1994)).

of due diligence. Case law and RCM 1210(f) currently do not provide the military judge with any guidance as to what constitutes due diligence.[126]

The diligence or negligence of a party is also important. A party with evidence sitting under their nose who fails to appreciate its significance should likewise not be rewarded. But being negligent is not the same as being deceitful. There may be times when a military judge may excuse the negligence of a party due to inexperience or just incompetence.

2. Substantially More Favorable Result

Most new trial petitions are denied because the newly discovered evidence does not meet the third prong of the rule, RCM 1210(f)(2)(C). What is a substantially more favorable result?[127] Both Article 73 and RCM 1210 are silent regarding what evidence will meet this burden. In reported cases where this standard was met, the new evidence was measured in terms of its type or form and the extent to which it contradicted the prosecution's case or corroborated the defense's case.

In terms of its type or form, newly discovered evidence meeting the burden under RCM 1210(f)(2)(C) is "relevant and admissible [as to] credibility [and consent],"[128] "material,"[129] "directly relevant to a material issue in the case,"[130] or "noncumulative, uncontradicted impeachment evi-

125. This is consistent with the practice in federal courts. *See, e.g.,* United States v. Gordon, 246 F. Supp. 522, 525 (D.D.C. 1965) (commenting that "the attorney for the defendant acted in good faith throughout" and "[t]here is no suggestion that there was any deliberate effort to make a scanty investigation with a view to using something that might be found later as a basis for a new trial if [sic] conviction resulted").

126. *Fisiorek*, 43 M.J. at 248-49, provides the one exception to this statement.

127. Other commentators have recognized the ambiguity with this phrase. *See, e.g.*, Woolf, *supra* note 40, at 31 (stating that "[t]he court in *Scaff* created some ambiguity regarding what constitutes a substantially more favorable result" because the court says that "the new evidence must produce an acquittal"). However, the analysis in *Scaff* and subsequent cases indicates "the defense need only show that the case result would be changed substantially by the new evidence—not that an acquittal would occur." *Id.*

128. United States v. Chadd, 32 C.M.R. 438, 442 (C.M.A. 1963).

129. United States v. Brooks, 49 M.J. 64, 68 (1998).

130. Unites States v. Niles, 45 M.J. 455, 459 (1996). This is consistent with practice in federal courts. *See* United States v. Lau, 828 F.2d 871, 877 (1st Cir. 1987) (stating that "discovery of new evidence merits a new trial only if [it] is material and might have had some impact on the outcome of the trial"); United States v. Buzzi, 588 F. Supp. 1395, 1397 (S.D.N.Y. 1984) (finding that non-exculpatory, cumulative, and insufficiently material evidence does not warrant a new trial).

dence [relevant] to a material issue in the case."[131] On the other hand, it does not meet the standard if it "would have done nothing more than impugn the credibility of a witness who the members . . . had already found unbelievable."[132]

In terms of the effect on the trial proceedings, newly discovered evidence meets the standard under the third prong if it "casts substantial doubt upon the accuracy of the proceedings,"[133] "may cast a substantial doubt upon the foundation of appellant's conviction,"[134] or shows that "the landscape upon which a new trial would play would be vastly different."[135] It also meets the burden if it "gives [the court] pause as to the completeness of the factfinding process,"[136] or is "significant and substantial evidence,"[137] "relevant to the fact finder [on the issue of credibility of a material witness],"[138] or that raises "a significant chance . . . that [it] could have induced a substantially more favorable result for the appellant."[139] However, Article 73 is not designed to allow "an accused to relitigate general matters which were presented below" and "[p]ost-trial attempts to exonerate co-actors should be viewed with extreme caution," including evidence that appears "contrived to exculpate the petitioner."[140]

How do these cases compare with the guidance in *Fisiorek*? There is little or no difference. Looking at each descriptive word or phrase broadly, several objective conclusions can be made. First, there is no requirement that the evidence rise to the level that it would have resulted in an acquittal.[141] Second, it must be admissible and not cumulative. Third, the new evidence has to affect a matter that relates directly to the culpability of the accused. In other words, it must be material evidence. Finally, the new

131. United States v. Williams, 37 M.J. 352, 357 (C.M.A. 1993).

132. United States v. Jiles, 51 M.J. 583, 591 (N-M. Ct. Crim. App. 1999).

133. United States v. Fisiorek, 43 M.J. 244, 248 (1995).

134. United States v. Dixon, No. 96-00466, 1997 CCA LEXIS 395, at *10 (N-M. Ct. Crim. App. July 21, 1997) (unpublished op.).

135. United States v. Sztuka, 43 M.J. 261, 271 (1995).

136. United States v. Singleton, 41 M.J. 200, 206 (C.M.A. 1994).

137. United States v. Van Tassel, 38 M.J. 91, 96 (C.M.A. 1993).

138. United States v. Good, 39 M.J. 615, 617 (A.C.M.R. 1994).

139. United States v. Dyer, 16 M.J. 894 (A.C.M.R. 1983).

140. United States v. Bacon, 12 M.J. 489, 492 (C.M.A. 1982).

141. This is actually different than the standard in federal and state jurisdictions. The standard in most other criminal jurisdictions is that the new evidence would have changed the verdict (produced an acquittal). United States v. Sjeklocha, 843 F.2d 485, 487 (11th Cir. 1988); State v. Fisher, 859 P.2d 179, 185 (Ariz. 1993).

evidence needs to do more than just contradict a material issue. Its effect must be substantial or at least significant.[142]

B. Why the *Fisiorek* Standard is the Best Solution

The *Fisiorek* standard is the best solution for several reasons. First, military appellate courts have yet to provide any clear guidance for practitioners.[143] The significant number of errors caused by inconsistent application of RCM 1210(f) over just the last decade show that the rule is not being used properly. Any guidance would be beneficial. With *Fisiorek* as a roadmap, military judges would have a means of measuring new evidence with a set of objective criteria. Instead of flying by the seat of their pants, military judges would be empowered with a clear and objective standard using the *Fisiorek* guidance. The result would be more cases being completed without lengthy post-trial remands from the CAAF or the service appellate courts.

Second, the requirements under *Fisiorek* are no different from the current rule.[144] Case law shows that the objective test for newly discovered evidence provided by *Fisiorek* is the same as RCM 1210(f). The only difference is that *Fisiorek* provides a means for military judges to appropriately measure the new evidence. There is no such guidance in the current rule or case law dealing with its application. The *Fisiorek* standard would clear up the confusion with minimal effort. The CAAF would only have to say that RCM 1210(f) does not apply to new evidence discovered after trial and before authentication. In addition, the CAAF could provide similar guidance as they did in *Fisiorek* or simply direct application of *Fisiorek* during the period before authentication (or action by the convening authority).

Third, the *Fisiorek* standard will stop the current trend of courts committing error when applying RCM 1210(f). A plain reading of the rule and the current guidance from the CAAF is "do not grant new trial peti-

142. These four factors (or conclusions) were used to draft the proposed change to RCM 1210(f) that was forwarded to military judges in the field. *See* app. A, para. 6, *infra.*

143. The guidance in *United States v. Fisiorek*, 43 M.J. 244 (1995), was for new evidence discovered *before* the end of trial.

144. With one major exception, the *Fisiorek* requirements are no different than the current rule. Currently, *Fisiorek* applies only to evidence discovered before the end of trial. This article proposes extending *Fisiorek* to the period from the end of trial to authentication or action by the convening authority.

tions."[145] However, the piecemeal handling of "new trial" cases has led to a considerable number of these cases being returned for additional proceedings. These cases demonstrate that current application of RCM 1210(f) is missing its intended mark. The *Fisiorek* standard will put military judges back on target.

Fourth, using the *Fisiorek* standard is a relatively easy solution. There would be no need for a change to RCM 1210 or Article 73 because both already state that the current standard only applies after action by the convening authority. In addition, the *Fisiorek* standard is flexible and will not restrict the broad discretion of military judges. It merely provides guidance. [146] This guidance is broad enough so that military judges will not be restricted to a particular result. In other words, the *Fisiorek* standard would provide a tool for military judges that will prevent them from trying to fit a square peg into a round hole.

Finally, the *Fisiorek* standard satisfies the concern for "finality" of courts-martial. Instead of being routinely returned for additional proceedings, cases with newly discovered evidence will be completed before they are forwarded for appellate review. This will reduce the added time and expense caused by post-trial proceedings directed by military appellate courts. More importantly, the guidance will benefit the accused. The delay from the end of trial to review on appeal has been many years in cases that have been reversed or remanded because of error in application of the current "new trial" standard.[147] Using a standard that measures newly discovered evidence appropriately will significantly reduce this delay. The

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145. *See, e.g.*, United States v. Rios, 48 M.J. 261, 267 (1998) (stating that "petitions for new trial are generally disfavored"); United States v. Black, 42 M.J. 505, 518 (Army Ct. Crim. App. 1995) (recognizing that "[r]equests for a new trial on the ground of newly discovered evidence are not regarded with favor and should be granted only with great caution").

146. In *United States v. Jiles*, 51 M.J. 583 (N-M. Ct. Crim. App. 1999), the court applied the *Fisiorek* guidance to evidence that was discovered after trial. The court recognized that this guidance from the CAAF was for new evidence discovered during trial but stated that "[n]onetheless, we apply the guidance provided in that case to these facts." *Id.* at 591. The court applied the *Fisiorek* guidance because of the CAAF's reluctance to establish a particular rule for newly discovered evidence. *Id.*

147. *See, e.g.*, *Fisiorek*, 43 M.J. at 245 (five years); United States v. Williams, 37 M.J. 352 (C.M.A. 1993) (three years); United States v. Niles, 52 M.J. 716 (Army Ct. Crim. App. 2000) (8 years).

Fisiorek guidance is this standard. It is the best solution for both the accused and the government.

C. Comments from the Field: What do the Military Judges Think?

1. Background

To get a "second opinion" regarding RCM 1210 from the legal field, the new trial questionnaire in Appendix A was sent to military judges in all of the services.[148] Seventy-five contacts were made and there were forty-two responses.[149] Only seven of those who responded had any experience with new trial petitions dealing with newly discovered evidence. There were two military judges who did not have "new trial" experience but made comments regarding the proposed discussion paragraph. Appendix B provides a summary of the comments that were received.

2. Results

Three conclusions can be made from the responses. First, new trial petitions are very rare. Of the seven military judges who had experience, the number of total petitions between them was ten. Out of the ten petitions, only two were granted and returned for a new trial or another disposition. This suggests that, not only are new trial petitions rare, but they are almost never granted. What does this mean? Either the standard is too strict or it is appropriate and the petitions that were made just did not meet the standard. Looking at all cases reported over the last ten years that considered new trial petitions, a majority of the decisions contained some form of error. A large number of these errors resulted in a finding that the cases

148. Four of the questionnaires were sent to field grade judge advocates without experience on the bench. A questionnaire was also sent to the Chief Judge of the Coast Guard Trial Judiciary.

149. The contacts were made either directly to each military judge or indirectly through the chief (senior) judge for the trial judiciary of each respective service.

needed to be returned for a new trial. Therefore, this review of reported decisions suggests that the standard is too strict.[150]

The second conclusion is that the guidance from military appellate courts is more than adequate. Six of the seven respondents with new trial experience said they felt comfortable with the case law on the subject. The one negative response related to case law that covered the third prong under the rule, whether the new evidence "would probably produce a substantially more favorable result for the accused."[151] The respondent found that case law was confusing and the analysis section of the *MCM* for RCM 1210 was no help. This opinion aside, the consensus among the respondents was that case law pointed them in the right direction.

The final conclusion is that the RCM 1210(f) discussion paragraph—proposed to the military judges in the new trial questionnaire—would be helpful. Seven of the nine respondents had a favorable opinion of the paragraph. Of those, two suggested changing some of the language or at least making the paragraph shorter. The remaining two respondents said that the paragraph was too lengthy and confusing, although only one had experience with new trial petitions. Several respondents recommended placing the paragraph in other sources like the Military Judges' Benchbook[152] or the analysis section of the *MCM*.[153] However, the consensus was that a version of the proposed paragraph should be included in the *MCM* or another source to clarify application of RCM 1210(f).

D. Getting a Second Bite at the Apple: Problems with Changing the Rule

The "court-martial process is designed to be fair and, at the same time, give finality to the case."[154] One of the major concerns of the drafters of Article 73 was finality.[155] The concern for finality must be balanced

150. The cases discussed in Part IV.A, *supra*, were decided over the last decade. Although there are other cases where error occurred, these eight cases illustrate that the rule is being applied improperly (or that the wrong standard is being used).

151. MCM, *supra* note 11, R.C.M. 1210(f)(2)(C).

152. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (1 Apr. 2001).

153. MCM, *supra* note 11, R.C.M. 1210 analysis, app. 21, at A21-89.

154. United States v. Fisiorek, 43 M.J. 244, 247 (1995).

155. *Hearings on H.R. 2498*, *supra* note 26, at 1215 (comment by Mr. Smart stressing the problems of obtaining witnesses and evidence which will unduly weaken the prosecution).

against the need for a fair system of justice that provides an accused with a full and complete trial. Getting a second bite at the apple may be necessary in some cases. Newly discovered evidence that is material, not cumulative, and otherwise admissible must be tested in the crucible of a court-martial. Otherwise, the courts-martial system will not produce verdicts worthy of confidence.

Since the burden is already heavy, any change to the new trial standard will be viewed as a lower burden for the accused. Many would argue that this would open the floodgates for more "new trial" requests or petitions. It may also result in an unwarranted safety net for defense counsels who do not do their jobs to ferret out favorable evidence before trial. A counsel who procrastinates and never sets foot out of his office to discover favorable evidence should not benefit later when new evidence falls in his lap after trial. The same is true for a counsel who decides not to present favorable evidence only to surprise opposing counsel with a new trial petition. However, the due diligence requirement would adequately protect against such defense counsels who fail to diligently perform their jobs.

V. Conclusion

Application of RCM 1210(f) to new evidence discovered after trial and before authentication of the record is a problem. Despite the large number of errors caused by inconsistent application of the rule over the last decade, military appellate courts have not recognized there is a problem. Without a change to the rule or clear guidance for application of the rule, these errors will continue.

The best solution is not to apply RCM 1210(f) to new evidence discovered after trial and before authentication (or action by the convening authority). In the place of RCM 1210(f), military judges should use the standard established by the guidance in *United States v. Fisiorek*.[156] New

156. 43 M.J. at 248. One court has taken the first step in this direction. In *United States v. Jiles*, 51 M.J. 583 (N-M. Ct. Crim. App. 1999), the court applied the *Fisiorek* guidance despite recognizing that the defense request for a new trial was made after trial. *Id*. at 591. *Jiles* is important because the court applied *Fisiorek* knowing that the CAAF's holding in *Fisiorek* applied to new evidence discovered during trial. *Id*. The court applied *Fisiorek* because there has been no clear guidance from any source. *Id*. Hopefully, other military appellate courts will follow *Jiles*, or at least recognize the need for a different standard for new evidence discovered after trial and before authentication (or action by the convening authority).

evidence that is discovered between the end of a trial and before authentication (or action by the convening authority) needs to be treated differently than new evidence discovered after authentication (or action by the convening authority). The concerns are different. Before authentication or action, evidence will be close, witnesses will still have clear memories, the parties to the court-martial will be nearby, and the record of trial will be available. These concerns are not the same well after trial when authentication has occurred and the convening authority has acted.

Application of *Fisiorek* is the best solution for many reasons. It will provide guidance that currently does not exist, the trend of "new trial" errors will be stopped, there will be no need to change RCM 1210(f) or UCMJ Article 73,[157] and it will satisfy the concern for finality of courts-martial. More importantly, it will result in a better military justice system.

Another potential solution would be to provide guidance in RCM 1210(f) consistent with RCM 1102(d).[158] Nearly all the military judges responding to the survey in Appendix A believed that the proposed discussion paragraph for RCM 1210(f) would be helpful.[159] If RCM 1210(f) continues to be applied to new evidence discovered before authentication, adding the proposed paragraph is an easy way to provide the guidance that currently does not exist. Without this guidance, application of RCM 1210(f) will continue to result in repeated errors.

Rather than causing the new trial "floodgates" to open or encouraging defense counsel to "sandbag," the *Fisiorek* standard would result in a more efficient system of justice. In short, it would help clear up a confusing area of the law and ensure that the court-martial process produced verdicts worthy of confidence.

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157. Neither RCM 1210(f) nor UCMJ Article 73 state that defense counsel can make a new trial petition before the convening authority takes action. In *United States v. Scaff*, the CAAF expanded the period for submission of a new trial petition to include the period before action is taken. 29 M.J. 60, 64-65 (C.M.A. 1989).

158. One military judge suggested adding language to the proposed paragraph. The language would clarify that a post-trial session may be held at the direction of the convening authority pursuant to RCM 1102(d) before action is taken. *See* app. B, para. 9, *infra*.

Appendix A

New Trial Questionnaire

Instructions: This is an anonymous questionnaire (Please do not give me your name). I am a student in the 48th Graduate Class at The Judge Advocate General's School, U.S. Army. I am writing my research paper/ thesis on "New Trials" under RCM 1210, MCM (2000 ed.). If you provide any comments, please do not use names of cases or persons related to cases that are pending review.

1. Have you ever been involved in a post-trial session as the Military Judge or counsel regarding a petition for a new trial under RCM 1210, MCM (2000 ed.)? ___yes ____no. If your answer is "no" please do not continue.

2. How many? ____

3. How did each case end up at a post-trial session? (for example, petition for new trial to the military judge before authentication of the record of trial, to the convening authority after authentication, to the Service Secre-

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159. The proposed paragraph to the discussion following RCM 1210(f) would state:

> The military judge may hold a post-trial session to consider a petition for a new trial that is filed before authentication of the record of trial or before action is taken by the convening authority under RCM 1107, MCM (2000 ed.). If such a post-trial session is held, the military judge will apply the requirements of this paragraph. The "due diligence" requirement is satisfied by a showing that the petitioner made a bona fide and good faith attempt at discovery. In finding whether or not the new evidence would probably produce a substantially more favorable result, the military judge is guided by the normal rules of relevance, cumulativeness, credibility of witnesses and evidence, the interests of justice, and elimination of frivolous post-trial attacks on the verdict. New evidence that would produce a substantially more favorable result is evidence that casts substantial doubt as to the accuracy of the trial proceedings. It does not mean that the new evidence would have resulted in a finding of not guilty for the offense related to the new evidence.

Most of the substantive language in the paragraph above is taken directly from *Fisiorek*, 43 M.J. at 248.

tary, or to the Service Court of Criminal Appeals/Court of Appeals for the Armed Forces)

4. What was the result of each petition (denied or granted)?

5. Did you feel that you had enough guidance from military appellate courts regarding how you should apply RCM 1210(f)? (please provide comments)

6. Would the paragraph below be helpful if it was added to the discussion following RCM 1210(f)? (please provide comments and use additional pages if necessary)

> The military judge may hold a post-trial session to consider a petition for a new trial that is filed before authentication of the record of trial or before action is taken by the convening authority under RCM 1107, MCM (2000 ed.). If such a post-trial session is held, the military judge will apply the requirements of this paragraph. The "due diligence" requirement is satisfied by a showing that the petitioner made a bona fide and good faith attempt at discovery. In finding whether or not the new evidence would probably produce a substantially more favorable result, the military judge is guided by the normal rules of relevance, cumulativeness, credibility of witnesses and evidence, the interests of justice, and elimination of frivolous post-trial attacks on the verdict. New evidence that would produce a substantially more favorable result is evidence that casts substantial doubt as to the accuracy of the trial proceedings. It does not mean that the new evidence would have resulted in a finding of not guilty for the offense related to the new evidence.

Appendix B

Summary of Responses

1. I have been involved with two cases where Article 39(a) sessions have been held to determine if a new trial should be granted. One was a petition to the military judge and the other was a petition to the convening authority. The convening authority did order a post-trial 39(a) session for the military judge to determine if a new trial was warranted. Each petition was denied.

There is plenty of guidance from the appellate courts on applying the standard under RCM 1210(f). That is not the problem. The problem is that the standard is so extremely high that it is virtually impossible for the standard to be overcome. In both cases the military judge was able to state that the evidence could have been discovered if due diligence was exercised. The problem I see with this rationale is that by denying the motion for a new trial, the issue of ineffective assistance of counsel is raised. What the court says is that, if counsel had interviewed this particular witness, the evidence would have been discovered. Then the converse is true that by not interviewing this witness who arguably has exculpatory or evidence likely to change the outcome, then counsel is ineffective.

The modification is very helpful. It lessens the burden on the accused to a more reasonable standard without allowing litigation of a trial just because counsel was lazy. The change also clarifies the effect that the new evidence has on findings.

2. No experience. I personally believe the language would be very helpful to practitioners.

3. I have had one case dealing with a new trial petition made to the military judge before authentication. It was denied. I had enough guidance from the appellate courts regarding application of RCM 1210(f). The discussion paragraph is too lengthy and potentially misleading/confusing. This lan-

guage is better served in the analysis section of the manual with citations to applicable case law.

4. No experience. The discussion paragraph is too lengthy and confusing.

5. I have experience with two new trial petitions. One was made to the [convening authority] and denied.

The second request was also made to the [convening authority] and a hearing was granted and held. I felt that I had enough guidance from the appellate courts. In both cases, I was aware of what I needed to do to request the hearing—by reading the rules and by a thorough review of the case law. In the case that was denied, the request was "weak." In the second case, this issue was substantial—and was well argued applying the standard. The first issue was whether the defense counsel had exercised bad faith in delaying until authentication to make the request [the judge did not consider this a real issue]. Next litigated was "due diligence"—in this situation, the new evidence came from a witness who claimed he had committed the offense. The last two prongs failed because, based on the testimony of the witness at trial, it was so readily apparent to all in the courtroom that the guy was lying and making up things as he went along. The judge could not make the leap and ruled against the defense.

The proposed discussion makes sense, appears to be supported by case law, and would make this area a bit less of a mystery—it involved some extensive research on my part to make sure I did things right in the first place.

6. I had two cases at the appellate level. Both requests for a new trial were granted. In one case, no new trial occurred because the victim disappeared. In the other, a new trial was held and the accused was acquitted.

The proposed discussion paragraph looks like a good gap-filler for that post-trial period.

7. I was involved with one new trial petition on appeal. There were actually two petitions made, one to the convening authority just after authentication and one to the [Judge Advocate General], which was forwarded to the service court of criminal appeals. Both were denied.

The issue in this case was more of a factual question than one of complicated review of the RCM. However, I felt and continue to feel that the

case law was somewhat confusing as to what constituted "probably produce a substantially more favorable result for the accused." RCM 1210(f)(2)(C). The analysis in the MCM was of little assistance in clarifying this ambiguity.

I believe the additional information would be helpful discussion, but I recommend redacting the highlighted language [deleting the portion from "cumulativeness" to "verdict"].

8. I have had one new trial petition as a military judge. It was made in the form of a motion for appropriate relief. I denied the petition without a hearing. The case was affirmed on appeal.

I had enough guidance from military appellate courts. I found no real need to go to the appellate courts—the RCM seemed to me to be quite clear on its face.

The language would be helpful. It would be especially useful for new judges who do not feel as comfortable as they might with esoteric rulings. Alternatively, it might be placed in the Benchbook.

9. I had one case with a new trial petition. I made the request after trial and before authentication of the record of trial. It was denied. The case did not involve dismissal or confinement—no relief from [the Office of The Judge Advocate General].

I had enough guidance from appellate courts (*Scaff* and RCM 1102).

Your first sentence [in the proposed discussion paragraph] appears ambiguous, unless you are recommending that RCM 1102(d) also be amended. Perhaps, you might change the latter part of the sentence to read: "…authentication of the record of trial or when directed by the convening authority before action is taken by the convening authority under RCM 1107, MCM." I have not researched all the case law recently on this but your third sentence adds additional concepts, "bona fide" and "good faith," that just seem to create additional tests that probably could be obviated by just leaving the sentence out. In your fourth sentence, I would add that "the military judge is guided by, *among other factors*, the normal rules of relevance, *admissibility*, …." The reason for adding those is so as not to limit the matters the military judge should be able to consider from the trial and also not to leave out admissibility. Some evidence may be relevant but not admissible (e.g. MRE 412 evidence that is excluded, evidence that is not

admitted under MRE 403). If you have found case law that substantially supports the last two sentences, you could probably leave them in; if not, the rule as written seems clear enough in RCM 1210(f)(2)(C). In short, if you are going to add to the current discussion section, I would recommend you pare down your suggested additional paragraph.