Recent Developments in Post-Trial Processing: *Collazo* Relief Is Here to Stay!

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Introduction

> *After the entire process has been completed below, then and only then, absent some extraordinary circumstances, is a case ripe for review by this Court . . . . Our role should be limited to reviewing decisions of the Courts of Criminal Appeals as a matter of law. Being so limited, we should not be involved in the minutiae of post-trial proceedings.*[1]

This past term, the Court of Appeals for the Armed Forces (CAAF) remained decisively engaged on the post-trial battlefield, as did the service courts. Over the past year, the CAAF decided *United States v. Emminizer*[2] and *United States v. Tardif*,[3] two decisions significantly impacting post-trial processing. *Emminizer* resolved a conflict between the Army and the Air Force in the processing of automatic and adjudged forfeitures. *Tardif* dealt with appellate courts' authority to grant relief, absent prejudice, for post-trial processing delay. Another notable CAAF decision was *United States v. Harris*,[4] a case addressing what the convening authority may consider before taking action.

In addition, the Army Court of Criminal Appeals (ACCA) decided four cases that all practitioners should read: *United States v. Zimmer*,[5] discussing how to process deferment requests properly; *United States v. Mack*,[6] addressing the requirement to note an "accused's service record, to include length and character of service, awards and decorations received"[7] in the Staff Judge Advocate's post-trial recommendation (SJAR); and *United States v. Chisholm*[8] and *United States v. Maxwell*,[9] both of which are post-trial processing delay cases.

Part I of this article addresses these seven decisions and their impact on the post-trial process. Part II reviews how the recent changes to *Army Regulation* (*AR*) *27-10*[10] impact the post-trial process, and also discusses The Judge Advocate General of the Army's (TJAG) post-trial processing directives.

Part I

The Winds of Change

Forfeitures—To Pay or Not to Pay, and HOW, That Is the Question[11]

United States v. Emminizer[12] provides valuable clarification on forfeiture processing—specifically, the options available to a convening authority when receiving a request to defer or waive forfeitures. Before *Emminizer*, the Air Force and Army courts disagreed on what action a convening authority must take to pay an accused's dependents.[13] The disagreement was based on the mistaken belief that one type of forfeiture had priority over the other.[14] Although adjudged and automatic forfeitures take effect on the same date,[15] they are not the same. The

1. United States v. Wheelus, 49 M.J. 283, 289 (1998).
2. 56 M.J. 441 (2002).
3. 57 M.J. 219 (2002).
4. 56 M.J. 480 (2002).
5. 56 M.J. 869 (Army Ct. Crim. App. 2002).
6. 56 M.J. 786 (Army Ct. Crim. App. 2002).
7. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1106(d)(3)(C) (2002) [hereinafter MCM].
8. No. 9900240, 2003 CCA LEXIS 7 (Army Ct. Crim. App. Jan. 24, 2003).
9. 56 M.J. 928 (Army Ct. Crim. App. 2002).
10. U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE (6 Sept. 2002) [hereinafter AR 27-10].
11. "To be, or not to be—that is the question—whether 'tis nobler in the mind to suffer the slings and arrows of outrageous fortune or to take arms against a sea of troubles, and by opposing end them?" WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.
12. 56 M.J. 441 (2002).

command's options regarding the handling of forfeitures are largely dependent on which type of forfeiture is involved. Regardless of the type, *Emminizer* makes clear that the convening authority must address all applicable forfeitures in a case before the government may divert any pay or allowances to an accused or his dependents.[16]

Post-trial processing of an accused's case will rarely be complete in less than fourteen days.[17] As a result, the accused will often request that the convening authority defer or waive any forfeitures. Deferment is the postponement of the running of the sentence,[18] which requires a written request by the accused, and which is available for both adjudged and automatic forfeitures.[19] A deferment ceases automatically at action unless the convening authority rescinds it first.[20] Absent an allotment to the contrary, the government pays deferred funds to the accused during the period of deferment.[21] Waiver, on the other hand, is the "voluntary relinquishment or abandonment of a legal right or advantage."[22] Like deferment, waiver also frees up forfeited funds. Unlike deferment, however, the government may only waive automatic forfeitures, and then only for the benefit of an accused's dependents.[23] The waiver period may not exceed six months, but unlike deferment, waiver of forfeitures may extend past action.[24] The convening authority may also waive the automatic forfeitures sua sponte.[25]

In 1998, the Air Force Court of Criminal Appeals (AFCCA) decided *United States v. Owen*,[26] a general court-martial case in which the appellant was convicted of various sex offenses with a child under sixteen years of age. The appellant was sentenced to a dishonorable discharge, eight years of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.[27]

Before the convening authority's action, the appellant requested waiver of forfeitures in favor of his dependents. The case involved both adjudged and automatic forfeitures. The issue facing the AFCCA was the validity of the convening authority's action, which approved the adjudged forfeitures but waived the automatic forfeitures for six months.[28] In upholding the convening authority's action, the court held:

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13. *See* United States v. Kolodjay, 53 M.J. 732 (Army Ct. Crim. App. 1999); United States v. Owen, 50 M.J. 629 (A.F. Ct. Crim. App. 1998).

14. *Owen*, 50 M.J. at 631.

15. Adjudged and automatic forfeitures are effective either "[fourteen] days after the date on which the sentence is adjudged" or "the date on which the sentence is approved by the convening authority," otherwise known as action, whichever date is earlier. UCMJ art. 57 (2002).

16. *Emminizer*, 56 M.J. at 445.

17. All courts-martial with sentences that trigger the automatic forfeiture provision of Article 58b, UCMJ, now require verbatim transcripts. MCM, *supra* note 7, R.C.M. 1103(b)(2)(B); *see* UCMJ art. 58b(a). Even if the transcript is summarized, the rule affords counsel for both sides the opportunity to review the record of trial before the military judge authenticates it. MCM, *supra* note 7, R.C.M. 1103(i)(1)(A)-(B). Once the parties review the record of trial, the military judge authenticates it and it is served on the accused. *Id*. R.C.M. 1104; UCMJ art. 54(d). In all general courts-martial and special courts-martial resulting in punitive discharges or confinement for one year or more, the SJA or legal officer prepares a written SJAR and serves it on the accused and counsel. MCM, *supra* note 7, R.C.M. 1106; UCMJ art. 60(d). The accused then has ten days, plus an additional twenty days, if requested, to submit clemency matters to the convening authority before action in the case. The accused's time to submit clemency matters begins when the accused receives the authenticated record of trial and the SJAR, if required. MCM, *supra* note 7, R.C.M. 1105(b)(2)(B); UCMJ art. 60(b). The defense counsel also has ten, plus an additional twenty days, to respond to the SJAR. This ten- plus twenty-day period begins to run when the government serves the authenticated record of trial on the accused, or when it serves the SJAR on the defense counsel, whichever is later. MCM, *supra* note 7, R.C.M. 1106. The complexity of this process explains why forfeitures will usually become effective before action in a case. *See* United States v. Zimmer, 56 M.J. 869, 872 (Army Ct. Crim. App. 2002).

18. *See Zimmer*, 56 M.J. at 872; *see also* MCM, *supra* note 7, R.C.M. 1101(c)(1); UCMJ art. 57.

19. *See Zimmer*, 56 M.J. at 872-73; MCM, *supra* note 7, R.C.M. 1101(c)(1)-(2); UCMJ arts. 57, 58b.

20. MCM, *supra* note 7, R.C.M. 1101(c)(6); UCMJ art. 57.

21. United States v. Kolodjay, 53 M.J. 732, 735 n.6 (Army Ct. Crim. App. 1999).

22. BLACK'S LAW DICTIONARY 1574 (7th ed. 1999). *See Kolodjay*, 53 M.J. at 736 (defining "waiver" as "a grant of relief from statutorily-mandated, automatic forfeitures, subject to the condition that the pay and/or allowances otherwise subject to automatic forfeiture will be paid directly to a dependent for support"); *see also* MCM, *supra* note 7, R.C.M. 1101(d)(1); UCMJ art. 58b(b).

23. MCM, *supra* note 7, R.C.M. 1101(d)(1); UCMJ art. 58b(b); *see also* United States v. Owen, 50 M.J. 629, 631 (A.F. Ct. Crim. App. 1998); *Kolodjay*, 53 M.J. at 736.

24. *See Kolodjay*, 53 M.J. at 736.

25. *Id*.

26. *Owen*, 50 M.J. at 629.

27. *Id*.

> [I]f the sentence of a court-martial includes a partial forfeiture of pay, or forfeiture of all pay and allowances, and otherwise keys [i.e., triggers] Article 58b(a)(1), and the accused requests a waiver which is granted, the convening authority is not required to first disapprove the adjudged forfeiture in order to effect the waiver. All that is required is approval of the sentence and language in the action directing the amount of the forfeiture to be waived and the duration of the waiver.[29]

The court found that automatic forfeitures take priority over adjudged forfeitures, thus negating any need for the convening authority to disapprove the adjudged forfeitures in order to free up monies for the appellant's dependents. The court stated,

> There is no requirement that adjudged forfeitures first be disapproved, for if the required components are present, it is Article 58b(a) which mandates forfeitures, not the sentence of the court-martial. In other words, "automatic forfeitures take priority over adjudged forfeitures."[30]

The following year, the ACCA took a different perspective on the interplay between adjudged and automatic forfeitures in *United States v. Kolodjay*.[31]

In Kolodjay, the accused was convicted of various drug-related offenses at a general court-martial and sentenced to a dishonorable discharge, thirty-nine months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. Shortly after the trial, the accused requested deferment and waiver of forfeitures. Despite submitting his request for deferment and waiver only fifteen days after trial, the convening authority did not receive the request until the time of action.[32] The SJA recommended a six-month waiver of the forfeiture of allowances only. On 23 August 1997, the convening authority acted on the case as well as the deferment and waiver requests. In so doing, he signed two inconsistent documents, a memorandum to the accused and the action. The memorandum purported to act on all pay and allowances, deferring the forfeitures until action and approving the waiver request for six months, until 10 September 1997.[33] The action, however, approved the sentence as adjudged, "suspended total forfeiture of allowances until 10 September 1997, and waived 'total forfeiture of allowances until 10 September 1997, a period of six months.'"[34]

Analyzing the two documents, the court noted their apparent inconsistency, making it impossible to discern the convening authority's intent.[35] As a result, the court determined that a new post-trial recommendation and action were warranted.[36] Discussing the interplay between adjudged and automatic forfeitures, the court provided guidance in direct contravention of that provided a year earlier by the Air Force court. "[I]f adjudged forfeitures are not deferred prior to action, and are approved without suspension at the time of the Article 60, UCMJ, action, then Article 58b waiver is unavailable because the adjudged forfeitures will be executed, and there will be no automatic forfeitures to waive."[37]

United States v. Emminizer[38] resolves the apparent inconsistency between the ACCA and AFCCA decisions. In *Emminizer*, the accused was convicted at a general court-martial of

28. *Id.* at 630. Appellate counsel sought a new convening authority action "to protect appellant and his family from the prospect of a recoupment action by the United States fiscal authorities *in futuro*." *Id.* Although the government had paid the appellant's family the amount of the waived forfeitures, the appellant's counsel was concerned that the inconsistent action of approving adjudged forfeitures while waiving automatic forfeitures would trigger a subsequent recoupment action. *Id*.

29. *Id.* at 631.

30. *Id*. (quoting U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE para. 9.7.3 (2 Nov. 1999) [hereinafter AFI 51-201]).

31. *Kolodjay*, 53 M.J. at 732.

32. *Id*. at 734-35. Processing of the deferment and waiver requests was delayed, in part, because the government was waiting for an allotment form from the appellant designating his spouse as the recipient of his pay. An allotment was necessary because—unlike with waived forfeitures, which the government may pay directly to a dependent—the government must pay deferred forfeitures to the appellant. *Id*.

33. *Id.* at 735. The date of 10 September 1997 was six months from the date the sentence was adjudged; however, forfeitures are not effective under Article 57, UCMJ, until fourteen days after trial or action, whichever is sooner. *Id.*; *see* UCMJ art. 57 (2002).

34. *Kolodjay*, 53 M.J. at 735.

35. *Id*. The memorandum to the appellant addressed pay and allowances, but the action discussed allowances. Both documents purported to provide forfeiture relief for a six-month period ending on 10 September 1997; however, 10 September 1997 was six months from the end of trial and only five-and-a-half months from the effective date of forfeitures. The action purported to suspend forfeitures for six months, ending on 10 September 1997, but suspension under RCM 1108 is only available after action, which means that the suspension period for appellant was from 23 August 1997 to 10 September 1997, or nineteen days. *Id*.; *see* MCM, *supra* note 7, R.C.M. 1108.

36. *Kolodjay*, 53 M.J. at 735.

37. *Id*. at 736.

four specifications of larceny and three specifications of making a false claim. The court sentenced him to a bad conduct discharge, confinement for eighteen months, forfeiture of all pay and allowances, and reduction to E-1.[39] After trial, and as part of the appellant's Rule for Courts-Martial (RCM) 1105 clemency petition, the defense counsel requested waiver of the forfeitures. Specifically, the defense counsel requested that the "convening authority 'consider utilizing Article [58b] of the UCMJ to waive the forfeitures of SPC Emminizer's pay and allowances and direct that money to be provided directly to SPC Emminizer's young son.'"[40] The SJA recommended disapproval of the request, advising the convening authority, "In order to grant the requested relief on forfeitures, you would have to disapprove the adjudged forfeitures and then grant the accused's request for waiver of the automatic forfeitures pursuant to Article 58b(b), UCMJ, for a period of up to six months."[41] The convening authority followed the SJA's advice and disapproved the request.[42]

On appeal, the appellant argued that the SJA erred in his advice. The appellant relied on the proposition that the convening authority may waive automatic forfeitures "regardless of whether the sentence includes adjudged forfeitures."[43]

The CAAF, disagreeing with *Owen*, noted that mandatory (or automatic) forfeitures are triggered by three conditions occurring simultaneously: (1) the sentence must trigger Article 58b; (2) the soldier must be in confinement or on parole; and (3) the soldier must otherwise be entitled to pay and allowances that are subject to automatic forfeiture.[44] If the convening authority approves the adjudged total forfeitures, then the third condition required for mandatory forfeitures is not met. Stated another way, if the convening authority approves an adjudged sentence of total forfeitures, there is nothing for a convening authority to waive.[45] As for the SJA's advice, the CAAF noted that although it was partially correct, it was incomplete.

> [T]he SJA was correct insofar as he advised the convening authority that if the convening authority disapproved the adjudged forfeitures, he could then waive the resultant mandatory forfeitures. The SJA's advice, however, was incomplete in two important respects. First, he also should have stated that if the convening authority modified or suspended the adjudged forfeitures, he could then waive the resultant mandatory forfeitures. Second, in light of appellant's eighteen-month sentence, the SJA advice reasonably could have been construed by the convening authority to mean that it was necessary to disapprove the forfeitures for the entire eighteen-month period in order to grant appellant's waiver request. The SJA should have advised the convening authority that compensation for dependents under the waiver authority may be paid only for a transitional six-month period, and that the convening authority could grant appellant's request by suspending adjudged forfeitures for six months, and then waiving the resulting mandatory forfeitures for the six-month period.[46]

As a result of the "incomplete advice," the case was returned to the convening authority for a new recommendation and action. As for the conflict between the service courts, the CAAF adopted the ACCA's view regarding the interplay between adjudged and automatic forfeitures.[47]

Practitioners in the field, whether acting on behalf of the government or defense, must be aware of the distinction between adjudged and automatic forfeitures and how they relate to one another. Both deserve attention. As a practical note, defense counsel seeking to maximize payments to an accused's dependents should seek the following: deferment of both adjudged and automatic forfeitures until action and at action, disapproval, suspension for six months, or commutation of the adjudged forfeitures and waiver of the automatic forfeitures for six months.[48] In support of the theme that the request is for the accused's dependents, the defense counsel should also submit a completed allotment form from the client directing

38. 56 M.J. 441 (2002).

39. *Id*. at 441. As a result of the sentence, appellant's case involved not only adjudged forfeitures but also automatic forfeitures. *Id*. at 441-42; *see* UCMJ art. 58b (2002).

40. *Emminizer*, 56 M.J. at 444.

41. *Id*.

42. *Id*.

43. *Id*. (citing United States v. Owen, 50 M.J. 629, 631-32 (A.F. Ct. Crim. App. 1998)).

44. *Id*.

45. *Id*. at 444-45.

46. *Id*. at 445.

payment of all forfeited monies to the accused's named dependents.[49]

The next noteworthy forfeitures decision is the ACCA's decision in *United States v. Zimmer*,[50] addressing convening authorities issuing one-line denials of deferment requests. In *Zimmer*, the appellant was convicted at a general court-martial of wrongful use and distribution of cocaine and sentenced to a bad-conduct discharge (BCD), confinement for seven months, forfeiture of all pay and allowances, and reduction to E-1. At trial, a civilian defense counsel represented the appellant, with assistance from a military defense counsel during the post-trial phase.[51]

One week after trial, the appellant requested deferment of the automatic forfeitures in his case until action.[52] The SJA recommended disapproval. The convening authority followed the recommendation in an "undated, one sentence 'action.'"[53] Neither the SJA's recommendation nor the convening authority's action explained the criteria used by either individual to evaluate the deferment request or provided any rationale for the denial.[54] Similarly, neither document explained the convening authority's reasons for denying the deferment request.

After the denial of the request, the appellant requested waiver of the forfeitures as part of his clemency petition. The petition first detailed why waiver was appropriate. It then went on to address the earlier denial of the deferment request.

> Also, the 82d Airborne Division Criminal Law Office suggested that the request for the waiver of forfeitures should be denied because PFC Zimmer hired a civilian attorney to represent him at his court-martial. The logic is that if a soldier can afford to hire a civilian attorney, he or his family can surely afford to keep up the bills. . . . [T]he bottom line is that Mrs. Zimmer should not be pun-

47. *Id*. at 444. The opinion stated,

> Although the position of the Air Force court reflects a thoughtful attempt to facilitate the provision of transitional compensation to dependents, Congress chose a different approach. The purpose of the statute [10 U.S.C. § 858b], as set forth in its plain language and legislative history, is to restrict payments to servicemembers who are in confinement or on parole under a qualifying sentence . . . . The discretionary authority under Article 58b(b) to ameliorate mandatory forfeitures for a brief period of time applies only when the statute triggers mandatory forfeitures. This provision does not constitute general authority to provide transitional compensation to dependents of convicted servicemembers, and does not provide authority to waive adjudged forfeitures.

Id.

48. From a defense perspective, the preferred approach at action regarding adjudged forfeitures is disapproval; if not disapproval, then suspension for six months; if not suspension, commutation. Commutation is simply a reduction in the amount of forfeitures, freeing up that amount of money not forfeited for waiver. Disapproval, suspension, and commutation can occur only at action. *See* MCM, *supra* note 7, R.C.M. 1107(d)(1); UCMJ art. 60(c) (2002).

49. Deferred monies are paid to an accused, and absent a completed allotment, a convening authority may not be inclined to approve the deferment request knowing that the money will go directly to the accused while confined. *See* United States v. Kolodjay, 53 M.J. 732, 734-35 (Army Ct. Crim. App. 1999).

50. 56 M.J. 869 (Army Ct. Crim. App. 2002).

51. *Id*. at 869-70.

52. *Id*. at 870. The appellant did not request deferment of his reduction in rank, which became effective pursuant to Article 57, UCMJ, fourteen days after the sentence was adjudged. *Id*.

53. *Id.*

54. Rule for Courts-Martial 1101(c)(3) provides a non-exclusive list of factors a convening authority "may consider" in evaluating a deferment request.

> Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include, where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; the accused's character, mental condition, family situation, and service record.

MCM, *supra* note 7, R.C.M. 1101(c)(3). Rule for Courts-Martial 1101(d)(2) provides a non-exclusive list of factors a convening authority "may consider" in evaluating a waiver request.

> Factors that may be considered by the convening authority in determining the amount of forfeitures, if any, to be waived include, but are not limited to, the length of accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents under 10 U.S.C. § 1059.

Id. R.C.M. 1101(d)(2).

> ished because of PFC Zimmer's actions or because he exercised his right to hire a civilian attorney.[55]

On appeal, the appellant argued that the convening authority abused his discretion by denying the deferment request for an improper reason—the accused's retention of civilian defense counsel. The appellant also argued that the SJA's addendum was defective because it failed to comment on the allegation of legal error raised by the accused in his clemency petition.[56] After examining RCM 1101(c),[57] the court held that it was error for the convening authority to fail to identify any reasons for denying the appellant's deferment request,[58] emphasizing the Court of Military Appeal's previous guidance in *United States v. Sloan*[59] and further extended its reasoning:

> If there has been any doubt in any quarter before, let us now resolve it: When a convening authority acts on an accused's request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the accused) and must include the reasons upon which the action is based.[60]

The court noted, however, that "erroneous omission" of reasons from a deferment denial, absent evidence of denial for an "unlawful or improper reason," does not entitle an appellant to relief.[61] Applying the CAAF's *Wheelus*[62] analysis to the post-trial error in the case, the court found that relief was warranted because the appellant made "a colorable showing of possible prejudice," that is, that the convening authority may have granted his deferment request but for consideration of an improper factor, his retention of civilian counsel.[63] Exercising its Article 66(c), UCMJ, authority, the court provided relief by setting aside the adjudged forfeitures and four months of confinement.[64] As a result, the appellant received sixteen weeks of forfeitures at the pay grade of E-1, ten weeks of forfeitures that would have been deferred if his initial request had been approved, and an additional six weeks to "moot any possible prejudice arising from the SJA's failure to address appellant's allegation of legal error."[65]

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55. *Zimmer*, 56 M.J. at 873.

56. *Id*. at 869-70. Rule for Courts-Martial 1106(d)(4) states, in part:

> Legal errors. The staff judge advocate or legal officer is not required to examine the record for legal errors. However, when the recommendation is prepared by a staff judge advocate, the staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate.

MCM, *supra* note 7, R.C.M. 1106(d)(4).

57. MCM, *supra* note 7, R.C.M. 1101(c).

58. *Zimmer*, 56 M.J. at 874.

59. 35 M.J. 4 (C.M.A. 1992).

60. *Zimmer*, 56 M.J. at 873 (citing *Sloan*, 35 M.J. at 7).

61. *Id*. at 874.

62. United States v. Wheelus, 49 M.J. 283 (1998).

> The applicable statutory and Manual provisions, as well as our prior cases, establish the following process for resolving claims of error connected with the convening authority's post-trial review. First, an appellant must allege error at the Court of Criminal Appeals. Second, an appellant must allege prejudice as a result of the error. Third, appellant must show what he would do to resolve the error if given such an opportunity. If appellant meets this threshold, then it is incumbent upon the Courts of Criminal Appeals, given their plenary review authority under Article 66(c), as amplified by the guidance found in RCM 1106(d)(6), to remedy the error and provide meaningful relief. Because clemency is a highly discretionary Executive function, there is material prejudice to the substantial rights of appellant if there is error and the appellant "makes some colorable showing of possible prejudice."

Id. at 288-89 (quoting and citing United States v. Chatman, 46 M.J. 321, 323-24 (1997)) (reversing the CAAF's prior policy of treating "new matter" injected into the post-trial process as "presumptively prejudicial").

63. *Zimmer*, 56 M.J. at 874.

64. *Id*. at 874-75.

65. *Id.* Defense counsel requesting deferment or waiver of forfeitures should consider whether a deferment (or suspension after action) of any adjudged reduction in rank is also appropriate. In *Zimmer*, the monetary award or windfall to the appellant was limited to payment at the grade of E-1 because the accused did not request a deferment of reduction in rank. Had the defense counsel made such a request along with the initial deferment of forfeitures request, the court may have awarded the appellant sixteen weeks of pay at his original pay grade. *Id.* at 875.

Military practitioners dealing with deferment or waiver requests should prepare documents for the SJA and convening authority that reference and apply the criteria outlined in RCM 1101(c)(3) or (d)(2), *depending on the request.*[66] Convening authorities should no longer issue one-line denials such as, "Your request for deferment and/or waiver of _____ dated _____ is disapproved." How detailed must these documents be? The SJA's memorandum, if any, and the convening authority's written action should reference and apply the appropriate RCM 1101(c)(3) or (d)(2) criteria, be factually correct, and be tailored to the facts and circumstances of the case.

In sum, *Emminizer*[67] requires the convening authority to address both adjudged and automatic forfeitures when attempting to divert funds to an accused's dependents either before or at action. Approval of a sentence that includes forfeiture of all pay and allowances, while simultaneously waiving the automatic forfeitures, results in the availability of no pay and allowances for an accused's dependents. At action, the convening authority should consider disapproval, suspension, or commutation of the adjudged forfeitures if he is considering waiver of the automatic forfeitures. *Zimmer*[68] tells the post-trial practitioner processing a deferment or waiver request to consider and apply the deferment and waiver factors of RCM 1101(c)(3) and (d)(2), respectively, and to document the decision making process that goes into the action on these requests.

The Staff Judge Advocate's Post-Trial Recommendation (SJAR)— Awards, Decorations, and Prior Service

This year, the ACCA altered the post-trial playing field for the government and defense in *United States v. Mack.*[69] In *Mack*, the SJA's post-trial recommendation omitted the appellant's Purple Heart and characterized his service as "satisfactory," both of which the appellant alleged as error.[70] The ACCA disagreed.[71]

The appellant, the installation chaplain, was tried and convicted of making false official statements and larceny of over $73,000 from the Fort Bliss Consolidated Chaplain's Fund. The appellant was sentenced to dismissal from the service, confinement for six months, and forfeiture of all pay and allowances. Before action, the SJAR noted every award and decoration listed on the appellant's Officer Record Brief (ORB) verbatim.[72] The ORB did not mention the appellant's Purple Heart. The SJAR also described the appellant's prior service as "satisfactory."[73]

On appeal, the appellant argued that the SJAR "failed to accurately and completely portray" his service record. He claimed that it omitted his Purple Heart, mischaracterized his service as "satisfactory," and "failed to provide details concerning his combat service and awards."[74] The appellant also argued that by failing to "agree" with his clemency submissions,[75] the SJA was disputing or disagreeing with his post-trial submissions.[76]

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66. *See* MCM, *supra* note 7, R.C.M. 1101(c)(3), (d)(2).

67. 56 M.J. 441, 444 (2002).

68. 56 M.J. at 869.

69. 56 M.J. 786 (Army Ct. Crim. App. 2002).

70. Rule for Courts-Martial 1106(d)(3)(C) requires that the SJAR concisely reflect an "accused's service record, to include length and character of service, awards, and decorations received, and any records of nonjudicial punishment and previous convictions." MCM, *supra* note 7, R.C.M. 1106(d)(3)(C). *See also* United States v. De Merse, 37 M.J. 488 (C.M.A. 1993) (holding that omission of Vietnam awards and decorations constitutes plain error requiring new action).

71. *Mack*, 56 M.J. at 787.

72. *Id*. at 789.

73. *Id*. at 790.

74. *Id.* at 789. The appellant also alleged error because he did not personally receive a copy of the authenticated record of trial and SJAR in the case until after action. The court noted that although this was "clear error," the appellant failed to make a "colorable showing of possible prejudice" under *Wheelus*, because his complaint was identical to the issues the court addressed in the opinion (i.e., omission of his Purple Heart, characterization of his service as "satisfactory," and failure to "detail" his prior service). Because the appellant failed to meet the *Wheelus* standard for relief, the court held that the untimely service of the record of trial and SJAR did not warrant any relief. *Id.* at 788 n.4. In denying relief based on the late service, the court did note a continued "concern about SJA's [sic] who, through inattention or indifference, fail to fulfill *all* of their basic post-trial responsibilities." *Id*.

75. In this context, "clemency submissions" refers to matters submitted under RCM 1105 and 1106. *See* MCM, *supra* note 7, R.C.M. 1105, 1106.

76. *Mack*, 56 M.J. at 789.

Addressing each allegation separately, the court found they all lacked merit. The SJAR noted all awards and decorations on the appellant's ORB, a record admitted at trial without defense objection. Additionally, the appellant testified in his unsworn statement that he did not feel he deserved the Purple Heart and that he "threw the orders away."[77] Without questioning the appellant's award of the Purple Heart, the court refused to establish a rule requiring the SJAR to mention awards and decorations "[neither] supported by an appellant's service record admitted at trial," such as an ORB, other official military records, or a soldier's copies of citations or orders, nor "established by stipulation of the parties."[78] Regarding the SJAR's characterization of appellant's service as "satisfactory," the court noted that RCM 1106(d)(3)(C) "provides no guidelines or word template to characterize service,"[79] and that based on the appellant's prior relationship with the convening authority, the court was confident that the use of the term "satisfactory" did not mislead the convening authority.[80]

As for the alleged lack of detail regarding the appellant's combat service and awards, the court noted that although *United States v. Barnes*[81] implies that "some narrative discussion about a service member's duty position, responsibilities, and length of service in a combat theater" is required, RCM 1106(d)(3)(C) imposes no such requirement.[82] Finally, the court disagreed with the appellant's argument that the SJA tacitly disputed the appellant's RCM 1105 submissions by failing to comment on them. The court found this argument unsupported by any authority and without merit.[83]

In *Mack*, the SJA and staff did it right. The "SJAR and addendum compl[ied] with the letter and spirit of [RCM] 1106."[84] The lesson for both the government and defense is to document the accused's awards and decorations on the admitted ORB or Enlisted Records Brief (ERB) or stipulate to them. Absent documented evidence of an award or decoration, there is no requirement to mention it in the SJAR. Finally, the SJA need not "detail" an accused's prior service. A mere chronology of prior service will suffice. If there is something that needs to be highlighted for the convening authority, the defense counsel should use the RCM 1105 and 1106 submissions to do so. The defense counsel should not rely on the SJAR to highlight the details of the accused's service.

What Can the Convening Authority Consider at Action?

The next area where the CAAF recently provided insight concerns those matters that a convening authority "may consider" under RCM 1107 before taking action. Rule for Courts-Martial 1107, "Action by the Convening Authority," breaks down those matters a convening authority considers before taking action into two categories: "required matters"[85] and "additional matters."[86] *United States v. Harris*[87] is a decision in which the CAAF addressed the "additional matters" prong of RCM 1107(b)(3).

Corporal Harris was tried and convicted at a general court-martial of various offenses associated with the wrongful pos-

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77. *Id*.

78. *Id*.

79. *Id*. at 790. "In our experience, few SJAs use superlatives to describe the overall service of a court-martialed soldier, notwithstanding that soldier's rank or prior stellar record. Many SJAs simply use 'satisfactory,' 'unsatisfactory,' or similar terms to summarize an accused's overall service record." *Id*.

80. *Id*.

81. 44 M.J. 680 (N-M. Ct. Crim. App. 1996).

82. *Mack*, 56 M.J. at 790 (citing MCM, *supra* note 7, R.C.M. 1106(d)(3)(C)). "To the extent that our Navy-Marine Corps brethren require such award detail, we decline to adopt their decision." *Id*.

83. *Id*.

84. *Id*.

> Like our superior court, this court continues to be perplexed by inaccurate, incomplete SJARs in all too many cases that come before us. Likewise, we are troubled that many of these errors and omissions escape notice and comment by trial defense counsel, as contemplated by RCM 1106(f)(4). The appellant's case presents us with no such concerns.

Id. at 789 (citations omitted).

85. The Rules for Courts-Martial define "required matters" as follows:

> (A) Required matters. Before taking action, the convening authority shall consider:
> (i) The result of trial;
> (ii) The recommendation of the staff judge advocate or legal officer under R.C.M. 1106, if applicable; and
> (iii) Any matters submitted by the accused under R.C.M. 1105, or if applicable, R.C.M. 1106(f).

MCM, *supra* note 7, R.C.M. 1107(b)(3)(A).

session, transportation, and disposition of stolen M-112 demolition charges (C-4 plastic explosives). He was sentenced to a dishonorable discharge, confinement for ten years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority's action approved the sentence as adjudged and suspended all confinement in excess of forty-nine months for a period of twelve months. The action stated, "I considered the Staff Judge Advocate's recommendation, record of trial, the Service Record Book [SRB] of Corporal Lester R. Harris, and the matters submitted by the defense pursuant to [RCM] 1105, MCM, 1995."[88]

On appeal, the appellant challenged the convening authority's consideration of his SRB. The SRB contained three pages that documented the appellant's criminal misconduct before his entry into the Marine Corps, some of which occurred when he was a juvenile. The appellant specifically challenged a one-page form entitled, "Request for Waiver of Enlistment Criteria," and a two-page memorandum entitled, "Subj: Request for Waiver Case of Harris, Lester R."[89] The documents outlined the appellant's pre-service use of marijuana, cocaine, and LSD.[90]

The appellant argued that the two documents did not fall within those matters in RCM 1107 which the convening authority may consider without providing prior notice to the appellant. Although RCM 1107(b)(3)(B)(ii) states the convening authority may consider the "personnel records of the accused," the appellant argued that "personnel records" was undefined, and that RCM 1001(b)(2)[91] therefore controlled. He then argued that the documents did not meet the RCM 1001(b)(2) definition for personnel records. Thus, the convening authority was prohibited from considering them without first providing him notice and an opportunity to respond. The appellant's second argument was that the documents were not personnel records kept in accordance with service regulations and therefore did not belong in his SRB. Because they did not belong in the SRB, the appellant should not be chargeable with the knowledge of the questioned documents. The appellant's final argument was that because his misconduct all occurred before his enlistment in the Marine Corps, "his past misdeeds should not be held against him."[92] In other words, the appellant argued, consideration of the two documents was unfair.

On appeal, the CAAF granted review of whether the convening authority's "failure to give [the appellant] notice and an opportunity to rebut [a]dverse preenlistment juvenile matters from outside the record"[93] before taking action, as well as his consideration of those matters, prejudiced the appellant.[94] The court summarily dismissed the appellant's argument that "personnel records," as defined in RCM 1107(b)(3)(B)(ii), are defined or limited by RCM 1001(b)(2). Rule for Courts-Martial 1001(b)(2) is a rule governing the admissibility of evidence during the adversarial presentencing process, while RCM 1107(b)(3) vests "broad discretion" with the convening authority on what matters to consider before taking action.[95] Rule for Courts-Martial 1107(b)(3) provides the accused with "constructive notice of the matters that must and may be considered by the convening authority."[96] Finally, a convening authority must provide notice and an opportunity to respond only when considering "matters adverse to the accused from outside the

86. The Rules for Courts-Martial define "additional matters" as follows:

> (B) Additional matters. Before taking action the convening authority may consider:
> (i) The record of trial;
> (ii) The personnel records of the accused; and
> (iii) Such other matters as the convening authority deems appropriate. However, if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut.

Id. R.C.M. 1107(b)(3)(B).

87. United States v. Harris, 56 M.J. 480 (2002).

88. *Id.* at 481.

89. *Id.*

90. *Id*.

91. MCM, *supra* note 7, R.C.M. 1001(b)(2) (providing for the admission of personnel records during the pre-sentencing portion of the court-martial proceedings).

92. *Harris*, 56 M.J. at 482.

93. *Id.* at 481.

94. *Id.* at 480.

95. *Id.* at 482.

96. *Id*.

record, with knowledge of which the accused is not chargeable."[97]

In the appellant's case, the *Marine Corps Individual Records Administration Manual* (*IRAM*) governs the SRB. As for the appellant's argument that the SRB is not a personnel record, the CAAF found that "it is beyond peradventure that the SRB is a repository of 'personnel records.'"[98] Next, the court addressed whether the questioned documents belonged in the SRB. After reviewing the *IRAM*, the court determined that paragraph 4001(c)(2)(48) addressed insertion of documents dealing with "[a]ny special authority for enlistment/reenlistment or extension" into the SRB.[99] The court held that the appellant failed to carry his burden to show that the questioned documents were not "special authority" within the meaning of paragraph 4001(c)(2)(48). Finally, the court noted that because the appellant had access to his personnel records, to include his SRB, as well as the opportunity to "address any potentially adverse information contained [therein]" in his RCM 1105 submission, the "appellant was 'chargeable' with the knowledge of the contents of his SRB and was on notice . . . that the enlistment waiver documents could be considered by the convening authority" before action.[100]

A close look at *Harris* reveals that in the future, an accused will be placed in a precarious position. If the accused has access to his personnel records, those records contain adverse material, and the adverse material is not in the record of trial, the convening authority can consider the adverse material without prior notice to the appellant. Part of the rationale on which *Harris* relies is the accused's ability to comment on the adverse material in his RCM 1105 submission to the convening authority.

Corporal Harris, however, would not have known with certainty that the convening authority knew about his juvenile misconduct, only that the misconduct was properly maintained in his SRB, a personnel record.[101] The SJAR in his case did not list the SRB as a matter the convening authority intended to consider. Corporal Harris and his counsel faced a difficult decision when they prepared their RCM 1105 and 1106 submissions—to rebut the adverse material in the SRB or remain silent. The obvious danger of rebutting the adverse material was that the rebuttal would actually highlight adverse matters that the convening authority might not have considered otherwise. Failure to respond to the adverse material, however, waived any objection to its consideration and might have implicitly admitted disputed assertions in those records. Corporal Harris was held to be "chargeable with the knowledge" of the contents of those records. The most prudent course in a particular case depends on the process by which the convening authority normally takes action in that jurisdiction. Defense counsel should talk to their SJAs and learn what their convening authorities routinely consider. This knowledge will help them make intelligent decisions about whether to respond to adverse information of this nature.

Post-Trial Processing Delay—Authority to Grant Relief, the Role of the Military Judge, and "Defense Time"

This last section of Part I discusses three significant cases in the area of post-trial processing delay: *United States v. Tardif*,[102] *United States v. Chisholm*,[103] and *United States v. Maxwell*.[104]

Tardif[105] may be the most significant post-trial decision of the term. *Tardif* addressed the service courts' authority to grant

97. *Id*.

98. *Id*. (citing U.S. DEP'T OF NAVY, MARINE CORPS INDIVIDUAL RECORDS ADMINISTRATION MANUAL ch. 1 (31 May 2002).

99. *Id*.

100. *Id.* at 483.

101. *See id*. The court did not reach the issue of whether a convening authority may consider information improperly maintained in a personnel record without prior notice and an opportunity to rebut. The court reasoned,

> Appellant has not carried his burden of demonstrating before this Court that the enlistment waiver documents maintained in his service record do not constitute "special authority" within the meaning of subparagraph (48). Therefore, we need not decide today whether a document improperly maintained in an accused's SRB may be considered.

Id. at 482-83.

102. 57 M.J. 219 (2002).

103. No. 9900240, 2003 CCA LEXIS 7 (Army Ct. Crim. App. Jan. 24, 2003).

104. 56 M.J. 928 (Army Ct. Crim. App. 2002).

105. *Tardif* was a three-to-two decision in which both Chief Justice Crawford and Senior Judge Sullivan filed separate dissenting opinions. *Id*. at 225-28 (Crawford, C.J., dissenting); *id.* at 228-30 (Sullivan, S.J., dissenting).

relief for post-trial processing delay when the delay has not caused an appellant any actual prejudice. Simply stated, *Tardif* held that "a Court of Criminal Appeals has authority under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to grant appropriate relief for unreasonable and unexplained post-trial delays."[106]

In Tardif, the appellant was tried and convicted at a general court-martial of unauthorized absence and assault upon a child under the age of sixteen. On 29 October 1999, the appellant was sentenced to a dishonorable discharge, confinement for three years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority took action on 9 June 2000 (223 days after the announcement of the sentence), approving the sentence as adjudged, with the exception of the confinement, which he reduced to two years.[107] Although the convening authority took action on the case in June, the record of trial was not forwarded to Headquarters, U.S. Coast Guard, for appellate review until 2 October 2000 (338 days after sentencing).[108]

On appeal, the appellant alleged prejudice because of the "excessive delay in the post-trial processing of his case."[109] The appellant argued he was prejudiced by "each segment of time that contributed to the ultimate delay of more than twelve months from trial to referral of the record to [the Coast Guard Court of Criminal Appeals]."[110] Despite his conclusory allegations of prejudice caused by the delay itself, the appellant provided no evidence of specific prejudice resulting from the delay in his case.[111]

In evaluating the post-trial processing of the case, the Coast Guard Court of Criminal Appeals (CGCCA) focused on the 115-day delay from 9 June 2000 until 2 October 2000, the post-action, pre-dispatch[112] period. The court commented that the delay during this period was "both unexplained and unreasonable."[113] The court went on to say that "[s]uch delay . . . casts a shadow of unfairness over our military justice system."[114] In spite of these conclusions, the CGCCA determined that, notwithstanding the Army court's decision in *United States v. Collazo*,[115] it was "to be guided by the opinions of the Court of Appeals for the Armed Forces on [the subject of excessive post-trial delay]."[116] In applying the CAAF's guidance, the CGCCA noted that "the Court of Appeals for the Armed Forces has repeatedly determined that an appellant *must* show that the delay, no matter how extensive or unreasonable, prejudiced his substantial rights" before he is entitled to relief.[117] Since the appellant in this case failed to establish any prejudice, the court held that no relief was warranted.[118]

On appeal, the CAAF reversed the CGCCA in a three-to-two decision,[119] holding that "a Court of Criminal Appeals has authority under Article 66(c) . . . to grant appropriate relief for unreasonable and unexplained post-trial delays."[120] The CAAF distinguished Article 59(a), UCMJ, authority from Article

106. *Id*. at 220.

107. United States v. Tardif, 55 M.J. 666, 666-68 (C.G. Ct. Crim. App. 2001).

108. *Tardif*, 57 M.J. at 220. The record was received at Headquarters, U.S. Coast Guard, on 1 November 2000 and referred to the Coast Guard Court of Criminal Appeals on 17 November 2000, 368 and 384 days after sentencing, respectively. *Id.*

109. *Tardif*, 55 M.J. at 668.

110. *Id*.

111. *Id*. Examples of potential prejudice could include release from confinement before action (thus mooting any request for early release through clemency), missed clemency or parole hearings because action was not yet taken in the case, and lost civilian job opportunities because the conviction was not yet final.

112. "Dispatch" is a term commonly used to refer to the forwarding or mailing of a completed, acted upon record of trial, from a legal office, to the appropriate authority for processing and appellate review. *See, e.g.*, United States v. Harms, 56 M.J. 755 (Army Ct. Crim. App. 2002). In *Tardif*, this was the period the Coast Guard Court of Criminal Appeals found problematic. *Tardif*, 55 M.J. at 668.

113. *Tardif*, 55 M.J. at 668.

114. *Id*.

115. 53 M.J. 721 (Army Ct. Crim. App. 2000) (holding that under Article 66(c), UCMJ, appellate courts have authority to grant relief for excessive post-trial delay without any showing of actual prejudice to the appellant); *see also* United States v. Maxwell, 56 M.J. 928 (Army Ct. Crim. App. 2002); United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001).

116. *Tardif*, 55 M.J. at 669.

117. *Id.* at 668 (emphasis added).

118. *Id.* at 669.

119. In their dissenting opinions, both Chief Judge Crawford and Senior Judge Sullivan viewed the majority decision as creating new law and as judicial rule-making. They also viewed the decision as investing the Courts of Criminal Appeal with equitable powers unsupported by legal authority. *See Tardif*, 57 M.J. at 225-28 (Crawford, C.J., dissenting); *id*. at 228-30 (Sullivan, J., dissenting).

66(c), UCMJ, authority. Article 59(a), UCMJ,[121] addresses an appellate court's authority to deal with errors of law. Article 66(c), UCMJ,[122] deals, in part, with an appellate court's authority to assess the appropriateness of a sentence.

In reviewing the legislative history of both articles, the court noted that both articles, taken together, "'bracket' the authority of a Court of Criminal Appeals."[123] Article 59(a) limits the courts' reversal authority to those cases involving legal errors, while Article 66(c) is a broader, "three-pronged constraint" on a service court's authority to affirm.[124] Before affirming the findings and sentence in a case, a court of criminal appeals must be satisfied (1) that the findings and sentence are correct in law; (2) that they are correct in fact; and that (3) based on the entire record, they should be approved. Only the first prong implicates a service court's Article 59(a), UCMJ, authority. It is the third prong of Article 66(c), the "should be approved" prong, that authorizes courts of criminal appeals to provide relief without a showing of actual prejudice.[125]

After addressing the service courts' authority to grant relief for excessive post-trial delay, the CAAF addressed the issue of appropriate relief, noting that "Courts of Criminal Appeals have authority under Article 66(c) . . . to tailor an appropriate remedy, if any is warranted, to the circumstances of the case."[126] The CAAF remanded the case to the CGCCA to exercise its Article 66(c) authority and determine what sentence should be approved, considering the totality of the circumstances, including the post-trial delay.[127]

Although *Tardif* validated the Army's *Collazo* approach to the handling of excessive post-trial delay, *Tardif* does not mandate relief when excessive post-trial delay has not prejudiced the appellant.[128] It simply clarifies that prejudice is not a prerequisite to Article 66(c) relief. Conversely, *Tardif* does not foreclose the dismissal of the findings and sentence in an otherwise error-free case, when dismissal is an "appropriate remedy" under the totality of the circumstances.

Tardif should have little impact on Army practitioners. The ACCA was granting *Collazo* relief based on post-trial processing delay before *Tardif*, and nothing indicates that this trend will end.[129] Government counsel in the other services, however, can no longer rely on an absence of prejudice to defeat appellants' requests for relief after excessive post-trial delay. The service courts will now have to evaluate the totality of the circumstances surrounding the post-trial processing of an appel-

120. *Id.* at 220.

121. UCMJ art. 59(a) (2002) ("A finding or sentence of 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.").

122. Article 66(c), UCMJ, states, in part:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or 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).

123. *Tardif*, 57 M.J. at 224.

124. *Id*.

125. *Id.* ("We agree with the Army court's conclusion in *Collazo* that a Court of Criminal Appeals has authority under Article 66(c) to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a), if it deems relief appropriate under the circumstances.").

126. *Id.* at 225. Practitioners in the post-trial area should note that the *Tardif* decision leaves the door open for appellate courts to dismiss otherwise legal findings and sentences solely for excessive post-trial delay. The CAAF's guidance regarding relief is that the appellate courts have authority to "tailor an appropriate remedy . . . to the circumstances of the case." *Id.* (citations omitted).

> We further conclude that appellate courts are not limited to either tolerating the intolerable or giving an appellant a windfall. . . . Appellate relief under Article 66(c) should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review.

Id. Despite the language regarding "last recourse," practitioners should understand that *Tardif* does not foreclose dismissal as an appropriate remedy in the appropriate case. *See id.*

127. *Id.*

128. *See, e.g.*, United States v. Dezotell, 58 M.J. 517 (N-M. Ct. Crim. App. 2003) (holding that a fourteen-month post-trial processing delay did not prejudice the appellant).

129. *See, e.g.*, United States v. Maxwell, 56 M.J. 928 (Army Ct. Crim. App. 2002); United States v. Hutchison, 56 M.J. 756 (Army Ct. Crim. App. 2002); United States v. Delvalle, 55 M.J. 648 (Army Ct. Crim. App. 2001); United States v. Nicholson, 55 M.J. 551 (Army Ct. Crim. App. 2001); United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001); *see also* United States v. Paz-Medina, 56 M.J. 501 (Army Ct. Crim. App. 2001).

lant's case and determine whether the appellant's sentence is appropriate in light of the post-trial delay.

A post-*Tardif* decision, *United States v. Chisholm*,[130] however, should raise eyebrows throughout the Army military justice system. In *Chisholm*, the ACCA sent a message to military judges regarding their post-trial roles and responsibilities, highlighting options available to military judges to remedy slow post-trial processing.[131] Among the options discussed, and the one that will concern chiefs of justice and SJAs the most, is outright dismissal of the findings and sentence in an otherwise error-free case with or without prejudice.[132]

Chisholm, like many cases since *Collazo*, is not a model for efficient post-trial processing. In *Chisholm*, it took the government over sixteen months to take action in a case with an 848-page record of trial.[133]

Sergeant (SGT) Chisholm was convicted at a general court-martial, contrary to his pleas, of conspiracy to commit rape, conspiracy to obstruct justice, false official statement, and rape. A panel of officer and enlisted members sentenced him to a bad conduct discharge, confinement for four years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.[134]

On appeal, the appellant's only allegation of error was that he was entitled to relief under *Collazo*[135] because of the dilatory post-trial processing of his case.[136] In evaluating the appellant's claim, the court considered the following facts, among others: that the trial was completed on 19 February 1999; that two military judges did not authenticate the record of trial until 21 March 2000 and 10 May 2000; that the convening authority did not take action until 23 June 2000, sixteen months after completion of the trial; and that the record of trial was just 848 pages long.[137] The court agreed with the appellant, but gave him little actual relief. The court reduced his confinement from forty-eight to forty-five months and affirmed the remaining portions of the sentence, as approved by the convening authority.[138]

In addressing the poor post-trial handling of this case, the court discussed the military judge's role in the process at great length. Both Article 38(a), UCMJ,[139] and RCM 1103(b)(1)(A)[140] make the military judge responsible for directing the preparation of the record of trial. The court, after noting that preparation of the record of trial is a "shared responsibility" between the SJA and military judge,[141] stated that military judges "have both a duty and responsibility to take active roles in 'directing' the timely and accurate completion of court-martial proceedings."[142] The court highlighted a military judge's "inherent authority to issue such reasonable orders as may be necessary to enforce that legal duty,"[143] noting that the manner in which the military judge directs completion of the record is a matter within his "broad discretion."[144] The court then suggested several "remedial actions" available to a military judge:

> The exact nature of the remedial action is within the sound judgment and broad discretion of the military judge, but could include, among other things: (1) directing a date certain for completion of the record with confinement credit or other progressive sentence relief for each day the record completion is late; (2) ordering the accused's release from confinement until the record of trial is completed and authenticated; or (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing.[145]

Of the suggested remedial measures, obviously the most disconcerting for government practitioners is the setting aside of the findings and sentence in a case. As for jurisdictions that may choose to ignore a military judge's order regarding preparation of the record of trial, the court stated that "[s]taff judge advocates and convening authorities who disregard such remedial orders do so at their peril."[146]

Chisholm has planted the post-trial Article 39(a) seed in the Trial Defense Service garden. If the post-trial process is taking too long, the military judge should intervene. If the detailed military judge is not actively involved, the trial defense counsel should request a post-trial Article 39(a) session[147] and suggest remedial measures the military judge can take to move the process along. Although *Chisholm* does not create any new substantive rights that counsel may enforce for the accused, it raises the level of judicial scrutiny of post-trial processing. Dilatory post-trial processing is no longer a phrase reserved for use by appellate court judges; trial judges will be using the same or similar terminology in the remedial orders they issue from the bench after trial but before authentication of the trial record. Whether military judges will also use similar language in dismissal orders remains to be seen.

The final post-trial processing case that practitioners should review is *United States v. Maxwell*.[148] Private Maxwell was tried and convicted at a general court-martial for desertion terminated by apprehension and wrongful appropriation of a motor vehicle. The military judge sentenced her to a BCD and confinement for five months. The sole issue the accused raised on appeal was the "unreasonable delay in the post-trial process-

130. No. 9900240, 2003 CCA LEXIS 7 (Army Ct. Crim. App. Jan. 24, 2003).

131. *Id.* at *16-18. The focus of the *Chisholm* decision is the military judge's responsibility to "direct" preparation of the record of trial and focuses on pre-authentication options and remedial measures available to a military judge. *Id.* at *7-8,

132. *Id.* at *17.

ing of her case,"[149] an issue she raised for the first time on appeal because she had previously waived her right to submit RCM 1105 matters. In Private Maxwell's case, it took the government almost twelve months to authenticate a 384-page record of trial, plus two additional months to act on the case.[150] Of the twelve months between trial and authentication, fifty-one days were attributable to the defense, while the defense counsel purportedly reviewed the record of trial.[151]

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133. A detailed chronology of the post-trial processing of SGT Chisholm's case follows:

•19 January 1999—Accused placed in pretrial confinement;

•19 February 1999—Accused sentenced;

•17 June 1999—Defense counsel requests waiver of forfeitures;

•28 June 1999—Convening authority (CA) denies the waiver request;

•8 November 1999—Court-martial tapes sent from Hawaii (25th Infantry Division) to Fort Irwin for transcription;

•9 November 1999—Fort Irwin SJA advises trial defense counsel (TDC) that "local" business, to include a guilty plea tried that same day, had priority over appellant's case;

•18 November 1999—Defense counsel requests that 25th Infantry Division expedite the processing of appellant's case, provide a date certain for completion of the record of trial (ROT), and order a post-trial 39(a) session if no date certain is provided by 1 December 1999;

•1 December 1999—SJA estimates completion of the ROT by mid-December;

•5 January 2000—TDC asks CA to order a post-trial 39(a) session, provides copy of request to the military judge (MJ);

•6 January 2000—CA denies the TDC's 5 January 2000 request; MJ orders daily status reports on the appellant's ROT;

•10 January 2000—ROT completed and forwarded to TDC for review;

•3 February 2000—TDC submits RCM 1105 clemency request to the CA, noting that the ROT was incomplete, requesting deferment of confinement and dismissal of the charges, or alternatively, disapproval of the discharge and reduction of the sentence of confinement to time served;

•10 February 2000—CA responds to 3 February 2000 clemency request, denies deferment of confinement, reserves decision on approval or disapproval of the sentence until action;

•23 February 2000—ROT forwarded to the MJ (two judges presided over appellant's case);

•21 March 2000—First MJ authenticates the ROT;

•13 April 2000—Chief of Military Justice prepares a memorandum for record regarding documents missing from the ROT;

•19 April 2000—Appellant's mother sends a letter to the CA requesting expeditious completion of the ROT;

•24 April 2000—Appellant's wife sends a letter to the CA requesting expeditious completion of the ROT;

•10 May 2000—Second MJ authenticates the ROT;

•22 May 2000—SJA completes his SJAR and responds to the mother and wife;

•4 June 2000—Appellant submits a second clemency request;

•22 June 2000—SJA completes an addendum to the SJAR;

•23 June 2000—CA takes action, approving the sentence as adjudged without granting any clemency.

Id. at *2-8. "In his only assignment of error, appellant asserts that he is entitled to relief under *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000), for dilatory post-trial processing. We agree." *Id.* at *1-2.

134. *Id*. at *8.

135. *Collazo*, 53 M.J. at 721.

136. *Chisholm*, 2003 CCA LEXIS 7, at *1-2.

137. *Id.* at *1-8, *20.

In addressing the post-trial processing of the appellant's case, the court noted that

> *Collazo* imposes obligations on trial defense counsel, as well as the government, to ensure that an accused's case is timely processed in the post-trial phase. "When the record of trial is not prepared in a timely manner, defense counsel should request specific relief from the convening authority under R.C.M. 1105 concerning the findings of guilty or the sentence, tailored to the facts and circumstances of the particular case, and supported by demonstrated prejudice." In fact, the trial defense counsel's delay in reviewing the record of trial contributed to the denial of the appellant's fundamental right "to secure the convening authority's action as expeditiously as possible, given the totality of the circumstances in appellant's case."[152]

Both the government and defense were responsible for the unreasonable delay in the appellant's case. After deducting the time attributable to the defense,[153] the court held that the remaining government delay was still an "excessive delay of more than ten months between trial and authentication."[154]

Maxwell provides valuable guidance for both government and defense counsel. Government counsel must ensure that all defense time is documented. For example, the government should capture the time spent by defense on errata review or during the preparation of clemency matters. Counsel will often exceed the thirty-day time limit for submission of RCM 1105 and 1106 matters.[155] Defense time captured in the record will not count against the government when determining whether *Collazo* relief is warranted. Defense counsel should also heed the court's guidance and demand relief from the convening

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138. *Id.* at *21. The court reasoned as follows:

> Appellant was one of seven coaccused convicted of offenses stemming from the rape of [PV2] S while she was passed out drunk in a military barracks room. In all, six soldiers were convicted of raping the unconscious PV2 S during the early morning hours of 16 May 1998. Appellant was the only noncommissioned officer among those seven offenders and should have stopped the assaults immediately upon encountering the first rape of Specialist Helton. Instead, appellant exhorted another junior soldier to "do it" to PV2 S while appellant watched. Appellant received one of the most lenient sentences, despite the fact that he could have stopped this series of rapes after the first assault. But for these factors, we would have granted even more sentence relief.

Id. at *20-21.

139. "The trial counsel of a general or special court-martial shall . . . under the direction of the court, prepare the record of the proceedings." UCMJ art. 38(a) (2002).

140. "The trial counsel shall: (A) Under the direction of the military judge, cause the record of trial to be prepared." MCM, *supra* note 7, R.C.M. 1103(b)(1)(A).

141. *Chisholm*, 2003 CCA LEXIS 7, at *9.

142. *Id.* at *14.

143. *Id.* at *10.

144. *Id.* at *14.

145. *Id.* at *16-17.

146. *Id.* at *17.

147. *See* UCMJ art. 39(a) (2002); MCM, *supra* note 7, R.C.M. 1102.

148. 56 M.J. 928 (Army Ct. Crim. App. 2002).

149. *Id.* at 929.

150. *Id.*

151. "Except when unreasonable delay will result, the trial counsel shall permit the defense counsel to examine the record before authentication." MCM, *supra* note 7, R.C.M. 1103(i)(1)(B).

152. *Maxwell*, 56 M.J. at 929 (quoting United States v. Collazo, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)).

153. *Id.*

154. *Id.*

155. *See* MCM, *supra* note 7, R.C.M. 1105(c)(1), 1106(f)(5).

authority in situations where unreasonable delay exists. In light of *Chisholm*, defense counsel should consider seeking relief from the military judge for delays associated with preparation of the record of trial.

Simply stated, *Tardif* holds that appellate courts need not find actual prejudice to grant relief based on post-trial processing delay. *Chisholm* is a wake-up call for military judges, emphasizing their duty and responsibility to direct the preparation of the record of trial. The opinion reminds military judges that they are not powerless to compel timely completion of trial records. They have multiple options, including (according to the ACCA) dismissal of the findings and sentence. Lastly, *Maxwell* tells defense counsel that they bear some responsibility for the post-trial processing of cases. The service courts will not hold the defense's post-trial time against the government when they evaluate whether post-trial delay is unreasonable or excessive. The government must carefully document any defense delays.

Part II—*Army Regulation (AR) 27-10*[156] and TJAG's Initiatives to Improve Post-Trial Processing[157]

The New AR 27-10[158]

On 6 September 2002, the Army revised *AR 27-10*. The amendments became effective on 14 October 2002.[159] This section summarizes the changes that impact the post-trial process, either directly or indirectly.

The most significant change to *AR 27-10* is that special court-martial convening authorities (SPCMCAs) can now convene courts empowered to adjudge bad-conduct discharges (BCD SPCM). The new regulation deletes the previous regulatory language that effectively prevented them from referring cases to BCD SPCMs.[160] Most general court-martial convening authorities (GCMCA), however, have reserved BCD SPCM convening authority at their level. Assuming that superior commanders do not withhold the authority to convene BCD SPCMs, the court may not adjudge a BCD, greater than six months of confinement, or forfeiture of pay for more than six months without a verbatim record of trial[161]

If the approved sentence includes a punitive discharge or any confinement, the automatic reduction of an enlisted service member to the grade of E-1 under Article 58a, UCMJ, is now limited to those circumstances where the approved sentence includes either a punitive discharge or confinement for more than 180 days (or six months).[162]

Home addresses and social security numbers will no longer be used to identify witnesses. Social security numbers, other than the accused's, will only be used to verify that the members actually detailed by the convening authority are present. Thereafter, no documents that include social security numbers, other than documents related to the accused, will be maintained in the record.[163]

Materials related to pretrial confinement (such as copies of the commander's checklist and the military magistrate's memorandum) must now be inserted into the record of trial.[164] Staff

156. AR 27-10, *supra* note 10.

157. E-mail from The Judge Advocate General, United States Army, to senior JAG Corps Leaders and Staff Judge Advocates, subject: TJAG's Directives in Post-Trial Study (Jan. 6, 2003) (reprinted *infra* app. A) [hereinafter E-mail Message].

158. Information Paper, Criminal Law Division, Office of the Judge Advocate General, subject: New Provisions in Army Regulation (AR) 27-10, Military Justice (24 Sept. 2002) (summarizing TJAG's proposed changes). The author extends his thanks to Major Michelle Crawford, the author of the information paper, and Colonel William Condron, Chief of Criminal Law, Office of The Judge Advocate General.

159. AR 27-10, *supra* note 10.

160. Article 23, UCMJ, empowers "the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army" to convene SPCMs. UCMJ art. 23. Before the promulgation of the new *AR 27-10* on 6 September 2002, however, the authority to convene a BCD SPCM was generally reserved to the GCMCA.

> A GCMCA may authorize an assigned or attached SPCM convening authority to convene a SPCM empowered to adjudge a BCD if the command of the SPCM convening authority is substantially located within an area in which hostile fire or imminent danger pay is authorized. If practicable, the authorization should be coordinated with Criminal Law Division, [Office of] The Judge Advocate General . . . . Such authorization will be written, and the authorization will be included in the record of each BCD SPCM convened under this provision. Termination of hostile fire pay status will terminate authority to convene SPCM empowered to adjudge a BCD under this provision.

U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 5-25b (20 Aug. 1999). The new regulation removed the "hostile fire or imminent danger pay" restriction and replaced paragraph 5-25 with paragraph 5-27. AR 27-10, *supra* note 10, para. 5-27. Paragraph 5-27 does have some strictly procedural limitations. To adjudge a BCD, confinement greater than six months, or forfeiture of pay for more than six months, the court will require a military judge, absent military exigencies; a qualified defense counsel under Article 27(b), UCMJ; a verbatim record of trial; and a pretrial advice by the SJA. *Id*. Many GCMCAs have nonetheless reserved BCD-SPCM convening authority at their own level.

161. Additionally, a special court-martial may not adjudge a BCD, confinement greater than six months, or forfeiture of more than six months' pay without: a detailed military judge, unless military exigencies or physical conditions prohibit such detailing; counsel qualified under Article 27(b) detailed to represent the accused; and a pretrial advice by his servicing SJA under RCM 406(b). AR 27-10, *supra* note 10, para. 5-27.

162. *Id.* para. 5-28e; *see also* UCMJ art. 58a (2002).

judge advocate offices are required to annotate the time from initiation of investigation of the most serious arraigned offense to the date of arraignment for that offense on Department of Defense Forms 490 (Record of Trial) and Form 491 (Summarized Record of Trial Chronology Sheet).[165] Records of trial for summary courts-martial and special courts-martial that do not involve a bad conduct discharge or confinement for more than of six months will be maintained in accordance with *AR 25-400-2* for a period of ten years after final action.[166]

By direction of Headquarters, Department of the Army, the Report of Result of Trial, Department of the Army Form 4430, must indicate (1) whether the convicted service member must submit to DNA processing in accordance with 10 U.S.C. § 1565;[167] and (2) whether the conviction requires sex offender registration in accordance with 42 U.S.C. § 14071.[168]

The Judge Advocate General's Post-Trial Processing Initiatives[169]

On 30 December 2002, The Judge Advocate General (TJAG), Major General Thomas J. Romig, approved the recommendations of an Army-wide post-trial study. The Judge Advocate General approved sixteen recommendations, which are reproduced at Appendix A.

A review of all sixteen recommendations leads to one conclusion—the Army Judge Advocate General's Corps takes post-trial processing seriously and will no longer tolerate unreasonable post-trial delay. Recommendations 1-7 are clear; The Judge Advocate General's Corps leadership now has visibility over post-trial processing.[170] For example, the Office of The Judge Advocate General (OTJAG) is developing "metric" standards, whereby all SJAs will have a processing timeline for how long each stage of the court-martial process should take, from the preferral of charges through dispatch of the record of trial to the appropriate appellate authority.[171] At 150 days after trial, if the appellate court has not yet received the record of trial, the Clerk of Court will correspond with the SJA and supervisory SJA.[172] At 210 days, the Clerk will again notify the SJA and supervisory SJA, along with the major Army command (MACOM) SJA.[173] At 300 days after trial, The Assistant Judge Advocate General for Military Law and Operations is "directed" to communicate with the SJA and the supervisory SJA.[174]

Recommendations 8 through 16 specifically address management of court reporters. The most significant recommendation for SJAs and Chiefs of Justice is the directive that the Sergeant Major of the Judge Advocate General's Corps "ensure that the busiest GCMCAs are fully staffed with [court reporters]."[175] This directive provides busy jurisdictions with the ammunition previously unavailable to bring their court reporter

163. AR 27-10, *supra* note 10, paras. 5-26, 12-5b(2).

164. *Id.* para. 5-40.

165. *Id.* para. 5-40b.

166. *Id.* para. 5-46a; *see* U.S. Dep't of Army, Reg. 25-400-2, The Army Records Information Management System (ARIM) (18 Mar. 2003).

167. The statute requires DNA processing for all service members convicted of "qualifying military offenses." *See* 10 U.S.C. § 1565 (LEXIS 2003); Memorandum, Undersecretary of Defense for Personnel and Readiness, subject: Policy for Implementing the DNA Analysis Backlog Elimination Act of 2001 (16 May 2001), *available at* http://afsf.lackland.af.mil/Organization/AFSFC/SFC/offenses-final.PDF (implementing the statue and listing "qualifying millitary offenses:). Conviction of a service member of a qualifying military offense requires the U.S. Army Criminal Investigtions Command to collect a DNA sample for analysis and forwarding to the FBI. Qualifying military offenses include murder, manslaughter, aggravated assaulst, property crimes such as housebreaking, robbery, arson, and burglary, and the full range of sex offenses. *Id.* A separate Department of Defense instruction implements the federal sex offender registration statute at 42 U.S.C. §§ 14071. Conviction of a listed offense requires notification to state and local law enforcement agencies. U.S. Dep't of Defense, Instr. 1325.7 Administration of Military Correction Facilities and Clemency and Parole Authority (17 July 2001), *available at* http://www.dtic.mil/whs/directives/corres/pdf/i13257_071701p.pdf. Listed sex offenses include rape, sodomy, indecent assault, assault with intent to commit another sex offense, kidnapping of a minor (other that by a parent), pornography involving aminor, and conspiracy, attempt, or solicitation to commit a listed offense. *Id.* app. C.

168. *See* U.S. Dep't of Army, DA Form 4430, Department of the Army Report of Result of Trial ll. 11-12 (Sept. 2002), *available at* ftp://pubs.army.mil/pub/eforms/pdf/a4430.pdf. This requirement is *not* mandated by *AR 27-10*.

169. *See* E-mail Message, *supra* note 157.

170. *Id*. paras. 1-7.

171. *See id.* para. 2; *see also* MCM, *supra* note 7, R.C.M. 1111-1112, 1201, 1203-1204; AR 27-10, *supra* note 10, para. 5-45.

172. *See* E-mail Message, *supra* note 157, para. 5.

173. *Id.*

174. *Id.* para. 6.

175. *Id.* para. 12.

sections up to full strength, provided the workload justifies the numbers.

The days of not worrying about transcription rates and post-trial processing times appear to have passed. The current leadership is focused on reducing post-trial processing delay, and has taken significant measures to achieve this objective. Staff Judge Advocates and Chiefs of Justice should take note of TJAG's directives, not only because justice is better served by timely post-trial processing, but also because those in the field may now be judged by how well they do in this area.

Conclusion

Although the past year was not a year of earth-shattering post-trial decisions, several decisions sent tremors through the post-trial community. *United States v. Emminizer*[176] modified the way the Air Force processes requests for deferment and waiver of forfeitures. *United States v. Tardif*[177] affirmed the ACCA's *Collazo*[178] approach to post-trial delay. *Tardif* dashed the hopes of those holding out for the day the CAAF would end the post-trial windfalls awarded appellants who suffered no actual prejudice from post-trial delay in their cases.

Just as the CAAF raised some post-trial eyebrows, so did the ACCA. Perhaps the greatest eye-opener for all post-trial practitioners—including military judges—is *United States v. Chisholm*.[179] Only time will tell whether the CAAF will agree with the ACCA's view of a military judge's authority to "direct" preparation of the record of trial. In the interim, careful and quiet listeners can hear counsel for both the government and the defense frantically striking their keyboards. The former are trying to complete records of trial as quickly as possible, and the latter are drafting requests for post-trial Article 39a, UCMJ, sessions, motions to dismiss, bold demands for clemency, and motions for other appropriate relief based on unreasonable post-trial delay. One thing is certain: the ACCA continues to lead the way concerning innovative changes or modifications to the post-trial process.

176. 56 M.J. 441 (2002).

177. 57 M.J. 219 (2002).

178. 53 M.J. 721 (Army Ct. Crim. App. 2000).

179. No. 9900240, 2003 CCA LEXIS 7 (Army Ct. Crim. App. Jan. 24, 2003).

Appendix A

E-Mail Excerpt—The Judge Advocate General's Post-Trial Directives

Subject: TJAG's Directives in Post-Trial Study

To: [Senior JAGC Leaders and Staff Judge Advocates]:

On 30 December 2002, MG Romig approved the recommendations of the Post-Trial study. The Post-Trial Study, chaired by COL Mark Harvey, had recommended refining the current post-trial process and measuring the effectiveness of these steps in [eighteen] months.

Great thanks to the Senior JAG leaders and Staff Judge Advocates who provided written recommendations and comments on the post-trial study. TJAG had read them all when we briefed him.

TJAG approved the following recommendations on 30 December 2002:

1. Field a JAG Corps, web-based, military justice case management automation program, including digital filing of records of trial, as soon as possible. Such a system should track each step in courts-martial processing in real time, and be able to provide reports with a click on a web site so that JA supervisors are fully aware of current status of their cases. Set a goal of having such a system in place by next WWCLE.

2. Direct CLD to draft metric standards (similar to the Air Force's standards), on what equals success in pretrial and post-trial processing and staff such standards for MACOM SJA and other senior JA review and comments. The AJAG for ML & O will then present such metrics for TJAG approval.

3. Publish statistical overviews of pre and post-trial processing by GCMCA on the ACCA Website as recommended by Clerk of Court. (The Clerk of Court will continue to provide quarterly Army-wide statistics to the *Army Lawyer.* The Clerk of Court will also continue to support TJAGSA courses with facts and analyses that may assist the students.)

4. Direct the Clerk of Court to provide a statistical overview of pre and post-trial processing by GCMCA for all Article 6 packets.

5. Direct the Clerk of Court to continue the recent initiative of sending electronic messages to SJAs and supervisory SJAs, identifying cases not yet received by the Clerk 150 days after trial end date and requesting their status. Further assist SJAs by sending a follow-up message at 210 days after trial end date with a copy furnished at that time to the MACOM SJA.

6. Direct the AJAG for ML & O (with assist from CLD) to correspond with the SJAs and their supervisory SJA at 300 days after trial end date. See Study pgs. 40-43 and Tab 1 for more details.

7. Direct the Clerk of Court to provide monthly statistics through 30 June 2003, regarding all cases over 120 days, 180 days, and over one year after trial that the Clerk of Court has not yet received. See, e.g., TAB D. This statistical summary will be e-mailed to SJAs with copy furnished AJAG for ML & O, TAJAG, and TJAG.

Reference Management of Court-Reporters [CR]:

8. Direct that the Chief, PPTO, with assistance from the Regimental SGM, provide proposals to the senior JAG leadership within 120 days on how the JAG Corps should manage CRs to include providing incentives for talented soldiers of any MOS to attend CR training, excel as a CR, and to stay a CR in the JAGC. The Chief, PPTO, should examine MOS reclassifications, incentive pay, E-8 authorizations for CRs, enlistment options for CR training after AIT, reenlistment bonuses, etc. Further study Warrant Officer status for CRs.

9. Direct the Commandant, TJAGSA to take measures deemed necessary, including identifying qualified potential AIT graduate attendees and requesting that MACOMs submit nominees, so that at least 24 new court reporters are trained by TJAGSA each year starting calendar year 2003.

10. Direct TJAGSA to gather and maintain information on qualified civilian[s] (on a contractual basis) and reserve CRs who are available and can help with surges in courts-martial.

11. Direct that newly trained CRs be assigned to CR duties for a minimum of six consecutive years.

12. Direct that the JAGC SGM ensure that the busiest GCMCAs are fully staffed with CRs and that new CRs graduating from the CR Course at TJAGSA are assigned under a talented supervisor at a busy jurisdiction in the field.

13. Direct that all military CRs be trained on the CAVRT [voice recognition technology] system as JAG Corps standard for military CRs. Direct those not yet trained to attend the [two]-week course at TJAGSA. Encourage civilian CRs to use the CAVRT system, but leave that decision with the local SJA.

14. Submit as a FY 2003 UFR [unit funding request] at OTJAG level the purchase of enough additional CAVRT systems so all military CR authorizations are provided a system (about 12 more systems @ $84K). Direct Chief, CLD [Criminal Law Division] to survey SJAs with civilian CR authorizations for requirements to purchase CAVRT systems for civilian CRs.

15. Direct TJAGSA study and make appropriate recommendations regarding what training is required for Legal Administrators relevant to the CAVRT systems; whether to issue the CAVRT to individuals or to units/installations; who should purchase CAVRT equipment (OSJA or OTJAG); and whether the CAVRT system currently fielded is meeting current and future needs and is actually being used by CRs in the field.

16. Direct SJAs with 27Ds in their organization with an ASI C5 designation to make a written recommendation to the Senior Instructor, CR Training at TJAGSA (MSG Wagner) on their proficiency as a CR and whether they should retain their ASI C5 designation by 30 June 2003.

The following Leaders are responsible for execution of the various recommendations:

Chief, Criminal Law Division, OTJAG: Recommendations 1, 2, assist AJAG for ML & O with number 6, 14 (identify number).

Clerk of Court: Recommendations 3, 4, 5, 7.

Chief, PPTO: Recommendation 8.

Commandant, TJAGSA: Recommendations 9, 10, assist with 13, 15 (with help from Criminal Law Division, CW3 Bertotti, as directed by BG Black).

SGM JAGC: Recommendations 11, 12, Assist with 13.

Installation SJAs: Assist with 13 and 14, and do 16 by 30 June 2003.