Don't Panic![1] Rehearings and *DuBay*s[2] Are Not the End of the World

Major Grace M. W. Gallagher[3]

Major (MAJ) Harriet J. Potter, after reviewing numerous charge sheets and mentoring her talented but very green trial counsel, finally has a free moment to attack the paperwork piled on her desk. She has been the Chief of Military Justice (CMJ) for the Division for nine months and she believes that she has encountered every odd military justice issue imaginable. As she is sorting through her inbox, she finds near the top a letter, from the Army Court of Criminal Appeals (ACCA), with a copy of the opinion, ordering a rehearing[4] in *United States v. Smythe*. *Smythe*? What is this? Unaware of the *Smythe* case, MAJ Potter has a hollow feeling in her stomach. A rehearing in a case she has never heard of? What is she supposed to do? Suddenly her uneasiness turns to panic. How can she get up to speed on this case? Where was the case tried? Where is the record of trial? Where is the trial counsel's file and do law enforcement investigators have the evidence? The Staff Judge Advocate (SJA) has put MAJ Potter on his calendar for 1530, only three hours from now, to update him on military justice issues, she now needs to brief him on how to handle this rehearing. How does she get this case to trial? Who can help her?[5] Why does the Court hate her? Where can she turn to for solace?

A rehearing presents unique challenges. A rehearing usually arrives in a military justice (MJ) office with little or no previous coordination with the appellate court or Government Appellate Division (GAD) and often triggers some degree of panic. The appellate court's directive, stated in the order[6] or opinion,[7] is to fix the problem. But how is that to be done? Most of the MJ office personnel often have little or no knowledge of the case and little or no experience in appellate litigation. Further complicating the task faced by the MJ office is the fact that records of trial in rehearing cases are usually large, and the records must be thoroughly reviewed and the cases reinvestigated. Additionally, neither the witnesses nor the evidence is readily available. Despite these challenges, the MJ office must focus on preparing for trial immediately because the 120-day speedy trial clock has been triggered by the receipt of the record of trial and the opinion authorizing or directing the rehearing and the clock is already ticking.[8]

---

[1] DOUGLAS ADAMS, THE HITCHHIKER'S GUIDE TO THE GALAXY 20, *in* THE ULTIMATE HITCHHIKER'S GUIDE (Wings Books 1996). In the book, the phrase "don't panic" appears on the cover of the alien Ford Prefect's book, *The Hitchhiker's Guide to the Galaxy*. *Id.*

[2] United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

[3] The Judge Advocate General's Corps, U.S. Army. Presently assigned a Branch Chief at the United States Army Legal Services Agency, Defense Appellate Division, Arlington, Va. LL.M., 2007, The Judge Advocate General's Legal Ctr. & Sch. (TJAGLCS), Charlottesville, Va; J.D., 1997, DePaul University, College of Law, Chicago, Ill.; B.L., 1993, The Honorable Society of King's Inns, Dublin, Ireland; LL.B., 1991, University College Galway, Ireland; B.A., 1989, University College Galway, Ireland. Previous assignments include: Chief of Military Justice, Fort Leavenworth, Kan. 2006–2007; Trial Counsel, Fort Leavenworth, Kan. 2005–2006; Trial Counsel, III Corps, Fort Hood, Tex. 2005; Chief of Administrative and Operational Law, 13th Corps Support Command, Logistical Support Area Anaconda, Balad, Iraq 2004; Trial Counsel, 13th Corps Support Command, Fort Hood, Tex. 2003; Trial Defense Counsel, 21st Theater Support Command, Kaiserslautern, F.R.G. 2001–2003; Command Judge Advocate, 1st Armored Division, Camp Monteith, Kosovo 2000–2001; Administrative and Operational Law Attorney, 1st Armored Division, Bad Kreuznach, F.R.G. 2000; Chief of Claims, 1st Armored Division, Bad Kreuznach, F.R.G. 1999; Legal Assistance Attorney, 1st Armored Division, Bad Kreuznach, F.R.G. 1998. Member of the bars of New York; Illinois; District of Columbia; Republic of Ireland; England and Wales; the U.S. Army Court of Criminal Appeals, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court. This article was written to satisfy, in part, the Master of Laws degree requirements for the 56th Judge Advocate Officer Graduate Course, TJAGLCS, Charlottesville, Va.

[4] The term "rehearing" is used generally to refer to a retrial on the merits, a sentence rehearing or a combined rehearing. "Retrial" is used generally to refer to a case returned by the appellate court to be retried on the merits, in whole or in part. "Resentencing" is used generally to refer to a case returned by the appellate court for a rehearing as to sentence. A *DuBay* hearing is a limited evidentiary hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

[5] The U.S. Army Legal Services Agency (USALSA) established the Trial Counsel Assistance Program (TCAP) and Defense Counsel Assistance Program (DCAP) to assist counsel. In rehearings counsel should contact these organizations for substantive, if not procedural, assistance on legal questions.

[6] ARMY COURT OF CRIMINAL APPEALS, POST-TRIAL HANDBOOK paras. 7-1, 7-12 (2008) [hereinafter ACCA POST-TRIAL HANDBOOK] (This document is available from the ACCA Clerk of Court's Office but will shortly be published by the Office of The Judge Advocate General, Criminal Law Division). Order—sometimes referred to as the court's "mandate." When mandate is used as a non-technical term it is interpreted as a "command issued by the court to [The Judge Advocate General] TJAG or to a convening authority." *Id.* para. 7-12(a). This command may come in the form of an order or opinion. The Court of Appeal for the Armed Forces (CAAF) uses a technical definition of the term mandate, which refers to the court "order issued ten days after an opinion has been published placing the decision in effect." *Id.* para. 7-12(b). "The [Army Court of Criminal Appeals] ACCA does not issue a separate mandate. Its decisions become effective upon promulgation by TJAG to a [General Court-Martial] GCM authority exercising jurisdiction over the accused or responsible for some further action in the case." *Id.*

[7] Opinion—The statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based. BLACK'S LAW DICTIONARY 1092 (8th ed. 2004).

[8] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707(b)(3)(D) (2008) [hereinafter MCM].

This article focuses on the Army MJ office, and provides practical guidance on how to process cases from receipt of the record of trial, through trial preparation, the trial itself, and the post-trial process.[9] The framework presented in this article will help counsel avoid wasting time and effort, maximize efficiencies, and, most importantly justify the advice: DON'T PANIC!

I. Introduction

Much academic research has focused on the substance of the military appellate courts' decisions. The subject of the procedure of actually conducting an appellate rehearing, however, has been neglected.[10] Between 1999 and June 2009 the Court of Appeals for the Armed Forces (CAAF) and the ACCA have remanded approximately 96 cases for rehearing, approximately 46 cases for a *DuBay* hearing, and approximately 190 cases back to Army convening authorities for a new review and action.[11]

How does an appellate court decide where to send the case back for a rehearing? The choice is generally between sending it back to: (1) the General Court-Martial Convening Authority (GCMCA) that originally tried the case; or (2) the GCMCA where the accused[12] or appellant is currently incarcerated or the Personnel Control Facility (PCF) where he is currently assigned[13] if the accused has already served his confinement. After the GCMCA has been selected, the record of trial will then be sent to the MJ office where the case must then be processed, and possibly tried.

II. Overview

In the Army, the rehearing process is governed by the *Manual for Courts-Martial* (*MCM*), Article 63 the Uniform Code of Military Justice (UCMJ),[14] and the Rules for Courts-Martial (RCM) 810[15] and 1107(e).[16] Chapter 13 of Army Regulation (AR) 27-10, *Military Justice*;[17] and Appendices D and K of Department of the Army Pamphlet (DA Pam) 27-7, *Military Judges' Benchbook*,[18] set out the regulatory rules for rehearings. In addition, the *Army Court of Criminal Appeals' Post-Trial Handbook*[19] provides some assistance. These limited resources are all that is available to assist the CMJ or the counsel in preparing for and conducting a rehearing and they do not fully address the practical issues associated with rehearings.

A rehearing can neither be treated like an original jurisdiction court-martial nor placed on the back burner because the MJ office is too busy. Unlike original jurisdiction cases, the trial counsel has no control over the case's investigative stage, which was completed before the original trial, nor the 120-day speedy trial clock.[20] The accused must be located immediately and the defense counsel served with a copy of the record of trial. The entire record of trial, including the appellate matters, must be thoroughly read and understood by both the paralegal and the trial counsel. This enables the paralegal to search for the victim and witnesses, and to obtain the evidence necessary to try the case. The trial counsel must

---

[9] This article does not deal in any depth with the complexity of conducting a rehearing in a death penalty case and its related issues because "death is different." Loving v. United States, 62 M.J. 235, 236 (C.A.A.F. 2005) (quoting Ring v. Arizona, 536 U.S. 584, 605–06 (2002)).

[10] Captain Susan S. Gibson, *Conducting Courts-Martial Rehearings,* ARMY LAW., Dec. 1991, at 9. To date this is the only article written specifically on the subject of rehearings.

[11] Statistics of cases remanded by the ACCA and CAAF between 1999 and June 17, 2009. E-mail from Homan Barzmehri, Office of the Clerk of Court, Army Court of Criminal Appeals, to author (June 17, 2009, 12:07 EST) (on file with author).

[12] The term "accused" is used generally to apply to the accused Soldier whose case has been returned for a complete retrial on the merits. "Appellant" is used to refer to a Soldier whose case is progressing through the appeals process.

[13] U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 9-3(b) (15 June 2006) [hereinafter AR 190-47].

[14] UCMJ art. 63 (2008).

[15] MCM, *supra* note 8, R.C.M. 810.

[16] *Id.* R.C.M. 1107(e) (Action by convening authority). Rrehearings, other trials or sentence reassessments ordered by a convening authority are outside the scope of this article.

[17] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 13 (16 Nov. 2005) [hereinafter AR 27-10].

[18] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK apps. D, K (1 Apr. 2001) (C1 and C2, 1 July 2003).

[19] ACCA POST-TRIAL HANDBOOK, *supra* note 6.

[20] MCM, *supra* note 8, R.C.M. 707(b)(3)(D).

ensure that every effort is made to bring the case to trial within the 120 days specified by RCM 707.[21] Any delays must be justified and well documented because the defense will almost certainly litigate a speedy trial motion, using both the 120-day clock[22] and Article 10, UCMJ.[23] If the defense prevails in the motion, the military judge could dismiss the charges with prejudice, and the accused will not only be released from confinement but subsequent prosecution could be barred.[24] These additional rehearing steps should not distract counsel from the fundamental fact that this is a trial. As in every trial, counsel's careful preparation and attention to detail[25] to the basics of procedure and evidence are essential to success.

III. Appellate Court Ordered Actions[26]

In a simple case, the appellate court often returns the following, relatively straightforward issues to the original convening authority for the completion of a certificate of correction;[27] or a corrected action substituting for a defective action.[28] If the issues are more complex, the appellate court usually sends the case to the convening authority currently exercising jurisdiction over the case, and may order one or more of the following: (1) a new review and action;[29] (2) a sanity board;[30] (3) a limited evidentiary hearing, known as a *DuBay* hearing; (4) a retrial or rehearing on some or all of the charges;[31] (5) a sentence rehearing alone;[32] (6) an "other trial";[33] or (7) a sentence reassessment.[34]

A. Completing a Certificate of Correction[35]

Incomplete or defectively authenticated records of trial may be returned to the convening authority for correction.[36] This process cannot be used to cure legal defects in the case. A Certificate of Correction is used to ensure that the record of trial corresponds with the events that occurred in the actual proceedings, for example, to correct typographical errors where text was inadvertently omitted or documents were unintentionally left out of the record.

B. Correction of the Action[37]

---

[21] *Id.* R.C.M. 707.

[22] *Id.*

[23] UCMJ art. 10 (2008).

[24] United States v. McFarlin, 24 M.J. 631, 635 (A.C.M.R. 1987) (holding since the accused was tried on the 121st day after notification to the convening authority, R.C.M. 707(e) mandated dismissal). United States v. Rivera-Berrios, 24 M.J. 679 (A.C.M.R. 1987) (noting the retrial was heard on day 136, in the absence of R.C.M. 707 delays, the findings and sentence were set aside and the charge and its specification was dismissed).

[25] Attention to detail includes enclosing all the necessary jurisdictional and procedural orders and documents in the record of trial. The appellate court stated: "We urge those responsible for the administration of military justice to include such written orders [terminating excess leave or returning to active duty] in the allied papers of the record of trial if the order has not been marked as an exhibit at trial." *McFarlin*, 24 M.J. at 633 n.2; *see also* United States v. Burris, 21 M.J. 140, 145 (C.M.A. 1985) ("The Government failed to establish a proper record, and it is not for appellate courts to launch a rescue mission.").

[26] Unless stated otherwise, this article generally discusses appellate court ordered actions, not convening authority ordered rehearings or "other trials." MCM, *supra* note 8, R.C.M. 1107(e).

[27] *Id.* R.C.M. 1104(d)(1); ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 6-2.

[28] MCM, *supra* note 8, R.C.M. 1107(f)(2); ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 6-3.

[29] ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-4.

[30] *Id.* para. 7-5.

[31] *Id.* para. 7-7(a).

[32] *Id.* para. 7-7(b).

[33] MCM, *supra* note 8, R.C.M. 810(e) (defining the term "other trial" as "another trial of a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense."). The technical term "new trial" is defined in Article 73, UCMJ. UCMJ art. 73 (2008). "At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court." *Id.*

[34] MCM, *supra* note 8, R.C.M. 1107(e)(1)(b)(iv).

[35] ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 6-2.

[36] MCM, *supra* note 8, R.C.M. 1104(d). The military judge shall give notice of the proposed correction to all parties, allow them to examine and respond to the proposed correction prior to authenticating the certificate of correction. *Id.* Depending on the circumstances, the record of trial may not necessarily be returned because the Office of the Staff Judge Advocate can use its own copy of the record of trial. ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 6-2(b)(1).

[37] ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 6-3.

A convening authority, on his own motion, is authorized to recall and modify an action prior to notification of the accused.[38] He may also recall and correct an "illegal, erroneous, incomplete, or ambiguous action at any time before completion of review under RCM 1112."[39] This correction cannot result in action less favorable to the accused than the initial action. A higher reviewing authority,[40] The Judge Advocate General (TJAG),[41] or authorities under Articles 64, 66, 67, or 69 of the UCMJ,[42] can also direct the convening authority to modify, withdraw or correct an action.

C. New Review and Action[43]

When a case is returned for a new review and action the entire RCM 1105, 1106, and 1107 process must be completed again. If the original defense counsel is not available, a new trial defense counsel will be detailed to assist the accused in submitting his new clemency matters.[44] The new action and promulgating order must be given to the accused. The new action must cite that the original action and promulgating order were set aside (not withdrawn) by the appellate court.[45] Since the original promulgating order was neither revoked nor amended, a new promulgating order must be issued.[46]

New reviews and actions can be more complex than may appear at first glance. In *United States v. Ayeni*, the accused was court-martialed twice for separate instances of misconduct. Private Ayeni's second court-martial[47] arose after charges were severed from his first trial.[48] The convening authority agreed to defer some of the adjudged forfeitures until he took action in the first court-martial on 1 July 2004.[49] At the second court-martial, the panel recommended "that six months of base pay will go towards the family."[50] The staff judge advocate's post-trial recommendation (SJAR) failed to bring the panel's clemency recommendation to the attention of the convening authority.[51] The ACCA found this to be plain error.[52] However, because of the passage of time, the convening authority could no longer waive or defer forfeitures when he took action on the second court-martial.[53] The ACCA noted the convening authority originally had the ability to recall and modify the action under RCM 1107(f)(2), if he had been timely informed of the panel's clemency recommendation.[54] The court

---

[38] MCM, *supra* note 8, RCM 1107(f)(2). If the accused has been notified, but prior to the record of trial being forwarded, the convening authority may recall and modify the action provided the modification is not less favorable to the accused than the previous action. *Id.*

[39] *Id*.

[40] *Id.* A higher reviewing authority or TJAG can direct the convening authority to modify "any incomplete, ambiguous, void, or inaccurate action." *Id.*

[41] *Id.*

[42] *Id.* R.C.M. 1107(g). Authorities under Article 64 (Review by a judge advocate), Article 66 (Review by Court of Criminal Appeal), Article 67 (Review by the Court of Appeal for the Armed Forces), or Article 69 (Review in the office of the Judge Advocate General), are permitted to instruct a convening authority to withdraw the original action if it is "incomplete, ambiguous, or contains a clerical error" and substitute a corrected action. *Id.*

[43] ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-4.

[44] MCM, *supra* note 8, R.C.M. 1105; *see also* United States v. Wheelus, 49 M.J. 283, 287 (C.A.A.F. 1998) ("It has long been asserted that an accused's best chance for post-trial clemency is the convening authority."); U.S. ARMY TRIAL DEFENSE SERVICE, STANDARD OPERATING PROCEDURES paras. 3-9b, 3-17 (n.d.) [hereinafter TDS SOP].

[45] ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-4(c); MCM, *supra* note 8, R.C.M. 1114.

[46] ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-4(c).

[47] No. 20030328, 2006 CCA LEXIS 374 (A. Ct. Crim. App. Sept. 29, 2006) (unpublished).

[48] United States v. Ayeni, No. 20030169 (A. Ct. Crim. App. Aug. 31, 2006) (unpublished) (affirming the findings and sentence).

[49] *Id.*

[50] *Ayeni*, 2006 CCA LEXIS 374, at *3.

[51] *Id.* (noting the recommendations of a panel, that six months base pay go to the family, "must be brought to the attention of the convening authority to assist him in considering the action to take on the sentence" (quoting United States v. Lee, 50 M.J. 296, 297 (C.A.A.F. 1999))).

[52] *Ayeni*, No. 20030328, at *2 (memorandum opinion) (failing to bring court-martial panel recommendations to the convening authority's attention here amounted to plain error); *see* United States v. Paz-Medina, 56 M.J. 501, 504–05 (A. Ct. Crim. App. 2001).

[53] *Ayeni*, 2006 CCA LEXIS 374, at *4.

[54] *Id.*

> It is important to note, however, that the convening authority had the ability "to recall and modify his action at any time prior to forwarding the record for review, as long as the modification [did] not result in action less favorable to the accused than the earlier action." R.C.M. 1107(f)(2). Our records indicate that the record of trial from appellant's first court-martial did not reach our court for review until 27 July 2004, twelve days after the convening authority's action on appellant's second court-martial on 15 July 2006. Thus, it appears that had the convening authority been informed by his SJA that appellant's second court-martial had recommended

returned the case to the accused's current convening authority for a new review and action. The appellate court stated in a footnote: "Although the same or a new convening authority will no longer have the option of recalling and modifying the action on appellant's first court-martial, the convening authority will have the ability to fashion an alternative form of clemency should it be deemed warranted."[55] The current convening authority in *Ayeni* was placed in the difficult position of attempting to craft a form of clemency that fulfilled the panel's intention of trying to benefit the accused's family or simply granting an alternative form of clemency. In Ayeni's case the current convening authority granted clemency in the form of a sentence reduction, although this did not directly assist the accused's family as the panel desired.[56] The convening authority's new action was still subject to the appellate court's review.[57]

D. Sanity Board[58]

The appellate court may order a sanity board to provide an opinion about the accused's mental responsibility at: (1) the time of the offense; (2) the time of the trial; (3) the current time; or (4) all three of these times.[59] The Office of the Staff Judge Advocate (OSJA) will be required to: arrange for the appointment of mental health professionals to the board; provide a copy of the record of trial[60] and other relevant documents to the board;[61] ensure that the board complies with the court order; and arrange for the accused's presence. The MJ office should ensure that the report is completed within the specified time or seek an extension if necessary, and return both the record of trial and the board's report to the Clerk of Court. Additionally, if a sanity board is necessary as part of the rehearing process, the trial counsel should ensure that the convening authority excludes this time from the 120-day speedy trial clock[62] under RCM 707(c).[63]

E. Limited Evidentiary or *DuBay*[64] Hearing[65]

United States v. DuBay[66] established the limited evidentiary hearing, even though the *MCM* contains no specific provision for this type of proceeding. A *DuBay* hearing arises when the appellate court remands the case to the appropriate convening authority who, upon the SJA's advice, refers[67] it to the same type of court-martial as the original trial. The

---

> that he provide even more assistance to appellant's family, the convening authority may have been able to have recalled and modified his action on appellant's first court-martial . . . to give him the ability to effectuate the panel's request in his action on the second court-martial. Moreover, even without recalling his first action, the convening authority could have granted appellant some alternative form of clemency in his action on the second court-martial. As such, we find that the error was not waived by the trial defense counsel's failure to object to the omission of the panel's recommendation in the SJAR.

Id.

[55] *Id.* at *6 n.2; *see* United States v. Moreno, 63 M.J. 129, 143 (C.A.A.F. 2006).

[56] Memorandum from the Staff Judge Advocate to GCMCA, subject: Post-Trial Recommendation of the Staff Judge Advocate in the General Court-Martial Case of United States v. Specialist Friday O. Ayeni and Action (28 June 2007). The accused originally received a ten year sentence at his court-martial. *Ayeni*, 2006 CCA LEXIS 374, at *2. The GCMCA granted three months clemency after the new review and action. Action of Convening Authority, United States v. Ayeni, No. 20030328 (28 June 2007).

[57] *Ayeni*, 2006 CCA LEXIS 374 (A. Ct. Crim. App. Oct. 26, 2007) (unpublished) (affirmed the findings and sentence after a new review and action), *petition denied*, USCA Misc. Dkt. No. 08-0226/AR Jun. 11, 2008, *petition for reconsideration denied*, Oct. 3, 2008.

[58] MCM, *supra* note 8, R.C.M. 706; ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-5.

[59] ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-5a.

[60] The MJ office should make a complete copy of the record of trial for the board to avoid problems with accountability of documents later.

[61] Examples of which may include, the case file from Criminal Investigation Division (CID), the correctional treatment file (CTF), medical or other law enforcement files.

[62] MCM, *supra* note 8, R.C.M. 707(b)(3)(D).

[63] *Id.* R.C.M. 707(c) discussion.

[64] 37 C.M.R. 411 (C.M.A. 1967).

[65] ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-6; United States v. Parker, 36 M.J. 269, 271–72 (C.M.A. 1993); *see also* United States v. Thomas, 22 M.J. 388, 392 (C.M.A. 1986).

[66] *DuBay*, 37 C.M.R. 411.

[67] ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-6(b) (directing that the charge sheet shall be "flapped"); *see id.* para. 7-8(a)(2) (overlaying ("flapping") the new referral on top of the original referral).

military judge must answer questions specified by the service court. Very complex and difficult issues can arise at *DuBay*[68] hearings and those issues will often be vigorously litigated. After hearing the evidence, the military judge must make findings of fact and conclusions of law, but those findings and conclusions are not binding on the appellate court which ordered the hearing. *DuBay* hearings often take on all the trappings of a fully contested trial, and trial counsel must prepare accordingly and expeditiously. The outcome of *DuBay* hearings has a great impact on the appellate court's ultimate decision in this case, including whether the case should be overturned on appeal, and the importance of such hearings cannot be overstated.[69]

A *DuBay* hearing can be further complicated if the appellate court does not clearly articulate its questions and the exact nature of the information it is seeking. If the appellate court orders a *DuBay* hearing based on broad or vague questions, it greatly adds to the burdens placed on the military judge and counsel to anticipate and answer potential additional questions required to answer the ultimate issue presented by the appellate court. Similarly, if a *DuBay* hearing is ordered too early in the appellate process, prior to the exact determination of the actual issues in dispute being fully articulated, the military judge and counsel at the *DuBay* must try to anticipate the potential appellate issues, and provide as much evidence as they believe the appellate court may require. This proactive approach, in most cases, will prevent the return of the case for a second *DuBay* hearing.[70]

F. Retrial[71] of All or Some of the Charges[72]

A full rehearing begins the process of trying all the charges from the original court-martial again. The MJ office can be faced with a rehearing where the appellate court has affirmed some findings, but set aside others. The MJ office will have to conduct a rehearing on the merits on the charges the appellate court set aside and a resentencing hearing on the affirmed charges. This is known as a combined rehearing. Generally, the charges originally investigated pursuant to Article 32, UCMJ, do not require reinvestigation in rehearings.[73] However, the SJA must still provide the convening authority with a detailed pretrial advice prior to the case being referred to court-martial, including an explanation of why the case has been returned for a rehearing.[74] In combined rehearings, the affirmed charges must not be considered prior to the sentencing phase and must not be disclosed to the court-martial panel members prior to sentencing.[75] Additionally, the parties' elections at the original court-martial are not frozen in place at the rehearing. The accused may change his forum selection[76] or plea,[77] to the

---

[68] In *DuBay* the U.S. Court of Military Appeals was dissatisfied with the parties' use of ex parte affidavits, in a complex case alleging command interference with judicial bodies. 37 C.M.R. 411. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), further sets out the courts requirements before it will order a limited evidentiary (or *DuBay*) hearing. *See Parker*, 36 M.J. at 271–72; *see also Thomas*, 22 M.J. at 392.

[69] Generally, the convening authority does not take any action in a *DuBay* hearing other than to return the record of the hearing (along with all copies of the original record of trial) to the appellate court after it has been authenticated by the military judge. There may be some circumstances that require the convening authority to take action. ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-6(c)(2). Some cases require the convening authority to take personal action based on the military judge's findings. *Id.* Examples of these actions include: setting aside findings of guilt and the sentence and ordering a rehearing; and setting aside the sentence only and ordering a sentence rehearing. *Id.* If the convening authority is required to take either of these actions, the SJA's advice will be treated like a post-trial recommendation. *Id.* The defense counsel would also be entitled to submit matters. *Id.* The convening authority may also be required to issue a supplementary promulgating order, in these cases. *Id.* If the convening authority determines a *DuBay* hearing is impracticable, the Clerk of Court should be informed and will assist in resolving the matter.

[70] United States v. Andreozzi, 60 M.J. 727, 729 (A. Ct. of Crim. App. 2004) (showing case sent back for two separate *DuBay* hearings); United States v. Murphy, No. 8702873 (A. Ct. Crim. App. Nov. 20, 2001) (Opinion of the Court on Remand) (unpublished); United States v. Murphy, No. 8702873 (A. Ct. Crim. App. Apr. 27, 2004) (Order) (unpublished). *Murphy* is a death penalty case, it has been returned by the appellate courts twice for *DuBay* hearings and is currently returned to the trial court level for a sentence rehearing. United States v. Murphy, No. 19872873 (A. Ct. Crim. App. June 27, 2008) (Opinion of the Court on Remand).

[71] MCM, *supra* note 8, R.C.M. 810.

[72] ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-7(a).

[73] *Id.* para. 7-8(a). A new Article 32, UCMJ investigation is not required if the court orders a "new trial" or "other trial." *Id.* However, if the Government prefers additional charges to be tried in the appellate case, those charges would be subject to an Article 32, UCMJ investigation.

[74] *Id.* para. 7-8. The pretrial advice should include a detailed history of the case, specific instructions from the TJAG's letter or instruction or the appellate court, the convening authority's options and the SJA's recommendations. Some of these cases are complex and the SJA should try to account for each charge on the original charge sheet, including whether it was dismissed during the original trial or at the appellate court. The SJA should address the options available to the convening authority, including a discussion on whether a rehearing is practical.

[75] MCM, *supra* note 8, R.C.M. 810(d)(1) discussion.

[76] *Id.* R.C.M. 810(b)(3).

[77] *Id.* R.C.M. 810(a)(3). If the accused originally pled guilty pursuant to a pretrial agreement at his original court-martial and fails to enter a guilty plea at the rehearing, his sentence may include any lawful punishment not in excess of or more serious than the lawfully judged sentence adjudged at the earlier court-martial. *Id.* R.C.M. 810(d)(2).

set aside charges, in the rehearing on the merits. The Government may also try additional charges arising out of misconduct that was unknown at the original trial; however these new charges are subject to sentence limitation rules[78] (and possibly a new investigation under Article 32, UCMJ). These sentence limitation rules, generally, require that the offenses for which a sentence in a rehearing, new trial, or other trial is ordered shall not be the basis for an approved sentence in excess of the sentence ultimately approved by the convening or higher authority following the previous trial or hearing, even if the accused fails to comply with the first Pretrial Agreement (PTA).[79]

G. Sentence Rehearing[80]

A sentence rehearing occurs when the appellate court returns a case to resentence the accused based on the affirmed findings of guilt. The accused cannot withdraw his original plea,[81] but he may change his forum selection.[82] The court-martial panel cannot know the original sentence;[83] however, the approved sentence is subject to sentence limitations rules.[84] The defense counsel should be aware that it is possible for the accused to "bust providence"[85] at a sentence rehearing. If the accused is no longer provident according to the terms of his original pre-trial agreement, he may no longer have the benefit of RCM 810(d) sentence limitation rules.[86] This is something the parties at a rehearing must be aware of in every sentence rehearing.

H. "Other Trial"[87]

"Other trials" arise when the original proceedings are "declared invalid because of lack of jurisdiction or a failure of a charge to state an offense."[88] "Other trials" are retrials, and not "new trials" under Article 73, UCMJ.[89]

In *United States v. Reid*,[90] the accused pleaded guilty to fraudulent separation and several other charges. The ACCA held the trial court only had jurisdiction[91] over the fraudulent discharge.[92] The court authorized an "other trial" after declaring all other findings void, and a sentence rehearing on the fraudulent discharge.[93] The Judge Advocate General of the Army certified the case to CAAF who affirmed ACCA's decision ordering an "other trial."[94] "Other trials" occur rarely.

I. Sentence Reassessments

---

[78] *Id.* R.C.M. 810(d), R.C.M. 1003.

[79] *Id.* R.C.M. 810(d). This rule does contemplate a more severe sentence if there is a mandatory sentence prescribed for the offense.

[80] ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-7(b).

[81] MCM, *supra* note 8, R.C.M. 810(a)(2)(B).

[82] *Id.* R.C.M. 810(b)(3).

[83] *Id.* R.C.M. 810(d)(1) discussion.

[84] *Id.* R.C.M. 810(d)(1). The convening authority is bound by the sentence limitation rules which generally means the sentence cannot be in excess of or more severe than the sentence ultimately approved by the convening authority at the original trial. *Id*.

[85] An accused "busts providence" when he is unable to articulate clearly that his acts or omissions constituted the offense to which he is pleading guilty, or he presents a defense to the charge or evidence which is inconsistent with his plea of guilty before sentence is announced. United States v. Care, 40 C.M.R. 247 (C.M.A. 1969). If this occurs the military judge must reopen the providence inquiry to resolve the inconsistency, if the accused cannot resolve the issue the military judge cannot accept the accused's plea of guilty.

[86] MCM, *supra* note 8, R.C.M. 810(d).

[87] ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-1.

[88] MCM, *supra* note 8, R.C.M. 810(e). The same speedy trial rules under RCM 707 apply to "other trials." *See* United States v. Moreno, 24 M.J. 752, 753 (A.C.M.R. 1987).

[89] UCMJ art. 73 (2008); MCM, *supra* note 8, R.C.M. 1210.

[90] 46 M.J. 236 (C.A.A.F. 1997), *aff'*g 43 M.J. 906 (A. Ct. Crim. App. 1996).

[91] UCMJ art. 3(b) (1995). This issue had to be decided prior to the Government proceeding in a second court-martial of the other charges.

[92] *Reid*, 46 M.J. at 237 (citing *Reid*, 43 M.J. at 908).

[93] *Id.*

[94] *Id.* at 240.

Sentence reassessments[95] can occur if an appellate court approves some of the findings, and authorizes a rehearing on the other offenses and sentence but the convening authority decides it is impractical to conduct a rehearing.[96] Unless prohibited by the court, the convening authority may reassess the sentence under RCM 1107(e)(1)(B)(iv),[97] without conducting a sentence rehearing. The convening authority will dismiss the remaining charges and reassess the sentence on the approved charges.[98] In *United States v. Reid*, the court lauded the convening authority for attempting to cure an error before Sergeant First Class Reid's case reached the appellate court, but held that the convening authority must be assured that the accused is placed "in the position he would have occupied if an error had not occurred."[99] In *Reid*, the Court of Military Appeals found that the SJA failed to distinguish clearly between curing any effect a trial error may have on the sentencing authority and determining the appropriateness of the adjudged sentence, or indeed give any guidance at all as to how the convening authority should rationally cure the prejudice.[100]

More frequently, the appellate court itself may reassess a sentence rather than returning the case for a rehearing. The appellate court may do so if it is "convinced that even if no error had occurred at trial, the accused's sentence would have been at least of a certain magnitude. Under those circumstances the [appellate court] need not order a rehearing on sentence, but instead may itself reassess the sentence."[101]

IV. The Rehearing

A. Initial Administrative Matters

The Clerk of Court, ACCA, often sends particularly complex cases to the Army GCMCA currently exercising jurisdiction over the accused[102] especially if the accused is still incarcerated[103] at: the United States Disciplinary Barracks (USDB) (Fort Leavenworth); the Army Regional Corrections Facilities (RCF);[104] or an another Department of Defense (DoD) facility.[105] The accused's chain of command, while in confinement, can be the Correctional Holding Detachment (CHD) or the PCF.[106]

When the appellate court orders a rehearing, the Clerk of Court, ACCA, will forward: the appellate court's order or opinion; the record of trial; and the TJAG's letter of instruction, or remand letter, to the GCMCA through the OSJA.[107] Upon receipt of these documents, the CMJ should immediately determine what further proceeding or remedial action the appellate court has directed the GCMCA to perform.[108] The military judge and the U.S. Trial Defense Service (TDS) must also immediately be notified of the case.

---

[95] United States v. Sales, 22 M.J. 305 (C.M.A. 1988); United States v. Moffeit, 63 M.J. 40 (C.A.A.F. 2006).

[96] United States v. Buber, 62 M.J. 476 (C.A.A.F. 2006). The CAAF returned this case for a sentence rehearing. *Id.* at 480. Ultimately the convening authority decided that it was impractical to conduct a rehearing on the remaining charges and approved a sentence of no punishment. United States v. Buber, 2006 CCA LEXIS 520, at *2 (A. Ct. Crim. App. 2006). In such cases the convening authority may choose to administratively separate the accused under Chapter 14, AR 635-200 based on the affirmed charge. U.S. DEP'T OF ARMY, REG. 600-8-104, MILITARY PERSONNEL INFORMATION MANAGEMENT/RECORDS ch. 14 (22 June 2004) [hereinafter AR 600-8-104].

[97] MCM, *supra* note 8, R.C.M. 1107(e)(1)(B)(iv).

[98] *Id.* R.C.M. 1112(f)(2).

[99] 33 M.J. 98, 99–100 (C.M.A. 1991) (citing *Sales*, 22 M.J. at 308).

[100] *Id.* at 100.

[101] *Sales*, 22 M.J. at 307 (citing United States v. Bullington, 13 M.J. 184 (C.M.A. 1982)); United States v. Moffeit, 63 M.J. 40, 43 (C.A.A.F. 2006) (Baker, J. concurring) (listing a non-exhaustive list of factors relevant to the Court of Criminal Appeals review of reassessments).

[102] AR 190-47, *supra* note 13, para. 9-3; Memorandum of Agreement Between Assistant Secretary of the Army (Manpower and Reserve Affairs) and Assistant Secretary of the Navy (Manpower and Reserve Affairs) (24 Mar. 2000) (transferring responsibility for female Army prisoners to Miramar Naval Brig).

[103] ACCA POST-TRIAL HANDBOOK, *supra* note 6, ch. 7.

[104] Army regional confinement facilities are located at Fort Knox and Fort Sill.

[105] U.S. DEP'T OF ARMY REG. 600-62, UNITED STATES ARMY PERSONNEL CONTROL FACILITIES AND PROCEDURES FOR ADMINISTERING ASSIGNED AND ATTACHED PERSONNEL paras. 3-11, 3-12 (17 Nov. 2004) (generally post-trial Soldiers in confinement or on excess leave will be administratively transferred to the nearest PCF).

[106] AR 190-47, *supra* note 13, para. 9-3(b).

[107] ACCA POST-TRIAL HANDBOOK, *supra* note 6, para. 7-1.

[108] *Id.* ch. 7.

The accused's status shapes many of the initial decisions in a rehearing. If the accused is incarcerated at a military confinement facility, he must be located immediately and either released from confinement, because he usually no longer has a sentence of confinement, or the trial counsel must prepare for, and conduct, a pretrial confinement (PTC) review.[109] Sometimes, the accused may decide to waive his presence at the PTC review and his objection to continued PTC because the additional time he spends in confinement will be credited toward his ultimate sentence of confinement.[110]

The confinement facility will not release an inmate without a written "mandate"[111] from the appellate court.[112] The record of trial usually takes a few days to arrive from the appellate court. This is an opportunity for the trial counsel to coordinate with the confinement facility to ensure he has access to all relevant records, particularly the Confinement Treatment File (CTF),[113] and learn whether the accused attended any Disciplinary and Adjustment (D&A) Boards.[114] The record of trial should also be reviewed for this hearing, particularly documents from a previous PTC review. The same rules apply to PTC reviews in rehearings as every other PTC review. The military magistrate[115] will apply the standard and require the trial counsel to establish that "confinement is necessary"[116] and "less severe forms of restraint are inadequate."[117] The CTF and D&A Boards are an invaluable source of evidence for the trial counsel for the PTC reviews.

The importance of the PTC review cannot be overstated. If the accused is released from confinement, either because the Government chose not to conduct a PTC review, or because the military magistrate released the accused, he becomes the responsibility of a local unit on post. The accused will usually be attached to the local unit for logistical support while remaining assigned to the PCF. The accused must also be placed into his pre-conviction status for personnel and finance purposes, because he is not the subject of any adjudged sentence.[118] This means that he now wears his pre-conviction rank and is paid at that rank, because he is no longer under an adjudged or approved sentence.[119] The unit is also responsible for providing the immediate housing, meals and uniforms of the accused, and assigning the accused useful duties as appropriate.[120] These are not simple issues because the accused usually does not have funds to pay for these necessities until he begins to get paid. Unfortunately, there is no special fund allotted for these expenses and so they must be paid out of unit funds.[121] Additionally, the accused may be a registered sex-offender, or may need to register as a sex-offender upon release, because of the original conviction.[122] The registration requirement is not automatically revoked as a result of the Court Order and the unit must maintain accountability of the accused, and ensure that his lodging and work arrangements do not cause him to violate state laws.

---

[109] MCM, *supra* note 8, R.C.M. 305.

[110] *Id.* R.C.M. 305(j)(2), (k).

[111] The Clerk of Court, ACCA, issues an order (sometimes referred to as a "mandate" pursuant to AR 27-10, para. 13-8) to the USDB to release an inmate. Memorandum from The Judge Advocate General to The Clerk of Court, U.S. Army Court of Criminal Appeals, subject: Authority to Order the Release of Post-Trial Prisoners (28 Apr. 2009).

[112] AR 190-47, *supra* note 13, para. 10-19(f)(3). Prisoners will be notified immediately of a modification in legal status or court-martial sentence by a proper authority. *Id.* This notification may be made telephonically. *Id.* Prisoners will only be released after verification of notification. *Id.*

[113] *Id.* para. 10-5(a). A correctional treatment file is established and maintained for each prisoner. It contains, at a minimum, prisoner's records as outlined in AR 190-47, para. 10–5b; required counseling; special training; employment needs; and or personal problems that may affect treatment. *Id.* The commander of the facility may determine additional required documents. *Id.*

[114] Disciplinary and Adjustment Board "evaluates the facts and circumstances surrounding alleged violations of institutional rules." U.S. DISCIPLINARY BARRACKS, REG. 600-1, MANUAL FOR THE GUIDANCE OF INMATES para. 4-2 (1 Jan. 2005); AR 190-47, *supra* note 13, ch. 12. The Government should investigate the accused's behavior while in post-trial and pretrial confinement disciplinary infractions or D&A Boards that may be admissible against the accused at trial or at a PTC review. *See also* AR 27-10, *supra* note 17, para. 5-29a(11).

[115] AR 27-10, *supra* note 17, ch. 9.

[116] MCM, *supra* note 8, R.C.M. 305(i)(2)(B)(iii).

[117] *Id.* R.C.M. 305(i)(2)(B)(iv).

[118] *Id.* R.C.M. 1002 ("[T]he sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial . . . may adjudge a sentence of no punishment.").

[119] UCMJ art. 57 (2008) (any forfeiture of pay or allowance or reduction of grade included in a court-martial sentence takes effect on the earlier of: (1) 14 days after the dated on which the sentence is adjudged; or (2) the date on which the convening authority approves the sentence).

[120] Ideally, the MJ office should coordinate a meeting between all the relevant agencies to work through these issues before an actual rehearing is sent to the jurisdiction. Some prior planning can help avoid serious issues for both the accused and the unit.

[121] This is an issue that is outside the scope of this article but causes real problems for the local unit who is responsible for the accused.

[122] Each state has its own requirements regarding mandatory sex-offender registration. The accused, defense counsel, and the trial counsel should ensure that they are aware of these requirements so as not to fall afoul of the state statutes.

If the accused is placed into PTC there are other logistical issues presented to the command. For example, if the accused is confined at Fort Leavenworth he cannot remain at the USDB as a pretrial confinee.[123] The accused must be confined at either a RCF or local civilian facility, (provided there is a contract[124] between the military and local civilian facilities[125]). The unit should develop a relationship with the civilian confinement facility and ensure that the defense counsel have adequate access to the accused. The trial counsel should monitor the accused's behavior or misconduct, as well as the treatment he receives at the facility. Such monitoring can be labor intensive, but ultimately the command is responsible for the accused's uniform[126] and grooming, as well as prohibited pretrial punishment.[127] The trial counsel should keep in mind, however, that if the accused commits misconduct this can be used against him in the sentencing phase of the trial.

If the accused has been released from confinement[128] or is on excess leave,[129] he must be brought back onto active duty. This involves coordination with the Office of The Judge Advocate General (OTJAG) and Human Resources Command (HRC).[130] The MJ office should also contact the U.S. Army Criminal Investigation Division Command (CID) and investigate the accused's activities since his release, particularly whether he had any other problems with civilian law enforcement. The accused must be assigned to a company. On smaller installations the government must carefully consider which company to assign the accused because enlisted personnel who are from the same company sized unit as the accused generally cannot serve on the accused's court-martial panel.[131]

Consideration should be given to minimizing the disruption of the accused's post-release life. The trial and defense counsel can coordinate with the personnel office processing the accused's orders, so that the accused will only be placed on active duty for a short period around the rehearing and permitted to return to civilian life as soon as possible. Generally, the accused will not serve any additional confinement.[132]

B. Preparing for Trial

If possible, two trial counsel should be assigned to a complicated rehearing. The CMJ should also designate one or more paralegals to work on the case and maintain continuity of this trial team. The effective use of paralegals is imperative in the rehearing process. Additionally, the court reporter should be notified of the rehearing early to minimize any issues with accountability of the records of trial and exhibits, to include jurisdictional and procedural orders related to the accused.[133] Once the record of trial arrives in the office the assigned paralegal should immediately begin to read the entire record of trial and create a detailed spread sheet of witnesses and evidence. He should locate witnesses and evidence, which is often a slow and difficult process that consumes many man-hours. The paralegal should also begin a chronology to annotate his efforts for possible future speedy trial motions. The paralegals should also order the Official Military Personnel File (OMPF)[134] and

---

[123] AR 190-47, *supra* note 13, para. 3-2(c).

[124] *Id.* para 3-2. The unit or installation may have to use its own funds to pay for the housing of the accused in a civilian facility. These contracts usually charge a daily rate, for example the rates at Fort Hood and Fort Leavenworth as of March 2008 were between $50–$55, per day.

[125] The Government is responsible for maintaining situational awareness and ensuring the accused is treated according to the same standards regardless of whether the accused is held in PTC in a military or civilian facility. AR 190-47, *supra* note 13, para. 11-1(b)(1) ("Pretrial prisoners will be segregated from other prisoners in employment and recreation areas. Pretrial prisoners will be billeted separately from posttrial prisoners.").

[126] MCM, *supra* note 8, R.C.M. 804(e)(1).

[127] UCMJ art. 13 (2008).

[128] MCM, *supra* note 8, R.C.M. 304(g) discussion. Pretrial restraint is an option if the appellate court orders a rehearing or "other" trial.

[129] U.S. DEP'T OF ARMY, REG. 600-8-10, LEAVES AND PASSES para. 5-15a (15 Feb. 2006) ("Excess leave is a nonchargeable absence granted for emergencies or unusual circumstances or as otherwise specified in this regulation."). The GCM authority may direct the use of involuntary excess leave awaiting punitive discharge. *Id.* para. 5-19a(1).

[130] Reserve and National Guard personnel who are no longer in confinement pose component specific requirements, which are beyond the scope of this article. The trial counsel should contact the Reserve or National Guard personnel offices for guidance in these cases.

[131] UCMJ art. 25(c); MCM, *supra* note 8, R.C.M. 912(f)(1)(A).

[132] If the accused is tried for new charges he may face additional confinement. MCM, *supra* note 8, R.C.M. 810(d). If the accused receives a sentence at the rehearing that is less than the confinement time he has already served he may receive compensation. U.S. DEP'T OF ARMY, REG. 37-104-4, MILITARY PAY AND ALLOWANCES POLICY para. 21-3 (8 June 2005) [hereinafter AR 37-104-4].

[133] United States v. McFarlin, 24 M.J. 631, 633 (A.C.M.R. 1987); *see also* United States v. Burris, 21 M.J. 140, 145 (C.M.A. 1985).

[134] AR 600-8-104, *supra* note 96.

locate the evidence, evidence custodian, original court-martial MJ office[135] and trial counsel (including the trial counsel notes, if any) and the original defense counsel. The retrial process is truly a team effort and the paralegal's work provides the foundation for the successful prosecution of the case.

The trial counsel must read the entire record of trial. Initially, it may appear that the record of trial will make the rehearing process easier, but relying too heavily on the record of trial is ill-advised. The appellate court's opinion or order usually dictates how useful the record will be. In a complete rehearing on the merits, the counsel may not be able to rely on the record at all, other than for impeachment and stipulation purposes, based on issues arising from the Confrontation Clause[136] and the military judge's rulings on motions. Trial counsel should always be prepared to litigate motions in any type of rehearing. In fact, the trial counsel should expect the defense to use the rehearing as an opportunity to perfect the original case (i.e., litigate both the motions in which the original defense counsel failed to prevail, and those that were never raised in the original trial).[137] Trial counsel should also carefully consider whether there are any defense motions that the government should not oppose or potential judicial rulings that may cause further appellate problems in the case. Additionally, the trial counsel should be prepared to litigate government motions in limine.[138] In a sentence rehearing, the counsel may be able to rely on testimony on the merits but will not be able to benefit from the opening statement or closing arguments.[139] Defense may also seek to limit and redact previously admitted testimony.[140] Blindly relying on the original government theory of the case or assuming that the defense strategy will not change at the rehearing is a mistake. Rather than the be all and end all of the case, the record of trial serves as a starting point from which counsel can map the subsequent direction.

The trial counsel must prepare for a rehearing as if the case will be fully contested and there will be no PTA. Unlike an original jurisdiction case, the Government is often in a weaker bargaining position at a rehearing because it has all the responsibility of retrying the case, but has lost leverage over the accused because the potential punishment usually cannot exceed the approved sentence at the initial trial.[141] Additionally, the trial counsel has the difficult tasks of: locating the evidence; finding the victim; and producing the witnesses,[142] who may very well be uncooperative and no longer affiliated with the military. As in all other cases, the trial counsel will be held accountable for the actions of the "Government."[143] Even though a myriad of bureaucratic issues are outside the control of the trial counsel in a rehearing, it is imperative to anticipate such issues, and inform the military judge and defense counsel of the difficulties immediately. Doing so may not save the trial counsel from blame when things go wrong, but it may ameliorate the wrath of the military judge, and assure all the parties that the government is acting responsibly.

The defense is often in a much stronger position at a retrial because the accused has nothing to lose, the punishment is usually capped at the previously approved sentence.[144] Often, the accused continues to earn credit towards the final sentence while in PTC.[145] Additionally, the accused can use evidence of good behavior in confinement as mitigation evidence. Some of the charges may have been overturned or dismissed, greatly enhancing the chances that a lesser sentence will be

---

[135] The MJ office should do all it can to obtain not only the evidence from law enforcement but also the original trial counsel notes as early as possible. Additionally, the original MJ office and trial counsel should be contacted as soon as possible to discuss the case. Infrequently, there are cases where the original MJ office no longer has a sense of attachment to the case and provides little, if any, assistance to the pretrial preparation, and may be defensive about the issues that caused the retrial. It may be advisable for the current GCMCA to write to the original GCMCA to ensure that the proper attention and cooperation is devoted to the case by the original MJ office.

[136] U.S. CONST. amend. VI.

[137] Defense counsel should be extremely aware of the consequences of the terms of a pretrial agreement (PTA). It is possible for the defense counsel to waive hard fought appellate issues, for example, if the military judge refused to allow him to relitigate motions but he then later agreed to waive all motions as part of the terms in the PTA.

[138] A Government offensive motion would be appropriate if a necessary witness has died since the original trial but his testimony was preserved in the original record of trial. Additionally, the Government may want to litigate a motion to admit evidence of disciplinary action while in confinement or criminal conduct if the accused was released from confinement.

[139] MCM, *supra* note 8, R.C.M. 810(a)(2)(A) (permitting only properly admitted evidence, opening statements and argument are not evidence).

[140] *Id.* RCM 810(a). The military judge will not allow the panel to take a copy of the redacted testimony with them into deliberations. *Id.* R.C.M. 810(c).

[141] *Id.* R.C.M. 810(d)(1).

[142] *Id.* R.C.M. 703(e)(2) (authorizing the presence of civilian witnesses to be obtained by subpoena). Service is usually served by a U.S. marshal. *Id.* R.C.M. 703(e)(2)(D). The issuance of a warrant of attachment if the witness neglects or refuses to appear is found in RCM 703(e)(2)(G). *Id.* R.C.M. 703(e)(2)(G).

[143] The trial counsel may be asked to account for the actions of both state and federal government agencies during the trial.

[144] MCM, *supra* note 8, R.C.M. 810(d)(1).

[145] *Id.* R.C.M. 305(j)(2), (k).

imposed.[146] Additionally, time has passed, memories have faded, witnesses have moved, and victims do not want to endure another trial. The defense also has the benefit of knowing that the government must take the case to trial within 120 days.[147] Thus, the defense has formidable factors in its favor in negotiating a plea agreement.

As previously mentioned, the MJ office must find and contact the victim and witnesses.[148] Dealing with the victim and the victim's family can be a very delicate process. It is essential that the trial counsel build a good relationship with the victim. The use of the Victim Witness Liaison (VWL)[149] and the Victim Advocate (VA)[150] can be of immense value assisting the trial counsel help the victim through the rehearing process. As in all cases, the trial counsel must treat the victims and witnesses with respect, but this becomes even more important in rehearings because the victim can be hostile towards the system and can focus that hostility on the trial counsel. Victims may be upset because important charges may have been dismissed or the maximum possible sentence may be greatly reduced. For these reasons it is probably better to rely on the VWL and VA to provide the emotional support to the victim, thereby enabling the trial counsel to maintain the emotional distance required to satisfactorily complete the rehearing. Trial counsel must help victims manage their expectations. It is extremely difficult to prosecute a case successfully if the victim refuses to cooperate.

Additionally, the VWL and VA can serve another important purpose: as the historical reference point for the case being reheard. Because they usually are civilian employees, many VWLs and VAs are not subject to the vagaries of assignments. They may be actually familiar with the case being retried, know the victims and remember the original hearing. As such, they can be invaluable reference points, and both the CMJ and trial counsel should immediately discuss the case with the VWL and VA upon receiving a rehearing notice.

The relationships between trial and defense counsel are often complicated. The rehearing process only increases the complexity of these relationships because there is a different dynamic in a rehearing. As was previously discussed, the bargaining power of the government is considerably weaker than it was in the original trial. It behooves the trial counsel to cooperate and agree upon uncontested matters early. Examples of issues that can be stipulated to include: the admissibility of evidence; and stipulations of fact and expected testimony. The defense counsel needs as much access to the accused as possible. Facilitating this communication is in the government's interest. The trial counsel needs to understand that the defense counsel's relationship with the accused in a rehearing is probably more complex than with other clients. Sometimes, the accused may request individual military counsel (IMC)[151] or have a civilian defense counsel (CDC). The trial counsel should confirm that the CDC has actually been retained by the accused before discussing the case with him. This can usually be done through the TDS counsel and obtaining a letter of representation from the CDC for the record.

The Government's procedural decisions should be deliberate and include a risk assessment of its strategy and tactics. The Government should generally not refer a case before they are ready to go to trial, based merely on defense assertions without a signed PTA. Any government action should follow the Government's own trial strategy and it should do everything possible to perfect its case prior to referral. Once the case is referred, the Government no longer has control of the timing of the case and the military judge will docket the case and require the Government to satisfy him that its reasons for requesting a delay are satisfactory. (There could certainly be circumstances when arraigning the accused early will mitigate the government's exposure to speedy trial motions.) Front loading the search for evidence and witnesses will make the process less painful. The Government should not assume that the accused will accept its offer of a "good deal," for example a Chapter 10 (discharge in lieu of trial by court-martial)[152] or a limitation on confinement. Sometimes the accused will refuse to enter an agreement despite the trial counsel's or defense counsel's belief that the accused has been offered a "good deal."

---

[146] If the sentence he receives in the second court-martial is less than the confinement he has actually already served, he may be entitled to compensation. AR 37-104-4, *supra* note 132, para. 21-3; U.S. DEP'T OF DEFENSE, FINANCIAL MANAGEMENT REG.7000.14-R, vol. 7A, ch. 48 (Oct. 2006); *see also* Captain Joel A. Novak, *Forfeitures, Recommendations, and Actions; Discretion to Insure Justice and Clemency Warranted by the Circumstances and Appropriate for the Accused*, ARMY LAW., Mar. 2000, at 16; Major Jan E. Aldykiewicz, *Recent Developments in Post-Trial Processing:* Collazo *Relief is Here to Stay!*, ARMY LAW., Apr./May 2003, at 83; United States v. Emminizer, 56 M.J. 441 (C.A.A.F. 2002).

[147] MCM, *supra* note 8, R.C.M. 707.

[148] *Id.* R.C.M. 703(e)(2) (authorizing the presence of civilian witnesses to be obtained by subpoena). A subpoena is usually served by a U.S. marshal. *Id.* R.C.M. 703(e)(2)(D). A warrant of attachment may be issued if the witness neglects or refuses to appear. *Id.* R.C.M. 703(e)(2)(G).

[149] AR 27-10, *supra* note 17, ch. 18 (Victim/Witness Assistance).

[150] U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM ch. 3 (30 Oct. 2007).

[151] AR 27-10, *supra* note 17, para. 5-7. If the approval process for the IMC request takes a significant amount of time, this may be an appropriate excludable delay. MCM, *supra* note 8, R.C.M. 707(c).

[152] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ch. 10 (Discharge in Lieu of Trial by Court-Martial) (6 June 2005) [hereinafter AR 635-200].

The trial counsel must not allow actions by the accused to place the trial counsel at a disadvantage because he has not diligently prepared for the rehearing, or the accused does not agree with the government's perception of what the case is "worth."

Additionally, if the Government is supporting a PTA, or an offer to plead guilty (OPG),[153] the trial counsel must feel assured that the accused will be provident to the charges.[154] This may require detailed discussion with defense counsel. Simple assurances that the accused will be provident are not enough. The government is in a stronger bargaining position prior to referral or the approval of a PTA or OPG. Here the trial counsel should ensure the defense counsel has actually spoken to the accused by demanding a written stipulation of fact prior to taking any action. This is good trial practice in every case and will ensure all parties are on the same page when the case is referred.

The trial counsel should listen to defense warnings that the accused cannot be provident to a charge. A "busted" providence inquiry is bad for everyone (both trial and defense counsel must realize that providence can also be "busted" at a sentence rehearing if there is evidence presented inconsistent with the plea).[155] If the defense believes that the accused cannot be provident to a charge, despite the fact that the accused wants to make a deal, it is better to work through this problem, and possibly prepare for a contested trial, than to go to trial without a satisfactory solution. The military judge (and, if not the military judge, certainly appellate defense counsel on appeal) will identify the issue, and not allow the accused to continue with the plea.[156] Sometimes a little imagination and cooperation between counsel can resolve the issue to the satisfaction of all the parties. In appropriate cases, the accused may be provident to a lesser included offense or he may be willing to waive his objection to resurrecting charges that have been dismissed earlier either by the trial court or by the appellate court[157] in order to secure a PTA.

The trial counsel must plan for every contingency, from the possibility that the accused will submit an OPG to a fully contested court-martial. This will enable the trial counsel to assess the value of the case, and, more specifically, what sentence the OSJA will support to the GCMCA in a PTA. The trial counsel's main considerations are the appellate decision, the remaining charges and the maximum punishment. The trial counsel should also consider the accused's behavior both during and after confinement and other aggravating or mitigating information about the accused.[158]

The trial counsel must objectively assess the case and its weaknesses in light of the appellate decision. Trial counsel memoranda are extremely important in evaluating the case and deciding whether to support the defense OPGs. Evidentiary issues will also factor heavily into the decision making process. If evidence has been lost or destroyed,[159] the Government may be forced to consider an administrative separation.[160] Additionally, if the only charges that survived the appeal are

---

[153] Generally an Offer to Plead Guilty (OPG) is a PTA that is generated by the accused whereby he offers to plead guilty in return for some specified action of the convening authority. For the purposes of this article the term PTA is used for all agreements between the accused and the convening authority unless otherwise stated.

[154] *USALSA Report: The Advocate for Military Defense Counsel: DAD Notes*, ARMY LAW., July 1986, at 52, 54. ("An accused must be counseled against getting cold feet in the course of the providence inquiry. Any hesitation or waiver on an accused's part could potentially generate additional inquiry that could lead to disclosure of damaging information."). This information could cause the military judge to reject the accused's plea.

[155] MCM, *supra* note 8, R.C.M. 810(a)(2)B ("[I]f such a plea is found to be improvident, the rehearing shall be suspended and the matter reported to the authority ordering the rehearing."); *see* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

[156] MCM, *supra* note 8, R.C.M. 910.

[157] United States v. Rios, No. 20020123, 2006 CCA LEXIS 433, at *1 (A. Ct. Crim. App. 2006) (memorandum opinion); Promulgating Order, *Rios*, No. 20020123 (July 25, 2003). The accused was originally convicted of premeditated murder. *Id.* A second charge of accessory after the fact of the same premeditated murder was dismissed at the original trial. Transcript of Record at 986; Promulgating Order, *Rios,* No. 20020123 (July 25, 2003). At the retrial the accused plead guilty to the previously dismissed charge of accessory after the fact. Promulgating Order, *Rios,* No. 20020123 (Fort Leavenworth June 19, 2007). The military judge wrote an Order "The Specification of Charge II" (29 Jan. 2007), to ensure that all the understandings between the parties were clearly described for the appellate courts. *Rios*, No. 20020123 (A. Ct. Crim. App. 14 Feb. 2008) (unpublished) (affirming findings and sentence at the rehearing).

[158] United States v. Currenton, No. 20020848, 2005 CCA LEXIS 474 (A. Ct. Crim. App. 2005) (memorandum opinion). The accused's misconduct in confinement at the USDB resulted in over twenty D&A Boards where he lost almost all the good time credit he had already earned from his fifteen-year sentence. Transcript of Record at Appellate Exhibit XI, *Currenton*, No. 20020848 (Fort Leavenworth 25 Nov. 2005). For this reason the Government was unwilling to support the accused's OPG which sought a substantial reduction of his sentence. *Currenton*, No. 20020848 (A. Ct. Crim. App. 29 Nov. 2006) (unpublished) (affirming the sentence at the sentence rehearing).

[159] United States v. Terry, 66 M.J. 514 (A.F. Ct. Crim. App. 2008) (granting the government interlocutory appeal under UCMJ art. 62(a)(1) of trial judge's dismissal of the case because of the destruction of evidence prior to the CAAF remanding the case for a rehearing pursuant to *United States v. Terry*, 64 M.J. 295 (C.A.A.F. 2007)).

[160] U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES ch. 3 (12 Apr. 2006); AR 635-200, *supra* note 152, chs. 10 (Discharge in Lieu of Trial by Court-Martial), 14 (Separation for Misconduct).

minor and would not warrant confinement, the government should also consider disapproving any punishment, and commencing an administrative separation.[161] The accused's personnel records are important in this decision because based on the length of his service in the military he may be entitled to a separation board.[162] However, time spent in confinement is generally considered "time lost," for the purpose of a separation board.[163] All of this may factor into the trial counsel's assessment which may be something neither the victim nor the GCMCA want to hear. Regardless of this fact, the case rests on the evidence and it is the trial counsel's responsibility to evaluate the case honestly.

Rehearings also provide unique challenges for defense counsel. Defense counsel should read the order or opinion, the record of trial, and talk to the accused before discussing a PTA with the Government. This statement may be obvious, but it must be emphasized. Reputation and credibility are a defense counsel's greatest assets. The defense counsel must understand why the case came back for rehearing, and must not make offers that are inconsistent with the facts or the appellate court's order. Defense counsel must know the accused and research the accused's confinement history. Defense counsel's efforts will help define the issues and build trust in the negotiation process. Facilitating this relationship is also in the government's interest because it not only promotes judicial economy, but can shorten the accused's appellate process.

Although it may add to the pressure of the case initially, a well drafted pretrial or docketing order[164] from the military judge can simplify matters once the case is referred. Both sides should request as many RCM 802[165] conferences (usually telephonic) with the military judge as necessary to ensure the smooth running of the trial. Unexpected issues inevitably arise on the day of trial, but there is no need to complicate things by failing to anticipate and agree upon matters that can be stipulated before trial.

C. Conducting the Rehearing

The general rule of rehearings is that an accused should not suffer a greater punishment because he was successful on appeal.[166] (An exception to this rule may be found when new charges are brought against the accused[167] that were not preferred under the original charge sheet.) Generally, this means that the maximum punishment that the accused can serve upon rehearing shall not exceed the approved sentence in the original trial.[168] However, occasionally an accused's maximum punishment was based on a PTA and guilty plea but the accused then failed to comply with his original PTA by changing his plea at the rehearing. What is the maximum sentence in these circumstances? The rule is that the approved sentence at rehearing may not exceed the lawfully adjudged sentence at the earlier court-martial.[169] This rule seems to be straightforward but it is still the subject of interpretation and challenge.[170]

United States v. Mitchell, involved a contested case where there was no PTA, but it illustrates the challenge of determining the maximum sentence.[171] In *Mitchell*, the accused was originally sentenced to a bad-conduct discharge and ten years confinement.[172] The case was remanded for a rehearing on sentence and the accused received a dishonorable discharge

---

[161] United States v. Buber, 62 M.J. 476, 476 (C.A.A.F. 2006). The accused was convicted of false official statement, unpremeditated murder, and assault upon a child. *Id.* The ACCA set aside the findings of guilty of unpremeditated murder and assault upon a child. *Id.* The lower court reassessed the sentence. *Id.* The CAAF affirmed the remaining findings and set aside the sentence, returning it to TJAG for a sentence rehearing. *Id.* at 480. The convening authority approved no punishment for the affirmed findings, and dismissed the remainder of the charges. United States v. Buber, 2006 CCA LEXIS 520, at *2 (A. Ct. Crim. App. 2006). The accused was then separated from the military under chapter 14, AR 635-200. AR 635-200, *supra* note 152, ch. 14.

[162] AR 635-200, *supra* note 152, ch. 14.

[163] *Id.* para. 1-21 (time lost must be made good at the end of the enlistment).

[164] U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL para. 1(a) and app. B (1 May 2004).

[165] MCM, *supra* note 8, R.C.M. 802.

[166] United States v. Mitchell, 58 M.J. 446 (C.A.A.F. 2003), *rev'g* 56 M.J. 935 (A. Ct. Crim. App. 2002).

[167] MCM, *supra* note 8, R.C.M. 810(d).

[168] *Id*.

[169] *Id.* R.C.M. 810(d)(2); UCMJ art. 63 (2008).

[170] *Mitchell*, 58 M.J. at 448 (citing United States v. Rosendahl, 53 M.J. 344, 348 (C.A.A.F. 2000)).

[171] *Id*.

[172] *Id*. at 447.

and six years confinement.[173] The ACCA approved the sentence, but the CAAF reversed and held that "punitive separations are 'qualitatively different' from confinement and 'other punishment.'"[174] "As a result, it is not possible in this case to make a meaningful comparison, objectively or otherwise, between the increased severity of Appellant's discharge and the decreased severity of his confinement and forfeitures."[175] Each category of punishment was viewed independently when calculating the maximum punishment.[176]

What motions[177] must the military judge hear in a retrial on the merits? Procedures for rehearings are addressed under RCM 810(a). Full rehearings, "new trials" and "other trials" procedures "shall be the same as in an original trial except as otherwise provided in this rule."[178] Sentence rehearings procedures "shall be the same as in an original trial, except that the portion of the procedure which ordinarily occurs after challenges and through and including the findings is omitted, and except as otherwise provided in this rule."[179] The RCM 810(a) discussion, states: "matters excluded from the record of the original trial on the merits or improperly admitted on the merits must not be brought to the attention of the members as a part of the original record of trial."[180] There is no specific discussion of motions practice in a rehearing in RCM 810, other than the discussion of "evidence properly admitted."[181] The references to admissible evidence seems to contemplate that defense counsel may challenge evidence from a previous trial whether it was unsuccessfully litigated in the previous court-martial or it is a new issue arising in the rehearing.

Trial counsel should always be prepared to litigate motions in a rehearing, at the very least a speedy trial motion, but also motions in limine or on the admissibility of previously admitted evidence or testimony.[182] It is better to litigate these motions at trial than have the appellate court return the case for another rehearing. A military judge's refusal to allow the defense to litigate motions can create an unnecessary appellate issue by leaving newly raised defense issues unresolved. Trial counsel should also carefully consider which defense motions to oppose, and occasionally which motions to join. Additionally, a defense counsel's waiver of these motions on the record or in a PTA will generally moot the issue on appeal in the absence of appellate defense counsel alleging ineffective assistance of counsel. The goal of the parties in the rehearing process should be to resolve all relevant questions of law or fact for the appellate court and not create new issues.

D. Post-Trial Processing of a Rehearing

The post-trial processing in a rehearing is similar to an original jurisdiction case. Both trial and defense counsel are well advised to keep the court reporter informed of anything unusual that occurs during the trial and post-trial processing. Unexpected issues can arise, however, and counsel should deal with them at the earliest opportunity. Situational awareness of regulatory, administrative changes, and other types of unusual rehearing issues enables the trial counsel to limit further appellate issues and generally promotes finality in litigation.

An example of an administrative change with potential appellate consequences occurred in 2004 when the calculation of good time credit (GTC) for inmates serving their sentences changed. After 1 October 2004, inmates could only earn a maximum five days a month GTC, regardless of length of their sentence.[183] Prior to that date, inmates earned GTC on a

---

[173] *Id*.

[174] *Id.* at 448.

[175] *Id*.

[176] *See id*.

[177] It is a good practice for counsel to keep the court reporter informed of motions and exhibits. This is particularly important in rehearings and *DuBay* hearings when the procedures are much more complex and the record of trial must reflect all relevant documents and exhibits.

[178] MCM, *supra* note 8, R.C.M. 810(a)(1).

[179] *Id.* R.C.M. 810(a)(2).

[180] *Id.* R.C.M. 810(a) discussion.

[181] *Id.* R.C.M. 810(a)(2)(A) (discussing contents of the record in rehearings on sentence only).

[182] United States v. Currenton, No. 20020848 (A. Ct. Crim. App. 2005) (memorandum opinion).

[183] Memorandum from Under Sec'y of Defense for Assistant Sec'y of the Army (Manpower and Reserve Affairs), subject: Clarification of DoD Policy on Abatement of Sentences to Confinement (17 Sept. 2004) (clarifying that the calculation of GTC would be in accordance with Appendix 4 of the *DoD Sentence Computation Manual.* U.S. DEP'T OF DEFENSE, INSTR. 1325.7-M, DOD SENTENCE COMPUTATION MANUAL app. 4 (Rate of GTC Earning for Partial Months Table) (27 July 2004) (C2, 9 Mar. 2007)). This issue has since been addressed and has grandfathered the calculation of GTC under the old system for inmates who are being retried. *Id.*

graduated scale, depending on the length of their sentence, with a maximum of ten days per month GTC for those inmates sentenced to over ten years confinement.[184] These changes did not take into account the effect that this would have on those inmates whose cases were being reheard. As a result, a number of accused could have lost the benefit of the extra GTC calculations and they would be in a worse position than if they had not been successful on appeal. In this situation, the GCMCA at Fort Leavenworth granted clemency in the form of directing the USDB in the convening authority's action to calculate GTC under the old system.[185] This action accomplished a number of goals: it honored the intent of the appellate process to ensure that the accused would not be in a worse position because he was successful in his appeal; it prevented an unnecessary and probably successful appellate issue for the accused, promoting judicial economy at the appellate courts; and it promoted a sense of good order and discipline among the inmates at the USDB because of the command's fair and equitable approach to the change in the rules.

Additionally, the convening authority should consider clemency in cases where the government has failed to comply with its own standards or regulations.[186] One example of appropriately granted clemency is where the government has taken too long in the post-trial processing of the case.[187] In these circumstances, the government should memorialize the reasons for the delay and include it with the chronology in the record of trial, and consider granting the accused relief and eliminating any prejudice suffered by the accused, thereby mooting an almost certain appellate issue.

Finally, defense counsel must continue to represent their clients and submit their clemency matters in an professional and timely manner. The TDS SOP[188] requires defense counsel to discuss a client waiving or withdrawing post-trial or appellate rights with both the Senior and Regional Defense Counsel and the immediate notification of the Chief of TDS of such client. Additionally, the appellate courts have adamantly and repeatedly stated that the best chance the accused has to receive clemency is from the convening authority.[189] Defense counsel will almost certainly trigger an ineffective assistance of counsel claim whenever they fail to comply with the RCM 1105 and 1106 rules, during either the trial or appellate process. The government should also annotate such failures in the record of trial.

V. Avoiding Rehearings—The Original Trial[190]

The Government is responsible to ensure that the accused receives both real and perceived justice.[191] Regardless of the trial counsel's opinion of the guilt or innocence of the accused, he must always ensure the Government's actions are legal and will survive the appellate courts' scrutiny. Professional objectivity is more important than emotional attachment to any case. By far, the easiest way to deal with a rehearing is to obviate the need for it, and conduct a solid trial the first time in the court room.

A. Trial Counsel Memoranda

Trial counsel should be required to prepare a "trial counsel memorandum" in all of their cases, especially rehearings. This ensures that the SJA and GCMCA understand the nuances of the particular rehearing, it will also help the CMJ manage expectations of the case. Creativity[192] in a charge sheet is generally discouraged because it usually complicates the case

---

[184] U.S. DEP'T OF DEFENSE, INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 26 (17 July 2001) (C1, 10 June 2003).

[185] United States v. Currenton, No. 20020848, 2005 CCA LEXIS 474 (A. Ct. Crim. App. May 6, 2005) (unpublished), *decision on further review* (A. Ct. Crim. App. Nov. 29, 2006) (unpublished).

[186] Failure to comply with AR 190-47, para. 10-19(b)—transferring accused to a military facility as soon as possible can raise appellate issues that might be appropriately dealt with through clemency. AR 190-47, *supra* note 13, para. 10-19(b).

[187] United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006). The CAAF imposed a presumption of unreasonable delay after 120 days after the completion of trial and a similar presumption of unreasonable delay where the record of trial is not docketed by the service Court of Criminal Appeal within thirty days of the convening authority's action. *Id.*

[188] TDS SOP, *supra* note 44, paras. 3-9b, 3-17.

[189] United States v. Wheelus, 49 M.J. 283, 287 (C.A.A.F. 1998) ("It has long been asserted that an accused's best chance for post-trail clemency is the convening authority.").

[190] Captain Timothy J. Saviano, *Avoidable Appellate Issues—The Art of Protecting the Record*, ARMY LAW., Nov.1990, at 27.

[191] Rex v. Sussex Justices, ex parte McCarthy [1923] All ER 233. Lord Chief Justice Hewart stated: "a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." *Id.*

[192] United States v. Lubasky, No. 20020924 (A. Ct. Crim. App. 2006) (memorandum opinion).

unnecessarily. Trial counsel should neither be overzealous in charging nor married to the charge sheet.[193] Requiring the trial counsel to write a trial counsel memorandum forces the trial counsel to take a step back and articulate his theory of the case and charging decisions. It also allows the CMJ and SJA, who are generally not emotionally attached to the case, to evaluate the Government's case properly and be the voice of reason if the trial counsel gets carried away by the facts of the case. Being unreasonably attached to the theory or charges is a good way to ensure the case comes back on appeal.

Some recent cases illustrate issues that can be faced at rehearings. *United States v Walton* is an example of the Government being too attached to its theory of the case.[194] The accused had been drinking heavily and argued with his girlfriend, he then drove away, crashing into another vehicle.[195] He injured the driver, killed one passenger, and inflicted a serious brain injury on the other passenger in the other vehicle.[196] The trial counsel charged the accused with murder,[197] and the panel convicted him, sentencing him to confinement for life.[198] The trial judge in that case wrote to the GCMCA, expressing his concerns and misgivings about the murder charge and recommending the GCMCA only approve the lesser included offense of involuntary manslaughter.[199] The GCMCA took no action to reduce the charge; however, he did reduce the sentence to twelve years.[200] The ACCA found the conviction was factually insufficient, dismissed the murder charge, but upheld the lesser included offense, involuntary manslaughter.[201] The ACCA sent the case back to GCMCA where the accused was incarcerated for a sentence rehearing.[202] In this case the original trial team was perhaps too attached to its murder conviction, but hoped that a significant grant of clemency would resolve the problem. However, clemency cannot fix legal error, but it can severely limit the maximum punishment at the sentence rehearing. In *Walton*, the GCMCA's half-hearted misguided attempt to correct a legal error provided a windfall to the defense and greatly reduced the government's bargaining position at the accused's sentence rehearing.

In *United States v Lubasky*, the accused was assigned as a Casualty Assistance Officer to help the victim, an Army widow, with her financial affairs and obtain an ID card.[203] The victim agreed to allow the accused to continue to help her with her financial affairs.[204] From September 1998 to June 2000 the accused managed most of the victim's affairs, including obtaining an insurance policy which named him as a beneficiary and listing himself as joint owner on some of her bank accounts.[205] The accused's original twenty-one page charge sheet contained forty-three separate specifications of larceny and three specifications of conduct unbecoming an officer and gentleman.[206] The accused was convicted of fifteen specifications of larceny and conduct unbecoming an officer and gentleman.[207] Here the charging decisions adversely affected the prosecution of the case because of the charge sheet's extraordinary length and complexity.[208] Additionally, drafting these specifications provided no benefit to the Government because the maximum punishment for each specification was not increased, but there were unnecessary and confusing elements which had to be proved at trial (and the Government failed to

---

[193] *See, e.g.*, United States v. Walton, No. 20011151, 2006 CCA LEXIS 472 (A. Ct. Crim. App. 2006).

[194] *Id*.

[195] *Id.* at *3.

[196] *Id.* at *7.

[197] *Id.* at *1. The accused charges were drunken operation of a vehicle, murder while engaged in an act inherently dangerous to another, and assault upon a person in the execution of law enforcement duties (two specifications). *Id.*

[198] *Id.* at *1. The accused was sentenced to a dishonorable discharge, confinement for life with the eligibility for parole, forfeiture of all pay and allowances, reduction to Private E1, and a reprimand. *Id.*

[199] *Id.* at *8.

[200] *Id.* at *2.

[201] *Id.* at *18.

[202] United States v. Walton, No. 20011151, 2007 CCA LEXIS 615, at *1 (A. Ct. Crim. App. 2006).

[203] No. 20020924, 2006 CCA LEXIS 390, at *3 (A. Ct. Crim. App. 2006) (memorandum opinion).

[204] *Id*.

[205] *Id*.

[206] *Id.* at *2.

[207] *Id.* at *1.

[208] Here the maximum sentence was not enhanced by the massive number of charges, each lengthy charge was not considered mega-specifications because the larceny consisted of ATM (automated teller machine) withdrawals, not writing bad checks. United States v. Mincey, 42 M.J. 376 (C.A.A.F. 1995) (recognizing that while specifications alleging two or more offenses are duplicitous, the CAAF permitted multiple checks to be charged in a single specification. The CAAF limited this type of pleadings to check cases describing it as the bad check "megaspec").

do so in twenty-eight of the forty-three specifications).[209] The trial counsel worked hard drafting this charge sheet, but unfortunately the majority of the charges were dismissed by the trial and appellate courts.[210] These poor charging decisions meant that when the remaining charges were presented to the court-martial panel at the sentence rehearing they were much less egregious. A more attentive and reasonable CMJ and SJA could have ensured that this charge sheet was never preferred. Requiring a trial counsel memorandum would probably have prevented the case from going to trial as charged.

B. Creativity in the Pretrial Agreement

Creativity in PTA terms is also something that should be carefully considered and reviewed before the parties, particularly the trial counsel, enter an agreement.[211] The trial counsel must be wary of unintended consequences[212] if the government is agreeing to unusual PTA terms. If counsel are going to agree to terms that involve finance[213] or corrections[214] regulations they must research how these terms will be actually executed under current regulations and guidelines. This research cannot stop at a simple reading of the regulation. The trial counsel should speak to the subject matter experts to ensure that there is nothing preventing the government from fulfilling its part under the PTA. In *United States v. Lundy*, the CAAF stated: "If there is a misunderstanding or government nonperformance of a material term of the pretrial agreement, 'the remedy is either specific performance of the agreement or an opportunity for the accused to withdraw from the plea.'"[215] Trial counsel should also avoid PTA terms that affect how the accused serves his sentence, for example, clemency and parole,[216] and even suspension of punishment. These issues are heavily regulated and ripe for appellate review with little or no benefit to the parties. Counsel must also ensure that all the PTA terms are in writing and guard against *sub rosa* agreements.[217]

C. Discovery

The trial counsel's job is not to ensure a conviction at all cost. This road leads to prosecutorial misconduct and must be avoided despite good intentions.[218] Some bright-line rules apply and the trial counsel violates them at great peril. The military justice discovery[219] rules are a prime example of these rules. The trial counsel may not engage in trial by ambush or gamesmanship—the rules dictate full and open discovery. The government should also ensure that it insists on reciprocal

---

[209] *Lubasky*, 2006 CCA LEXIS 390, at *1–2.

[210] *Id.*

[211] Colonel Louis J. Puleo, USMC, *Bulletproof Your Trial: How to Avoid Common Mistakes that Jeopardize Your Case on Appeal*, ARMY LAW., Aug. 2008, at 53, 55; Major Mary M. Foreman, *Let's Make a Deal! The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53 (Dec. 2001); Major Bradley J. Heustis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, ARMY LAW., Apr. 2002, at 20. These articles provide a good history of the development of pretrial agreements and the dangers of counsel becoming too creative in the terms of those agreements.

[212] Major Deidre J. Fleming, *The Year in Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., June 2007, at 31, 39.

[213] AR 37-104-4, *supra* note 132.

[214] AR 190-47, *supra* note 13.

[215] 58 M.J. 802, 803–04 (C.A.A.F. 2003) (quoting United States v. Smith, 56 M.J. 271, 273 (C.A.A.F. 2002)).

[216] United States v. Tate, 64 M.J. 269 (C.A.A.F. 2007), *aff'g in part and modifying in part*, United States v. Tate, No. 200201202, 2005 CCA LEXIS 356 (N-M. Ct. Crim. App. Nov. 21, 2005). One of the terms of the accused's PTA stated that he was prohibited from requesting clemency for twenty years and must decline it if offered during that period. *Id.* at 271. The accused's sentence was confinement for life. *Id.* at 269. The CAAF held that this provision violated RCM 705(c) and was unenforceable. *Id.* at 272.

[217] MCM, *supra* note 8, R.C.M. 910(f)(3) (requiring the military judge to require the disclosure of the entire pretrial agreement before the plea is accepted). *Id.* R.C.M. 705(d)(2) (requiring "[a]ll terms, conditions and promises between the parties shall be written") (*Sub rosa* is defined as—"confidential, secret, not for publication." BLACK'S LAW DICTIONARY 1427 (8th ed. 2004)).

[218] Major Kwasi L. Hawks, *To Err is Human, to Obtain Relief is Divine*, ARMY LAW., June 2007, at 55, 61 (Prosecutorial Misconduct). In *United States v. Edmond*, 63 M.J. 343 (2006), defense counsel subpoenaed a reluctant witness. *Id.* The trial counsel, and Special Assistant US Attorney (SAUSA), interviewed the witness and based on the witness' demeanor and the conflict between his current and prior testimony believed the witness would be committing perjury. *Id.* The trial counsel warned the witness that he would be committing perjury if he testimony if he corroborated the accused's defense. *Id.* The trial counsel told the witness he was "free to go," after the witness stated he wanted to leave. *Id.* Despite receiving a subpoena, the witness left without speaking to the defense counsel. *Id.* At the *DuBay* hearing the trial counsel indicated that he was trying to inform the witness of the consequences of perjury. *Id.* The CAAF found that the trial counsel was responsible for giving the witness an option to leave, despite the defense's R.C.M. 703 entitlement to compulsory process. *Id.*

[219] MCM, *supra* note 8, R.C.M. 701.

discovery in the appropriate cases.[220] One of the greatest dangers for the Government is in the area of electronic discovery, also known as E-discovery. The trial counsel should heed the warning, "the e-mail of the species is more deadly than the mail."[221] Trial counsel should advise commanders to ensure that their correspondence is professional and they would not be embarrassed to discuss them in open court on the witness stand. The Government's failure to discover and turn over appropriately requested e-mail correspondence can be very damaging to the case[222] and there is a continuing duty to disclose.[223] Additionally, if the trial counsel discovers misconduct by government agents, either the unit or law enforcement, he must disclose the information to defense, and in appropriate circumstances to the military judge. Justice must be seen to be done and if the trial counsel appears to be involved in a conspiracy it can damage the case irreparably, and raise ethical issues for counsel.[224]

D. Ineffective Assistance of Counsel

Ineffective assistance of counsel[225] is the government's enemy because the accused is denied his right to competent legal representation. If the trial counsel suspects that the defense counsel is ineffective or not adequately advising the accused, he should bring this to the CMJ's or SJA's attention immediately. In certain circumstances it may be necessary to go to the Senior Defense Counsel or Regional Defense Counsel. Making the Government prove its case is an acceptable defense strategy, but lack of preparation or advocacy should cause both the trial counsel and the military judge to question defense counsel's actions. A rehearing or *DuBay* hearing for IAC is in no one's interest, especially the accused.

E. Evidence Accountability

The CMJ should be held professionally responsible and accountable for the premature destruction of evidence. These acts should be visible to the highest levels of the Judge Advocate General's (JAG) Corps and CID chains of command. In the *United States v. Terry* rehearing, the legal office gave permission to destroy the evidence in the case prior to the completion of the appellate process, where the CAAF later authorized a full rehearing.[226] The trial judge granted the defense's motion to dismiss the case.[227] The Government appealed under Article 62, UCMJ.[228] The appellate court found that the trial judge abused his discretion in this case and granted the government's appeal.[229] However, the appellate court stated "the government's loss of evidence is shocking. We will not hesitate to approve or make such a ruling [to affirm the military judge's decision to dismiss the charges and specifications] in the appropriate case."[230] The CMJ should personally verify with the appropriate Clerk of Court to ensure that all appeals are completed prior to authorizing the destruction of evidence. It is better for the military justice system to be proactive in this area than to have rules imposed from either Congress or the appellate courts. Failure to safeguard the evidence could lead to the Government being forced to accept a Chapter 10 or an administrative discharge because the CMJ or law enforcement agents have lost or destroyed the evidence required for the rehearing. In these circumstances the record of trial cannot save the case.

---

[220] *Id.* R.C.M. 701(b)(3).

[221] Quotes to Remember, http://wulik.com/quotes.htm (last visited June 25, 2008).

[222] MCM, *supra* note 8, R.C.M. 701(g)(3)(C). Failure to comply with the discovery rules can lead to the military judge prohibiting the part from introducing the evidence.

[223] *Id.* R.C.M. 701(c).

[224] *Id.* R.C.M. 701(g)(3); U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

[225] Captain Scott A. Hancock, *Ineffective Assistance of Counsel: An Overview*, ARMY LAW., Apr. 1986, at 41; Captain John A. Schaefer, *Current Effective Assistance of Counsel Standards*, ARMY LAW., June 1986 at 7; Captain Robert Burrell, *Effective Assistance of Counsel: Conflicts of Interest and Pretrial Duty to Investigate*, ARMY LAW., June 1986, at 39; Captain Floyd T. Curry, *Ineffective Assistance of Counsel During Trial*, ARMY LAW., Aug. 1986, at 52; Major Eric T. Franzen, *USALSA Report: The Advocate for Military Defense Counsel: Effective Assistance of Counsel During Sentencing*, ARMY LAW., Oct. 1986, at 52; Captain Stephanie C. Spahn, *USALSA Report: The Advocate for Military Defense Counsel: Ineffective Assistance During the Post-Trial Stage*, ARMY LAW., Nov. 1986, at 36.

[226] 66 M.J. 514 (A.F. Ct. Crim. App. 2008) (granting the Government's interlocutory appeal under UCMJ art. 62(a)(1) of trial judge's dismissal of the case, previously remanded for rehearing on findings and sentence by United States v. Terry, 64 M.J. 295 (C.A.A.F. 2007)).

[227] *Id.* at 515.

[228] *Id*.

[229] *Id*.

[230] *Id.* at 520.

F. Improper Argument[231]

Trial counsel should be aware of the danger of improper argument and the effect it can have on a trial. Rule for Courts-Martial 1001 permits the trial counsel to "present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."[232] Such evidence may include "financial, social, psychological, and medical impact on or the cost to any person or entity who was a victim of the offense committed by the accused."[233] One example of improper argument is the impact of the court-martial on the unit, which fails to fall within the parameters or intent of RCM 1001. While the commander and Soldiers in the unit may be inconvenienced by the logistics of a court-martial, there is always the option of an alternative disposition, for example, an administrative discharge. The inconvenience to the unit is the cost of doing business when the command chooses the court-martial option. It is improper to elicit evidence or this issue. Trial counsel should be aware that unit impact as well as other improper argument can lead to a case being returned for a rehearing. "[T]rial counsel is well within his rights to strike hard blows by forcefully commenting on the evidence presented at trial; however, at the same time the blows must be fair and must not be made with the intent to incite the passions of the fact finder or the sentencing authority."[234]

G. The Perils of Charging

1. Charging in the Conjunctive/Disjunctive

Charging in the conjunctive/disjunctive ("and/or") is a dangerous practice and should be avoided by trial counsel. While not specifically prohibited, it has been strongly discouraged by the appellate courts[235] because it can lead to ambiguity in findings which violates the Double Jeopardy Clause.[236] The Court of Military Appeals has referred to the "abominable combination of a conjunctive and a disjunctive means either 'and' or 'or'"[237] and "[i]t's presence in pleadings renders them void for uncertainty."[238] "As a general rule, where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative; the proper way is to connect the various allegations in the accusing pleading with the conjunctive term 'and' and not with the word 'or'."[239] By far the easiest way to avoid an appellate issue in charging is to avoid this practice completely.

2. Duplicitous[240] *Specifications*

The use of the word "divers" necessarily means the trial counsel has charged two or more separate offenses within a single charge. This is another charging practice which is of limited use in certain cases, for example bad check mega-specifications,[241] but in other circumstances can lead to appellate issues and ultimately the dismissal of the entire specification by the appellate courts. This method of charging, while not always facially fatally defective, can lead to ambiguous findings. For instance, in *United States v. Walters* the accused was charged with wrongful use of drugs "on divers occasions."[242] The panel struck out the word "divers" without specifying which occasion or occasions Airman Basic Walters

---

[231] Puleo, *supra* note 211, at 66.

[232] MCM, *supra* note 8, R.C.M. 1001(b)(4).

[233] *Id*.

[234] United States v. Waldrup, 30 M.J. 1126, 1132 (N.M.C.M.R. 1989).

[235] United States v. Autrey, 30 C.M.R. 252, 253 (C.M.A. 1961) ("It is settled law that an offense may not be charged in the conjunctive or the disjunctive").

[236] U.S. CONST. amend. V.

[237] *Autrey*, 30 C.M.R. at 254 (citations omitted).

[238] *Id*. (citations omitted).

[239] Heflin v. United States, 223 F.2d 371, 373 (5th Cir. 1955) (citations omitted).

[240] MCM, *supra* note 8, R.C.M. 906(b)(5) discussion ("A duplicitous specification is one which alleges two or more separate offenses. Lesser included offenses . . . are not separate, nor is a continuing offense involving several separate acts. The sole remedy for a duplicitous specification is severance . . . .").

[241] United States v. Mincey, 42 M.J. 376 (C.A.A.F. 1995) (recognizing that while specifications alleging two or more offenses are duplicitous, the CAAF permitted multiple checks to be charged in a single specification. The CAAF limited this type of pleadings to check cases describing it as the bad check "megaspec").

[242] 58 M.J. 391, 391 (C.A.A.F. 2003).

was acquitted of.[243] The CAAF looked at Article 66(c), UCMJ[244] noting that while it "affords the Courts of Criminal Appeals an 'awesome, plenary, de novo power,'"[245] it is not without limitation. "A Court of Criminal Appeals cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not guilty."[246] Essentially, the Double Jeopardy Clause prevents the appellate court from reviewing a finding of not guilty because double jeopardy attaches to the findings of which at least one resulted in an acquittal.[247] By using the word "divers" in the charge, the trial counsel run the risk of having the affected charges overturned on appeal, without a rehearing on them being possible.[248]

3. Multiplicity[249] and Unreasonable Multiplication of Charges

Multiplicity is a possible ground for a motion to dismiss under RCM 907(b)(3).[250] "[M]ultiplicity is a concept that derives from the *Double Jeopardy Clause of the U.S. Constitution* . . . [and] deals with the statutes themselves, their elements, and congressional intent."[251] Charging an offense and its lesser included offense is a clear example of multiplicity.[252] "Multiplicity is a questionable practice because it is, by definition, more likely to produce an unreasonable multiplication of charges than a more restrained charging posture."[253]

The general rule under RCM 307(c)(4) prohibits the unreasonable multiplication of charges, where one person is charged with multiple offenses arising out of essentially the same transaction.[254] However, it also acknowledges that there may be circumstances when charging under more than one theory for the same transaction may be appropriate.[255] The discussion of RCM 307(c)(4) seems to contemplate that such circumstances do not normally apply and should be carefully considered by the trial counsel.[256] The discussion[257] specifically prohibits separately charging an offense and a lesser included offense in separate specifications.[258] Unreasonable multiplication of charges is not based upon a violation of the Due Process Clause,[259] rather it is based on more of a traditional legal standard of unreasonableness.[260]

Trial counsel should carefully consider their charging decisions and clearly articulate them in the trial counsel memorandum. This will ensure that both the charges and the conviction will survive the appellate process.

---

[243] *Id.* at 393; *see also* United States v. Wilson, No. 09-0010 (C.A.A.F. June 18, 2009).

[244] UCMJ art. 66 (2000).

[245] *Walters*, at 395 (quoting United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001)).

[246] *Id*. at 395 (citations omitted); *see also* United States v. Seider, 60 M.J. 36, 38 (C.A.A.F. 2004).

[247] *Walters*, 58 M.J. at 397.

[248] *Id*.

[249] MCM, *supra* note 8, R.C.M. 907(b)(3)(B) discussion ("A specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other. A specification may also be multiplicious with another if they describe substantially the same misconduct in two different ways.").

[250] *Id.* R.C.M. 907(b)(3)(B) ("The specification is multiplicious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and should be dismissed in the interest of justice").

[251] United States v. Quiroz, 55 M.J. 334, 337 (C.A.A.F. 2001) (quoting United States v. Quiroz, 53 M.J. 600, 604 (N-M. Ct. Crim. App. 2000)).

[252] MCM, *supra* note 8, R.C.M. 907(b)(3)(B) discussion.

[253] Major William T. Barto, *Alexander the Great, The Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1, 6–7 (1996).

[254] *Id.* ("What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307(c)(4) discussion (1995))).

[255] MCM, *supra* note 8, R.C.M. 307(c)(4) discussion ("There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses. In no case should both an offense and a lesser included offense thereof be separately charged.").

[256] *Id*.

[257] *Id*.

[258] *Id.*

[259] U.S. CONST. amend. V.

[260] United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001).

4. Multiplicity for Sentencing and the Conditional Dismissal

The defense can litigate a motion for appropriate relief for multiplicity of offenses for sentencing purposes under RCM 906(b)(12).[261] This should usually be litigated prior to the hearing on the merits but the ruling should be deferred until after findings are entered.[262] The relief granted to the defense is usually either: (1) the dismissal of charges on the grounds of multiplicity[263] (which is what the defense would prefer); or (2) a determination of the maximum punishment.[264]

One example of multiplicity arises with the new Article 120, UCMJ.[265] One of the added complications with the new Article 120 is that it now requires the Government to articulate its theory of the case in the charges. The facts of a particular case may fall under both rape by rendering another unconscious[266] and rape by administration of drug, intoxicant, or other similar substance.[267] If the trial counsel drafts charges in a sexual assault case where the victim does not remember the events due to the voluntary use of intoxicants, there may be affirmative defenses available to the accused, to include, consent or mistake of fact. The victim's version of events may be vague or incomplete and could lead to several different theories of how the sexual assault occurred, and different theories of charging the offense. The most obvious course of action is to charge under multiple theories and leave it to the trier of fact to decide under which theory the accused may be guilty or not guilty.

The defense will object to charging under multiple theories of liability, namely multiplicity, unreasonable multiplication of charges, and multiplicity for sentencing.[268] The defense's argument is that the extra charges and specifications on the charge sheet are, in and of themselves, disproportionately prejudicial to the accused regardless of their content. The charge sheet becomes vitally important because it is the first impression a court-martial panel has of the accused.

If the accused is convicted under both charged theories, the trial court is then left in a dilemma because the charges arose out of essentially the same transaction. Normally, the court would dismiss the charge or specification on the grounds of multiplicity[269] but which charge should be dismissed and which should survive for appellate review? The trial counsel and the military judge should consider possible appellate implications action in these circumstances.[270]

A possible solution would be the concept of "conditional dismissal." Conditional dismissal was articulated as dicta in *United States v. Britton.*[271] In that opinion, Judge Effron recognized the Government's dilemma as a practical, rather than a constitutional double jeopardy concern.[272] This occurs if the trial court dismissed the charges that the appellate courts would have approved, and the appellate courts dismissed the remaining charges, there are essentially no charges left even though both courts agree that the accused is guilty of some of the charges. "The government is reluctant to agree to dismissal of a lesser charge, run the risk of losing the greater offense during further appeal, and then be put to the time and expense of a new trial when the conviction of the lesser offense was obtained lawfully."[273] Judge Effron proposed the concept of the conditional dismissal.[274] In *United States v. Fraizer*, Chief Judge Baum, recognized not only the "inherent authority of the

---

[261] MCM, *supra* note 8, R.C.M. 906(b)(12).

[262] *Id.* R.C.M. 906(b)(12) discussion; *see id.* R.C.M. 1003 (concerning determination of the maximum punishment); *see also id.* R.C.M. 907(b)(3)(B) (concerning dismissal of charges on grounds of multiplicity. A ruling on this motion ordinarily should be deferred until after findings are entered.).

[263] *Id.* R.C.M. 1003(c)(1)(C) (Multiplicity) ("If the offenses are not separate, the maximum punishment for those offenses shall be the maximum authorized punishment for the offense carrying the greatest maximum punishment.").

[264] *Id.* R.C.M. 906(b)(12) discussion; *see id.* R.C.M. 1003 (concerning determination of the maximum punishment).

[265] UCMJ art. 120 (2008).

[266] *Id.* art. 120b(1)(d).

[267] *Id.* art. 120(1)(e).

[268] MCM, *supra* note 8, R.C.M. 906(b)(12).

[269] *Id.* R.C.M. 906(b)(12).

[270] *Id.*

[271] 47 M.J. 195, 203 (C.A.A.F. 1997).

[272] *Id.* at 199, 202 (Effron, J. concurring).

[273] *Id.* at 202–03 (Effron, J. concurring).

[274] *Id.* at 203 (Effron, J. concurring).

> In my view, this problem could be remedied if appellate authorities (*i.e.*, the Courts of Criminal Appeals and this Court) were to enter a "conditional dismissal" of a colorably multiplicious charge under which the less-serious charge would be dismissed without

appellate courts"[275] to order a conditional dismissal, but also stated, "we see no reason to believe that the trial judge lacks such authority."[276] Both the *Britton*[277] and *Fraizer*[278] courts dealt with cases involving charged lesser included offenses, which were clearly multiplicious. In the Article 120 scenario, the multiplicious charges arising out of different theories of essentially the same transaction, would be of equal weight. Judge Crawford expressed the need for a rule change,[279] addressing the timing of the dismissal.[280] She pointed out that the CAAF is apparently requiring the trial judge to dismiss charges after findings have been announced at the trial level, but recognizes that in the past this has created problems on appeal,[281] leading to significantly different results than if dismissal had occurred on direct appeal.[282]

Trial counsel must keep this issue in mind and ensure that he gives the military judge options to ensure that he protects the integrity of the conviction in a case. At the same time justice demands that the accused neither suffers from the dangers of a being convicted doubly for offenses arising out of the same transaction nor being punished doubly for the same offense

VI. Conclusion

After analyzing the pitfalls and hurdles of the order for a rehearing, MAJ Potter is confident that she can advise the SJA on the next steps. She has discussed the case with the VWL, who remembers the case well. She has assigned a paralegal to begin charting and tracking the rehearing, and also retrieved the original record of trial from "the stacks," discovering that the record of trial is long, but reading the record of trial will not be too cumbersome (while also recognizing that it will not be accomplished during the duty day). She has also assigned her Senior Trial Counsel the task of litigating the case, assured that, with his experience, he will be capable of identifying potential pit falls. She now realizes that there is no need to reinvent the wheel, just recognize that it is a different type of wheel. She is ready for the briefing and no longer in a state of panic.

> prejudice to: (1) considering the facts surrounding the lesser offense as matters in aggravation with respect to the sentence; and (2) reinstatement of the dismissed charge before the case becomes final should the more-serious charge be dismissed. There is the potential to substantially reduce appellate litigation in this area, without prejudice to either party, if appellate authorities—in the interest of judicial economy—were to dismiss conditionally lesser charges in any case involving a colorable allegation of multiplicity and no perceptible impact on the sentence.

Id.

[275] United States v. Fraizer, 51 M.J. 501, 506 (C.G. Ct. Crim. App. 1999) (quoting *Britton*, 47 M.J. at 204). Chief Judge Baum went on to state:

> We ascribe full vigor to the military judge's conditional dismissal of the Article 92 offense. Despite the differences between facts here and those in the Government-cited cases, we are of the view that the finding under that charge may be revived and affirmed by us upon the setting aside of the corresponding indecent act offense, by analogy to what we would do with a lesser-included offense when the major offense is disapproved. In that latter circumstance, guilt of the lesser offense may be affirmed at the appellate level without an express finding of guilt at trial because the trial court's guilty finding for the major offense necessarily included the lesser offense. Here, we have an express finding of guilt for the Article 92 offense, so there is no need for it to be a lesser-included offense within the disapproved indecent act offense under Article 134. Having disapproved the Article 134 offense, and thereby satisfying the military judge's condition for restoring the Article 92 offense finding of guilty, we believe it may now be affirmed.

Id.

[276] *Id.*

[277] *Britton*, 47 M.J. 195.

[278] *Fraizer*, 51 M.J. 501.

[279] United States v. Williams, 62 M.J. 442, 443 (C.A.A.F. 2006) (Crawford, J., concurring).

[280] *Id.*

> For this reason, I would not require or suggest that dismissal be effected prior to action on direct appeal. To require otherwise, is to require the trial judge to predict how the appellate court may examine the issue.
>
> As a pointed example, one need only consider the case in which an accused is charged with both felony murder and premeditated murder, ostensibly arising from the same facts. Are these multiplicious? Is the election required before direct appeal is completed? If the answer now is "yes," then the burden is either on this Court to recognize a "conditional dismissal," or on the President to make a change to the Manual for Courts-Martial, both as suggested by Judge Effron in *United States v. Britton*.

Id.

[281] *Id.* (citing United States v. Clark, 35 M.J. 432 (C.M.A. 1992)).

[282] *Id*.

Rehearings, retrials and resentencing are often complex and difficult cases for trial counsel. They present new and unusual legal problems and sometimes issues of first impression. While they are challenging, they do not have to be chores and they are a way to learn from other's mistakes. This article provides the basic guidance to process a rehearing from receipt of the record of trial through the post-trial process. Rehearings should also focus on the basics of trial practice.

Don't panic, there are materials and mentors to assist trial and defense counsel. This article seeks to demystify the process and enable counsel to concentrate on litigation and the law, rather than long hours and logistics. To that end, a Rehearing Check List and two information papers are included to assist counsel. Trial counsel play an essential role in the administration of justice, particularly in the difficult and technical area of rehearings. The Judge Advocates' focus should be on providing the best representation for both the government and the accused in an effective and efficient manner, without reinventing the wheel.

Appendix A

Rehearing Checklist

CMJ = Chief of Military Justice, TC = Trial Counsel, P = Paralegal

	REHEARING TASK	**Personnel Tasked**
	Receive Record of Trial (ROT) from Clerk of Court.	CMJ/TC/P
	Begin Chronology—annotate receipt of ROT as Day 1 under RCM 707.	TC/P
	Inventory all sets of the ROTs and evidence—original. Defense, and Military Judge (MJ).	CMJ/P
	Read Appellate Court Order or Opinion.	CMJ/TC
	Assign TC and Paralegal Team (maintains continuity of trial team).	CMJ
	Inform Trial Defense Service (TDS), MJ, and Court Reporter of retrial.	CMJ
	Determine whether pre-trial confinement (PTC) review is necessary.	CMJ/TC
	Prepare for PTC immediately.	TC
	If Accused in PTC—maintain situational awareness of conditions.	TC/P
	Contact the confinement facility/law enforcement/parole authority/civilian law enforcement for information on the Accused's post-trial behavior.	TC/P
	Review Confinement Treatment File (CTF), previous pre-trial confinement reports, and Disciplinary and Adjustment (D&A) Boards documents, treatment files; and work reports.	TC
	Make copy of ROT if necessary (for Sanity Board, MJ, etc.).	P
	Read all ROT including appellate briefs.	P
	Begin spreadsheet for all witnesses and evidence.	P
	Begin searching for witnesses (contact CID, internet sources, etc.).	P
	Contact original Military Justice Office and TC. Request all case files.	TC/P
	Order Accused's Official Military Personnel File.	P
	Prepare documents to bring the Accused back to active duty, if necessary. Coordinate with the relevant agencies and the company commander.	CMJ/TC
	Contact Accused's new company commander. Keep in mind that enlisted panel members cannot come from the Accused's company sized unit. This may factor into choosing which company to assign the Accused.	CMJ/TC
	If Accused not in PTC coordinate with Personnel, Finance and the company, re uniforms, housing, pay, etc.	TC/P
	Order evidence from CID.	P
	Order National Crime Information Center (NCIC) report.	P
	Monitor Chronology.	CMJ
	Locate original TC and Defense Counsel (DC). Verify DC's status and whether he still represents the Accused.	CMJ/TC
	Obtain Letter of Representation from Civilian Defense Counsel (CDC) before discussing case with him.	CMJ/TC
	Read complete ROT (including appellate briefs)—tabbing the ROT after copies are made, can make it more user friendly).	TC
	Review evidence.	TC
	Coordinate with Victim Witness Liaison (VWL)/Victim Advocate (VA).	TC
	Contact and interview victim and discuss case and prior testimony.	TC
	Contact and interview witnesses and discuss prior testimony.	TC
	Calculate maximum punishment.	TC
	Draft Trial Counsel Memorandum.	TC
	Assist preparation of SJA Pre-Trial Advice and GCMCA documents. Scan all signed copies of these documents.	CMJ
	Manage Speedy Trial Clock and set milestones.	CMJ
	Decide if it is necessary to request RCM 707 Exclusion.	CMJ/TC
	Consider motions, including government motions *in limine.*	TC
	Consider admissibility of evidence from the ROT and necessary redactions.	TC

	Prepare for Discovery Requests, including Reciprocal Discovery and Section III.	TC
	Comply with Pre-Trial Orders.	TC
	Research possible acceptable Pretrial Agreement (PTA) or Offers to Plead Guilty (OPG) terms.	TC
	Negotiate with DC re potential stipulations of fact and expected testimony.	TC
	Coordinate witness travel arrangements.	P
	Trial Script, ensuring that the procedural history of the case is completely documented.	TC
	Deliver all original documents, from the original trial and the rehearing to the Court Reporter.	TC
	Create the relevant trial and sentencing documents. Do not reveal prohibited information to the Court-Martial panel.	TC
	Prepare for *voir dire.*	TC
	Consider trial and sentencing instructions.	TC
	Refer case and flap charge sheet. Discuss amendments that need to be made to the charge sheet with the MJ but do not make changes until morning of the trial to ensure MJ approves proposed changes.	CMJ/TC
	Scan all relevant or signed documents originated in the rehearing.	P
	Be aware of post-trial and clemency issues.	CMJ/TC
	Ensure all post-trial documents are accurate, including the Result of Trial, Staff Judge Advocate Recommendation (SJAR), Action and Promulgating Order.	CMJ
	If possible, generate a complete electronic file of the case, including the rehearing ROT (and if possible the voice recordings of the court proceedings), and ensure that all the case files are secured until the case completes the appellate process. The CMJ should periodically check with the Clerk of Court to track the appellate status of the case.	CMJ/P

Appendix B

Rehearings Information

Rehearings

General Information

You have received an overturned case. What to do next?

The first step is to locate the accused. If the accused has not completed the term of confinement, the Soldier will normally be at the United States Disciplinary Barracks (USDB), Fort Leavenworth. If not at the USDB, one of the two Personnel Control Facilities (PCF) (Fort Knox or Fort Sill) should have contact information. As a last resort you may contact the Defense Appellate Division (DAD) attorney assigned to the case for contact information. Once you have located the accused, have the company commander send a memorandum advising the Soldier of the rehearing and to contact the company commander. Also, provide contact information to the Senior Defense Counsel (SDC).

Return to Duty

The Soldier must be ordered back to active duty for the rehearing. When deciding upon a report date, some consideration should be given to the Soldier's current employment and/or family situation. Discussions with the Trial Defense Counsel (TDC) if assigned, may be helpful in choosing a report date that is convenient for the Soldier, the defense and the prosecution. You should now provide the PCF with the name of the unit to which the Soldier will be assigned, if necessary. The PCF personnel will usually issue a reassignment order to the Soldier. The Soldier's new unit commander should then issue a written order terminating the Soldier's involuntary excess leave (IEL) and ordering him back to the unit on the established reporting date. This memorandum should explain that the purpose of the recall is the specific typed of rehearing ordered and should be accompanied with travel orders. These documents should be mailed to the Soldier via certified mail and a copy provided to the assigned TDC. Inform the unit of the rehearing early, this gives them time to plan how to utilize the Soldier so he is properly employed.

Referral

Referral involves the process of referring the rehearing hearing to a new court-martial with a convening order. This involves flapping the original charge sheet. A new referral section is taped over the original section so it can be flipped up and the original still seen. On the new flap, the General Court-Martial Convening Authority (GCMCA) refers it like any other case except that a clause defining the type of rehearing is typed in Block 14d, i.e. "This case is referred for resentencing only"

Scheduling the Rehearing

Under RCM 707(b)(3)(D) the speedy trial clock sets at 120 days from the GCMCA's receipt of the record of trial (ROT) and the opinion authorizing the rehearing. The speedy trial clock stops at arraignment or the first session under RCM 803 in those rehearings not requiring arraignment. You need to review RCM 707 and make a determination early if you are going to request the GCMCA to exclude time. It is best to exclude the time early for the time necessary to conduct a sanity board, locate witnesses or locate the accused, rather than an after the fact exclusion. Keep track of the time with a chronology that records each action taken to move the case to trial, you or your NCOs may have to testify as to your process towards court-martial.

Script Issues

When preparing for the rehearing you will need to know and put on the record the full procedural history of the case. The Military Judge (MJ) should give you guidance on exactly what and when he wants the information in the record. Additionally, the MJ will read the special rehearing instructions from the Military Judges' Benchbook, if needed.

Evidence

Evidence **properly** admitted on the merits in the original trial, relating to offenses for which the accused is being resentenced, is admissible, under RCM 810. For complete retrials the normal rules apply. If the Soldier originally pled guilty, the stipulation of fact, any incorporated exhibits and the providence inquiry can all be admitted and published to the

panel with this evidence, the government may not even need to call any live sentencing witnesses. If the original case was contested, however, consider calling at least one central witness to tie together the evidence and bring life to an otherwise paper case. The evidence may be presented in three ways: (1) direct excerpts from the ROT; (2) stipulations of fact or expected testimony; or (3) read into the record by a person.

Another Way

Of course, conducting a sentence rehearing is not the only option. In some cases, the initial order directing a rehearing may also authorize a sentence of no punishment if a rehearing is deemed impracticable by the GCMCA. Keep in mind, though, that such an order will require the restoration of all rights, privileges, and property of which the convicted Soldier has been deprived as a result of the originally approved sentence. Practically speaking, this will mean an Honorable or General Discharge and a substantial amount of back pay. You must determine if this windfall to the convicted Soldier is the just result. Additionally, in the case of a full rehearing Chapter 10 is available, as well as post-trial Chapter 10.

Justice Requires We Do Our Best

As you can see, rehearings are not as hard as they may at first seem. The unknown always seems more difficult. However, given the relative effort required and the consequences of not conducting the rehearing, they are well worth doing right.

What Follows Is More Detailed Guidance On Conducting Rehearings

Record of Trial

First you must read the complete record of trial, the court's opinion and the order. The appellate briefs may or may not help you prepare for trial.

Have the Paralegals begin attempting to locate witnesses named in the ROT.

Locate the Accused

The Accused may be located in various places:

a. Confined in the USDB and assigned to the Correctional Holding Detachment (CHD/PCF).

b. Confined at a Regional Confinement Facility (RCF) at Fort Knox, Fort Sill, or other DoD facility.

c. Assigned to the CHD/PCF and on Mandatory Supervised Release (MSR) (parole). You must coordinate with the Army Clemency and Parole Board to have MSR terminate if sentence is overturned.

d. Assigned to the CHD/PCF and on IEL pending appellate review (confinement completed but no approved discharge).

e. Assigned to the PCF at one of the RCFs.

Once you have determined where the accused is assigned and his physical location you need to determine where he should be assigned during the process of the rehearing. Those accused still at the USDB should remain assigned to the CHD/PCF, but may be attached to Headquarters Company, Combined Arms Center (HQ CAC), Fort Leavenworth for administrative and day-to-day duties if released from confinement. If the accused is not assigned to the CHD/PCF, determine where it is appropriate to assign the accused to HQ, CAC or another unit. Remember that enlisted panel members cannot be from the same company sized unit as the accused.

Administrative Actions

a. Review the accused's Correctional Treatment File (CTF), to include Discipline and Adjustment (D&A) Board Records, treatment files and work evaluations.

b. Order the Official Military Personnel File (OMPF).

c. Request a National Crime Information Center (NCIC) check.

d. If the Soldier is released from confinement or is called back to duty coordinate with the company and insure that he gets his uniforms, pay, is started (at pre-conviction rank), and he receives proper housing or VHA, etc.

e. Determine what, if any, restrictions need to be placed on the accused, pass privileges pulled, etc.

f. ID cards for family members.

g. Get DD 2704 Victim/Witness notification from the confinement facility (witness locations).

h. If on MSR get records from his probation officer (US Federal Probation Officers supervise our MSR accused).

i. Order complete CID file from the Headquarters CID or the investigating Resident Agency.

j. Locate evidence (should be at the investigating Resident Agency). Coordinate with your CID office if you need help. They should maintain the evidence and return it to the original RA when the trial is completed.

New Review (SJAR) and Action

A new review and action is ordered to correct a post-trial error. Examples of error are ineffective assistance of counsel post-trial, and errors in the SJAR or Action.

When preparing the new review and action you must carefully read the opinion to ensure you are correcting the error as directed by the court. Additionally, you must ensure that you correct any other error that occurred pretrial or at trial. For example, if after reading the ROT you determine there is insufficient evidence on a charge. Disapprove the finding on that charge and reassess the sentence.

LTC Everett Yates, Chief of Military Justice, Fort Leavenworth, May 2006

Appendix C

Rehearings/*DuBay* Hearings—Bridge the Gap

1. Appendix D to the *Military Judges' Benchbook* provides some guidance as to language/scripts to be used at "Rehearings, New or Other Trials, and Revision Proceedings." What it fails to do is to provide guidance to counsel concerning what is expected of them at the rehearing or at *DuBay* hearings. What follows are items that I have learned over the years should be included at these type proceedings (*see* RCM 810). (I express appreciation to my namesake and fellow judge (COL Rob Holland at Fort Leavenworth) for his insightful comments when reviewing a draft of this message.)

(a) **Full rehearing**. A full rehearing places the case back normally to the pre-trial advice stage, which requires the convening authority to refer the case to trial. The normal trial procedure guide is followed, except as follows:

(1) **Jurisdictional Papers/Summary of the Proceedings.**
Immediately prior to the judge's advice to the accused regarding counsel rights, the trial counsel should introduce as Appellate Exhibits copies of the jurisdictions papers, normally consisting of:

(A) original charge sheet.
(B) original promulgating order or subsequent orders.
(C) appellate opinion.
(D) Clerk of Court memorandum.
(E) SJA recommendation and Convening Authority direction.

The trial counsel should summarize what has happened as reflected by these exhibits so all parties agree and understand what the current proceeding entails.

(2) **Right to Counsel.** The prior defense counsel for the accused may no longer be in TDS or around to represent the accused. However, the prior attorney-client relationship cannot be severed absent good cause. Before the rehearing, counsel should determine the identity and whereabouts of all prior trial defense counsel. If a prior defense counsel is not present at the rehearing, the judge should make a determination that the prior attorney-client relationship has been severed and obtain an affirmative waiver from the accused for the former counsel's absence.

(3) **Forum Selection.** The forum selection by the accused is not affected by what the accused chose at the original trial; that is, the accused can choose any lawful forum at the rehearing. The defense counsel and judge should make this clear to the accused.

(4) **Preliminary Instructions.** If the rehearing or proceeding will have court members, the judge should give a general instruction to the members after obtaining the concurrence of counsel. (Samples of these general instructions are at Appendix D, *Military Judges' Benchbook*.) Note: If the accused is convicted at the rehearing, the maximum punishment that can be approved (not adjudged) at the rehearing is limited to that ultimately approved after the original trial. In a court member trial, the judge will instruct the members only upon what they would hear at a normal trial: the authorized penalty provided by law for the offenses without mentioning what sentence can ultimately be approved by the Convening Authority. NOTE: The court members at the rehearing should not know the findings or sentence from the first court-martial.

(b) **Sentence Rehearing.** A rehearing on sentence places the case back to the point in the trial where the finder of fact has just announced findings. For the particular court-martial to have jurisdiction, the SJA must provide a pretrial advice and the convening authority must refer the case to trial. [Notes: (1) The accused cannot withdraw any plea of guilty upon which a prior finding of guilty was entered; however, the judge must be careful to ensure a prior guilty plea does not become improvident during the sentencing proceeding. If it does, the case is suspended and the matter is reported to the authority ordering the rehearing. (2) The maximum punishment which can be approved (not adjudged) at a sentence rehearing is limited to that ultimately approved after the original trial. In a court member trial, the judge will instruct the members only upon what they would hear at a normal trial: the authorized penalty provided by law for the offenses without mentioning what sentence can ultimately be approved by the Convening Authority. The court members should not know the sentence from the earlier court-martial.] The normal trial procedural guide should be followed, except with the deletions and additions noted below:

(1) The jurisdictional papers as listed in paragraph 1.A.1., above.
(2) Summarization by the trial counsel of the prior proceeding to include a statement as to the maximum punishment that was ultimately approved after the original trial.

(3) Election of defense counsel and excusal of prior defense counsel if necessary.
(4) The statement of the general nature of the charges may be omitted.
(5) Include the script about challenging the military judge.
(6) Forum selection must be included. (The accused has the right to change his selection from the original trial and the judge should make this clearly known to the accused.)
(7) Omit the arraignment.
(8) Ask if there are any motions.
(9) If the rehearing is with court members, the judge should give a preliminary instruction with consent of counsel (*see* Appendix D, Military Judges' Benchbook) and go through *voir dire* as normal.
(10) (Optional—opening statements by counsel)
(11) Presentation of sentencing evidence—beware of any inadmissible evidence from the original trial. The pre-findings presentation of the facts to the court normally is via a stipulation or the mere reading of the transcript to the sentencing authority. (In judge alone trials, counsel could agree to let the judge read the prior transcript him or herself. Even in court member trials, counsel may agree that appropriately redacted portions of the prior transcript can be given to the members as an Appellate Exhibit for them to read in open court, in lieu of the transcript being read aloud in open court by counsel. Note that if this occurs, the members may not take this exhibit with them while deliberating.) At a RCM 802 Conference prior to the rehearing, counsel and the judge should review and agree upon any expedited procedures.
(12) Remainder of trial is same as if was an original trial, to include post-trial and appellate rights advice.

(c) ***DuBay* Hearing.** This is a limited evidentiary hearing where the judge is to make findings of fact and conclusions of law pertaining to issues specified by the authority ordering the hearing. The following procedures should occur:

(1) The jurisdictional papers as listed in paragraph 1.A.1. above, minus the charge sheets and promulgating order.
(2) Summarization by trial counsel of the prior proceeding to include the issues to be addressed at the hearing.
(3) Election of defense counsel and excusal of prior defense counsel if necessary.
(4) The statement of the general nature of the charges may be omitted.
(5) Include the script about challenging the military judge.
(6) Omit the forum selection.
(7) Omit the arraignment.
(8) Ask if there are any motions.
(9) (Optional—opening statements by counsel, but a good idea. Because most issues in a *DuBay* hearing have been raised by the defense on appeal, counsel and the judge should normally treat the issues as defense motions as if they were made at the original trial. This will typically dictate which counsel goes first and who has the burden of proof on the issues.)
(10) Presentation of evidence.
(11) Argument by counsel.
(12) Ruling by the judge (from the bench or at sometime before authentication of the transcript.)

2. *DuBay* hearings seem to be happening more often, and require a special trial script. Another point about *DuBay* hearings: the Appellate Court usually specifies a suspense date for the government to have the record back to the appellate court. Trial counsel need to ensure that sufficient time is given after the date of the *DuBay* hearing for the judge to prepare the findings of fact and conclusions of law, for the court reporter to transcribe the record, for errata to be accomplished, and for mailing the authenticated transcript to the court.

3. In any type of rehearing, new or other trial, or revision proceeding, counsel should seek to clarify procedural issues well in advance with the military judge at a RCM 802 conference, either in person, telephonically, or via e-mail.

COL Gary J. Holland, Military Judge, FEB2001