Sometimes, They Come Back![1] How to Navigate the World of Court-Martial Rehearings

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I. Introduction

When an appellate court returns court-martial charges to the convening authority for a rehearing on findings, sentence, or both, both government and defense counsel are faced with rules and issues that are not part of their ordinary practice. How does the government go forward? Why was this sent back? What charges are still in play after the appellate decision? What limitations exist based on the rules? When does the speedy trial clock start? Is this a sentencing-only rehearing or a full rehearing? Is justice served by a retrial, or is an administrative separation a better option? What about simply not going forward at all? These decisions are often made in an environment where no one in the command has any ties to any of the parties or misconduct involved. Further compounding those issues, some witnesses may be dead, missing, hard to find, or they may have a memory of key events that is at best faulty and at worst non-existent. The victim may have no interest in being involved in the process or may be incensed at having to go through this all over again.

Defense counsel must decide how to best serve a client who lost beyond a reasonable doubt the first time around. They have an accused and his family who also have to go through the trial process all over again. Their client may be put in pretrial confinement and not get paid because his term of service from active duty ended and finance refuses to pay him. Does the defense counsel do everything the prior counsel did, only better? Or, does counsel try another route since the first approach did not work at the initial trial? Everyone is trying to figure out what to do. How do rehearings work?

This article will summarize the rules, procedures, pitfalls, and quirks that surround rehearings. Section I reviews the authority for and types of rehearings. Section II focuses on sentence-only rehearings, while Section III addresses full rehearings. Finally, Section IV summarizes key lessons for counsel in dealing with rehearings.

[1] Stephen King, *Sometimes They Come Back*, Cavalier, Mar. 1974.

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II. Authority for Rehearings

Rehearings come in three types: rehearings in full, sentence-only, or a combination of both. Rehearings can be authorized by the appellate courts; or, in some cases, by the convening authority. Also, appellate courts may send cases back for limited evidentiary hearings. The authority for rehearings comes from several places. Article 66(d), Uniform Code of Military Justice (UCMJ) gives service courts the authority to order a rehearing on the findings and/or the sentence in all cases where the findings and/or sentence are set aside, except cases involving a "lack of sufficient evidence" to support a finding of guilty.[2] Article 67(d), UCMJ gives the Court of Appeals for the Armed Forces (CAAF) the same authority and the same limitation.[3] Appellate courts can also order limited evidentiary hearings called *DuBay* hearings, named after *United States v. DuBay*.[4] These limited evidentiary hearings are a court-created means to resolve disputed factual issues raised on appeal through an adversarial, trial setting that develops the facts sufficiently to allow the court to rule on an issue.[5]

A rehearing can occur at initial action, or when the convening authority is authorized to do so by a superior competent authority, usually an appellate court.[6] It can also occur when the case does not qualify for appellate review, or appellate review is waived, and the case is reviewed by a judge advocate under Rule for Courts-Martial (RCM) 1112,[7] or when an accused petitions for a new trial under RCM 1210.[8] An important limitation of this authority is that a convening authority cannot order a rehearing in cases where there is "a lack of sufficient evidence in the record to support

[2] UCMJ art. 66(d).

[3] UCMJ art. 67(d).

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

[5] *Id*. *See also* United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997) (holding that a *DuBay* hearing may only be required if the following circumstances are not met: 1) appellant alleges an error that would not result in relief; 2) an affidavit alleges not facts but speculative or conclusory observations; 3) a facially adequate affidavit is uncontested by the Government; 4) the record as a whole compellingly demonstrates the improbability of appellant's facts; 5) an appellate claim of ineffective representation contradicts a matter within the record of a guilty plea, unless the appellant rationally explains why he made those statements at trial but not on appeal). In practice, a *DuBay* hearing is similar to a motions hearing during an Article 39(a) session. Counsel for each side will be allowed to call relevant witnesses, to cross-examine opposing witnesses, and to make argument concerning the specified issues. Like rehearings, *DuBay* hearings usually occur some significant period of time after the trial, and thus the same issues with witness availability, memory, and evidence are present in *DuBay* hearings as in other types of rehearings.

[6] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(e)(1)(B) (2012) [hereinafter MCM].

[7] *Id*., R.C.M. 1112(f)(1)(C).

[8] *Id*., R.C.M. 1210(a).

the findings of guilty of the offense charged or of any lesser included offense."[9] Like the appellate courts, the convening authority can order a rehearing on findings and/or sentence, but subject to the limitations noted above. Also, a convening authority cannot take any action inconsistent with directives of a superior competent authority.[10]

In addition to the appellate courts, a convening authority has the authority to order a rehearing on a limited selection of findings at initial action.[11] Recent amendments to Article 60(c) prohibit the convening authority from setting aside a finding of guilty for an offense that is not a "qualifying offense."[12] A "qualifying offense" is an offense under the UCMJ, other than offenses under Articles 120(a) or (b), 120b, or 125, for which "the maximum sentence of confinement that may be adjudged does not exceed two years; and the adjudged sentence does not include a dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months."[13] Article 60(f)(3) remains unchanged and technically allows on its face the convening authority to order a rehearing without any limitations.[14] Notwithstanding Article 60(f)(3), the changes to Article 60(c) barring dismissal of non-qualifying offenses remove the convening authority's ability in Article 60(f)(3) to dismiss the charge for non-qualifying offenses, although the ability of the convening authority to disapprove and order a rehearing for qualifying offenses remains.[15]

[9] *Id*., R.C.M. 1107(e)(1)(C)(ii).

[10] *Id*., R.C.M. 1107(e)(1)(B), discussion.

[11] UCMJ art. 60(f)(1) ("The convening authority . . . in his sole discretion, may order . . . a rehearing.").

[12] UCMJ art. 60(c)(3)(B)(i) (The convening authority "may not dismiss any charge or specification, other than a charge or specification for a qualifying offense, by setting aside a finding of guilty thereto.").

[13] UCMJ art. 60(c)(3)(D).

[14] UCMJ art. 60(f)(3) (providing that if findings are disapproved, the convening authority may order a rehearing or dismiss the charges). *See also* MCM, *supra* note 6, R.C.M. 1107(e)(1)(A) (authorizing the convening authority to order a rehearing as to some or all offenses where there is a finding of guilty, or to the sentence alone, subject to the limitations of Rule for Courts-Martial (RCM) 1107(e)(1)(B-E)).

[15] This raises an interesting problem. What happens when the defense raises a legal error through clemency, and the convening authority wants to address it? Before the changes to Article 60(c), the answer was simply for the convening authority either to set aside and order a rehearing or to dismiss. Now, for non-qualifying offenses, the convening authority can only order a post-trial Article 39(a) session. *See* MCM, *supra* note 6, R.C.M. 1102(d) (convening authority may direct a post-trial session any time before initial action). A post-trial RCM 39(a) session can be called to resolve "any matter that arises after trial and substantially affects the legal sufficiency of any findings of guilty or the sentence." *Id*., R.C.M. 1102(b)(2). If there is legal error, the military judge is free to enter a finding of not guilty. *Id*. Or, she can order a mistrial. *Id*., R.C.M. 915. If a mistrial is ordered by the military judge, then the affected charges and specifications are withdrawn from the court-martial. *Id*., R.C.M. 915(c). They are then returned to the convening authority who "may refer them anew or dispose of them." *Id*., R.C.M. 915, discussion.

III. What Alternatives to Trial Does the Government Have?

When an appellate court sends charges back and authorizes a rehearing, the convening authority does not have to order a rehearing. For rehearings in full, the convening authority can dismiss the charges with or without prejudice.[16] For sentence rehearings, the convening authority can approve a sentence of no punishment without conducting a rehearing.[17] The reasons why a convening authority might make a certain decision depends on why the case was sent back, what charges remain, or the availability of witnesses or evidence. In cases where an appellate court dismisses the more significant charges on the charge sheet, and the remaining charges are relatively minor, the reasons not to go forward to court-martial could include time, cost, availability of witnesses, impact on the unit, or fairness to the accused. Where an appellate court identifies a discovery violation, the government will have to determine if they can resolve the violation in a way which allows them to go forward to trial, or whether the information now available to the defense significantly improves the viability of a defense, or lessens the credibility of a witness. Availability of witnesses, or evidence, and the impact on the complaining witness are additional reasons why a court-martial may not be the best option in some cases. These examples may appear to be stating the obvious. However, it is important for government counsel to remember that administrative separation, reprimand, non-judicial punishment, resignations, or simply taking no action other than dismissal of the charges are other viable courses of action that should be considered fully in lieu of a rehearing.

Alternatively, the government may have held back on additional charges, or may be aware of new charges based on older misconduct, or misconduct that occurred while the accused was in pretrial confinement and these charges can be added to the rehearing. Either of these reasons could justify going forward to trial when combined with the remaining charges not dismissed by an appellate court. Furthermore, after analyzing the difficulties involved, the government may still decide to go forward even with a reduced chance of conviction. Whichever path the government chooses, the government should discuss the decision with any complaining witnesses, who should be kept informed throughout the process.

A. Sentence Rehearings

A sentence rehearing involves a new presentencing proceeding to determine an appropriate sentence for the affirmed findings of guilty, where there were errors in the original sentencing hearing. The new sentencing hearing must be referred to the same level of court-martial (general or special) as the original trial.[18] Generally, the sentence

[16] MCM, *supra* note 6, R.C.M. 1107(e)(1)(B)(iii).

[17] *Id*., R.C.M. 1107(e)(1)(C)(iii).

[18] MCM, *supra* note 6, R.C.M. 1107(e)(1)(C)(iii).

approved after the new sentencing hearing cannot be in excess of the sentence approved at the original trial.[19] However, the process is not without some complexity.

1. Permissible Punishments at Sentence Rehearings

As the Court of Military Appeals (CMA) noted in *United States v. Hodges*, it is not always clear in comparing two punishments which punishment is more or less severe.[20] A convening authority cannot convert a sentence to confinement into a punitive discharge or convert a bad-conduct discharge (BCD) to a dishonorable discharge (DD).[21] However, a convening authority can commute a punitive discharge into a period of confinement.[22] Consider the hypothetical where the original approved sentence was for six months of confinement and a BCD. At the sentencing rehearing, the panel sentences the accused to nine months of confinement and no BCD, and the convening authority approves the sentence. This sentence with longer confinement can be approved by the convening authority, because the BCD was effectively converted to three months of confinement. If the sentence adjudged at the second sentence rehearing was instead nine months of confinement and a DD, it would not be permissible to approve this sentence because of the more serious type of discharge and the three extra months of confinement. However, the convening authority can reduce the DD to a BCD and the confinement to six months. There is not an exact answer on how to convert a BCD or DD into a set number of days of confinement. One year of confinement has been found not more severe than a BCD.[23] Staff judge advocates should be leery of recommending that the convening authority approve a punishment that converts a punitive discharge to a period of confinement much longer than a year, and if they do, defense counsel should be ready to challenge.

2. Guilty Pleas and Sentence Rehearings

Guilty pleas add an additional layer of complexity to sentence rehearings. In sentence rehearings, the accused may not withdraw from a prior guilty plea,[24] and the maximum punishment is limited to the approved sentence.[25] Sometimes, the convening authority will combine a sentencing rehearing with a trial on new charges, which is called a combined rehearing.[26] In this situation, the maximum punishment allowed is calculated as the maximum punishment allowed for the new charges plus the approved sentence for the charges of which the accused has been found guilty at the first trial.[27] Another hypothetical example will illustrate this point. Assume that an accused has been found guilty of an offense at court-martial and received an adjudged sentence of ten years. The statutory maximum punishment for that offense is twenty years. The convening authority gives significant clemency and only approves five years of the adjudged sentence. On appeal, an appellate court overturns the conviction and authorizes a full rehearing. The accused is retried on the original charge, but has committed an additional offense which is referred together with the original charge at the rehearing. The statutory maximum punishment for the additional offense is seven years. Thus, the combined statutory maximum punishment for both offenses is twenty-seven years. The accused is convicted of both offenses, and receives an adjudged sentence of twenty years. The most that the convening authority can approve in this hypothetical is twelve years. That is the maximum punishment of the additional offense (seven years) added to the approved sentence for the original offense at the first trial (five years).

Another sentencing consideration in retrials is the Disciplinary and Adjustment Board (D&A Board). When inmates in confinement facilities get into trouble, they receive D&A Boards.[28] These are the functional equivalent of a non-judicial punishment hearing for Soldiers under Article 15, UCMJ. They are admissible as personnel records of the accused just like Article 15s.[29] Trial counsel should be aware of the possibility of these records and exercise due diligence in identifying whether they exist and their utility on sentencing.

The rights and safeguards for D&A Boards are even more limited than for Article 15s, as the right to counsel is

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[19] UCMJ Art. 63. *See also* MCM, *supra* note 6, R.C.M. 810 (but note that it can be increased if there is a mandatory minimum sentence).

[20] United States v. Hodges, 22 M.J. 260, 262 (C.M.A. 1986).

[21] MCM, *supra* note 6, R.C.M. 1107(d)(1), discussion (a bad-conduct discharge can be changed to confinement , but not vice versa). *See also* United States v. Altier, 2012 WL 1514767 (N. M. Ct. Crim. App. 2012).

[22] *Hodges*, 22 M.J. at 262 (holding a punitive discharge may be commuted to some period of confinement); United States v. Prow, 32 C.M.R. 63, 64 (C.M.A.1962) (changing a bad-conduct discharge to confinement for three months and forfeiture of $30.00 per month for three months lessens the severity of the punishment); United States v. Brown, 32 C.M.R. 333, 336 (C.M.A.1962) (permissible to substitute six months' confinement and partial forfeitures for a bad-conduct discharge); United States v. Owens, 36 C.M.R. 909, 912 (A.F.B.R.1966) (commuting a bad-conduct discharge to confinement at hard labor for eight months, forfeiture of $83.00 per month for eight months, and reduction to airman basic was permissible).

[23] MCM, *supra* note 6, R.C.M. 1107(d)(1), discussion (a bad-conduct discharge adjudged by a special court-martial can be changed to confinement for up to one year). *See also* United States v. Carrier, 50 C.M.R. 135, 138 (holding that a bad-conduct discharge is more severe than one year in confinement).

[24] MCM, *supra* note 6, R.C.M. 810(a)(2)(B).

[25] *Id*., R.C.M. 810(d)(1). *But see* R.C.M. 810(d)(2) ("If . . . the sentence was approved in accordance with a pretrial agreement and at the rehearing the accused fails to comply with the pretrial agreement . . . the approved sentence resulting at a rehearing of the affected charges and specifications may include any . . . lawful punishment not in excess of or more serious than lawfully adjudged punishment at the earlier court-martial).

[26] *Id*., R.C.M. 810(a)(3).

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

[28] U.S. Disciplinary Barracks, Reg. 600-1, Manual for the Guidance of Inmates para. 6-3 (14 Nov. 2013) [hereinafter USDB Reg. 600-1].

[29] MCM, *supra* note 6, R.C.M. 1001(b)(2).

extremely limited, and the investigation process is comparatively minimal.[30] Also, the language used to describe offenses is often inflammatory. An example is that an inmate can be charged with "trafficking" for giving a note or piece of fruit to another inmate.[31] Defense counsel should expect that their client may have some of these in his records, and consider fighting their admission and how it affects the sentencing case. There may also be situations where getting into the underlying offense for a D&A Board is actually helpful to an accused in properly portraying it to the fact-finder as minor misconduct.

3. Evidentiary Issues in Sentence Rehearings

One of the issues with sentence rehearings is how to present evidence from the original trial on the merits to the panel. One option is to have someone read it aloud to the panel. This is a tactic often used when presenting prior Article 32 or deposition testimony to the panel at a trial. While this is an acceptable method, the downside is a panel may have difficulty following and retaining a long, dry recitation of prior testimony. Another option is to produce copies of the verbatim testimony you want admitted and have the panel read it. The problem with this option is that not everyone reads at the same speed, and you risk slower readers "skipping" portions to catch up with the faster readers. Also, if it is voluminous, it can be difficult for panel members to retain all of the testimony. A third option is to have attorneys act out the roles as questioner and witness, reading in turn from the verbatim transcript. While there is a giggle factor with this method initially, the benefit is it most closely replicates the manner in which panels are used to receiving evidence: a question and answer colloquy. Finally, counsel could choose to reduce prior merit testimony into a mutually-agreed stipulation of fact. The final determination on how the relevant evidence from the original trial on the merits will be presented to the court members is up to the military judge.

Another issue with sentence-only rehearings is not simply how to present prior merits evidence, but determining what prior merits evidence is admissible or necessary. "Matters excluded from the record of the original trial or improperly admitted on the merits must not be brought to the attention of the members . . . ."[32] On appeal, whole charges could have been dismissed or select pieces of evidence or testimony could have been ruled inadmissible.[33] Addressing these issues can involve both counsel and the military judge going through the prior merits testimony and evidence line-by-line or even word-by-word to determine what should come in before the panel at the rehearing. Counsel for both sides should be prepared for this time-intensive, but necessary, process.

B. Rehearings in Full

A rehearing in full starts almost from scratch with a few, notable exceptions. First, it is not required to re-prefer the charges[34] or conduct a new Article 32 hearing, assuming no new preferred charges are combined with the charges to be reheard.[35] However, a referral to a new court-martial is required.[36] Second, the speedy trial clock starts anew "on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing."[37] The inclusion of the word "authorizing" in addition to the word "directing" supports that the speedy trial clock starts not just in cases where the appellate court directs a rehearing, but also in cases where the convening authority is "authorized" to either order a new trial or conduct some other action, such as dismissal, *DuBay* hearing, or sentence re-assessment. Thus, government counsel should be wary in thinking the convening authority has additional time to make a decision when a superior competent authority leaves the decision in the convening authority's hands. Finally, all alternative resolution options are still applicable during rehearings, particularly rehearings in full. Thus, dismissal of some or all of the charges by the convening authority[38] or military judge,[39] discharge in lieu of court-martial,[40] or offer to plead guilty[41] are still viable options for both sides to pursue.

1. Appendix D, Military Judges' Benchbook

Most counsel who conduct a rehearing are doing so for the first time. Appendix D of the Military Judges' Benchbook[42] can give counsel a quick understanding of the procedures and script for a rehearing. The military judge will address right to counsel, forum rights, maximum punishment, how to inform the panel that this is a rehearing,

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[30] USDB Reg. 600-1, *supra* note 28.

[31] Policy Letter 16, United States Army Corrections Command, subject: Army Corrections Command (ACC) Policy Letter #16 – Institutional Offense Policy (31 Mar. 2010) [hereinafter ACC Policy Letter 16], at 7.

[32] MCM, *supra* note 6, R.C.M. 810(a), discussion.

[33] *See e.g.* United States v. Gilbreath, 2014 CAAF LEXIS 1206 (C.A.A.F. Dec. 18, 2014) (holding appellant's confession inadmissible for failure to administer rights-warnings); United States v. Conklin, 63 M.J. 333 (C.A.A.F. 2005) (finding search of appellant's computer for child pornography was unlawful, and subsequent images found were tainted by the unlawful search).

[34] United States v. McFarlin, 24 M.J. 631, 634 (A.C.M.R. 1987).

[35] UCMJ Art. 32. *See also* MCM, *supra* note 6, R.C.M. 405(b).

[36] *Id*., R.C.M. 801(a).

[37] *Id*., R.C.M. 707(b)(3)(D).

[38] *Id*., R.C.M. 306(c)(1). *See also id*., R.C.M. 401(c)(1).

[39] *Id*., R.C.M. 907.

[40] U.S. DEPT OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS Ch. 10 (6 June 2005) (RAR, 6 Sept. 2011) [hereinafter AR 635-200].

[41] MCM, *supra* note 6, R.C.M. 910.

[42] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK app. D (10 Sept. 2014) [hereinafter DA PAM 27-9].

and disregarding the prior trial.[43] The military judge will also address the manner in presenting evidence from the first trial to the rehearing panel, pretrial confinement credit, and how to deal with convictions for offenses that remain from the original trial.[44] Reviewing Appendix D at the start of the rehearing process will help guide counsel on some of the issues that both sides should consider.

2. Evidentiary Issues in Rehearings in Full

The biggest issues in rehearings in full typically involve evidentiary considerations and witness location. Counsel for either side should never assume that the rehearing will go just like the first trial. Witnesses may forget or change testimony, or they may be dead, missing, or difficult to locate. Key evidence can be lost or damaged.[45] As such, counsel for both sides may have to take a different tactical or strategic approach to the case than the counsel at the original trial.

The initial inclination of government counsel is to replicate what the government counsel did before that led to the prior conviction, while accounting for whatever appellate ruling sent the case back. After all, that approach led to a conviction beyond a reasonable doubt. However, the error(s) that led to a rehearing and the time that has passed likely have changed the playing field, usually in favor of the accused.[46] The previously mentioned issues with witness memory and availability, as well as evidence, will also have introduced new challenges to consider. As early as possible, government counsel need to aggressively identify any potential issues with witness availability and memory, and prepare for evidentiary issues. Government counsel should also anticipate defense expert requests. The case may have been sent back due to expert witness issues,[47] or new defense counsel may have identified an expert to patch up a hole in the defense.

While government counsel seek to replicate, defense counsel will be tempted to follow the opposite approach of what was done by defense at trial. After all, it "did not work." There is merit to this, in that defense counsel should be prepared to bring a fresh perspective to the case. However, just because the case resulted in a conviction does not mean that the path taken at the original trial by defense counsel was wrong, or cannot work at a rehearing. It may simply require slight tweaks, an additional lay or expert witness, or evidence that was not presented or was not allowed to be presented at the first trial. On the other hand, it could mean wholesale changes in strategies and tactics, or in themes and theories. Defense counsel should also consider a request for a defense investigator in more complex cases, or in cases where there is a large lag between the original trial and rehearing.

Another twist common in rehearings is that Military Rule of Evidence (MRE) 804(b)(1) allows the admission of prior testimony given "as a witness at another hearing of the same or different proceeding . . . if the party against whom the testimony is now offered, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." However, the witness must be unavailable, and the prior testimony must be a verbatim record at a prior court-martial, Article 32 hearing, or other equivalent hearing.[48] Unavailability for this purpose is not limited to death, serious illness or literal physical absence, but also includes when the witness testifies to a lack of memory of the relevant subject matter.[49] Article 50, UCMJ allows, in non-capital cases and in cases not involving the dismissal of an officer, authenticated prior verbatim testimony to be read into the record where the witness is unavailable to testify.[50] The admission of prior testimony is something not often seen by counsel on either side. The fact that nearly every witness has verbatim prior testimony to consider brings whole new challenges to counsel.

There are many challenges when dealing with prior verbatim testimony. Prior verbatim testimony can be a significant issue when witnesses are dead, too sick to attend, or missing.[51] Prior verbatim testimony can also be an issue when a witness does not remember.[52] Prior verbatim testimony cannot be cross-examined. The parties are "stuck" with the cross-examination that was done at that time, for good or bad. However, when a witness is not physically present, or testifies they cannot remember, and prior verbatim testimony is entered into the record, counsel have a couple of paths to addressing the testimony, since cross-examination is not an available tool. First, counsel can highlight the cross-examination that was done at the prior trial or hearing. The prior cross-examination may have been effective and complete on its own. However, if there were holes in the prior cross-examination, counsel should look to fill those holes with other witnesses or evidence, while remembering to look for missed evidence of bias or motive to fabricate.

[43] *Id*.

[44] *Id*.

[45] *See e.g.* United States v. Muwwakkil, 73 M.J. 859 (A. Ct. Crim. App. 2014) (striking testimony of alleged victim after loss of tapes from Article 32 hearing by government).

[46] *See e.g.* United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011) (overturning trial judge's ruling preventing appellant from introducing evidence of the alleged victim's first marital affair to show a motive to fabricate, and ordering a new trial).

[47] *See, e.g.*, United States v. McAllister, 64 M.J. 248 (C.A.A.F. 2007) (setting aside findings of guilty to a murder specification where there was an improper denial of a requested defense expert witness).

[48] MCM, *supra* note 6, Mil. R. Evid. 804(b)(1).

[49] *Id*., Mil. R. Evid. 804(a)(1-6).

[50] UCMJ art. 50 (however, in capital cases and cases involving the dismissal of an officer, only the defense is allowed to read in prior testimony).

[51] MCM, *supra* note 6, Mil. R. Evid. 804(b)(1).

[52] *Id*.

Prior verbatim testimony also provides a host of challenges for the witnesses who return to testify at the rehearing. First, rarely do witnesses testify exactly the same way, every time they testify. Second, rehearings usually occur years after the original trial. Witnesses usually have not spent that time thinking about the events that led to the charged offenses. There is going to be memory loss or changes to memory. These factors collectively result in some witnesses testifying differently at the rehearing. The challenge for counsel is not only dealing with these contradictions in thier own witnesses, but also recognizing the limitations of attacking them on cross-examination. The panel or military judge is going to be aware of the difficulties in memory, the passage of time, and the fact that witnesses will have some variability in testimony, particularly in this situation. In other words, impeachment tactics will have a reduced effectiveness, when some or all of the discrepancies can reasonably be explained away by time and the vagaries of memory. What should still remain very effective impeachment are the differences between statements made prior to the original trial and testimony at the original trial or the rehearing. These are much less affected by the passage of time, are much closer in time to the events surrounding the charged offenses, and they should not get the same benefit of the doubt from the finder of fact. The limitation here is that if the witness was already cross-examined about these discrepancies at the first trial, they are going to be better prepared to deal with those issues at the rehearing.

3. Common Issues with the Complaining Witness in Rehearings in Full

A rehearing can be an emotional, confusing, and difficult situation for a complaining witness. Defense counsel, and the military judge, will sometimes use the term "alleged victim."[53] While this may be appropriate once a conviction has been overturned, it returns to the complaining witness the qualifier "alleged" that the complaining witness likely thought was permanently excised by the prior conviction. Additionally, the complaining witness has likely spent the intervening period moving on from the alleged offenses, possibly reaching closure. Now, usually through no fault of the complaining witness, the process reverts to square one, and the complaining witness will be forced not only to testify again including facing cross-examination, but will now face anew the possibility that the accused could be found not guilty. The presence of the victim advocate (VA),[54] special victims' counsel (SVC),[55] and special victims' prosecutor (SVP)[56] will help the complaining witness deal with this tough situation, but trial counsel should recognize that preparing the complaining witness for direct and cross-examination may have an emotional element. Trial counsel must also consider how to assist the complaining witness if the panel finds the accused not guilty at the rehearing of some or all the offenses. While acquittals happen and are a natural part of the justice system, they have an added impact to a complaining witness at a rehearing.

Much like other witnesses, the complaining witness may testify inconsistently with prior testimony, because of memory loss, confusion, or the passage of time. While some latitude will likely be given by the finder of fact because of these reasons, it is important that the complaining witness, like all witnesses, review prior testimony. This is not so that the complaining witness closely parrots prior testimony on the stand, but so that the complaining witness understands what has been testified to previously and can be prepared to address the changes in testimony. Government counsel can use the complaining witness's prior testimony, if there is a fact or issue testified to at the first trial that the complaining witness now no longer remembers.[57] Trial counsel can first attempt to refresh the complaining witness's memory using prior testimony.[58] If that does not work, and the complaining witness or any witness still has no recollection of the subject matter of that prior testimony, then that witness may be unavailable,[59] and relevant prior testimony can be introduced to the panel.[60]

4. Common Issues with the Accused in Rehearings in Full

Similar to complaining witnesses, an accused rides an emotional roller coaster at a rehearing. While there may be some hope or optimism tied to getting a second chance, the accused may have achieved closure after the original trial. Now, the accused's life once again hangs in the balance between the defense counsel and the finder of fact. Some accused will have understandably unreasonable optimism at their chances of an acquittal the second time around, while others may be more fatalistic about what is to come. However the accused reacts, defense counsel should be prepared for the added impact that a rehearing will have on their client.

The accused may consider hiring a civilian defense counsel, if he did not do so at the first trial. After all, the detailed military counsel lost. Even if an accused does not ultimately hire civilian defense counsel, he may be reluctant

[53] DA Pam. 27-9, *supra* note 42 (compare the use of the words "alleged victim" repeatedly throughout Department of the Army (DA) Pamphlet (Pam) 27-9 prior to findings, e.g., in Instruction 7-14, with the use of the word "victim" alone throughout DA Pam 27-9 after findings, e.g., in paragraph 2-5-23).

[54] U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM para. 3-2(h) (30 Nov. 2007) (RAR, 13 Sept. 2011).

[55] *See* TJAG Sends Vol. 39-02, The Judge Advocate General, Army, subject: Special Victim Advocate Program 13 Oct. 2013 (establishing the special victim advocate (later changed to special victim counsel) program).

[56] *See* TJAG Sends Vol. 37-18, The Judge Advocate General, Army, subject: Special Victim Prosecutors and Highly Qualified Experts in Military Justice Jan. 2009 (establishing special victim prosecutors).

[57] MCM, *supra* note 6, Mil. R. Evid. 804(b)(1).

[58] *Id*., Mil. R. Evid. 612.

[59] *Id*., Mil. R. Evid. 804(a)(3).

[60] *Id*., Mil. R. Evid. 804(b)(1).

to trust a newly detailed military defense counsel. Even if the accused makes an individual military counsel[61] (IMC) request for the original trial defense counsel, trust issues could still arise. Detailed defense counsel at rehearings in full should be aware that they may have to do more to earn the trust and confidence of their clients. They should endeavor to keep their clients involved and fully informed about the process.[62] While this is good advice at any time, it is even more so for rehearings.

If the accused is currently in post-trial confinement, he should be released once a rehearing has been ordered. If the government desires to place him into pretrial confinement, they must follow the normal rules governing pretrial confinement, including proper notice and a pretrial confinement hearing. This is because "all rights and privileges affected by an executed part of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored . . . ."[63]

Defense counsel should inquire into improper pretrial punishment as well. Rehearings in full can occur years after a court-martial. A unit may view an accused that has been returned to them for a new trial as an added nuisance who is only there for the purpose of a new trial, and of no use to the unit. Due to the lack of any ties between the unit and the accused, an accused in this situation could be isolated, mistreated, put on special work details, or penalized in other ways that could violate Article 13, UCMJ.[64] There is also the added burden that the accused may spend some time away from his civilian job, and, in cases where he is past his ETS date, will do so while no longer receiving pay from the military.[65] One solution to this situation is for government counsel to work with the accused to minimize time away from his civilian job. Additionally, some civilian employers will be more agreeable to allowing the accused time away, if the trial counsel issues a subpoena for the accused and provides it to the employer. In shorter cases, the court-martial could be held over a weekend or during the accused's off-time.

However, the lack of ties between the accused, the charged offenses, and the unit can also be a plus for the accused. In cases where a guilty plea is feasible, the lack of any real personal stake by the command or the government in the case can be a boon for defense counsel looking for the best result for their client. For the same reasons, alternate resolutions such as an administrative discharge may be easier in rehearings, depending upon the severity of the charges.[66] Defense counsel must quickly assess command interest and be prepared to move forward with a favorable alternate disposition.

If alternate disposition is not an option, and the case is going to trial, defense counsel must look at pretrial investigation as being even more extensive in a rehearing than at an original trial. The defense should complete a new discovery request, look at physical evidence, review the scene of the alleged offense, and interview all necessary and material witnesses. Often, relying on the previous counsel's work will fall short of what is required to zealously represent a client.[67] In some cases, the client no longer has access to his awards, family photos, or other items that defense might need for presentencing because of immediate confinement after the last trial. In these cases, defense counsel should communicate with the previous counsel to get the entire defense file, as some of these things may have been collected but not used at the previous trial (and thus not in the record).

The accused's decision whether or not to testify can be tough under normal conditions. At a rehearing, the degree of difficulty can increase. If the accused did not testify at the original trial, then the calculus does not fundamentally change from the decision to testify at any trial. However, if the accused did testify at the original trial, then things become more complicated. Ostensibly, the accused testified at the earlier trial, gave his version of events, and the finder of fact, in whole or in part, did not believe him. While this may or may not actually be true, the fear that his testimony was found not credible in some respect is a reasonable one. Furthermore, if the accused testifies at the rehearing, that testimony will be compared for inconsistencies with his earlier testimony, along with any other statements.[68]

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[61] UCMJ, art. 38(3)(B).

[62] U.S. DEP'T OF ARMY, REG. 27-26, RULES FOR PROFESSIONAL CONDUCT FOR LAWYERS Rule 1.4 (1 May 1992) [hereinafter AR 27-26].

[63] UCMJ, art. 75(a).

[64] *See, e.g.*, United States v. Combs, 47 M.J. 330 (C.A.A.F. 1997) (airman forbidden to wear E-6 rank while awaiting rehearing violates Article 13); United States v. Cruz, 25 M.J. 326 (C.M.A. 1987) (public denunciations violate Article 13); United States v. Hoover, 24 M.J. 874 (A.C.M.R. 1987) (being required to sleep in pup tent violates Article 13); United States v. Cruz, 25 M.J. 326 (CMA 1987) (separating out suspected drug users into a "peyote platoon" violates Article 13).

[65] Dock v. United States, 46 F.3d 1083, 1092-93 (Fed. Cir. 1995) (citing UCMJ art 75(a) and the Department of Defense Military Pay & Allowances Entitlements Manual, the court held that the appellant was not entitled to pay and allowances post-expiration of term of service while in pretrial confinement awaiting a rehearing unless and until "acquitted, charges are dropped, or the member is restored to full duty status"); *see also* United States v. Dodge, 60 M.J. 873, 878 (A.F. Ct. Crim. App. 2005) ("[T]here are myriad reasons why finance officials could conclude the appellant is not entitled to pay, including the not unreasonable belief that Article 75(a), UCMJ bars his restoration to a pay status until after this Court's decision . . . . [A]ppellant . . . . should pursue [his claim] . . . in . . . the United States Court of Federal Claims."); United States v. Fischer, 61 M.J. 415 (C.A.A.F. 2005) (failure to pay an accused in pretrial confinement after ETS is not an Article 13 violation).

[66] *See* AR 635-200, *supra* note 40; *see also* U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (C1, 13 Sept. 2011) (administrative separation process for officers).

[67] *See* AR 27-26, *supra* note 62, Rule 1.1.

[68] MCM, *supra* note 6, Mil. R. Evid. 801(c) ("[A]n accused who chooses to testify as a witness waives the privilege against self-incrimination only with respect to the matters about which he or she testifies."). *But cf.* United States v. Murray, 52 M.J. 671, 674 (N-M. Ct. Crim. App. 2000), *citing* Harrison v. United States, 392 U.S. 219 (1968) (holding that ordinarily an accused testimony can be used at a retrial except either where that testimony was based on ineffective assistance of counsel or where the appellant testified in order to overcome the impact of an illegally obtained confession).

However, if the accused does not testify at the rehearing, there may be issues left unclarified from his prior testimony that the government has offered into evidence.[69] Also, the trial counsel may not offer the accused's testimony into evidence at all because of its exculpatory nature. All of these competing concerns should inform the advice of defense counsel on whether or not the accused should testify at the rehearing.

5. Sentencing in Rehearings in Full

As with sentence rehearings, the sentence at a rehearing in full normally cannot exceed the prior approved sentence.[70] Unlike a sentence rehearing, the accused may withdraw from a guilty plea in a rehearing in full. However, by withdrawing from a guilty plea, the accused loses the protection of any pretrial agreement that was conditioned on that guilty plea.[71]

In situations where the original adjudged sentence was less than the limitation in the pretrial agreement, the accused is protected from receiving a higher sentence, regardless of whether he pleads guilty or not guilty, because the second approved sentence cannot be higher than the earlier approved sentence.[72] In this situation, there is no tactical advantage for the accused to keep the pretrial agreement, unless it contained other benefits besides a sentence cap, such as a promise not to prosecute certain offenses. However, if the original adjudged sentence was greater than the approved sentence, then the accused risks a sentence up to that greater adjudged sentence, if he pleads not guilty.[73] For example, if the original deal was for six years, and the adjudged sentence was three years, then the accused cannot receive an approved sentence greater than three years at a rehearing, regardless of the plea. If the original deal was for three years, and the adjudged sentence was six years, then the accused risks an approved sentence of up to six years, unless the accused pleads guilty to keep the benefit of the three year cap in the pretrial agreement.

IV. Lessons for Counsel

Every rehearing has something unique to it, but there are some lessons common to all rehearings. If trial and defense counsel follow the ten lessons below, they will be a step ahead in successfully tackling the challenge of rehearings.

1. The speedy trial clock starts when the responsible convening authority receives the record of trial and mandate directing or authorizing the rehearing.

2. The authority for rehearings comes primarily from Article 63, RCM 810, and RCM 1107. It is important to understand the type of rehearing and the authority for it and to remember that a convening authority cannot take any action inconsistent with directives of a superior competent authority. Also, counsel should remember that Article 60(c) creates an obstacle to the ability of the convening authority to order rehearings for non-qualifying offenses. However, at a post-trial Article 39(a) session, a military judge may impose a remedy that enables a convening authority to order a rehearing.

3. A new preferral or Article 32 hearing is generally not required, unless new charges are combined with the charges to be reheard, but a new referral is required.

4. Defense counsel especially (but also trial counsel) should watch for issues with confinement, pay, and improper pretrial punishment.

5. A pretrial confinement hearing will be necessary to confine the accused pending a rehearing.

6. Trial counsel should understand that witness location and production is likely going to be harder and take longer than for an original trial, and trial counsel should begin identifying and locating witnesses early in the process.

7. Defense counsel should check for D&A Boards their client received during post-trial confinement. They should research and know what, if any, rights their client had to dispute the allegations. Further, they must be prepared to argue against their admission or mitigate their impact by getting details about the underlying conduct that led to the D&A Board.

8. Rehearings take a tremendous emotional toll on the accused, the complaining witness, and their families. This may make it harder to establish a relationship between the defense counsel and the accused, or trial counsel/SVP and the alleged victim. It will also likely require more understanding and willingness to listen on the part of counsel.

9. Rehearings do not necessarily unfold like the prior trial. While counsel should read and know the original trial transcript, they should approach the rehearing with fresh eyes and be ready to reinvestigate the case from scratch. Both sides should be prepared for faulty memories, missing witnesses, and missing or degraded evidence.

10. Unless there are new offenses, the approved sentence cannot be greater than the sentence previously approved.

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[69] *Harrison*, 392 U.S. at 222 ("[I]n this case we need not and do not question the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings.").

[70] UCMJ art. 6. *See also* MCM, *supra* note 6, R.C.M. 810 (but note that it can be increased if there was a mandatory minimum sentence).

[71] MCM, *supra* note 6, R.C.M. 810(d)(2) ("If . . . the sentence was approved in accordance with a pretrial agreement and at the rehearing the accused fails to comply with the pretrial agreement . . . the approved sentence resulting at a rehearing of the affected charges and specifications may include any . . . lawful punishment not in excess of or more serious than lawfully adjudged punishment at the earlier court-martial.").

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

[73] *Id*., R.C.M. 810(d)(2).

However, a punishment can be commuted to another punishment that is not more severe.

These lessons recognize the procedural issues as well as the personal issues for the participants. Dealing with the latter will require counsel to show patience and understanding as accused and complaining witnesses alike go through the difficult process of a court-martial for the second time. Trust will also be at issue, particularly between the accused and the defense counsel.

VI. Conclusion

Rehearings may seem daunting to counsel facing them for the first time. There are new, difficult tactical and strategic decisions to make, as well as a significant increase in potential issues with evidence and witnesses. There are also emotional concerns with both the accused and the alleged victim. However, so long as counsel slow down, plan in advance, and consider the tactical and strategic ramifications of having a prior trial's worth of evidence and testimony, rehearings can be not only manageable, but a rewarding professional experience.