Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—the Why and How

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Introduction

Your client confessed.

As his defense counsel, you immediately realize that unless his statement is suppressed, your client has no chance of acquittal. If it is suppressed, the government's case will fall apart, and it will have to dismiss the charges against your client. As luck would have it, you have a "sure-fire" suppression motion based on what appears to be a clear violation of your client's constitutional rights. You draft a brilliantly researched, powerful, persuasive motion to suppress, re-interview the witnesses, and prepare them for the motion hearing.

The two-day hearing proceeds spectacularly, with your witnesses and client testifying exactly as you anticipated. Your cross-examinations of the government witnesses were scorching; the hapless trial counsel struggled to keep up as you argued brilliantly. You sit back and wait for the military judge to rule in your favor, for the admiring congratulations of your fellow defense counsel, and for a much-needed weekend off.

The military judge denies your motion. Your client, defenseless, decides to plead guilty in exchange for a pretrial agreement. You assume, of course, that the motion is still preserved for appeal; you litigated it fully, with witnesses, briefs, and arguments, and the military judge made findings of fact and conclusions of law. Surely the appellate courts will see the manifest error of the judge's ruling, and your client (and you) will be vindicated.

Is this issue preserved for appeal if your client pleads guilty? Have you now "made the appellate record?" What if you have not? Can your client obtain relief from the appellate courts anyway? The answer to all these questions is most likely "no". By entering an unconditional guilty plea, your client waived his right to consideration of the suppression motion on appeal under almost all circumstances.[2]

This article explains how defense counsel can "make the appellate record" by preserving issues properly; it also discusses the ramifications of the failure to do so. Part I of this article answers the question, "Why make the record for appeal?" It explains the doctrine of waiver and why it exists, including a discussion of Military Rule of Evidence (MRE) 103,[3] which requires counsel to state a timely "specific ground of objection" to preserve an issue for appeal.[4] This section then explains appellate standards of review, the different degrees of deference appellate courts give to trial judges' rulings, and why a basic understanding of these appellate linchpins is essential for trial practitioners. The section then discusses "harmless error," the standard appellate courts apply when the defense counsel objects at trial, and "plain error," which the courts apply when the defense counsel *does not* object. These standards define the burdens of proof on appeal, as well as the distribution of that burden. Finally, the section discusses Article 59(a), Uniform Code of Military Justice (UCMJ). This critical provision requires "material prejudice to a substantial right" of the accused to merit relief on appeal, regardless of whether the defense counsel lodges a proper objection at trial.[5]

Part II of this article discusses "Ten General Observations on Making the Appellate Record." This section includes practical observations and pitfalls for trial practitioners who wish to preserve issues for appeal. Finally, Part III provides a "how to" guide to preserving selected specific objections during the pretrial, trial, and post-trial stages. It discusses Article 32 and discovery issues, motions in limine, challenges to panel members, evidentiary objections during trial, instructions, and post-trial representation. This final section demonstrates how trial practitioners would benefit from examining many of these issues through an appellate lens. Structuring arguments at trial with the knowledge and assistance of the principles employed during appellate review can help counsel to "make the appellate record" effectively.

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2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 910(j) (2002) [hereinafter MCM]. *But cf.* United States v. Smith, 56 M.J. 653 (Army Ct. Crim. App. 2001) (considering the merits of a suppression motion on appeal despite an unconditional guilty plea at trial; the appellant asserted error in the admission of unsuppressed evidence as aggravation in presentencing proceedings, and the government did not argue waiver); United States v. Hinojosa, 33 M.J. 353, 353 (C.M.A. 1991); United States v. Streetman, 43 M.J. 752, 755 (A.F. Ct. Crim. App. 1995); *see also* Estelle v. Smith, 451 U.S. 454, 468 n.12 (1981).

3. MCM, *supra* note 2, MIL. R. EVID. 103.

4. *Id*. MIL. R. EVID. 103(a)(1).

5. UCMJ art. 59(a) (2000).

I. Why Make the Record for Appeal?

A. The Waiver Doctrine

Why is it important to "make" an appellate record by properly preserving issues at trial? The answer lies in the doctrine of waiver. Simply stated, the failure to properly preserve an issue at trial "waives" the issue for appeal. This means that an appellate court is unlikely to consider the issue. In other words, the accused has almost no chance of relief on appeal.[6]

> A judicial finding of waiver will often prove dispositive of the case in question. The decision that a legal right has been waived forecloses relief, even in cases that might otherwise have been decided differently. Courts may balance the advantages or disadvantages of this decision against other social policies in determining whether a finding of waiver is appropriate; however, once a right is judged to have been waived it is a nullity, and the issue is at an end.[7]

Although the classic definition of waiver is the "intentional relinquishment or abandonment of a known right,"[8] many situations described as "waiver" are actually "forfeiture," which the Supreme Court defines as "the failure to make a timely assertion of a right."[9] This latter definition is a better description for the mere failure to object properly at the appropriate time. The importance of this distinction is that issues that counsel intentionally waive will never merit relief.[10] As the Supreme Court stated,

> Deviation from a legal rule is "error" unless the rule has been waived. . . . Mere forfeiture, as opposed to waiver, does not extinguish an "error" . . . . If a legal rule was violated during the [trial] court proceedings, and if the defendant did not waive the rule, there has been an "error" . . . despite the absence of timely objection.[11]

Even if there is error, forfeited or not, that certainly does not mean the accused gets any relief; but that discussion comes later.[12]

Where the defense counsel forfeits an issue (but does not waive it), an appellate court may, in an extraordinary case, grant relief under the doctrine of plain error, despite a lack of objection at trial, to avoid manifest injustice.[13] A "raise or waive rule" is "typically known as a rule of forfeiture . . . [as] it is well established that such a rule does not absolutely preclude appellate review."[14]

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6. The doctrine of plain error, employed to determine whether a waived (or forfeited) issue merits relief, is discussed *infra* at notes 95-104.

7. Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 479 (1981).

8. Johnson v. Zerbst, 403 U.S. 458, 464 (1938). According to Rubin,

> *Johnson* did not originate this formulation. The *Johnson* Court was merely paraphrasing the standard common law definition of waiver—a definition which courts had experienced considerable difficulty in applying. . . . For these reasons, the Restatement of Contracts abandoned the formula as "inexact" six years before the *Johnson* case. . . . Not surprisingly, the *Johnson* definition has created the same difficulties in constitutional adjudication that it did in its *quondam* common law career.

Rubin, *supra* note 7, at 481-82 (footnotes omitted). Because of the problems of the *Johnson* definition, in particular in applying the "knowing" and "intentional" concepts, Rubin posits that "the most general definition of waiver is not the intentional relinquishment of a known right, but simply a relinquishment of the right." *Id.*; *see Johnson*, 403 U.S. at 483-84.

9. United States v. Olano, 507 U.S. 725, 733 (1993).

10. *Id.* The Supreme Court gives the following example to illustrate this principle:

> [A] defendant who knowingly and voluntarily pleads guilty . . . cannot have his conviction vacated by a court of appeals on the ground that he ought to have had a trial. Because the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that right, his conviction without a trial is not "error."

Id.

11. *Id.* at 733-34. This distinction between "waiver" and "forfeiture," in much more common use since the *Olano* decision, would still not satisfy Rubin, who views the distinction as a "multiplication of legal rules beyond necessity." Rubin, *supra* note 7, at 483. "The legal problem of waiver forms a distinct part of the larger legal issue of how individual rights are created, exercised, and lost." *Id.* Waiver, in his view, is the issue of how rights "can be given up." *Id.* As such, as a "discrete legal problem, it demands a single answer." *Id.*

12. *See infra* notes 81-85.

13. The "plain error" doctrine is discussed more fully *infra* at notes 95-104 and accompanying text.

14. United States v. Chapa, 57 M.J. 140, 146 (2002) (Sullivan, J., concurring in part and in the result).

In practice, however, most cases in military courts continue to use the terms "forfeiture" and "waiver" interchangeably, and do not distinguish between the two concepts for purposes of appellate review, including whether an error at trial merits relief under the plain error doctrine.[15] In fact, the Court of Appeals for the Armed Forces (CAAF) recognized during its most recent term that "waiver," as used in Rule for Courts-Martial (RCM) 905(e),[16] is "synonymous with the term 'forfeiture' used by the Supreme Court in *United States v. Olano*."[17]

In any event, very few issues are not subject to waiver (or forfeiture). The Supreme Court has "articulated a general rule that presumes the availability of waiver,"[18] and has "recognized that 'the most basic rights of criminal defendants are subject to waiver."[19] There are different requirements to constitute waiver, depending on the right at issue:

> What suffices for waiver depends on the nature of the right at issue. Whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. For certain fundamental rights, the defendant must personally make an informed waiver. For other rights, however, waiver may be effected by action of counsel. . . . As to many decisions pertaining to the conduct of the trial the defendant is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney. Thus, decisions by counsel are generally given effect as to what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. Absent a demonstration of ineffectiveness, counsel's word on such matters is the last.[20]

The category of waivable issues primarily discussed in this article is that vast number "effected by action of counsel."[21]

Military practice recognizes very few issues that are not subject to waiver.[22] They include jurisdiction,[23] failure to state an

15. *See, e.g.*, United States Quiroz, 55 M.J. 334, 338 (2001); United States v. Green, 55 M.J. 76, 80, *cert. denied*, 534 U.S. 998 (2001); United States v. Brown, 50 M.J. 262, 268 (1999); United States v. Simoy, 50 M.J. 1, 2 (1998); United States v. Combs, 47 M.J. 330, 334 (1997) (Cox, J., concurring); United States v. Carter, 40 M.J. 102, 104 (1994); United States v. Schneider, 38 M.J. 387, 394 (C.M.A. 1993), *cert. denied*, 511 U.S. 1106 (1994). *But see* United States v. Scalarone, 54 M.J. 114, 118 (2000) (Cox, J., concurring) (distinguishing between waiver and forfeiture); United States v. Harwood, 46 M.J. 26, 28 (1997); United States v. Toro, 37 M.J. 313, 320 (C.M.A. 1993) (Sullivan, C.J., concurring); United States v. Strachan, 35 M.J. 362, 364 (C.M.A. 1992), *cert. denied*, 507 U.S. 990 (1993). The Army Court of Criminal Appeals (ACCA) affirmatively recognizes that the waiver rules in the military incorporate both forfeiture and waiver. United States v. Thompson, 37 M.J. 1023, 1026 n.3 (A.C.M.R. 1993) (citing *Toro*, 37 M.J. at 362). At least one intermediate military appellate court affirmatively declined to distinguish between waiver and forfeiture. United States v. Bolerjack, No. 98-01500, 1999 CCA LEXIS 244, at *5 (N-M. Ct. Crim. App. Aug. 31, 1999) (unpublished). *But see* United States v. Valliere, No. 96-00975, 1997 CCA LEXIS 298, at *4-6 (N-M. Ct. Crim. App. May 5, 1997) (unpublished) (holding that failure to object under the circumstances constituted mere forfeiture, and not waiver).

16. Rule for Courts-Martial 905(e) states:

> (e) Effect of failure to raise defense or objections. Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defenses or objections, except lack of jurisdiction or failure or a charge to allege an offense, must be raised before the court-martial is adjourned for that case, and unless otherwise provided in this Manual, failure to do so shall constitute waiver.

MCM, *supra* note 2, R.C.M. 905(e).

17. *Chapa*, 57 M.J. at 142 n.4. At least one recently retired CAAF judge bemoans this linguistic imprecision. In *Chapa*, Judge Sullivan recently wrote:

> I do not agree with the majority that this Court should continue to use the word "waiver" when it means "forfeiture." As Judge Posner has pointed out, "the distinction between waiver and forfeiture is important to the operation of an adversary system, which is another reason for avoiding use of the word 'waiver' to designate bother concepts." Precision, not imprecision, should be the hallmark of this Court in the area of plain error.

Id. at 147 n.3 (Sullivan, J., concurring in part and in the result) (citations omitted).

18. New York v. Hill, 528 U.S. 110, 114 (2000) (citing United States v. Mezzanatto, 513 U.S. 196, 200-01 (1995)).

19. *Id*. (quoting Peretz v. United States, 501 U.S. 923, 936 (1991)).

20. *Id.* at 114-15 (citations and internal quotations omitted). *See also* United States v. Collins, 41 M.J. 428, 430-31 (Cox, J., concurring), wherein Judge Cox advocated that "military due process" required intentional waivers of constitutional and statutory rights, even while acknowledging that the Supreme Court did not require them: "[I]f an accused wants to waive a statutory or constitutional right, we should be able to see from the record of trial that the accused knowingly gave up that right." *Id.* at 431. Judge Cox did not advocate the same MRE 103 procedure for "trial tactics and errors." *Id*. Judge Baker, new to the CAAF in 2002, may also support a similar view. He has expressed the opinion that, "where a liberty interest is at stake, . . . I would not rely on a mechanical application of waiver." *Chapa*, 57 M.J. at 143 (Baker, J., concurring in part and in the result) (discussing the waiver of credit under RCM 305(k)).

offense[24] (although appellate courts view this issue with a jaundiced eye if counsel do not raise it at trial),[25] incompetence to serve as a member under the provisions of Article 25, UCMJ,[26] adjudicative (versus accusatory) command influence,[27] and Article 13 punishment (which is not waived in the absence of an "affirmative, fully developed waiver on the record").[28] Practically all other issues are subject to waiver. "The principle of waiver and forfeiture is well understood in the context of trial. The *Manual for Courts-Martial* is replete with requirements that trial defense counsel timely declare an objection lest the issue be forfeited."[29]

These "raise or waive" issues include the following violations of the Rules for Courts-Martial: credit for violations of the procedures to place an accused into pretrial confinement;[30] objections to the Article 32 investigation;[31] objections to either the taking of a deposition, or to questions or evidence presented at the deposition;[32] failure to lodge objections at the appropriate time;[33] failure to place matters agreed upon in an out-of-court conference in the record orally or in writing;[34] challenges to the military judge (although some bases for challenge are not waivable);[35] an untimely request (or withdrawal of a request) for trial by enlisted panel or by military judge alone.[36] Other "raise or waive" issues include motions which counsel must raise *before entering a plea*, including defects in preferral, forwarding, investigating, or referral of charges and specifications; motions to suppress; motions for discovery or production of witness; motions to sever; and motions for individual military counsel.[37] Counsel must raise certain motions, requests, defenses, or objections *before the court-martial is adjourned*,[38] such as the right to speedy trial under RCM 707; the statute of limitations; double jeopardy; motions asserting that the prosecution is barred by a grant of immunity, a presidential pardon, or the like;[39] allegations of improper selection of members (in most

21. *Id.*

22. *See generally* MCM, *supra* note 2, R.C.M. 705(c); Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113 (1999). Additional issues that may not be bargained away (waived) by pretrial agreements, and the propriety of those prohibitions are beyond the scope of this article.

23. MCM, *supra* note 2, R.C.M. 907(b)(1).

24. *Id.* At least one scholar views the "longevity of this indeterminate concept [as] remarkable, especially considering the beating it has taken" in the Supreme Court. King, *supra* note 22, at 143. Professor King believes that "[c]learly another concept is needed to serve as a coherent expression of what features of a particular error render it appropriate for review despite express waiver by the parties." *Id*. at 144 (footnote omitted).

25. United States v. Watkins, 21 M.J. 208, 209 (C.M.A. 1986) (holding that specifications challenged for the first time on appeal are "liberally construed in favor of validity").

26. MCM, *supra* note 2, R.C.M. 912(f)(1)(A).

27. *See id.* R.C.M. 907(b)(1); United States v. Weasler, 43 M.J. 15 (1995) (holding that defense counsel can waive accusatory command influence); United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994); *see also* United States v. Richter, 51 M.J. 213, 224 (1999) ("Defects in preferring and forwarding charges [accusatory command influence] are waived if not raised at trial, unless the failure to raise the issue is itself the result of command influence."); *cf.* United States v. Baldwin, 54 M.J. 308, 310 n.2 (2001) (holding that "[w]e have never held that an issue of unlawful command influence arising during trial may be waived by a failure to object or call the matter to the trial judge's attention," in a case alleging that the command held meetings that were intended to influence members' actions in the trial of an officer).

28. United States v. Huffman, 40 M.J. 225, 227 (C.M.A. 1994) (holding that Article 13 issues were non-waivable, but viewing counsel's failure to object as "strong evidence" that there was no Article 13 violation). *See also* United States v. Scalarone, 54 M.J. 114 (2000).

29. United States v. Shavrnoch, 47 M.J. 564, 566 (A.F. Ct. Crim. App. 1997), *aff'd in part, set aside in part*, 49 M.J. 334 (1998).

30. MCM, *supra* note 2, R.C.M. 305(k); United States v. Chapa, 57 M.J. 140 (2002).

31. MCM, *supra* note 2, R.C.M. 405(k).

32. *Id.* R.C.M. 702(h), 702(c)(3)(D) (stating that when the convening authority denies a request for deposition, failure to renew the request before the military judge waives the issue).

33. *Id.* R.C.M. 801(g).

34. *Id.* R.C.M. 802(b).

35. *Id.* R.C.M. 902(e); United States v. Howard, 50 M.J. 469, 470 (1999); *cf.* United States v. Quintanilla, 56 M.J. 37, 77 (2001) (holding that the defense counsel does not waive a challenge against a military judge unless the failure to challenge the judge is "preceded by a full disclosure on the record of the basis for disqualification").

36. MCM, *supra* note 2, R.C.M. 903(e).

37. *Id.* R.C.M. 905(c).

38. *Id.* R.C.M. 905(e).

instances);[40] and challenges for cause[41] or peremptory challenges.[42] Other issues have their own specific points when they must be raised or waived. Counsel must object to improper argument on findings before the beginning of instructions on findings.[43] Objections to instructions or omissions of instructions on findings must be raised before members close to deliberate on findings.[44] Objections to sentencing instructions must be raised before the members close to deliberate on sentence.[45] Counsel must submit clemency matters[46] and comment on matters in the Staff Judge Advocate's post-trial recommendation[47] within the specific deadlines set by the Rules for Courts-Martial.

In addition to all of these waiver provisions, the Military Rules of Evidence also list several specific issues the accused must raise *before entering a plea* to avoid waiver, including motions to suppress confessions,[48] motions to suppress evidence obtained by an unlawful search or seizure,[49] and motions to suppress eyewitness identifications.[50] The military judge may exercise his discretion to consider untimely motions if the accused demonstrates good cause.[51]

Military Rule of Evidence 103, however, contains the most comprehensive and sweeping evidentiary waiver rules.[52] Military Rule of Evidence 103(a) states three basic but critical points. First, even where a defense counsel makes a proper objection and the military judge erroneously excludes or admits the evidence, no relief is available "unless the ruling materially prejudices a substantial right of" the accused.[53] Second, the defense counsel must object to the admissibility of evidence the defense seeks to exclude. Finally, if the military judge excludes evidence that the defense seeks to admit, the defense counsel must comply with MRE 103's mandate to preserve the defense position with respect to that evidence. This rule speaks for itself:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and
>
> (1) *Objection*. In case the ruling is one *admitting evidence*, a *timely objection* or motion to strike appears of record, *stating the specific ground of objection*, if the specific ground was not apparent from the context; or
>
> (2) *Offer of proof.* In case the ruling is one *excluding evidence*, the *substance of the evidence was made known to the military judge* by offer or was apparent from the context within which the questions were asked.[54]

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39. *Id.* R.C.M. 907(b)(2). *But see* United States v. Ragard, 56 M.J. 852, 854 n.9 (Army Ct. Crim. App. 2002) (considering the merits of a double jeopardy claim raised and denied before trial, followed by guilty plea; "because the issue could be resolved on the existing record, the appellant's guilty plea does not bar his claim").

40. *Id.* R.C.M. 912(b)(3).

41. *Id.* R.C.M. 912(f)(4).

42. *Id.* R.C.M. 912(g)(2).

43. *Id.* R.C.M. 919(c).

44. *Id.* R.C.M. 920(f).

45. *Id.* R.C.M. 1005(f).

46. *Id.* R.C.M. 1105(d).

47. *Id.* R.C.M. 1106(f)(6).

48. *Id.* MIL. R. EVID. 304(d)(5) (stating that an unconditional guilty plea waives all motions under this rule).

49. *Id.* MIL. R. EVID. 311(i) (stating that an unconditional guilty plea waives all motions under the Fourth Amendment and MRE 311-317).

50. *Id.* MIL. R. EVID. 321(g) (stating that an unconditional guilty plea waives all issues under this rule).

51. *Id.* MIL. R. EVID. 311(d)(2)(A), 321(c)(2)(A). *But see* United States v. Pomarleau, 57 M.J. 351, 362 (2002) (holding that while RCM 311(d)(2)(A) is "salutary and provides for efficient administration of justice, it should be liberally construed in favor of permitting the accused the right to be heard fully in his defense") (citing United States v. Coffin, 25 M.J. 32 (C.M.A. 1987)).

52. MCM, *supra* note 2, MIL. R. EVID. 103. The military rule is similar to its federal counterpart—one of the differences is that in the military, the test for prejudice incorporates UCMJ art. 59(a). *Cf.* FED. R. EVID. 103 (2000).

53. MCM, *supra* note 2, MIL. R. EVID. 103(a); *see also* UCMJ art. 59(a) (2000).

54. MCM, *supra* note 2, MIL. R. EVID. 103(a) (emphasis added).

In other words, for an accused to obtain relief from an evidentiary error, he must establish the existence of prejudice and a correct preservation of the objection under MRE 103(a). In the absence of the latter, the defense counsel has waived the issue; in the absence of the former, the court will consider the error, if any, to be harmless. In the absence of both, the appellate court will almost certainly not grant relief.

One cannot overstate the impact of MRE 103 on military trial practice. When it became effective in 1980,

> [MRE 103] altered court-martial practice more than any other provision contained in the MRE. This is because MRE 103 places responsibility for raising and preserving evidentiary issues squarely and almost entirely upon counsel, not upon trial or appellate courts. As a result, if a proper record is not made at trial, no relief will be available on appeal.[55]

According to one commentator, before the enactment of MRE 103(a), "appellate defense counsel were often permitted, if not encouraged by the court, to raise allegations of error having no foundation in the trial record. Military Rules of Evidence 103 clearly rejects this approach."[56]

Some judges lamented the military's embrace of waiver. After Chief Judge Crawford accused him of "swim[ming] in a sea of paternalism," now-retired Judge Cox responded:

> [L]et me make clear, I may be a "paternalist," but after 36 years of involvement with military justice and 22 years on the bench as a trial and appellate judge, I have witnessed for myself the experience level of the young military attorneys who represent our nation's men and women. Notwithstanding the fact that, in the main, these young attorneys are zealous, conscientious, and try hard to fully represent their clients, they do not always get it right. Someone, somewhere, has to step in and insure that each service member is afforded the protections that Congress intended they have. It saddens me that the Chief Judge of this Court, the Judge Advocate General of the Navy, and so many trial and appellate judges are quick to find "waiver" or some other legal theory to deny a service member relief if it is due.[57]

Notwithstanding Judge Cox's concerns, "current practice demonstrates that the CAAF's past paternalistic tendencies have been abandoned."[58] The general observations discussed later show just how sweeping this abandonment can be.

B. The Rationale of Waiver

Why do appellate courts apply waiver? "We begin with what we assume to be common ground—that piecemeal litigation is a bad thing, contributing to uncertainty, lack of finality and instability. . . . Avoidance of piecemeal litigation leads to the general rule that a federal appellate court does not consider an issue not passed upon below."[59] This "general rule . . . is hardly new to appellate practice. Dating to the 17th century English writ of error, it is as firmly rooted in common sense as in the common law."[60] The CAAF has commented on the theory of waiver as follows:

> The waiver rule places responsibility upon defense counsel to object. . . . This rule is designed . . . to prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished. It is important "to encourage all litigants to seek a fair and accurate trial the first time around."[61]

The CAAF also asserted judicial economy as a rationale for the waiver rules when it stated that "[t]he purpose of these so-called 'raise-or-waive' Manual rules are [sic] to eliminate the expense to the parties and the public of rehearing an issue that could have been dealt with by a timely objection or motion at

55. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 16 (4th ed. 1997).

56. *Id*. at 17 (footnote omitted).

57. United States v. Scalarone, 54 M.J. 114, 118 (2000).

58. SALTZBURG, *supra* note 55, at 18 (citing United States v. Meyers, 18 M.J. 347 (C.M.A. 1984) (requiring counsel to establish the parameters of all claimed errors during trial or lose them on appeal)).

59. United States v. Shavrnoch, 47 M.J. 564, 566 (A.F. Ct. Crim. App. 1997).

60. *Id.* (citation omitted). *See generally* Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1025-28 (1987).

61. United States v. Collins, 41 M.J. 428, 428 (1995) (quoting United States v. Causey, 37 M.J. 308, 311 (C.M.A. 1993)); *see also* United States v. Reist, 50 M.J. 108, 110 (1999).

trial."[62] Professor La Fave suggested other rationales for waiver:

> There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expense of an appeal.
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> There is, of course, nothing in these rationales that requires that the "raise-or-waive" rule be absolute, and all jurisdictions recognize one or more situations in which issues not raised below will be considered on appeal. The plain error rule . . . is clearly the most important of these "exceptions" to the raise-or-waive rule. Several other exceptions . . . either do not cover as broad a range of objections, or are not as widely accepted, but they nevertheless have a fairly significant impact upon the scope of review in many jurisdictions.[63]

Professor Saltzburg also echoes these rationales. First, "allowing defense counsel to raise issues for the first time on appeal encourages and permits careless litigation at trial . . . [and] sloppy handling of issues."[64] Second, the unfair advantage granted the defense, which could withhold issues at trial in order to litigate them by affidavits or otherwise on appeal, would deny the government "a fair chance to be heard on appeal."[65] Third, "the absence of a proper record may lead to inappropriate decisions and inconsistent reasoning by an appellate court."[66] Finally, the failure to raise and decide issues at the trial level makes appellate litigation more likely.[67]

C. Standards of Review

"The critical issue in this case is one not discussed by the parties: our standard of review."[68]

Simply stated, the standard of review is the amount of deference an appellate court accords a trial judge's decision. Most standards of review are highly deferential to trial judges' rulings. They are absolutely critical in appellate practice, as the above quote demonstrates.[69]

Trial practitioners may wonder, "Why do I need to be familiar with these appellate principles?" The answer is simple: appellate courts perform a completely different analysis of properly preserved objections and issues than of issues that are not properly preserved. Because of the degree of deference appellate courts traditionally grant to trial judges' rulings through their standards of review, it is almost always difficult to obtain any relief on appeal, even with a properly preserved issue. Obtaining relief in the face of waiver or forfeiture, however, is exponentially harder.

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62. United States v. Huffman, 40 M.J. 225, 229 (C.M.A. 1995) (Crawford J., dissenting in part and concurring in the result). *See also* United States v. Collins, 41 M.J. 428, 430 (1995) (quoting United States v. Jones, 37 M.J. 321, 323 (C.M.A. 1993)).

63. WAYNE LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 27.5(c), at 923-24 (2d ed. 1999), *quoted in* United States v. Chapa, 57 M.J. 140, 146 (2002) (Sullivan, J., concurring in part and in the result).

64. SALTZBURG, *supra* note 55, at 17.

65. *Id.* at 17-18.

66. *Id*.

67. *Id*.; *see also* Martineau, *supra* note 60, at 1028-34.

68. Fox v. Comm'r, 718 F.2d 251, 253 (7th Cir. 1983), *quoted in* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, 1 FEDERAL STANDARDS OF REVIEW § 1.02, at 1-7 (3d ed. 1999).

69. *See* W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 359 (1998) ("Standards of review are the cornerstone of an appeal, and these standards must be woven into the discussion of the facts and the substantive law in a manner which persuades the appellate court that the trial court erred."), *quoted in* CHILDRESS & DAVIS, *supra* note 68, § 1.02, at 1-8 n.10.

For purposes of the following discussion—and in order to understand how these standards work—divide issues into two categories: those properly raised and preserved at trial; and those not properly raised and preserved (that is, waived or forfeited). First, assume that the trial defense counsel properly preserved the objection. The client will not get relief on appeal unless there is: (1) error; and (2) material prejudice to a substantial right.[70] The appellate court applies the appropriate standard of review to answer the first question of this two-part analysis: "Is there error?" If the court concludes that there is error, then it engages in a separate analysis—commonly known as harmless error or Article 59(a) analysis—to answer the second question: "Is there prejudice?" If (and only if) the answer to both questions is "yes," the accused get relief—that is, when the appellate court finds *prejudicial error.* If there is error but no prejudice, there is "harmless error," and the accused gets nothing.

There are several main standards of review appellate courts apply to answer the first question of the appellate inquiry ("Is there error?") where the defense counsel objected. These are *abuse of discretion*, *clearly erroneous*, and *de novo*.

The most common standard of review—and that applied to the nearly all evidentiary rulings—is *abuse of discretion*. "To reverse for an abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous,' in order to be invalidated on appeal."[71]

Another major standard of review, also exceedingly deferential to the trial judge, is *clearly erroneous*, which appellate courts use to determine whether a trial judge's findings of fact are incorrect.[72] A frequently quoted definition of this standard of review is this colorful description: "At least one court has defined the clearly-erroneous standard by stating that it must be 'more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'"[73]

The least deferential standard of review is applied to questions of law—*de novo*.[74] Here, the appellate court gives *no deference* to the trial judge's ruling. Even where the appellate court is reviewing an issue *de novo*, however, it normally defers to any findings of fact by the military judge unless they are clearly erroneous.[75]

Some issues lend themselves to a *mixed* standard of review because such issues present mixed questions of law and fact. For example, appellate courts review motions to suppress for abuse of discretion,[76] deferring to trial judges' findings of fact unless they are clearly erroneous, and review trial judges' legal conclusions *de novo*. An appellate court will not find an abuse of discretion unless the findings of fact are clearly erroneous or the conclusions of law are incorrect.[77]

Finally, there are some standards of review that do not fit any of the common categories. For example, the discretion granted a military judge's decision on a challenge for cause depends on whether the basis of the challenge was actual or implied bias. A ruling on a challenge for cause based on actual bias is reviewed for an abuse of discretion. "By contrast, issues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than *de novo*."[78]

The CAAF and the Army Court of Criminal Appeals (ACCA) both recognize the importance of standards of review to appellate decision makers. Accordingly, both require a state-

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70. *See, e.g.*, UCMJ art. 59(a) (2000); MCM, *supra* note 2, MIL. R. EVID 103(a).

71. United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (quoting United States v. Yoakum, 8 M.J. 763 (A.C.M.R. 1980)).

72. *See, e.g.*, United States v. Alameda, 57 M.J. 190, 198 (2002). If the military judge fails to make findings of fact, an appellate court will accord his ruling much less (or no) deference. *Id.* Appellate courts also give military judges less deference on evidence rulings if they fail to articulate the MRE 403 balancing analysis (that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice) on the record, and no deference whatsoever if the military judge fails to conduct the balancing test at all. United States v. Manns, 54 M.J. 164, 166 (2000); *see generally* MCM, *supra* note 2, MIL. R. EVID. 403.

73. United States v. French, 38 M.J. 420, 425 (C.M.A. 1993) (citing Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988)).

74. *See* United States v. Smith, 56 M.J. 290, 292 (2002). For example, appellate courts apply the *de novo* standard of review to questions of whether a service member is entitled to pretrial confinement credit, and whether he has suffered cruel and unusual punishment in violation of Article 55, UCMJ, or the Eighth Amendment. *See id*. Appellate courts also apply the *de novo* standard to questions of ineffective assistance of counsel, United States v. Grigoruk, 56 M.J. 304, 306 (2002), and whether a confession is voluntary, United States v. Benner, 57 M.J. 210, 212 (2002).

75. *See* United States v. Melanson, 53 M.J. 1 (2000) (resolving a question of jurisdiction, a classic *de novo* issue, primarily by deferring to trial judge's findings of fact).

76. *See* United States v. Ayala, 43 M.J. 296, 298 (1995); *see also* United States v. Hollis, 57 M.J. 74, 79 (2002).

77. *Ayala*, 43 M.J. at 298. A mixed standard of review also applies to issues of whether a service member suffers unlawful pretrial punishment in violation of Article 13, UCMJ. The "court will not overturn a military judge's findings of fact, including a finding of no intent to punish, unless they are clearly erroneous. . . . We will review *de novo* the ultimate question of whether an appellant is entitled to credit for a violation of Article 13." United States v. Mosby, 56 M.J. 309, 310 (2002). *See also* United States v. Corteguera, 56 M.J. 330, 334 n.1 (2002).

78. United States v. Downing, 56 M.J. 419, 422 (2002).

ment of the applicable standard of review for every issue presented by an appellant.[79] This brief description of some of the basic standards of review demonstrates that it is not enough for an appellate court to simply disagree with a trial judge's ruling. It is not the province of the appellate court to substitute its judgment for the trial judge. In the vast majority of cases, the appellate courts refuse to do so. As one appellate court succinctly stated, "We take this occasion to repeat: we do not sit to hear cases *de novo*."[80]

Harmless Error, Plain Error, and Article 59(a)

It is important to remember that all of the standards of review discussed above apply only when counsel have properly preserved those issues for appeal by objecting at the appropriate point in the trial process. If the appellate court applies the appropriate standard of review and finds error, it next analyzes whether the error is prejudicial or harmless. This is where the trial attorney's hard work to properly preserve appellate issues may pay off for the client. If the appellate court finds error, *the burden shifts to the government to prove that the error is harmless*.[81] This burden depends on the type of error—non-constitutional or constitutional. For a non-constitutional error, the government must prove that any error is harmless. In doing so, the government must address "whether the error itself had substantial influence"[82] on the findings. "If so, or if one is left in grave doubt, the conviction cannot stand."[83] For a constitutional error, the government must prove that the error is harmless beyond a reasonable doubt.[84] "Stated differently, the test is, 'Is it clear beyond a reasonable doubt that a rational jury would have found the appellant guilty absent the error.'"[85]

There is a certain category of errors that the appellate courts do not test for harm. Known as "structural errors,"[86] these errors are so basic that harm is self-evident. "[W]e recognize that in some cases the precise legal characterization of an error may be important. In this regard, the Supreme Court has observed that some errors are 'structural defects' in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards."[87]

Structural errors include[88] the "total deprivation of the right to counsel at trial,"[89] the lack of an impartial judge,[90] the "unlawful exclusion of members of the defendant's race from a grand jury,"[91] the "right to self-representation at trial,"[92] and the "right to public trial."[93] "Without [certain] basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."[94]

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79. U.S. Court of Appeals for the Armed Forces, Rules of Practice and Procedure, Rule 24 (1 Nov. 2001); Army Court of Criminal Appeals, Internal Rules of Practice and Procedure app. 1 (1 April 2002). Sometimes, the question of the appropriate standard of review is itself the subject of litigation. Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997) (considering appeal in which the sole issue was what standard of review applied to the trial court's decision to admit or exclude expert testimony); United States v. Butcher, 56 M.J. 87, 90-91 (2001) (discussing the standard of review for recusal of a military judge).

80. Commercial Standards Ins. Co. v. Bryce Street Apartments, Ltd., 703 F.2d 904, 908 (5th Cir. 1983), *quoted in* Childress & Davis, *supra* note 68, § 1.02, at 1-9.

81. *See, e.g.*, United States v. Pablo, 53 M.J. 356, 359 (2000). The CAAF reviews a court of criminal appeals' determination of harmlessness *de novo*. United States v. Hall, 56 M.J. 432, 436 (2002) (citing United States v. Grijalva, 55 M.J. 223, 228 (2001) (applying *de novo* standard of review for constitutional error)); United States v. Gunkle, 55 M.J. 26, 30 (2001) (applying *de novo* standard of review for non-constitutional error).

82. *Pablo*, 53 M.J. at 359 (quoting Kotteakos v. United States, 328 U.S. 750 (1946)). *See also* United States v. Moolick, 53 M.J. 174, 177 (2000); United States v. Armstrong, 53 M.J. 76, 81 (2000); United States v. Pollard, 38 M.J. 41, 52 (C.M.A. 1993).

83. *Pablo*, 53 M.J. at 359; *Armstrong*, 53 M.J. at 81 (citing *Kotteakos*, 328 U.S. at 750).

84. Chapman v. California, 386 U.S. 18, 23 (1976); United States v. Ward, 1 M.J. 176 (C.M.A. 1975) (applying *Chapman* to military cases); *see also* United States v. George, 52 M.J. 259, 261 (2000) (citing United States v. Bins, 43 M.J. 79, 86 (1995)).

85. United States v. McDonald, 57 M.J. 18, 20 (2002) (quoting Neder v. United States, 527 U.S. 1, 18 (1999)).

86. *See, e.g.*, United States v. Reynolds, 49 M.J. 260, 262 (1998).

87. *Id*. (quoting Arizona v. Fulminante, 499 U.S. 279, 309 (1991)).

88. *See Reynolds*, 49 M.J. at 261 (listing examples of structural errors).

89. *Id*. (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

90. *Id*. (citing Tumey v. Ohio, 273 U.S. 510 (1927)).

91. *Id*. (citing Vasquez v. Hillery, 474 U.S. 254 (1986)).

92. *Id*. (citing McKaskle v. Wiggins, 465 U.S. 168 (1984)).

93. *Id*. (citing Waller v. Georgia, 467 U.S. 39 (1984)).

For issues that trial defense counsel have *not* properly preserved, appellate courts may only grant relief for errors that rise to the level of "plain error." Accordingly, to determine whether relief is warranted for waived or forfeited issues, the appellate courts engage in a completely different analysis than for properly preserved issues. Plain error analysis gives an accused an extremely low chance of success. Before granting any relief, the court must find: (1) error; (2) that is "plain," "clear," or "obvious;" and (3) that the error materially prejudiced one of the accused's substantial rights.[95]

> Put another way, an error is "plain" if it is "so egregious and obvious" that a trial judge and prosecutor would be "derelict" in permitting it in a trial held today. . . . Although the error may not have been "plain" at the time of the court-martial proceeding, it is sufficient if the error becomes "plain" at the time of appellate consideration.[96]

Unlike harmless error analysis, plain error analysis places the *burden on the appellant* to prove all three prongs of the test.[97] The accused receives no relief unless his allegation of error meets all three prongs, in which case the appellate court may only grant relief if the error "seriously affects the fairness, integrity, or public perception of judicial proceedings."[98]

In order to prove "material prejudice to a substantial right" in a plain error scenario, the appellant must prove that the error "was so significant as to influence the outcome of the trial, that is, [the error] made the trial unfair,"[99] or that the error had an "unfair prejudicial impact on the jury's deliberations."[100]

> The plain-error doctrine . . . tempers the blow of a rigid application of the contemporaneous-objection requirement. The Rule authorizes the Courts of Appeals to correct only "particularly egregious errors," . . . those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." In other words, the plain-error exception is to be "used sparingly, solely in those cases in which a miscarriage of justice would otherwise result." Any unwarranted extension of this exacting definition of plain error would skew the Rule's "careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed."[101]

The CAAF announced the three-part test for plain error in the military in the landmark case of *United States v. Powell*.[102] In so doing, the CAAF distinguished military practice from practice in other federal courts where appellants need only establish plain, obvious error that "affects substantial rights."[103] The arguably more stringent military standard results from the mandate of Article 59(a), UCMJ, which states that "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."[104] Article 59(a) applies to virtually every non-structural error in military practice, whether preserved or not. How, then, does one square this single universal requirement with all the different formulations, requirements, and burdens for harmless error (constitutional and non-

94. United States v. Reynolds, 49 M.J. 260, 261 (1998) (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). There is also a concept known as "invited error," "invited response", or "invited reply." This doctrine essentially states that the defense cannot create error and then take advantage of a situation of its own making. *See generally* United States v. Gilley, 56 M.J. 113 (2002) (citing United States v. Eggen, 51 M.J. 259 (1999); United States v. Raya, 45 M.J. 151 (1996)).

95. United States v. Powell, 49 M.J. 460, 465 (1998). *See* MCM, *supra* note 2, MIL. R. EVID. 103(d); UCMJ art. 59(a) (2000).

96. United States v. Baker, 57 M.J. 330, 337 (2002) (Crawford, C.J., dissenting) (citations omitted).

97. *See, e.g.*, United States v. Schlamer, 52 M.J. 80, 85-86 (1999), *cert. denied*, 529 U.S. 1005 (2000). In *Powell*, 49 M.J. at 460, the CAAF described a confusing "shifting burden" for plain error, which it never applied and appears to have abandoned. *See id.*; *cf.* United States v. Gilley, 56 M.J. 113, 129 (2002) (Sullivan, C.J., concurring in part and dissenting in part); *see also* United States v. Ruiz, 54 M.J. 138, 139 (2000); United States v. Kho, 54 M.J. 63, 65 (2000); United States v. Southwick, 53 M.J. 412, 414 (2000); United States v. Reist, 50 M.J. 108, 110 (1999). The appellant alone clearly bears the burden of proving all three components of plain error, and the burden never shifts to the government. *See* United States v. Olano, 507 U.S. 725, 734, 741 (1993).

98. United States v. Johnson, 520 U.S. 461, 466-67 (1999). The CAAF has never clearly addressed this fourth prong of the plain error analysis. Some plain and obvious error still may not cause material prejudice to a substantial right. *See, e.g.*, *Southwick*, 53 M.J. at 412. For this reason, trial practitioners should read opinions closely—an affirmance of a conviction does not necessarily signal approval of the military judge's rulings.

99. *See* United States v. Boyd, 52 M.J. 758, 762 (A.F. Ct. Crim. App. 2000) (citing *Powell*, 49 M.J. at 465; United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986)).

100. *Schlamer*, 52 M.J. at 85.

101. United States v. Young, 470 U.S. 1, 15-16 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 (1982); United States v. Atkinson, 297 U.S. 157, 160 (1936)).

102. 49 M.J. 460 (1998).

103. United States v. Olano, 507 U.S. 725, 734 (1993).

104. UCMJ art. 59(a) (2000).

constitutional) and plain error? In this author's view, the different formulations define what "material prejudice to a substantial right" *is* in those different contexts.

This brief introduction to waiver and standards of review sets the stage for some general observations that apply to trial practice. These observations will assist trial attorneys who now realize the crucial importance of "making the appellate record."

II. Top Ten General Observations on Making the Appellate Record

1. Failure to Object (or to Object Properly) at Trial Waives the Issue

This basic observation bears repeating. Proper objections at trial are the bedrock of appellate relief. Without a proper objection, the accused's chances for relief on appeal are meager. The lesson for trial advocates is self-evident: *object*, and *object properly*!

2. An Error Without Prejudice Means No Relief on Appeal

Even where the trial defense counsel objects properly at trial, the appellate courts will not grant relief unless there is both an error and resulting harm to the accused.[105] Trial practitioners must articulate how specific rulings prejudice the accused when they make their objections. For example, if the judge refuses to allow a defense counsel to ask a victim certain questions on cross-examination, the counsel must tell the judge why those questions and answers fit into the defense theory of the case. Do they impeach credibility? If they do, is the victim's credibility central to the defense theory of defense?

3. An Objection at Trial on One Basis Does Not Preserve an Objection on a Different Basis

As already noted, MRE 103(a) requires counsel to state a "specific ground of objection."[106] Similarly, RCM 905(a) requires that every "motion shall state the grounds upon which it is made."[107] Military Rule of Evidence 304, which deals with confessions and admissions, allows the military judge to require the defense to specify the grounds upon which the defense is moving to suppress or object to evidence.[108] Military courts take this requirement seriously. There are numerous examples of courts finding waiver where appellate defense counsel raise different bases of objection from those that defense counsel lodged at trial.[109] In *United States v. Schlamer*,[110] for example, the following exchange took place at trial after the defense objected to a trial counsel's questions of a Criminal Investigative Command agent, concerning a potentially false confession:

> Q: During this interrogation of [the accused], did it appear to you that he was making—
>
> CC [Civilian Defense Counsel]: Objection, Your Honor. Speculation, ultimate issue.
>
> MJ: Overruled.
> . . .
> Q: Did it appear to you that he was making this information up?
>
> A: No, sir, it did not.
> . . .
> Q: [B]ased on the way the interview was conducted and how he appeared, do you think this is a false confession?
>
> A: Absolutely not, sir.[111]

The defense appellate counsel later argued that this clearly troubling exchange violated the rule against "human lie detector testimony."[112] The CAAF found this basis waived, stating that the "speculation" objection was not sufficient to preserve

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105. *See id*.; MCM, *supra* note 2, MIL. R. EVID. 103; United States v. Powell (discussing the requirement to show prejudice in "plain error" cases).

106. MCM, *supra* note 2, MIL. R. EVID. 103(a)(1).

107. *Id.* R.C.M. 905(a).

108. *Id.* MIL. R. EVID. 304(d)(3).

109. *See, e.g.*, United States v. Norris, 55 M.J. 209, 213 (2001) (holding that an objection to a proffered expert's qualifications does not preserve an appellate objection to the adequacy of the foundation for the expert opinion); United States v. Munoz, 32 M.J. 359, 364-65 (C.M.A. 1991), *cert. denied*, 502 U.S. 967 (1991) (holding that an objection to the admissibility of evidence offered as a "plan" under MRE 404(b) "suggests waiver" of an appellate objection under MRE 403); United States v. Arab, 55 M.J. 508, 512 (Army Ct. Crim. App. 2001) (holding that counsel waived a speedy trial issue on appeal after making a related motion at trial; lack of objection to the specific time period for purposes of calculating the number of days to bring appellant to trial constituted waiver of an assertion on appeal that the same time period counted against the government).

110. 52 M.J. 80 (1999).

111. *Id.* at 85.

112. *Id.*

the "human lie detector" basis, first raised on appeal.[113] The court reviewed the issue for plain error and found none.[114]

Similarly, but without basing its decision on waiver, the CAAF denied relief in a case where the basis for the objection at trial was hearsay, and the basis argued on appeal was a violation of the spousal privilege.[115] The court echoed one of the bases for the waiver rules, reiterating that appellate review of an objection "requires a record that the appellate court can review."[116] "It is difficult, if not impossible," the court stated, "to second-guess the intent of the trial defense counsel if he or she does not make the specific objection known to the military judge."[117] The obvious lesson for trial practitioners is that they must alert the judge to all possible bases for their objections.[118]

4. Offering Evidence on One Basis at Trial Does Not Preserve an Offer of the Same Evidence on a Different Basis on Appeal

This is a corollary to the previous observation. The military courts have adopted this general rule, which also applies in other federal courts. One court describes this general rule as follows:

> If evidence is excluded at trial because it is inadmissible for the purpose articulated by its proponent, the proponent cannot challenge the ruling on appeal on the ground that the evidence could have been admitted for another purpose. A purpose not identified at trial does not provide a basis for reversal on appeal.[119]

As with its corollary observation, the CAAF also takes this principle seriously. An excellent example of its application is *United States v. Palmer*,[120] in which the defense counsel offered certain evidence as an exception to the hearsay rule, and the military judge sustained the trial counsel's objection to the evidence. The appellate defense counsel later argued that the military judge should have admitted the evidence as a prior inconsistent statement under MRE 613.[121] Without specifically finding that the trial defense counsel waived this argument, the CAAF found that the trial defense counsel's "vague and misdirected proffer" meant that the military judge did not abuse his discretion.[122] In its decision, the CAAF provides two-part guidance for trial practitioners. First, the court reminded counsel that

> [w]hen a ruling excludes evidence, appellate review of the correctness of the ruling is not preserved unless the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked. Military judges are not expected to be clairvoyant. When the basis for admissibility is not obvious, an offer of proof is required to clearly and specifically identify the evidence sought to be admitted and its significance.[123]

Although proffers by attorneys are not evidence;[124] MRE 103(a)(2) requires them.[125] In some instances, trial defense

113. *Id*. *See also* United States v. Rodriguez-Lopez, No. 33548, 2001 CCA LEXIS 223, *36-37 (A.F. Ct. Crim. App. July 26, 2001) (unpublished). In *Rodriguez-Lopez*, the trial defense counsel objected that expert testimony vouching for the credibility of child sex abuse victims "invad[ed] the province of the trier of fact." *Id.* at *36. The ACCA held that this objection failed to preserve an appellate objection that the expert's testimony was the equivalent of a "human lie detector." *Id.* at *30. The appellate court stated that "[t]here was nothing before the military judge at the time to suggest the expert witness' testimony would improperly vouch for the credibility of the witnesses." *Id.* at *36-37. "Without 'divine inspiration,' the military judge would have had no way of knowing that the defense counsel's objection extended to that basis." *Id.* at *37.

114. *Schlamer*, 52 M.J. at 86.

115. United States v. McCarty, 45 M.J. 334 (1996).

116. *Id*. at 335 n.2.

117. *Id*.

118. Counsel should be wary of making their objections too broad; a "vague reference" to a basis for objection at trial may not be enough to preserve an issue for appeal. United States v. Gray, 51 M.J. 1, 26 (1999) (holding that in a capital case, a motion to suppress statements to civilian investigators that made only a "vague reference to Article 31" waived Article 31 objection on appeal; the defense counsel made "no attempt to develop a proper factual basis for suppression" on this ground at trial); United States v. Harris, 52 M.J. 665, 669 (Army Ct. Crim. App. 2000) (holding that a trial defense counsel waived appellate allegation of error for failure to grant new Article 32 investigation; the trial defense counsel never "clearly put" the issue to the convening authority or the military judge).

119. United States v. Palmer, 55 M.J. 205, 208 (2001) (citing United States v. Hudson, 970 F.2d 948, 957 (1st Cir. 1992)).

120. *Id*.

121. *Id*. at 207.

122. *Id*. at 208 (citation omitted).

123. *Id.* (quoting United States v. Means, 24 M.J. 160, 162-63 (C.M.A. 1987)). *See* MCM, *supra* note 2, MIL. R. EVID 103(a)(2).

counsel may want to suggest to the military judge that he actually hear the disputed evidence before ruling on its admissibility. Alternatively, the defense counsel should make sure that the proffer is complete by ensuring that it fully sets forth what the witness will say, why it is relevant, how the evidence fits the defense theory of defense (and thus is necessary to the defense), how the evidence counters government evidence or a government contention, and how the evidence comes within a defense theory of admissibility. If the military judge refuses to allow a proffer, the defense counsel can cite the requirement of MRE 103(a)(2) to the judge. If that does not work, the defense counsel should consider drafting a written proffer and attaching it as an appellate exhibit.

The second point of guidance the CAAF made in *Palmer* is that, while counsel do not have to cite specific rules of evidence by number or quote specific words from the rules,[126]

> counsel [are] required to alert the military judge to the significance of the proffered evidence. In this case, defense counsel did not allude to the inconsistency between [the witness's] pretrial statement and his trial testimony as the basis for admission. Instead, he focused the military judge on the hearsay exception based on [the witness's] state of mind. *If defense counsel had two theories of admissibility, it was incumbent upon him to alert the military judge to both theories, especially when it became apparent that the military judge was ruling only on the* [*state of mind*] *basis.*[127]

The lessons from this quotation are self-evident. First, counsel seeking to admit evidence should offer it under every applicable theory of admissibility. They should also urge the military judge to apply the same principle to the trial counsel. If the government offers evidence on one basis, the defense counsel should object if the military judge admits it on a different basis. If the military judge erroneously admits evidence under one theory, however, an appellate court could find that the error did not prejudice the accused if the evidence was properly admissible under another theory.[128]

5. An Unconditional Guilty Plea Waives Most Motions, Even If Counsel Fully Litigate Them Before the Plea

This observation answers the hypothetical question posed at the beginning of this article. An unconditional guilty plea "which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made."[129] There are only two ways to preserve issues that would be waived by a guilty plea: to plead not guilty; or to enter into a conditional plea, which requires the consent of the government and the approval of the military judge. If an appellate court finds that the military judge's ruling on the preserved issue was erroneous, the accused may then withdraw his plea.[130]

6. Failure to Raise Most Motions Before Plea Waives Them, Absent Good Cause

Those issues affected by this general principle are primarily listed in RCM 905(b), and include motions relating to discovery and production of witnesses.[131] Also included are most motions based on the Fourth and Fifth Amendments and Article 31, UCMJ. Appellate courts review a military judge's determination of good cause for abuse of discretion.[132]

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124. *See* United States v. Grant, 38 M.J. 684, 690 n.3 (A.F.C.M.R. 1993), *aff'd*, 42 M.J. 340 (1995) ("We again caution trial participants that averments of counsel are not evidence.").

125. MCM, *supra* note 2, MIL. R. EVID. 103(a)(2).

126. *Palmer*, 55 M.J. at 208.

127. *Id*. (emphasis added).

128. United States v. Cobia, 53 M.J. 305 (2000) (holding that the defense counsel waived any objection to admission of evidence of a prior conviction under MRE 609; in any event, the conviction was also admissible as substantive evidence; thus, the admission of the evidence was not prejudicial); United States v. Robles, 53 M.J. 783, 798-99 (A.F. Ct. Crim. App. 2000) (holding that the military judge's error in admitting testimony as residual hearsay was not prejudicial where the evidence would have been admissible on a different basis).

129. MCM, *supra* note 2, R.C.M. 910(j). *See generally* King, *supra* note 22; MCM, *supra* note 2, R.C.M. 705(c) (discussing prohibited terms and conditions of pretrial agreements). It is not clear if an unconditional guilty plea waives a motion to dismiss for violation of Article 10, UCMJ's statutory right to a speedy trial. United States v. Birge, 52 M.J. 209 (1999) (deciding on other grounds and failing to reach this issue, despite the fact that appellate counsel presented it); *see also* United States v. Gutierrez, 57 M.J. 148, 149 (2002) (deciding the case on other grounds). *But see* United States v. Benavides, 57 M.J. 550, 554 (A.F. Ct. Crim. App. 2002). For a general discussion in favor of disallowing waiver of this right by a guilty plea, see King, *supra* note 22, at 178-80.

130. MCM, *supra* note 2, R.C.M. 910(a)(2).

131. *Id.* R.C.M. 905(b)(4).

132. *See id*. MIL. R. EVID. 304(d)(2)(A); 311(d)(2)(A).

7. If the Military Judge Defers Ruling or Invites Further Evidence or Reconsideration, He Has Not Ruled, and There Is No Ruling to Appeal

"Where a military judge makes a preliminary ruling excluding evidence but invites counsel to renew the request at a later time in the trial, counsel's failure to renew the request waives the issue."[133] This principle is discussed in greater detail in the section relating to the proper preservation of motions in limine.

8. Whether the Trial Is Before a Panel or Military Judge Alone Matters, Especially for the Purposes of Plain Error Analysis

Numerous presumptions appellate courts apply to military judges tilt the balance against appellate relief when the accused was tried by military judge alone, particularly when defense counsel fail to object properly.

> When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle. A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence. As a result, "plain error before a military judge sitting alone is rare indeed."[134]

The appellate courts also presume that the "prejudicial impact of erroneously admitted evidence" on a military judge is less than on a panel.[135] All of these presumptions make it especially imperative for the trial practitioner to object properly in judge-alone trials. Erroneous rulings based on proper objections may also chip away at the appellate judges' presumption that the military judge knows the law and applied it correctly.

9. With Few Exceptions, the Record of Trial Cannot Be Supplemented on Appeal

Appellate review is generally limited to matters presented at trial.[136] Probably the most common exception to this principle is allegations of ineffectiveness of counsel.[137] If the appellate courts see a need for further inquiry into a specific area not covered in the record of trial, they usually remand the case for a fact-finding hearing, where the military judge will hear additional evidence and enter findings of fact and conclusions of law.[138] The principle of disallowing record supplementation on appeal leads to probably the most important general observation concerning making the appellate record:

10. If It's Not in the Record, It Didn't Happen!

The "record" means the "record of trial," which includes only those matters received into evidence and appellate exhibits.[139] It does *not* mean everything "between the 'blue covers,'" such as the summarized transcript of the Article 32, UCMJ hearing, other allied papers, or rejected exhibits "marked for and referred to on the record but not received into evidence."[140] Other examples include electronic correspondence between counsel and with the military judge, and out-of-court sessions under RCM 802 that are not properly reflected on the record. These items are not "on the record," are not part of the "record for trial," and cannot be considered on appeal.[141]

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133. United States v. Browning, 54 M.J. 1, 9 (2000) (citing United States v. Rockwood, 52 M.J. 98, 105, *cert. denied*, 528 U.S. 1160 (2000)); United States v. Dollente, 45 M.J. 234, 240 (1996)); *see also* United States v. Brannan, 18 M.J. 181, 183, 185 (C.M.A. 1984) (holding that the military judge initially erred when he denied a defense motion in limine, but that the error was harmless because he "stated he would consider objections individually at the time the witnesses testified," and because the defense counsel failed to further object "in view of [MRE] 103").

134. United States v. Robbins, 52 M.J. 455, 457 (2000), *cert. denied*, 531 U.S. 874 (2000) (citation omitted).

135. United States v. Cacy, 43 M.J. 214, 218 (1995) (quoting United States v. Cardenas, 9 F.3d 1139, 1156 (5th Cir. 1993)).

136. United States v. Mason, 45 M.J. 483, 484 (1997) (holding that the CAAF's review under Article 67, UCMJ is limited to the facts, testimony, and evidence presented at trial); United States v. Rust, 41 M.J. 472, 479 n.3 (1995), *cert. denied*, 516 U.S. 86 (1995) (holding that appellate courts must review rulings of a military judge based on evidence in the record of trial); United States v. Vangelisti, 30 M.J. 234, 237 (C.M.A. 1990) (noting that the pertinent inquiry is the legal sufficiency of the evidence of record supporting the judge's findings, not the existence of evidence—or of potential evidence—supporting a contrary holding). Courts of Criminal Appeals, however, do have fact-finding power under UCMJ art. 66, so those courts do allow some supplementation of the record. Supplementation is not normally allowed on evidentiary issues or issues of guilt or innocence. *See, e.g.*, United States v. Hopkins, 2 M.J. 1031, 1034 n.2 (A.C.M.R. 1976), *modified on other grounds*, 4 M.J. 260 (C.M.A. 1978) (rejecting the appellant's attempt to supplement the record on a speedy trial motion because the "appellant was not prevented from presenting the evidence at trial, and . . . his belated attempt to present the evidence to this Court is an inappropriate attempt to add to the trial record that which could have been presented at trial").

137. *See generally* United States v. Ginn, 47 M.J. 236 (1997).

138. United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

139. United States v. Leal, 44 M.J. 235, 236 (1996).

140. *Id.* (quoting United States v. Heirs, 29 M.J. 68, 69 (C.M.A. 1989)).

III. Preserving Selected Specific Objections

Mere objections do not preserve all issues for appeal; the preservation of some issues requires counsel to comply with specific requirements. This section describes the requirements for some common objections in the chronological order of their usual occurrence in the court-martial process.

1. Preserving Objections to or During the Article 32 Investigation

Preserving objections to matters involving the Article 32 investigation involves some fairly complicated steps. First, counsel must object on the record during the investigation and ask the investigating officer to specifically note the objection in the report of investigation.[142] Next, counsel must again object—in writing—to the convening authority within five days of receiving the investigating officer's report.[143] Failure to do either of these things constitutes waiver.[144] If the objection is for failure to produce a witness, the defense counsel must also ask the convening authority to order a deposition of the witness.[145] Finally, the defense counsel must object yet again—to the military judge—before entering a plea, or waive the issue.[146]

2. Preserving Objections to Discovery and Witness Matters

Counsel should make specific requests for discovery, tailored to the facts of each case, rather than simply relying on standard discovery requests. Case law recognizes a distinction between general and specific requests for information.[147] If the government denies a request for certain discovery or for a particular witness, the defense counsel should move to compel the government to produce the item or witness sought before entering a plea.[148] If the motion is to compel a witness, the defense counsel should proffer the substance of the witness's testimony and explain how that testimony is both legally and logically relevant.[149] The defense counsel should first *interview the witness* or describe—on the record—any unsuccessful attempts to interview the witness. Failure to do so could cause the military judge to summarily deny a request to produce the witness.

Failure to interview the requested witness was one of the reasons the appellate court held against the appellant in *United States v. Rockwood*.[150] The defense counsel's proffer and RCM 703 request were both inadequate to support production of the requested witness, the Commanding General of the Joint Task Force located in Haiti.[151] The defense made a proffer to the military judge, but did not interview the witness first. Not surprisingly, the military judge denied the request, although he invited the defense to renew it.[152]

On appeal, the CAAF first reiterated that the UCMJ grants all parties "equal opportunity to obtain witnesses . . . in accor-

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141. *See id.* (citing *Heirs*, 29 M.J. at 69).

142. MCM, *supra* note 2, R.C.M. 405(h)(2).

143. *Id.* R.C.M. 405(j)(4); United States v. Czekala, 38 M.J. 566, 571-72 (A.C.M.R. 1993), *aff'd*, 42 M.J. 168 (1995) (holding that failure to submit objections to the convening authority within five days of the Article 32 report of investigation, based, *inter alia*, on inadequate time to prepare, waived any objection to the conduct of the hearing); *see also* United States v. Harris, 52 M.J. 665, 669 (Army Ct. Crim. App. 2000).

144. MCM, *supra* note 2, R.C.M. 405(k) (stating that the convening authority, investigating officer, or military judge may grant relief from waiver for good cause).

145. United States v. Chuculate, 5 M.J. 143 (C.M.A. 1978).

146. MCM, *supra* note 2, R.C.M. 905(b)(1).

147. *See, e.g.*, United States v. Stone, 40 M.J. 421, 423 (C.M.A. 1994). In *Stone*, the Court of Military Appeals stated as follows:

> [W]here prosecutorial misconduct is present or where the Government fails to disclose information pursuant to a *specific* request, the evidence will be considered "material unless failure to disclose" can be demonstrated to "be harmless beyond a reasonable doubt." Where there is no request or only a *general* request, the failure will be "material only if there is a reasonable probability that" a different verdict would result from disclosure of the evidence.

Id. (quoting United States v. Hart, 29 M.J. 407, 410 (1990)). *See also* United States v. Morris, 52 M.J. 193, 197 (1999) (repeating the standard applicable to general requests); United States v. Eshalomi, 23 M.J. 12, 22 (C.M.A. 1986).

148. MCM, *supra* note 2, R.C.M. 905(b)(4).

149. *See id.* R.C.M. 703(c)(2)(B).

150. 52 M.J. 98 (1999).

151. *Id.* at 103.

152. *Id.* at 104.

dance with such regulations as the President may prescribe."[153] "The President, in turn, has provided that 'each party is entitled to the production of any witness whose testimony on a matter in issue . . . would be relevant and necessary.'"[154] The CAAF, however, found that

> [w]hatever marginal relevance [the Commanding General's testimony] might have had, we cannot fault the military judge for lacking clairvoyance *in limine*. Moreover, the requirement of RCM 703(c)(2)(B)(i) for a synopsis of expected testimony is not satisfied by merely listing subjects to be addressed; rather, it must set out what the witness is expected to say about those subjects.[155]

The final nail in the coffin for the defense counsel's request resulted from his failure to renew the request after the military judge invited him to do so. Thus, the defense counsel had waived the issue.[156]

3. Preserving Motions in Limine

Preserving motions in limine is perhaps the greatest area of confusion for counsel, especially for inexperienced defense attorneys. To preserve a motion in limine, there must be both a "ruling" and proper preservation of the issue *after* the ruling. First, there must be a "ruling." The military judge may defer ruling, make a tentative or preliminary ruling subject to further evidence, or invite defense counsel to reopen consideration of a preliminary ruling. If the military judge does any of these, he has not ruled. In any of these circumstances, there is no ruling to appeal. In *United States v. Dollente*,[157] the CAAF adopted a three-part test to determine when a motion in limine is sufficient to preserve an issue for appellate review absent further objection. First, the matter must "be adequately presented"[158] to the trial court; second, the issue must be "of the type that can be finally decided in a pretrial hearing," that is, "akin to [a] question [ ] of law;"[159] third, the lower "court's ruling must be definitive."[160]

Even if the military judge makes a ruling, the defense counsel must still properly preserve the issue *after* the ruling. Here, the Supreme Court's doctrine in *United States v. Luce*[161] comes into play. The issue in *Luce* was the proper method to preserve a motion in limine under Federal Rule of Evidence (FRE) 609. The defense motion sought to prohibit government cross-examination of the defendant concerning a prior conviction.[162] The Court held that to properly preserve the judge's denial of the motion, the defendant must testify;[163] of course, he must also be cross-examined about the prior conviction. *Luce* is also the law in military courts-martial.[164]

More recently, the Supreme Court extended *Luce* even further. In *Ohler v. United States*,[165] which the military adopted almost immediately in *United States v. Cobia*,[166] the Supreme Court created yet another requirement to preserve a motion in limine to prohibit cross-examination based on a prior conviction. After *Ohler* and *Cobia*, the accused must not only testify to preserve the motion, but his testimony must not "remove the sting" of the conviction on direct examination.[167] In other words, the government's cross-examination must be the first

153. *Id*. (citing UCMJ art. 46 (2000)).

154. *Id*. (citing MCM, *supra* note 2, R.C.M. 703(b)(1), MIL. R. EVID. 401).

155. *Rockwood*, 52 M.J. at 105.

156. *Id*.

157. 45 M.J. 234 (1996).

158. *Id*. at 240 (quoting United States v. Mejia-Alarcon, 995 F.2d 982, 986-87 (10th Cir. 1993)).

159. *Id*.

160. *Id*. *See also* United States v. Cardreon, 52 M.J. 213 (1999).

161. 469 U.S. 38 (1984).

162. *See id*. at 39.

163. *Id*. at 43.

164. United States v. Sutton, 31 M.J. 11 (C.M.A. 1990).

165. 529 U.S. 753 (2000).

166. 53 M.J. 305 (2000).

167. *Id*. at 309-10.

time the members hear about the accused's prior conviction. The rationale for this requirement, which basic trial advocacy courses may argue is simply poor trial practice, is that if the accused "preemptively introduces evidence of a prior conviction on direct examination [he] may not on appeal claim that the admission of such evidence was error."[168]

The *Luce* rule is not limited to motions in limine involving prior convictions under FRE or MRE 609. It also applies to other rulings in limine concerning impeachment, such as motions under MRE 608(b) to prohibit cross-examination of good military character witnesses with questions about specific instances of misconduct. In *United States v. Gee*,[169] the military extended the *Luce* rationale to these motions.[170] After the military judge makes a definitive ruling denying the defense motion, the defense must call witnesses to testify to the accused's good character under MRE 405(a), and the government must attempt to impeach them with the specific instances that were the subject of the defense motion. Failure to call the witnesses—or failure by the government to attempt to impeach them on this basis—waives the issue for appeal.[171]

The rationale for this line of cases is three-fold. First, "the reviewing court is handicapped in considering the trial court's ruling on the motion *in limine* because the record does not contain the testimony of the witness who would have been impeached."[172] Second, "the impact of the judge's ruling is speculative because it has no factual context."[173] "[T]he judge's ruling could change as the case unfolds."[174] Third, without a fully developed record, "the reviewing court cannot determine whether the ruling on the motion *in limine* motivated the decision of a defendant not to testify or not to call certain witnesses," decisions that normally result from the "consideration of numerous factors."[175] As such, any harm resulting from the ruling is speculative.[176]

It remains to be seen whether the courts will extend the additional requirements of *Ohler* to motions in limine other than to exclude a prior conviction, as *Gee* extended *Luce* to motions involving impeachment evidence in addition to impeachment by prior conviction under MRE 609. There does not appear to be any rationale to limit the additional requirements solely to that scenario.

In motions in limine involving evidence other than impeachment evidence, even where the military judge makes a definitive ruling on an issue, subsequent events may require the defense counsel to make further objections or waive appellate review. In *United States v. Johnson*,[177] the defense counsel's failure to object when the trial counsel's questions exceeded those permitted by the military judge's ruling in limine constituted waiver.[178]

One recent development relaxes the defense burden in this area. Until recently, it was common practice in federal court to require an additional objection even after a definitive ruling denying a defense motion in limine. This practice required the defense counsel to make the objection before admission of the evidence during trial. A recent amendment to FRE 103(a)(2), effective 1 December 2000 (and to the corresponding MRE 103(a)(2), effective 1 June 2002) eliminated this requirement.[179] That change reads: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."[180]

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168. *Id.* at 310 (citing Ohler v. United States, 529 U.S. 753, 760 (2000)).

169. 39 M.J. 311 (C.M.A. 1994).

170. *Id.* at 313-14.

171. The CAAF has applied the *Luce* and *Gee* rationale to other instances. In *United States v. Nelson*, 51 M.J. 399 (1999), the CAAF applied the rationale to a scenario where the appellant claimed that he withdrew his guilty plea in response to a ruling by the military judge. The CAAF held that the issue was not preserved because the accused plead not guilty. *Id.* at 400.

172. *Gee*, 39 M.J. at 313.

173. *Id.*

174. *Id.* (citation omitted).

175. *Id.*

176. *Id.*

177. 35 M.J. 17 (C.M.A. 1992).

178. *Id.* at 21.

179. MCM, *supra* note 2, MIL. R. EVID. 1102.

180. FED. R. EVID 102(A)(2); MCM, *supra* note 2, MIL. R. EVID. 103(a)(2). This change does not affect the line of cases under *Luce* and *Ohler. See id.*

4. Preserving Challenges for Cause and Peremptory Challenges

Preserving defense challenges of panel members and preserving objections to government challenges of members also requires defense counsel to take certain specific steps, depending on the nature of the challenge. Again, failure to take these mandatory steps waives the issues for appeal. Rule for Courts-Martial 912 contains the basic rules controlling challenges. Rule 912(f)(4) covers waiver of challenges for cause; Rule 912(g)(2) covers waiver of peremptory challenges. Certain bases for challenge are not waivable. Challenges against members who are accusers, witnesses, or investigating officers, or other persons who had a role in the disposition of the charges, are not Waivable.[181] Most defense counsel are familiar with these prohibitions. A challenge based on the membership of enlisted members in the same unit as the accused is waivable, however, "if the party knew or could have discovered by the exercise of due diligence the ground for challenge and failed to raise it in a timely manner."[182]

Preserving a challenge for cause requires counsel to state a "but for" objection on the record:

> [W]hen a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.[183]

The source of the "but for" rule is *United States v. Harris*.[184] Subsequent case law explains the rule and "make[s] four things clear."[185] First, "if the accused does not exercise his peremptory challenge *at all*, he waives his objection to denial of his challenge of a member for cause."[186] Second, if the accused "peremptorily challenges the member whom he has unsuccessfully attempted to challenge for cause and does not state on the record that he would have used his peremptory challenge on some other member, he waives his objection."[187] Third, an accused "does not waive his objection to the military judge's denial of a challenge for cause if he peremptorily challenges another member."[188] Finally, an accused "does not waive his objection if he peremptorily challenges the member he has unsuccessfully challenged for cause and he states on the record that he would have peremptorily challenged another member if his challenge for cause had been granted."[189]

The CAAF explained the rationale for the "but for" rule in *United States v. Eby*,[190] and strictly enforced the precise requirements of the rule. In *Eby*, the military judge denied a defense challenge for cause against a member. The defense then followed up that denial with a peremptory challenge as follows:

> Ma'am, bear with counsel for a second. I would have to refresh my recollection on the rule. The defense is going to peremptorily challenge [the officer] and I would just like to note that we're doing so because our challenge for cause was denied in this case; just to protect our record.[191]

The CAAF held that this insufficient statement did not preserve the issue for appeal.[192]

The CAAF provided three reasons for the "but for" rule and its strict interpretation of that rule. First, "[a]bsent specifying the intent to exercise a different peremptory challenge, we are left to assume that counsel was satisfied with the remaining members on the court-martial panel."[193] Second, "[i]f defense

181. MCM, *supra* note 2, R.C.M. 912(f)(1). These non-waivable grounds are listed in RCM 912(f)(1). *Id.*

182. *Id.* R.C.M. 912(f)(4).

183. *Id*.

184. 13 M.J. 288 (C.M.A. 1982); *see also* United States v. Jobson, 31 M.J. 117 (C.M.A. 1990).

185. *Jobson*, 31 M.J. at 120.

186. *Id*. (emphasis in original).

187. *Id.*

188. *Id*.

189. *Id*.

190. 44 M.J. 425 (1996).

191. *Id*. at 426.

192. *Id.* at 427.

would have challenged another member had the challenge for cause been granted, counsel should so state so an appellate court can consider whether any error prejudiced appellant's substantial rights."[194] Where no intent is specified, there can be no prejudice. Third, where defense counsel do not "state that they would peremptorily challenge another member if the challenge for cause was granted, they have not shown they were deprived of anything. They must state that they intended to exercise a right before they can complain of being deprived of it."[195]

Preserving a defense objection to a government peremptory challenge also has its hurdles, particularly when the basis for the challenge involves *Batson v. Kentucky*[196] and its progeny, as applied to the military. Typically, when the government peremptorily challenges a minority or female member, the defense counsel requests a "*Batson*" rationale. This requires the trial counsel to state a race or gender-neutral rationale for the peremptory challenge. In the military, the race or gender-neutral rationale may not be one that is "unreasonable, implausible, or that otherwise makes no sense."[197]

Whatever rationale the trial counsel provides for a challenge, failure by the defense to contest that rationale waives appellate consideration of the peremptory challenge absent plain error.[198] Counsel must speak up. For example, if the trial counsel's purported rationale for a peremptory challenge is that a member appeared to be inattentive during the voir dire process, the defense counsel must dispute those facts to preserve appellate review of an objection to the government's challenge. The military judge should then enter findings of fact on the matter before making a ruling. If, however, the military judge does not give the defense counsel an opportunity to disagree, the courts will not apply waiver.[199]

In articulating the basis for a challenge for cause, the CAAF gives defense attorneys a few allowances for imperfection. Generally, challenges for cause are classified in two groups, actual bias and implied bias. Actual bias is reviewed through the eyes of the military judge and court members. "The test for actual bias is whether any bias is such that it will not yield to the evidence presented and the judge's instructions."[200] Implied bias, on the other hand is "reviewed under an objective standard, viewed through the eyes of the public."[201] The focus is on the perception or appearance of fairness of the military justice system.[202]

The CAAF ruled in *United States v. Armstrong*[203] that a challenge for cause "encompasses both actual and implied bias."[204] "Actual and implied bias are separate tests, not separate grounds for challenge."[205] In other words, a defense counsel does not have to specify whether a challenge is based on actual bias or implied bias. *Armstrong* is contrary to the CAAF's earlier opinion in *United States v. Ai*,[206] where the court refused to consider a challenge for cause based on implied bias raised for the first time on appeal.[207]

193. *Id*.

194. *Id*.

195. *Id*.

196. Batson v. Kentucky, 476 U.S. 79 (1986) (prohibiting peremptory challenges based on race); United States v. Moore, 28 M.J. 366, 368 (C.M.A. 1989) (applying *Batson* to the military); *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (prohibiting peremptory challenges based on gender).

197. United States v. Tulloch, 47 M.J. 283, 287 (1997) (declining to follow *Purkett v. Elem*, 514 U.S. 765 (1995)).

198. United States v. Gray, 51 M.J. 1, 35 (1999); *see also* United States v. Brocks, 55 M.J. 614, 618-19 (A.F. Ct. Crim. App. 2001); United States v. Watson, 54 M.J. 779, 782 (A.F. Ct. Crim. App. 2001); United States v. Walker, 50 M.J. 749, 750 (N-M. Ct. Crim. App. 1999); United States v. Galarza, No. 980075, at 3 (Army Ct. Crim App. 31 May 2000) (unpublished).

199. United States v. Hurn, 55 M.J. 446, 449 (2001) (holding that playing the "numbers game" is not a valid reason for a peremptory challenge, because such a goal could be accomplished by challenging any member).

200. United States v. Weisen, 56 M.J. 172, 174 (2001) (quoting United States v. Napoleon, 46 M.J. 279, 283 (1997)).

201. *Id*.

202. *Id*.

203. 54 M.J. 51 (2000).

204. *Id*. at 53.

205. *Id*.

206. 49 M.J. 1 (1998).

207. *Id*. at 4-5.

One way to reconcile these two opinions is to conclude that military appellate courts will consider a challenge for cause to encompass both actual and implied bias, but will not allow counsel to raise a separate rationale for the first time on appeal, regardless of whether it encompasses actual or implied bias, or both. Defense counsel should consider specifying that challenges encompass both actual and implied bias.

5. Preserving Evidentiary Objections During Trial

To effectively preserve evidentiary objections during trial, counsel should scrupulously adhere to the mandates of MRE 103, already discussed in depth.[208] Counsel should also consider arguing some appellate principles. Using arguments that employ principles the appellate courts will apply can help make the appellate record at the trial level. For evidentiary questions, that means employing a four-part test that the CAAF uses to evaluate prejudice from an erroneous evidentiary ruling; in other words, to determine if the error is "prejudicial" or "harmless." The CAAF originally announced the test in 1985 in *United States v. Weeks*,[209] and reiterated it recently in *United States v. Gunkle*.[210] The court considers: "(1) the strength of the prosecution's case; (2) the strength of the defense case; (3) the materiality of the evidence at issue; and (4) the quality of the evidence at issue."[211]

To effectively employ these points, the trial defense counsel should incorporate them into his argument for why the military judge should admit the proffered evidence. Addressing these points at trial provides a road map for appellate counsel to argue prejudice on appeal, and for the appellate courts to find prejudice from an erroneous evidentiary ruling. When the credibility of witnesses is key, the defense should also be entitled to use all the "weapons in its arsenal" to attack it.[212] Trial defense counsel should use this argument as ammunition to persuade the military judge to admit defense evidence. As one military judge recently stated, "Five of the most beautiful words in the English language, to the trial advocate, are 'Goes to credibility, Your Honor.'"[213]

6. Preserving Issues Concerning Instructions

There are two main concerns for trial defense counsel regarding instructions. First, the military judge may insist on giving an instruction to which the defense objects. Second, the military judge may refuse to give an instruction upon which the defense insists. While a military judge has substantial discretion when it comes to instructions, this discretion has limits. For example, the military judge must *sua sponte* instruct on any lesser included offenses "reasonably raised" by the evidence.[214] Similarly, "when an affirmative defense is raised by the evidence, an instruction is required."[215] Waiver is normally not an issue in these instances.[216] Counsel must object, however, to any instructions the military judge proposes to give in order to avoid waiver of those issues.[217] "It is a rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court."[218] This is especially true if the defense counsel agrees with the military judge that the instruction is correct.[219]

An appellate lens is also helpful for defense-proposed instructions, to help counsel craft effective arguments for the trial level. The test appellate courts use to determine if denial of a requested instruction is error is whether: (1) the instruction

208. *See supra* notes 52-58.

209. 20 M.J. 22 (1985).

210. 55 M.J. 26 (2001).

211. *Id*. at 30.

212. *See* United States v. Waller, 29 C.M.R. 111, 122 (C.M.A. 1960) (Ferguson, C.J., concurring in part and dissenting in part).

213. LTC (P) Stephen Henley, Military Judge, U.S. Army, Address at Ft. Hood Trial Defense Service Officer Professional Development Day (May 18, 2001).

214. *See, e.g.*, United States v. McDonald, 57 M.J. 18, 20 (2002); MCM, *supra* note 2, R.C.M. 920(e). Counsel can "affirmatively waive an instruction on lesser-included offenses to present an 'all or nothing' defense, but only in those rare cases of an 'affirmative, calculated, and designed course of action' by a defense counsel." United States v. Smith, 50 M.J. 451, 457-58 (1999) (Gierke, J., dissenting) (quoting United States v. Moore, 31 C.M.R. 282, 286 (C.M.A. 1962)).

215. *McDonald*, 57 M.J. at 20.

216. *Id*.

217. MCM, *supra* note 2, R.C.M. 920(f); *Smith*, 50 M.J. at 455. The CAAF continues to state that waiver must be established "by *affirmative* action of the accused's counsel, and not by a mere failure to object to erroneous instructions or to request proper instructions." *Id.* "No magic words are required to establish a waiver." *Id.* "[T]he language of [RCM 920(f)] itself does not anticipate an explicit statement by a trial attorney, but merely the lack of objection." *Id*.

218. Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

219. United States v. Valdez, 35 M.J. 555, 561-62 (A.C.M.R. 1992); *see also Smith*, 50 M.J. at 456; United States v. Smith, 34 M.J. 200, 203 (C.M.A. 1992) (holding that counsel waived objections to instructions where his "opinions and proposals concerning special instructions were solicited").

is correct;[220] (2) the instruction was "not substantially covered in the main charge;"[221] and (3) the instruction "is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation."[222] Trial defense counsel should incorporate this test into arguments to military judges for giving specific instructions. This argument lays the groundwork for appeal, and will demonstrate how the accused is prejudiced if the military judge still refuses to give the requested instruction.

7. Preserving Objections to Sentencing Evidence

The same general principles that apply to preserving objections to evidence in the merits portion of the trial apply to preserving objections to sentencing evidence. Defense counsel should remember that the trial counsel can only admit testimony and other forms of evidence that fit into one or more of the subparts of RCM 1001(b)(1)-(5). Defense objections to evidence trial counsel seek to admit should stress that the evidence does not fit any of those categories.

Defense counsel can also argue that the proposed evidence fails the balancing test of MRE 403—that its probative value is substantially outweighed by the danger of unfair prejudice. For evidence the defense seeks to admit, counsel should remember that the court may relax the rules of evidence for the defense on sentencing.[223] The accused also has a "virtually unrestricted" right to present any matters desired in an unsworn statement.[224] Those matters, however, are not "evidence" in the strict sense of the word.[225]

8. Preserving Objections to Post-Trial Matters

Waiver is alive and well in post-trial matters, and can arise at several points in the post-trial process. First, failure to object to matters in the Staff Judge Advocate's Post-Trial Recommendation constitutes waiver in the absence of plain error.[226] The plain error analysis applied to this type of post-trial error differs, however, from the traditional formulation. In post-trial errors, the accused must still comply with the three-part test of *Powell*; he must show plain and obvious error and material prejudice to a substantial right.[227] Material prejudice to substantial rights, however, occurs in post-trial matters where an appellant "makes some colorable showing of prejudice."[228] To accomplish this, "[f]irst, an appellant must allege the error at the Court of Criminal Appeals."[229] "Second, an appellant must allege prejudice as a result of the error."[230] "Third, an appellant must show what he would do to resolve the error if given such an opportunity."[231] "If the appellant makes such a showing, the Court of Criminal Appeals must either provide meaningful relief or return the case to the Judge Advocate General concerned for a remand to a convening authority for a new post-trial recommendation and action."[232]

Failure to raise appellate issues in RCM 1105 and RCM 1106 clemency requests generally does not waive issues such as alleged legal errors at trial. The CAAF has stated, however,

220. United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993), *cert. denied*, 512 M.J. 1244 (1994).

221. *Id*.

222. *Id.*

223. *See, e.g*., United States v. Roth, 52 M.J. 187, 190 (1999) ("This rule . . . is not limited to documentary evidence. . . . [I]t is clear that the intent of the sentencing rules is to favor the admission of relevant evidence in the sentencing proceeding, regardless of the form of the evidence.") (citing MCM, *supra* note 2, R.C.M. 1001(c)(3)).

224. United States v. Jeffery, 49 M.J. 229, 230 (1998); United States v. Grill, 48 M.J. 131, 132 (1998).

225. United States v. Manns, 54 M.J. 164, 167 (2000) (Cox, J., concurring in the result).

226. MCM, *supra* note 2, R.C.M. 1106(f)(6); *see* United States v. Wheelus, 49 M.J. 283, 286 (1998) (noting that despite amendments to the Rules for Courts-Martial that greatly simplified the post-trial process in 1984, "post-trial processing problems abound"). The CAAF reiterated its concern with the "lack of attention to post-trial processing" again last term. United States v. Williams, 57 M.J. 1, 4 n.5 (2002).

227. United States v. Powell, 49 M.J. 460, 465 (1998). Prejudice is not required to merit relief for dilatory post-trial processing under the doctrine of *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2001). The service courts' power to grant relief in this area flows from their mandate under Article 66(c), UCMJ, to "affirm only such findings of guilty and the sentence or such part and amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." UCMJ art. 66(c) (2000). This determination is commonly referred to as "sentence appropriateness." *See* United States v. Tardif, 57 M.J. 219, 220 (2002); United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim App. 2001).

228. *Wheelus*, 49 M.J. at 289 (citing United States v. Chatman, 46 M.J. 321, 323-34 (1997)). *See also Williams*, 57 M.J. at 2-3.

229. *Wheelus*, 49 M.J. at 289.

230. *Id*.

231. *Id.* at 288.

232. *Id*. at 289.

that the failure to mention an issue in post-trial submissions "underscore[s] the lack of prejudice."[233] The rationale for this is that if the error was prejudicial to an accused, it would merit at least a mention in the post-trial submission.[234]

Finally, an accused must take certain steps to raise issues under the provisions of Article 55, UCMJ, concerning cruel and unusual punishment while serving post-trial confinement. Specifically, post-trial prisoners must exhaust administrative remedies before raising such matters in court. Counsel should do this by raising these issues in post-trial submissions, filing complaints through the prisoner grievance system, and requesting redress and complaint under the provisions of Article 138, UCMJ.[235] As with complaints of illegal pretrial punishment under Article 13, UCMJ, failure to complain while undergoing the alleged cruel and unusual conditions may be evidence of the lack of rigor of the post-trial conditions.[236]

IV. Conclusion

Defense attorneys at the trial level should possess a basic understanding of the principles of appellate practice to vigorously defend their clients. That understanding must include a thorough knowledge of the requirements to preserve objections and other issues at trial. Some of those requirements are somewhat complex, particularly in the area of motions in limine. Trial defense attorneys who master these principles will effectively "make the appellate record" for their clients, furthering the chance of relief for those clients on appeal. Those who fail to master these basic principles will almost certainly foreclose any chance of relief for their clients.

233. United States v. Holt, 52 M.J. 173, 185 (1999), *cert. denied*, 529 U.S. 1100 (2000).

234. *Id.*

235. *See* United States v. Erby, 54 M.J. 476, 478 (2001); United States v. White, 54 M.J. 469, 472 (2001); *see also* United States v. Towns, 52 M.J. 830, 834 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 361 (2001) (holding that counsel satisfied the requirement for exhaustion of administrative remedies by raising the issue to the convening authority in post-trial submissions).

236. *See* United States v. Huffman, 40 M.J. 225, 227 (C.M.A. 1994) (holding that failure to complain of alleged illegal pretrial punishment in violation of Article 13, UCMJ while it is still ongoing is "strong evidence" that there is no violation).