



**AFLOA/JAJM
ARTICLE 32 PRELIMINARY HEARING
OFFICER'S GUIDE**

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AFLOA/JAJM
Article 32 Preliminary Hearing Officer’s Guide

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ARTICLE 32 PRELIMINARY HEARING OFFICER'S GUIDE

OVERVIEW

There are two sections to this guide. Section I consists of a discussion of several aspects of the Article 32 Preliminary Hearing -- the source of authority and requisite qualifications of the Preliminary Hearing Officer (PHO), the role of the other participants, and the PHO's responsibilities during the preliminary hearing and preparation of the report. Section II consists of a Preliminary Hearing Officer's script for conducting an Article 32 preliminary hearing. At the end of the guide are attachments consisting of sample letters and an example of an Article 32 report.

Section 1702(a) of the FY14 National Defense Authorization Act (NDAA) made significant changes to Article 32, most fundamentally changing the scope of the hearing from a "thorough and impartial investigation" to a "preliminary hearing." Pursuant to Section 531(g) of the FY15 NDAA, the new Article 32 became effective for all preliminary hearings conducted on or after 26 December 2014. Many of the cases cited in this guide pertain to review of Article 32 investigations under the previous version of Article 32 and have been included for reference only rather than an assertion that the case law is applicable to the new Article 32 statute. The primary authorities which govern an Article 32 Investigation are: 10 U.S.C. Section 832, Rule for Court-Martial (R.C.M.) 404A, 405, 406(b)(2) and 601(d) and AFI 51-201, Section 4A (which is currently being re-written to include the changes caused by the new Article 32 statute and is expected to be published in the fall of 2015.)

The purpose of the Article 32 preliminary hearing is limited to an examination of those issues necessary to determine whether there is probable cause to conclude that an offense has been committed and whether the accused committed it. The other limited functions of the preliminary hearing are to determine whether a court-martial would have jurisdiction over the offenses(s) and the accused; to consider the form of the charge(s); and to recommend the disposition that should be made of the charge(s). A preliminary hearing is not intended to serve as a method for the government to perfect its case against the accused and is not intended to serve as a means of discovery or to provide a right of confrontation required at trial. Recommendations of the preliminary hearing officer to the convening authority are advisory.

The local SJA and military justice section should provide you with all the support you need to conduct the preliminary hearing and complete your report as efficiently and quickly as possible. A Counsel for the Government (GC) must be appointed to present the case to the PHO. The GC should have fully prepared the government's case supporting probable cause that the accused has committed an offense and be fully prepared to present that case to you by the time of the preliminary hearing. It should be the rare case where the date of the Article 32 preliminary hearing has not already been worked out with the Defense Counsel (DC) and Victims' Counsel (VC) by the time of your appointment.

In most cases, the GC should have already informed the DC of the witnesses the government expects to testify at the hearing and the documentary and physical evidence the government will be asking you to consider. Regardless, the applicable Rules for Courts-Martial detail the GC's duties to provide witnesses and documentary evidence to the DC within 5 days of your appointment. These rules also require DC to provide notice to GC of which witnesses and what evidence the defense wants produced for introduction at the preliminary hearing and, if GC objects to production of a defense-requested witness or evidence, grants you the authority to determine whether the witness or evidence is relevant, not cumulative, and necessary.

GC is responsible for ensuring that all preliminary hearings are recorded by a suitable recording device. You are required to include a summary of the substance of all testimony in

your report. Attaching a recording of the preliminary hearing to your report will satisfy this requirement.

Upon completing and turning in the original of your report, the local SJA and military justice section should ensure your report and all allied papers are in proper form and then make the requisite number of copies of the report.

Please submit any feedback on this guide to AFLOA/JAJM at usaf.pentagon.af-ja.mbx.afloa-jajm-workflow@mail.mil

SECTION I

1. AUTHORITY

Your authority for conducting a preliminary hearing comes from a letter of appointment issued by any court-martial convening authority, which customarily will be the special court-martial convening authority (SPCMCA) or in rare cases the general court-martial convening authority (GCMCA). A sample letter of appointment is included at Attachment 1. Your appointment letter should inform you that the preliminary hearing is your primary duty until its completion. You must conduct the preliminary hearing promptly and diligently to completion unless you are relieved.

2. QUALIFICATIONS OF THE PRELIMINARY HEARING OFFICER

2.1. Status. The PHO must be a designated judge advocate (JAG) and should be certified under Article 27(b). If precluded by military necessity or other compelling circumstances, the PHO may be a JAG who is not certified under Article 27(b). This includes reserve JAGs who may be detailed to serve as a PHO while on active duty or performing inactive duty training. Article 136(b), UCMJ, authorizes reserve Judge Advocates to administer oaths while on active duty or performing inactive duty training. If you are an Air National Guard Judge Advocate, you must be on Title 10 orders to serve as a PHO. Military Judges are available to serve as PHOs in cases in which an Article 120 charge is the heart of the case and both perpetrator and victim are military members. Military Judges may be available for other complex preliminary hearings (Article 120 or otherwise) on a case-by-case basis. The use of Military Judges as Article 32 PHOs will be centrally funded. Note that a military judge acting as a PHO in an Article 32 hearing does not hold any additional power or authority by the fact that he or she has been certified as a military judge. All PHOs have the same power, and the same limitation on their power and authority.

2.2. Grade. Whenever practicable, PHOs should be senior in rank to the accused and equal or senior in grade to the GC and DC. *See* Article 32(b), R.C.M. 405(d)(1). Case law supports the notion that PHOs should be senior in rank to the accused. *United States v. Reynolds*, 24 M.J. 261 (C.M.A. 1987). If you are not senior in rank to the accused, GC, and DC, bring the fact to the attention of the appointing authority's Staff Judge Advocate (SJA) immediately. If you remain assigned as the PHO, document the military necessity or other compelling circumstances presented by the GC in your report.

2.3. Impartiality. You must be impartial. *See* Article 32(b), R.C.M. 405(d)(1). Your impartiality can be questioned as a result of your knowledge of the case before you start the preliminary hearing and by what you do during the course of the preliminary hearing. You shall not depart from an impartial role and become an advocate for either side. You are generally disqualified to act later in the same case in any other capacity.

2.3.1. Disqualification by Prior Knowledge or Association. An accuser cannot serve as the PHO. *See* R.C.M. 405(d)(1). Likewise, an officer who is a close personal friend of the accuser is also disqualified to serve. *See United States v. Castleman*, 11 M.J. 562 (A.F.C.M.R. 1981). If the PHO discloses all grounds for any possible bias, prejudice or impropriety, and the defense fails to object at the preliminary hearing, it is generally construed as a waiver. *United States v. Lopez, supra; United States v. Martinez*, 12 M.J. 801 (N.M.C.M.R. 1981).

2.3.1.1. Examination of Related Cases. A PHO who has previously had a role in inquiring into the offense to be examined is disqualified. *United States v. Lopez, supra; United States v. Natalello*, 10 M.J. 594 (A.F.C.M.R. 1980); *U.S. v. Parker*, 19 C.M.R. 201 (C.M.A. 1955). However, a disqualification to act as a PHO can be waived by an accused. *United States v. Mickel*, 26 C.M.R. 104 (C.M.A. 1958).

2.3.1.2. **Joint Hearing.** Unlike examination of related cases, a joint preliminary hearing is proper since the PHO begins the preliminary hearing with no preconceived ideas of credibility, guilt, or innocence and has made no prior decisions that he or she might seek to vindicate. Thus, when two or more accused are charged with a joint offense, a joint preliminary hearing is entirely proper. The mechanics of arranging for a joint preliminary hearing are more difficult, however, and the PHO would be required to submit a separate report with separate recommendations on each accused.

2.3.1.3. **Office Associations.** A PHO is not disqualified solely by virtue of his position in the legal office. *United States v. Reynolds, supra* at 263. However, a PHO who supervises the accused's DC is disqualified and should be recused absent military exigency. *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985). While not prohibited, appointment of the chief of military justice as the PHO should be avoided. *See United States v. Merritt*, 2009 WL 1936628, at *2 (A.F. Ct. Crim. App. Jun. 30, 2009).

2.3.1.4. **Disqualification by Subsequent Action.** Anything you do as the PHO that reasonably calls your impartiality into question may be subject to later judicial scrutiny. You must, therefore, strive not only for impartiality in fact but also to avoid any appearance of partiality. Limit any *ex parte* communication with GC and DC to administrative matters only. If you are unsure whether an appearance of partiality may exist, you are encouraged to consult the SJA to the appointing authority.

2.3.1.5. **Legal Advice.** As the PHO, you may seek legal advice concerning your responsibilities from an impartial source, but may not obtain such advice from counsel for any party or victims' counsel (VC). *See R.C.M. 405(d)(1) Discussion*. The JAG providing legal advice must be certified under Article 27(b). You may consult with the local SJA on any matter, including matters of substance. *United States v. Grimm*, 6 M.J. 890 (A.C.M.R. 1979). You must give notice to all parties (*i.e.*, DC, accused, and GC, if any) before obtaining advice from an independent source, including the local SJA, on substantive issues. *Id.* at 893. The failure to do so may constitute error that will be tested for prejudice if raised at trial. *Id.*

2.3.1.6. **Action on Defense Requests.** Your response to defense requests, such as requests for delay, may be reviewed by appellate courts as an indicator of your impartiality. Remember, a PHO can grant a delay only if the appointment letter delegates that authority. *R.C.M. 707(c)(1) Discussion*. If the appointment letter contains no written delegation, the convening authority remains the decision authority.

2.3.1.6.1. **Granting Delays.** PHOs face potential dilemmas when acting on delay requests. You may be caught between the need for speedy disposition of the charges, and a DC's legitimate need for more preparation time. *See* Articles 10 and 33, UCMJ, and *R.C.M. 707*. Also consider a victim's right to proceedings free from unreasonable delay. *See* Article 6b(7), UCMJ. What you must do in such circumstances is to act impartially to protect all interests. To do this, you must ascertain and record in detail the legitimacy of any defense request for delay. Require defense counsel to describe in writing the basis for the delay request and then decide if the request is well-founded. *R.C.M. 707(c)(1) Discussion*, provides that pretrial delays should not be granted *ex parte*; therefore, you should notify the GC of the delay request and ask for a written response to the delay request. If the government is not opposed to a well-supported request, you should probably grant the delay, provided your appointment letter authorizes you to do so. Your decision to grant the delay, together with supporting reasons and the dates covering the delay, should **immediately** be reduced to **writing** and included in your report.

2.3.1.6.2. **Other Considerations.** If GC is opposed to granting the delay, you should, at a minimum, also ascertain and include in your report when the DC first learned of the case, when DC received disclosure of information or matters under R.C.M. 404A and 405, and what other matters or cases have prevented or will prevent DC from being adequately prepared for the hearing. You will most likely be required to determine whether the length of the defense's requested delay is reasonable and necessary. If, after you review defense's position, you conclude more time is needed in the interests of justice, you should grant the delay. *United States v. Miro*, 22 M.J. 509 (A.F.C.M.R. 1986), held that a PHO's refusal to grant a defense request for delay due to inadequate preparation time (less than 24 hours) was reversible error that required a new Article 32 preliminary hearing, regardless of whether the accused can demonstrate prejudice.

2.3.1.6.3. **Victims' Counsel Unavailable.** If the victim's counsel or other witness counsel provides written notice to the PHO that he or she is not available to appear at the preliminary hearing, or not available to consult with his or her client via other means (*e.g.*, telephone, video teleconference) during the preliminary hearing, the preliminary hearing should not proceed without the written approval of the represented victim or witness or the convening authority who appointed you. Even if the victim chooses not to testify or exercise his or her right not to be excluded from the preliminary hearing, the VC's schedule should be taken into account.

3. QUALIFICATIONS OF OTHER PARTICIPANTS

3.1. Counsel for the Government. The Air Force shall appoint a GC to present the government's case.

3.1.1. **Role.** The GC's role is to present evidence on behalf of the government relevant to the following limited scope and purpose of the preliminary hearing: 1) determination of whether there is probable cause to conclude that an offense has been committed and whether the accused committed it; 2) determination of whether the court-martial would have jurisdiction over the offense; 3) consideration of the form of the charge; and 4) the PHO's recommendation to the convening authority of the disposition that should be made of the charge. The GC provides logistical support for the PHO. This aspect is essential where the PHO is not stationed locally. As soon as the GC has been appointed, he or she should contact the PHO to determine the logistics necessary to insure a smooth preliminary hearing. Among the details the GC should expect to take responsibility for are:

- Arranging for a preliminary hearing location.
- Ensuring the defense is aware of the time and date of the preliminary hearing and that civilian counsel has been provided a copy of this guide.
- Ensuring the victim of the offense being considered, and if applicable the VC, at the preliminary hearing is aware of the time and date of the preliminary hearing and any civilian VC has been provided a copy of this guide.
- Arranging for the travel and appearance at the preliminary hearing of government and defense-requested witnesses.
- Providing the PHO with a copy of the charge sheet, the appointment letter, and this guide.
- Arranging for the preliminary hearing to be recorded by a suitable government recording device.

3.2. Defense Counsel. The accused is entitled to be represented by a DC certified under Article 27(b) and sworn under Article 42(a), UCMJ; R.C.M. 405(d); AFI 51-201, paragraph 4.1.3.2. This item is covered in block 6 of the PHO's report, DD Form 457. The accused may also elect to hire a civilian defense counsel at his own expense. The PHO should ensure any civilian defense counsel has submitted proof of representation before granting a delay. Make sure you verify that detailed DC is qualified under Article 27(b), UCMJ. The attached script covers this point for you. Note that the accused may request self-representation, but it is not an absolute right. *U.S. v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990).

3.3. Victims' Counsel. Victims may be represented by counsel during the Article 32 preliminary hearing. Only designated judge advocates who are certified under Article 27(b) are authorized to serve as military victims' counsel (VC). Civilian VC must take an oath to perform his or her duties faithfully when representing the witness. The PHO will administer this oath. If a witness is represented by counsel during the Article 32 preliminary hearing, document in the report the name and rank of the witness counsel, the fact that counsel has been certified under Article 27(b) if a designated judge advocate, and whether counsel has taken the requisite oath if civilian.

3.3.1. The PHO shall ensure VC has the opportunity to participate in a pre-hearing conference with GC and DC on matters related to the victim (*e.g.*, scheduling, witness availability, scope of preliminary hearing, etc.). However, the VC's participation in the pre-hearing conferences should be limited to matters within his or her authority (see paragraph 3.3.2.)

3.3.2. The PHO shall ensure VC has the opportunity to advocate appropriately for the victim's interests during the preliminary hearing to include:

- Objections to questions pertaining to the victim pursuant to R.C.M. 405(h). Objections shall be made to the PHO upon discovery of the alleged error. The PHO shall not be required to rule on any objection except for issues relating to Military Rules of Evidence that apply to the preliminary hearing as listed in R.C.M. 405(h). All objections shall be submitted in writing to the PHO and the PHO will note the objections in the hearing report.
- Requests to close the proceedings pursuant to R.C.M. 405(i)(4);
- Objections to production of the victim's records covered by M.R.E. 412 or Section V (Privileges) of the Military Rules of Evidence (see paragraph 8.2.1 regarding applicability of M.R.E. 412); Note: The witness's counsel should be given adequate opportunity to review the records in question prior to the PHO considering them; and
- Requests for the witness's records covered by Section V (Privileges) of the Military Rules of Evidence to be sealed and for the witness's personally identifiable information to be redacted.

3.4. Other Participants. The convening authority can detail a reporter, interpreter, and others to aid the preliminary hearing. R.C.M. 405(d)(4). Likewise, the local SJA may assign personnel for administrative support.

4. YOUR RESPONSIBILITIES

4.1. Statutory. Under Article 32(a), UCMJ, you are responsible for:

- Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense;

- Determining whether a court-martial would have jurisdiction over the offense(s) and the accused;
- Considering whether the form of the charges is proper; and
- Making a recommendation as to the disposition of the charge(s).

4.2. Generally. The Article 32 preliminary hearing is a probable cause hearing. As a reference for your consideration, “probable cause” has been defined by the U.S. Supreme Court as a “reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.” *Stacy v. Emery*, 97 U.S. 642, 645 (1878). As the Court of Appeals of the Armed Forces noted:

The threshold for probable cause is subject to evolving case-law adjustments, but at its core it requires factual demonstration or reason to believe that a crime has [been] or will be committed. . . . It is not a “technical” standard, but rather is based on “factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” Probable cause requires more than bare suspicion, but something less than a preponderance of evidence.

United States v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007). A useful discussion of “probable cause” can also be found in M.R.E. 315(f)* as well as in the Analysis section of M.R.E. 315(f) contained in Appendix 22 of the Supplement to the M.C.M. The preliminary hearing shall be limited to an examination of the issues necessary to fulfill the purpose of the preliminary hearing described above. You are limited to hearing testimony and examining evidence presented by GC and DC. You may question witnesses that are called by GC and DC. However, you shall not call witnesses *sua sponte* and shall not consider evidence not presented at the preliminary hearing. If you determine additional evidence is necessary, you may provide GC and DC an opportunity to present additional testimony and evidence.

4.3. Before the Preliminary Hearing. You should take the following steps before the preliminary hearing begins:

4.3.1. **Review the Letter of Appointment.** Read your letter of appointment and make sure you understand the nature of the preliminary hearing. If the preliminary hearing covers more than one set of charges against the accused, make sure this is accurately reflected in the letter of appointment or that you have a second letter of appointment.

4.3.2. **Evidence.** It is important to know the evidence that GC will offer during the preliminary hearing because you will be required to rule on its relevancy if there is a DC objection. Thus you are authorized to review all evidence provided to you by GC after your appointment. You should limit your review of additional information so that your impartiality is not questioned. If you inadvertently receive additional information, you should note during the preliminary hearing that you will not consider the information in your report.

4.3.3. **Documents to VC or Witness Counsel.** Upon notice of representation, you should direct the GC to provide VC copies of the charge sheet and PHO appointment letter; and reasonable notice of, and access to, evidence procured from his or her client (*e.g.*, statements, records, physical evidence, etc.) and evidence related to asserting his or her client’s right to be heard under M.R.E. 412, 513, and 514 (even if the evidence is from a witness other than the

* M.R.E. 315(f) discusses the probable cause standard as it applies to search authorizations.

victim). Personally identifiable information redactions should be made to these documents. There is no need to redact the personally identifiable information of the VC's client.

4.3.4. **Waiver.** The accused may waive a preliminary hearing. R.C.M. 405(k). Relief from the waiver may be granted by the convening authority who directed the preliminary hearing, a superior convening authority, or the military judge, as appropriate, for good cause shown.

5. REVIEWING THE CHARGE SHEET

5.1. Format and Personal Data. You must read the charge sheet and make sure the information on it is correct and the charges are in the proper form. Often, charge sheets contain erroneous personal data or fail to contain the data that they're supposed to contain. Compare each specification with the model specification forms found in Part IV of the Manual for Courts-Martial and the Military Judge's Benchbook. R.C.M. 603(b) prohibits the PHO from making any changes, even minor ones, to the charges. However, you should recommend that necessary changes be made. Alert the local SJA to any errors you note on the face of the charge sheet. If such authorized pen and ink changes are made, be sure to mention them in your report.

5.2. Corrections to the Charges. Remember that your role is to recommend, not act! If you spot some obvious deficiencies in the charges, such as missing dates, etc., notify the GC and the DC. The GC and the local SJA can then arrange for the accuser to correct the charges before you start your hearing. R.C.M. 603(a). It would be better practice if you were not present when the changes are made to avoid the appearance of any impropriety. In all cases in which you, as the PHO, communicate directly with the local SJA (and those occasions should be rare), you should inform DC of your intention and the purpose and subject. You should limit such contacts to one-way communication and refrain from discussion. For recommending changes to the charges after the close of the preliminary hearing, see *infra* para. 9.3.4.

6. TIMING OF AND ACCESS TO THE HEARING

6.1. Time and date. In most cases, the date and place for the Article 32 preliminary hearing will have already been established by the local SJA, GC or chief of military justice and the DC before the charges were preferred. This is good case management and the recommended practice. If for some reason a preliminary hearing date has not been established, you shall call a pre-preliminary hearing conference with GC, DC, and VC if applicable to set a preliminary hearing date. Since you are tasked with expeditiously conducting the preliminary hearing and this is your primary duty, you should ordinarily set the date for the Article 32 preliminary hearing no later than the day after your appointment. Ensure the formats in Attachment 2 are used to notify DC and VC of the Article 32 preliminary hearing. You should insist that any requests for delays be in writing, specifically setting forth the basis for the request.

6.2. Public Access. Ordinarily, Article 32 preliminary hearings are open to the public, wherever possible. Victims of crime may only be excluded under Article 6b if you determine by clear and convincing evidence that the testimony by the victim of an offense under the UCMJ would be materially altered if the victim heard other testimony at the hearing. This rule took effect 26 December 2013 and specifically mentions Article 32 preliminary hearings and PHOs. Congress modeled this provision on the Federal Crimes Victims' Rights Act (18 U.S.C. § 3771). Note that the standard is not whether the testimony "may" or "might" or "possibly" would be materially altered. You must find it *would* be materially altered. Federal district court judges have only on very rare occasions found the clear and convincing evidentiary standard to be met. Article 6b defines a victim of an offense as a person who has suffered direct, physical, emotional or pecuniary harm as a result of the commission of an offense under the UCMJ.

6.2.1. **Potential Witnesses.** Although potential witnesses are normally excluded from watching the proceedings, you have the authority to permit some potential witnesses (*e.g.*, experts) to be present if you consider their presence helpful to the proceedings.

6.2.2. **Open proceedings.** Article 32 preliminary hearings should ordinarily be open to the public and news media. (*See* AFI 51-201, para. 4.1.9; R.C.M. 405(i)(4); *San Antonio Express News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996); and *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997)). AFI 51-201, paragraph 4.1.9, states a strong regulatory policy in favor of open Article 32 preliminary hearings. Access by spectators to all or part of the proceeding, however, may be restricted or foreclosed at the discretion of the convening authority who directed the preliminary hearing, or at your discretion when an overriding interest exists that outweighs the value of an open preliminary hearing. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. The convening authority or you must conclude that no lesser methods short of closing the preliminary hearing can be used to protect the overriding interest in the case. The convening authority or you must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether the closure is necessary. You should make every effort, though, to close only those portions of the preliminary hearing that are clearly justified and keep the remaining portions of the preliminary hearing open. If you close a hearing, you are required to provide specific findings of fact in writing that support the closure and the written findings of fact must be included in your report. *See U.S. v. Davis*, 62 M.J. 645 (A.F. Ct. Crim. App. 2006) (holding that the Article 32 Investigating Officer had no factual basis to support closing a portion of the hearing in an effort to encourage the testimony of two witnesses). Examples of overriding interests may include: preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety or privacy of a witness or victim, protecting classified material, and receiving evidence where the witness is incapable of testifying in an open setting.

6.2.3. **Media.** You should refer any media request for information on a criminal case to the local SJA. *See* AFI 51-201, para. 13.6.8. You should also immediately advise the local SJA if you receive a direct request from a journalist to attend the proceedings. The local SJA should involve the base's public affairs office. *See infra* para. 8.3.4, for a discussion of the problem of spectators or news media trying to record the proceedings.

7. WITNESSES AND EVIDENCE

7.1. Duties of the Counsel for the Government (GC) following issuance of the Article 32 appointing order. Within five days of issuance of the Article 32 appointing order, the GC must provide to the defense the following information, IAW R.C.M. 404A:

- Charge Sheet;
- Article 32 appointing order;
- Documents accompanying the charge sheet on which the preferral decision was based;
- Documents provided to the convening authority when deciding to direct the preliminary hearing;
- Documents the GC intends to present at the hearing; and
- Access to tangible objects counsel for government intends to present at the preliminary hearing.

7.2. Duties of the GC prior to the Article 32 preliminary hearing. Prior to the preliminary hearing, GC shall provide to the defense IAW R.C.M. 405(f)(1):

- Notice of any witnesses that the GC intends to call at the preliminary hearing;
- Copies of or access to any written or recorded statements made by the witnesses GC intends to call at the preliminary hearing that relate to the subject matter of any charged offense (definitions of “written statement” and “recorded statement” are provided in R.C.M. 405(f)(1)(A));
- Notice of, and reasonable access to, any other evidence the GC intends to offer at the preliminary hearing; and
- Notice of, and reasonable access to, evidence that is within the possession or control of GC that negates or reduces the degree of guilt of the accused for an offense charged.

7.3. Defense Counsel Request for Production of Witnesses. You may establish a timeline prior to the preliminary hearing by which DC shall provide to GC the names of proposed military and civilian witnesses whom the accused requests that the government produce to testify at the preliminary hearing and the requested form of the testimony.

7.3.1. Counsel for the Government Response to Defense Counsel Request for Witnesses. Upon receipt of a request from the DC to produce proposed military and civilian witnesses, GC shall either agree that the witness testimony is relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing and will seek to secure the witness’s testimony for the hearing; or object to the proposed defense witness on the ground the testimony would be irrelevant, cumulative, or unnecessary based on the limited scope and purpose of the preliminary hearing. The GC must provide this response in writing at a timeframe you establish prior to the preliminary hearing.

7.3.1.1. Defense Counsel Response to Government’s Objections to Witnesses. Should GC object to a witness requested by DC, DC may request, in writing, that you determine whether the witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing.

7.3.2. Counsel for the Government Requests Commander of Military Witness Make Individual Available to Provide Testimony. If GC does not object to the defense-requested military witness or you determine that the military witness is relevant, not cumulative, and necessary, GC shall request that the commander of the military witness make that person available to provide testimony.

7.3.2.1. Commander Determination of Witness Availability. The commander of the witness shall make a determination of whether the individual is available based on operational necessity or mission requirements. The commander’s determination of whether an individual is available, as well as the means by which the individual is available, is a balancing test. The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to deny production of the witness. Based on operational necessity and mission requirements, the witness’s commander may authorize the witness to testify by VTC, telephone, or similar means of remote testimony. Factors to be considered in making this determination include the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the proceeding that may be caused by the production of the witness; and the likelihood of significant interference with operational deployment, mission accomplishment, or essential training. The commander’s determination is final. The commander’s determination may be made in writing, via email, or orally. The commander will also resolve any dispute among the parties on whether the witness will testify in person, by VTC, or by telephone or similar means of remote testimony. If there is a dispute

between the parties as to form, the commander's decision should be in writing and included in the final report. The GC shall make arrangements for any military witness's testimony.

7.3.3. Counsel for the Government Invites Civilian Witness to Provide Testimony. If GC does not object to the defense-requested civilian witness or you determine the civilian witness to be relevant, not cumulative, and necessary, GC shall send a written invitation to the civilian witness to provide testimony and, if the individual agrees, shall make arrangements for that witness's testimony. If expense to the government is to be incurred, the convening authority who directed the preliminary hearing, or the convening authority's delegate, shall determine whether the witness testifies in person, by VTC, by telephone, or similar means of remote testimony.

7.4. Victim Testimony. A victim of an offense under consideration at the preliminary hearing is not required to testify at the preliminary hearing pursuant to Article 32(d)(3). A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.

7.5. Defense Counsel Request for Production of Evidence. You may establish a timeline prior to the preliminary hearing by which DC shall provide to GC a list of evidence under the control of the government and not under the control of the government that the accused requests the government produce to the defense for introduction at the preliminary hearing. *See* R.C.M. 405(g)(3). This is not a right to discovery of evidence for future consideration by the defense. The R.C.M. is limited to defense requests for evidence that the defense will seek to introduce at the preliminary hearing.

7.5.1. Counsel for the Government Response to Defense Counsel Request for Evidence. Upon receipt of a request from the DC to produce evidence for introduction at the preliminary hearing, GC shall either agree that the evidence is relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing and will make reasonable efforts to obtain the evidence; or object to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary based on the limited scope and purpose of the preliminary hearing. The GC must provide this response in writing at a timeframe you establish prior to the preliminary hearing.

7.5.1.1. Defense Counsel Response to Government's Objections to Evidence. Should GC object to production of evidence requested by DC, DC may request, in writing, that you determine whether the requested evidence should be produced.

7.5.1.1.1. Preliminary Hearing Officer Determination for Evidence Under the Control of the Government. You shall determine whether the evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing.

7.5.1.1.2. Preliminary Hearing Officer Determination for Evidence Not Under the Control of the Government. If you determine the defense-requested evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing and that the issuance of *subpoenas duces tecum* would not cause undue delay to the preliminary hearing, you shall direct GC to issue *subpoenas duces tecum* for the defense-requested evidence. Failure on the part of GC to issue *subpoenas duces tecum* directed by you shall be noted in your report.

7.5.2. Counsel for the Government Makes Reasonable Efforts to Obtain Evidence Under the Control of the Government. If GC does not object to production of the defense-requested evidence or you determine that the evidence is relevant, not cumulative, and necessary, GC shall make reasonable efforts to obtain the evidence that is under the control of the government.

7.5.3. Counsel for the Government Issues *Subpoenas Duces Tecum* for Defense-Requested Evidence. If GC does not object to production of the defense-requested evidence or the PHO determines that the evidence is relevant, not cumulative, and necessary, GC shall issue *subpoenas duces tecum* for the evidence.

7.6. Depositions. If an important witness is unable to testify at the preliminary hearing and due to the exceptional circumstances of the case it is in the interest of justice that the testimony of the witness be taken and preserved for use at a preliminary hearing or court-martial, the GC or local SJA may request the convening authority order a deposition pursuant to R.C.M. 702(a). The convening authority shall determine whether the requesting party has shown by a preponderance of the evidence that due to the exceptional circumstances and in the interest of justice the testimony must be taken and preserved for use at a preliminary hearing or court-martial. *See* R.C.M. 702(c)(3)(A). A victim’s declination to testify at a preliminary hearing pursuant to Article 32(d)(3) or declination to submit to pretrial interviews shall not, without some other significant reason, be considered exceptional circumstances. *See* R.C.M. 702(a).

8. CONDUCTING THE PRELIMINARY HEARING

8.1. Preliminary Advice and Inquiries. Get a copy of the DD Form 457, Preliminary Hearing Officer’s Report, and check off in pencil each required point as you go over it with the accused. Use the script in Section II of this guide to begin the hearing. It covers all the important points required on the DD Form 457.

8.2. Presentation of Evidence. The Military Rules of Evidence (M.R.E.) do not apply to Article 32 preliminary hearings, except as discussed below. *See* R.C.M. 405(h). This means, quite simply, that you can consider hearsay. *See, e.g., United States v. Matthews*, 15 M.J. 622 (N.C.M.R. 1982).

8.2.1. Military Rules of Evidence that Apply In Their Entirety:

M.R.E. 301	privilege concerning compulsory self-incrimination
M.R.E. 302	privilege concerning mental examination of an accused
M.R.E. 303	degrading questions
M.R.E. 305	warnings about rights
M.R.E. 501	privilege in general
M.R.E. 502	lawyer-client privilege
M.R.E. 503	communications to clergy
M.R.E. 504	husband-wife privilege
M.R.E. 507	identity of informants
M.R.E. 508	political vote
M.R.E. 509	deliberations of courts and juries
M.R.E. 510	waiver of privilege by voluntary disclosure
M.R.E. 511	privilege matter disclosed under compulsion without opportunity to claim privilege
M.R.E. 512	comment upon or inference from claim of privilege; instruction
M.R.E. 513	psychotherapist-patient privilege

8.2.2. Military Rules of Evidence that Apply In Part:

M.R.E. 505	classified information
M.R.E. 506	government information other than classified information
M.R.E. 412	sex offenses: the victim’s sexual behavior or predisposition

8.2.3. Military Rule of Evidence 412. M.R.E. 412 applies in any case that includes a charge defined as a sexual offense under M.R.E. 412(d). However, M.R.E. 412(b)(1)(C), the constitutionally required exception, does not apply. You assume the military judge’s authority to follow procedures in M.R.E. 412 and to exclude evidence from the preliminary hearing. M.R.E. 412 sets forth a clear procedure for admissibility of evidence of victim sexual behavior and sexual predisposition during trials involving an alleged sexual offense. Sexual behavior is defined as “any sexual behavior not encompassed by the alleged offense.” Sexual predisposition refers to an alleged victim’s “mode of dress, speech or lifestyle that does not directly relate to sexual activities or thoughts but that may have a sexual connotation for the fact finder.” The rule provides for a general exclusion of this evidence whether presented by the prosecution or the defense with three enumerated exceptions, two of which are applicable to preliminary hearings. Specific notice procedures are included before introducing this evidence and a process exists for closing hearings and sealing records not admitted into evidence.

8.2.4. Military Rule of Evidence 505. M.R.E. 505 applies. However, M.R.E. 505(f)-(h) and (j) do not apply. You assume the military judge’s authority to follow procedures in M.R.E. 505 and to exclude evidence from the preliminary hearing.

8.2.5. Military Rule of Evidence 506. M.R.E. 506 applies. However, M.R.E. 506(f)-(h), (j), (k), and (m) do not apply. You assume the military judge’s authority to follow procedures in M.R.E. 506 and to exclude evidence from the preliminary hearing.

8.2.6. Military Rule of Evidence 513. M.R.E. 513 applies. Note that Section 537 of the FY15 NDAA directed subparagraph (d)(8), the constitutionally required exception, to be stricken from M.R.E. 513. You assume the military judge’s authority to follow procedures in M.R.E. 513 and to exclude evidence from the preliminary hearing. However, you are not authorized to compel production of communications covered by M.R.E. 513.

8.2.7. Military Rule of Evidence 514. M.R.E. 514 applies. However, M.R.E. 514(d)(6), the constitutionally required exception, does not apply. You assume the military judge’s authority to follow procedures in M.R.E. 514 and to exclude evidence from the preliminary hearing. However, you are not authorized to compel production of communications covered by M.R.E. 514.

8.2.8. Rulings on Evidence. In applying the M.R.E.s to a preliminary hearing, the term “military judge” shall mean PHO. You shall assume the military judge’s authority to exclude evidence from the preliminary hearing, and in discharging this duty follow the procedural requirements of the M.R.E.s. Failure of either party to follow the procedural requirements of the M.R.E.s shall result in exclusion of evidence from the preliminary hearing, unless good cause is shown. Recent case law from C.A.A.F has interpreted the right to be heard under M.R.E. 412 and 513 to extend to hearing from VC. Section 534 of the FY15 NDAA directs that when a victim of a sex-related offense has a right to be heard, the victim may exercise that right through VC.

8.3. Testimony. Witness testimony may be provided in person, by VTC, by telephone or similar means of remote testimony. As mentioned above, all testimony, except that of a sworn statement of the accused, is required to be taken under oath. *See* R.C.M. 405(i)(3)(A). The form for the oath shall be as follows: “Do you (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?”

8.3.1. Taking testimony. After you have informed the accused of the accused’s rights, GC will present evidence. Upon the conclusion of GC’s presentation of evidence, DC may present matters in defense and mitigation. *See* R.C.M. 405(i). For purposes of the preliminary

hearing, “matters in mitigation” are defined as matters that may serve to explain the circumstances surrounding a charged offense. You may also question witnesses called by the parties.

8.3.1.1. **Cross-examination.** You shall provide GC and DC the opportunity to cross-examine adverse witnesses on matters relevant to the limited scope and purpose of the preliminary hearing. *See* R.C.M. 405(f)(2)(F), 405(i)(1).

8.4. Other Evidence. If relevant to the limited scope and purpose of the preliminary hearing, and not cumulative, you may consider other evidence, in addition to or in lieu of witness testimony, including sworn statements, tangible evidence, or reproductions thereof, when submitted by either GC or DC, that you determine to be reliable. This other evidence need not be sworn. *See* R.C.M. 405(i)(3)(B). In making your reliability determination of unsworn statements, you should consider the fact the unsworn nature of the statement in determining the credibility and weight to give to the unsworn statement and should articulate said consideration in your preliminary hearing report.

8.4.1. **Evidence Not Under Control of the Government.** Evidence not under the control of the government may be obtained through noncompulsory means or by *subpoenas duces tecum* issued by the GC IAW the process established by R.C.M. 703.

8.4.2. **Accused’s confession or admission.** Statements that are incriminating are important for you in making a recommendation as to disposition of the charges. Because an accused has a right to assert rights under Article 31, UCMJ, and M.R.E. 301 applies during the hearing, the evidence of a confession or admission in the form of statements is normally admissible.

8.4.3. **Witness statements.** You may consider a witness statement you determine to be reliable and not cumulative so long as the statement is relevant to the limited scope and purpose of the preliminary hearing.

8.4.4. **Reports.** Reports are documents, notwithstanding their hearsay nature. Thus, treat them as “other evidence” and follows the rules set forth in R.C.M. 405(i)(3)(B).

8.5. Handling Objections. The main purpose of the Article 32 preliminary hearing is limited to an examination of those issues necessary to determine whether there is probable cause to conclude that an offense has been committed and whether the accused committed it. So, unless one of the few Military Rules of Evidence discussed above applies, the basis of a defense objection shouldn’t be a rule of evidence. Rather, the basis should be a failure to comply with the procedural requirements of R.C.M. 405. Any objection alleging failure to comply with R.C.M. 405 shall be made to the convening authority using the preliminary hearing report as the vehicle for transmission. For example, R.C.M. 405 (i)(3)(B) establishes a rule of procedure that prohibits you from considering evidence that is cumulative to other evidence presented at the preliminary hearing. The defense may object to your consideration of an unsworn witness’s statement claimed to be cumulative. The basis for their objection, however, is not that the statement is hearsay, a common faulty objection, but rather because if you considered the statement, you would violate one of the procedural requirements of R.C.M.405. That does not mean, however, that you should prohibit testimony about the statement or evidence documenting the statement from becoming part of your report. While the Rules for Courts-Martial prevent you from considering certain evidence, the GCMCA is not subject to those same rules. R.C.M. 601(d)(1) specifically authorizes the GCMCA to consider information from “any source” in deciding whether to refer charges to trial by general court-martial as long as “there has been substantial compliance with the preliminary hearing requirements of R.C.M. 405.” R.C.M. 601(d)(2)(A). It’s your job to see to it that the preliminary hearing is conducted in substantial compliance with R.C.M. 405, but you should attach evidence, as long as it’s not

impermissible evidence such as MRE 412 or MRE 513 evidence, even if you cannot consider it. Of course, you should identify what you did not consider and why it is in your report.

8.5.1. Written Objections. The DC as well as the GC and VC are required to file any objections in writing. R.C.M. 405(i)(7). You are required to note any objections in the report. A best practice is to require all objections to be filed with you within 24 hours after the close of the preliminary hearing, as the script suggests. Requiring that the objections be filed in writing reduces unnecessary objections, forces the proponent to articulate the objection, gives you the benefit of calm consideration, and prevents you from becoming a stenographer for counsel.

8.5.2. Fair and Thorough Proceedings. The new aspect of Article 32 proceedings that has been in place since EO 13669 was signed on 13 Jun 2014 is that you now stand in the place of a military judge with respect to the Military Rules of Evidence that apply to the preliminary hearing as articulated in R.C.M. 405(h). However, for all other objections under rules that do not apply at the preliminary hearing, although you don't rule on these objections, you certainly are expected to correct any deficiencies in the conduct of the proceedings when they are brought to your attention and you think it appropriate. For example, suppose the GC presents you with a copy of a witness's statement obviously taken from an OSI or security police report. Defense objects, citing hearsay as the basis for the objection. Although hearsay is not a valid objection for Article 32 preliminary hearings, you should realize that you are not authorized to consider this statement until you have first determined that the evidence is relevant to the limited scope and purpose of the preliminary hearing and not cumulative. Be sure to explain what you did in your report, i.e., that you determined the statement to be relevant and not cumulative, and your facts and rationale for that finding. Don't leave the SPCMCA, GCMCA, and their staffs wondering whether you complied with R.C.M. 405.

8.6. Sealed Exhibits and Proceedings. You have the authority to order exhibits, proceedings, or other matters sealed as described in R.C.M. 405(i)(8) and 1103A. Further, be mindful of a victim's right to privacy pursuant to Article 6b(a)(8), UCMJ.

8.7. Handling Other Offenses. Another area that frustrates many convening authorities is the haphazard way many PHOs handle the problem of other uncharged offenses that are discovered during the preliminary hearing. If evidence adduced during the preliminary hearing indicates the accused committed an uncharged offense, you may examine evidence and hear witnesses relating to the subject matter of such offense and make the findings and recommendations enumerated in R.C.M. 405(e)(1) regarding such offense without the accused first having been charged with the offense. The accused's rights under R.C.M. 405(f)(2), where the accused must be present at the preliminary hearing, must be informed of each uncharged offense investigated, and must be afforded the opportunity for representation, cross-examination and presentation of anything in his or her own behalf and where it would not cause undue delay to the hearing are the same with regard to both charged and uncharged offenses.

8.7.1. Procedure. When considering uncharged offenses identified during the preliminary hearing, the PHO shall inform the accused of the general nature of each uncharged offense considered, either at the outset of the hearing or at any point during the hearing where the potential offense is revealed, and otherwise afford the accused the same opportunity for representation, cross-examination, and presentation afforded during the preliminary hearing of any charge offense. Specifically, tell the accused and his counsel that the hearing or the presented evidence has disclosed that the accused is reasonably suspected of offenses other than the ones charged and identify these offenses to the accused and counsel. Then tell all parties that now the preliminary hearing is enlarged to encompass the additional offense.

8.7.2. Consideration of New Offense. Proceed with the preliminary hearing of the new offenses. If the evidence presented supports the offense, your report should include appropriate

recommendations concerning referral of the new charge prior to anyone forwarding them for referral.

8.8. Reopening the Preliminary Hearing. It will be necessary to reopen the preliminary hearing to address unconsidered aspects of the case if additional charges are preferred after the first preliminary hearing has been completed, if there has been a “major” change in a specification, or if additional evidence is required. *U.S. v. Louder*, 7 M.J. 548 (A.F.C.M.R. 1979).

8.8.1. **Procedure.** You should convene the preliminary hearing as before and re-advise the accused of his rights and the nature of the charges. The second hearing should then proceed in the same manner as the first.

8.8.2. **The Report.** If the DD Form 457, Preliminary Hearing Officer’s Report, was not completed prior to the reopening, include all matters presented in one report. If the first report was completed, submit the additional matters as an addendum to the original package without accomplishing another DD Form 457.

8.9. Recording of the Preliminary Hearing. Pursuant to Article 32(e), all preliminary hearings must be recorded by a suitable recording device. The GC shall ensure the preliminary hearing is recorded by a suitable government recording device. A suitable government back-up recording by the GC is also allowed. No other recordings of the preliminary hearing are allowed. A verbatim transcript is not required to be completed by the government following the hearing. IAW AFI 51-201, paragraph 4.1.8, a verbatim transcript of the hearing may only be authorized with approval of the SJA.

8.9.1. **Providing the Recording to the Victim.** The GC shall provide the PHO a copy of the recording of the hearing as soon as practicable following the conclusion of the hearing for attaching the PHO report. Upon written request from the victim or VC, the victim will be provided a copy of, or access to, the recording immediately following the preliminary hearing. (The GC will also provide a copy of the recording to the DC at the same time.) In exceptional circumstances, the SJA may delay immediate release to the victim or DC. If immediate release is delayed by the SJA, the SJA shall put in writing, and provide to the victim, VC (if applicable) and the DC, the reasons for the delay and the expected date the recording will be released. The copy of the recording provided to the victim and the DC shall not contain sealed portions of the hearing. You will assist the GC and court reporter or paralegal responsible for recording the preliminary hearing with ensuring that closed sessions are noted for ease in delineating closed sessions on the recording. The recording is subject to defense discovery. R.C.M. 914.

8.9.2. **Reducing the testimony to writing.** In the event the technology used to record the preliminary hearing fails, you will be required to include in your report a summary of the substance of each witness’s testimony. As a result you should take notes as each witness testifies. Your notes of testimony should be preserved until the end of trial. *See* R.C.M. 405(i)(3)(A) *Discussion*. If the recording fails, you should reduce the substance of the testimony of each witness to writing. The witness may sign and swear to the truth of their respective testimonies. You may also sign the statement indicating that the summary is true and accurate.

8.9.3. **Recordings by defense, victim, or others.** Recording the testimony of witnesses at an Article 32 preliminary hearing, other than the recording being accomplished by the government, is not addressed in the Manual for Courts-Martial. If testimony is recorded, a Jencks Act issue may arise, even when the government recording or summarized testimony is prepared and included in the report. The Jencks Act requires the government to provide the defense “any statement of the witness that relates to the subject matter concerning which the witness has testified.” R.C.M. 914. Therefore the media or stenographic notes must be retained.

Id. This will create a potentially touchy issue because the tapes should be maintained by the government. You should inform others that perform the recording that the original tapes will need to be turned over to the government for safekeeping.

8.9.3.1. **Recording by defense or victim.** You should not allow the DC, the accused, VC, or the victim to accomplish their own recording. Regardless, you should make clear to all that the government's recording is the official version of the preliminary hearing.

8.9.3.2. **Recording by others.** You may prohibit spectators or news media from tape recording, videotaping, or filming the testimony or other parts of the preliminary hearing as part of your duty to conduct the hearing in a fair and orderly manner.

9. PREPARING THE REPORT

9.1. Role as the Preliminary Hearing Officer. Throughout the preliminary hearing, you should have in mind your statutory obligation to conduct an "impartial" hearing and to determine whether there is probable cause to believe an offense has been committed and the accused committed the offense; whether a court-martial would have jurisdiction over the offense and the accused; whether the form of the charges is proper; and your requirement to make a recommendation to the convening authority as to the disposition of the charge.

9.2. Contents of the Report. You will make a written report of the preliminary hearing to the convening authority. Your PHO appointment letter will specify when the report is due to the convening authority who directed the preliminary hearing. The report shall include the following IAW R.C.M. 405(j):

- The qualifications of the PHO;
- The identity, organization, and contact information for DC. Whether DC was present throughout the taking of evidence, or if not, present the reason why;
- The identity, organization, and contact information for VC. Whether or not VC was provided with copies of the charge sheet, PHO appointment letter, and notice of/access to any evidence produced from his/her client;
- An explanation of any delays in the preliminary hearing;
- The manner in which the hearing was recorded and who was responsible for conducting the recording;
- A review of the format and personal data on the charge sheet;
- Whether a *subpoena duces tecum* was requested and whether or not GC failed to issue it;
- Whether there was a military witness request, whether the request was found relevant, not cumulative, and necessary. Whether the commander for the military witness determined the witness was available to testify and by what means;
- A discussion of relevant victim issues including, whether victim chose not to testify; whether victim requested to be present during the testimony of other witnesses and if so

the ruling of the PHO on the victim's request; whether MRE 412 issues were applicable; whether MRE 513 issues were applicable; whether sealed records are attached to the original PHO report; and GC and/or DC objections to those issues;

- Any miscellaneous issues that arose, e.g. media interest;
- A case synopsis;
- A discussion of the elements of the offense(s) charged;
- A discussion of the evidence and a statement that an essential witness may not be available for trial;
- A discussion of relevant legal issues;
- Your determination as to whether there is probable cause to believe the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing occurred;
- Your determination as to whether there is probable cause to believe the accused committed the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing;
- Your determination as to whether a court-martial would have jurisdiction over the offense(s) and the accused;
- Your determination as to whether the charge(s) and specification(s) are in proper form;
- Your recommendations regarding disposition of the charge(s); and
- A chronology of events relevant to your duties as a PHO.

9.3. Format. The DD Form 457 was originally intended to serve as a complete report of the preliminary hearing. Thus, you should not have to supplement it to any great degree. Do *not* repeat in your narrative anything that is adequately reported on the form.

9.3.1. Summarize the Facts. A brief factual synopsis of the case sets the stage. Usually, a chronological account is best. When present, briefly state the facts which establish the elements of each offense. Cite the exhibits that show each fact you state in the summary.

9.3.2. Analyze the Evidence. An analysis of the elements of proof and the available evidence is very helpful. Do not simply copy the elements for no purpose; they are the threshold for your analysis. Obviously, if an element of proof is missing, you should not conclude that a charge is warranted by the evidence. But remember that you can consider hearsay in deciding whether all the elements of proof are met. You should also consider the credibility and demeanor of any witnesses who testify. If relevant, include your observations in your report.

9.3.3. Note the Legal Issues. Although you are not required to rule on the admissibility of evidence, with the exception of evidence that falls within the purview of the rules contained within R.C.M. 405(h), you should note inadmissibility of evidence in your report whenever you are aware that evidence may not be admissible at trial. Thus, you should **briefly** discuss any evidentiary or other legal issues you see. Do not go into a lengthy legal analysis. Cite the proper

authorities to save others unnecessary labor, but keep your explanation **brief**. In determining whether the charges are in proper form, you should also consider whether any of the charges are multiplicitous on their face and therefore subject to a preliminary motion to dismiss. It is part of your job to determine whether there's been an unreasonable multiplication of charges. Please note that unreasonable multiplication of charges applies to both findings and sentencing. *U.S. v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). That is, "if an offense is multiplicitous for sentencing it must necessarily be multiplicitous for findings as well." *Id.*

9.3.4. **Recommending changes to the charges.** After hearing and seeing all the evidence, you may note some errors in the charges or wish to make recommendations concerning the referral of the charges to a court-martial; e.g. the date of an alleged offense is inaccurate or a lesser-included offense is warranted because evidence is lacking on a certain element of the offense actually charged. Or, in the extreme, a specification may not be supported at all by the evidence. Remember, you may not make any changes to the charges. You must make **recommendations** which the GCMCA may later accept. When making recommendations, be sure to state specifically what evidence (or lack thereof) supports them and then determine whether they are "minor," or "major" changes.

9.3.4. 1. **Minor changes.** R.C.M. 603 deals with changes to charges and specifications which do not require redrafting or reswearing by the accuser. "Minor" changes are defined as any changes except one which adds a party, offense or substantial matter not fairly included in the charges previously preferred or which is likely to mislead the accused as to the offenses charged. *U.S. v. Sullivan*, 42 M.J. 360 (C.A.A.F. 1995); *U.S. v. Page*, 43 M.J. 804 (A.F. Ct. Crim. App. 1995). When the convening authority makes a minor change, the Article 32 preliminary hearing does not need to be reopened.

9.3.4.2. **Major changes.** Any changes that are not "minor" are considered "major" by definition. R.C.M. 603(d). For example, converting a specification that does not state an offense into one that does is a major change requiring charges to be resworn and an additional preliminary hearing to be conducted. *U.S. v. Garrett*, 17 M.J. 907 (A.F.C.M.R. 1984). Changing a date or place in the specification is usually "minor" unless a clearly different offense than that contemplated by the accuser results. However, if changing a date affects jurisdiction over the offense, it would be considered a "major" change. If a change is major, the recommendation should be to reopen the Article 32 preliminary hearing (*See supra*, para. 8.8), unless the substance of the charge or specification as amended or changed was not covered in the previous hearing. R.C.M. 603, *Discussion*.

9.3.5. **Objections.** You are required to note in your report objections made during the proceedings by either party. *See* R.C.M. 405(i)(7). The attached Article 32 Script gives you a procedure for handling objections that will facilitate your report writing. Basically, you should advise the parties that they will be required to put their objections in writing. Once the written objections are received, you should respond to each in your report and cure any deficiencies, if necessary.

9.3.6. **Delays.** You should explain any delays in submitting your report in excess of the number of days authorized in the letter of appointment (usually eight days). A brief chronology of your activities should suffice. If DC requested and was granted one or more delays, be sure to include the defense requests and your replies in the report. Remember, you must always have counsel put delay requests in writing for inclusion in the report.

9.4. Assembly. Like records of trial, reports of preliminary hearing under Article 32, UCMJ, are expected to follow a certain sequence (up to a point). That sequence follows:

- PHO Appointment letter. This letter is not a numbered exhibit.

- First indorsement to DD Form 458 (Charge Sheet). The first indorsement is not a numbered exhibit.
- DD Form 457 (PHO Report), its supplemental pages, and exhibits.
- Exhibits. A copy of the charge sheet is always PHO Exhibit 1. Do not use the original; it along with court member data will be placed on top of everything else when your report is forwarded to the GCMCA. Other exhibits and documents such as witness statements and reports you considered (and those which you did not consider) should form the rest of the report. If there are any exhibits that you did not consider, you note this in your report. Paginate exhibits when they have more than one page. *See* AFI 51-201, para. 4.1.13.

9.4.1. **Exhibits containing child pornography.** Under no circumstances should you attach copies of exhibits that may constitute evidence of child pornography. You should provide a recital of the substance or nature of such evidence sufficiently detailed to aid the convening authority in determining whether there is sufficient evidence to warrant referring the charges to trial. Additionally, you should note where the evidence is maintained in evidence storage and arrange through the local SJA to have the evidence made available by the evidence custodian for the appropriate convening authority level to review if necessary for proper fulfillment of his or her duties. DC and the accused must not be given copies of such evidence, either prior to the preliminary hearing or in copies of the preliminary hearing report.

9.4.2. **Sealed Exhibits and Proceedings.** If your report contains exhibits, proceedings, or other matters ordered sealed by you in accordance with R.C.M. 405(i)(8) and 1103A, GC shall cause such materials to be sealed so as to prevent unauthorized viewing or disclosure.

9.5. Reproducing the Report. You need not reproduce the report, but you must give a report of such quality that all of it can be reproduced clearly and legibly. It goes to a convening authority and must be carefully considered before deciding upon disposition of the case. Your report should establish your craftsmanship, because that establishes your credibility. Therefore:

- Consider having someone else proof your report. Although you should always use a spell checker, it cannot catch all grammatical errors;
- Get the originals, if necessary, from which to have readily **legible** copies made;
- Consider having statements in poor handwriting typed and attach them behind the statements;
- Ensure there are no copies of exhibits that may constitute evidence of child pornography;

9.6. Distribution of the Report. R.C.M. 405(j)(4) obligates you to cause the report to be delivered to the convening authority who directed the report.

9.6.1. **Local SJA.** Normally, your obligation ends when you deliver your report to the local SJA of the convening authority. The SJA then becomes responsible for making any other required copies and distributing them. The SJA may, however, decide that your report is inadequate and ask you to clarify certain aspects of it. He or she cannot, however, influence your independent judgment.

9.6.2. **Accused's Copy.** R.C.M. 405(j)(4) obligates the convening authority who directed the preliminary hearing to "promptly cause a copy of the report to be delivered to each accused." The local SJA normally performs this function for the convening authority so you

don't have to worry about it. Note that the requirement is to serve a copy on the accused - not the accused's DC. However, it may be a good business practice to serve a copy of the report on the DC as well. Local SJAs should get in the habit of serving the copy on the accused *and* simultaneously notifying the DC that they have done so. Finally, a signed and dated acknowledgment of service on the accused should be included when forwarding the report. *See* AFI 51-201, para. 4.1.4.

9.6.3. **Victim's Counsel.** Upon request by a victim in the case, or VC, the convening authority that directed the hearing, or the SJA on behalf of the convening authority, will promptly cause a FOIA compliant copy of the report to be served upon the requestor.

9.7. Defense Counsel's Right to Object. Service of a copy of the report on the accused starts the running of the 5-day period for DC to object to the report. R.C.M. 405(j)(5); AFI 51-201, para. 4.1.4. The day the report is delivered to the accused is not counted in calculating the 5-day period. *See* R.C.M. 103(9). Failure to object to matters included or omitted from the report "will constitute a waiver of such objections in the absence of good cause for relief from the waiver." R.C.M. 405(k) and *Discussion*. The convening authority, or the PHO, if the convening authority has delegated such authority, may extend the period of time during which the DC may object to the report. The SPCMCA is not required to wait for expiration of the 5-day period before deciding whether or not to forward the charge and report of preliminary hearing. R.C.M. 405(j)(5). If the charges have already been forwarded when timely objections are received, the objections should be sent through the SPCMCA through the GCM SJA to the GCMCA.

10. DUTIES AFTER SERVICE AS THE ARTICLE 32 PHO

10.1. Disqualification. A PHO is generally disqualified to act later in the same case in any other capacity. R.C.M. 405(d)(1).

SUMMARY

R.C.M. 405 is not comprehensive enough to allow a preliminary hearing officer to begin a preliminary hearing with no other information. The purpose of this guide is to fill that gap so that Article 32 preliminary hearing officers can promptly and diligently conduct the preliminary hearing to which they are detailed, correctly receive and make recommendations regarding the evidence for review by others, and correctly resolve the issues which most frequently confront them.

SECTION II
PRELIMINARY HEARING OFFICER'S ARTICLE 32 SCRIPT

INTRODUCTION:

PHO: Good (morning/afternoon). This Article 32 preliminary hearing will come to order. This hearing is being recorded by the government. Per Article 32 UCMJ, a crime victim will be granted access to the recording as prescribed in the Manual for Courts-Martial and governing Air Force rules.

PHO: I am (Grade)(Full name). I am assigned to _____. The Commander of the _____ Wing, (Grade) (Name), appointed me to conduct this preliminary hearing regarding (a charge/certain charges) against (Grade) (Full name). Are you (Grade) (Full name), the accused in this case?

ACC: _____.

PRELIMINARY ADVICE:

(Use a copy of DD Form 457, dated Dec 14)

PHO: I need to cover certain preliminary matters with you. First, I will cover your right to counsel at this preliminary hearing. You have the right to be represented by your detailed defense counsel, (Grade) (Name), or you may be represented by military counsel of your own selection, if the counsel you request is reasonably available. Military counsel is provided to you free of charge. You also have the right to be represented by a civilian counsel provided by you at your own expense. Civilian counsel may represent you alone or along with your military counsel.

Do you understand these rights?

ACC: _____

PHO: By whom do you wish to be represented?

ACC: _____

PHO: I would like counsel to introduce themselves and state their qualifications. Government?

[Counsel for the Government must be detailed to all Article 32 preliminary hearings. The senior counsel for the government will be abbreviated as GC. The assistant counsel for the government will be abbreviated AGC.]

GC: I am (Grade) (Full name). I am assigned to AFLOA/JAJG at _____. (Rank)(Full name of Detailing Authority) detailed me as counsel for the government for this preliminary hearing. I am qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice.

AGC: I am (Grade) (Full name). I am assigned to the _____ AFB legal office. (Rank)(Full name of Detailing Authority) detailed me as assistant counsel for the government for this preliminary hearing. I am (qualified and certified) (qualified but not certified) under

Article 27(b) and (have been/have not been) sworn under Article 42(a), Uniform Code of Military Justice.

[Counsel for the government who are not certified under Article 27(b) will be sworn by the preliminary hearing officer using the below oath:

PHO: "Do you (swear) (affirm) that you will faithfully perform all the duties of counsel for the government in this preliminary hearing (so help you God)?"]

PHO: Thank you, (Grades) (Name(s) of GC). Are counsel for the government aware of any grounds that might disqualify you from this hearing?

GC/AGC: No sir/ma'am.

PHO: Would counsel representing the accused please identify your (self/selves) for the record and state your qualifications?

DC: I am (Grade) (Full name), Area Defense Counsel at _____ assigned to AFLOA/JAJD. I am qualified and certified under Article 27(b) and sworn under Article 42(a), UCMJ. (I have not)/(No member of defense has) acted in any manner which might tend to disqualify (me/us) in this hearing.

CIV DC: I am (Mr/Ms) _____. I am an attorney. My office is located at _____. My mailing address is _____. My office phone number is _____. I am a member in good standing of the bar of the state of _____.

(Civilian counsel must be sworn)

PHO: Do you (swear/affirm) that you will faithfully perform all the duties of defense counsel in the case now in hearing [so help you God]?

CIV: I do.

(If a special victims' counsel, victims' legal counsel or other victim's counsel are participating in the hearing)

PHO: Would counsel representing (Rank, if military) (Full Name), (please approach the podium) identify yourself for the record and state your qualifications?

SVC/VLC: I am (Grade) (Full name), Special Victims' Counsel/Victim's Legal Counsel at _____. I am qualified under Article 27(b) and sworn under Article 42(a). I have not acted in any manner which might tend to disqualify me in this hearing.

CIV VIC COUNSEL: I am (Mr/Ms) _____. I am an attorney. My office is located at _____. My mailing address is _____. My office phone number is _____. I am a member in good standing of the bar of the state of _____.

(Civilian victim's counsel must be sworn)

PHO: Do you (swear/affirm) that you will faithfully perform your duties when representing (Grade, if Military)(Name of Crime Victim) in this preliminary hearing [so help you God]?

PHO: It appears that counsel representing the accused (has/have) the requisite qualifications required under Article 32 and I will so note in my report.

I am qualified and certified under Article 27(b) and sworn under Article 42(a), UCMJ.

(If PHO is not certified under Article 27(b), a Legal Advisor certified under Article 27(b) must be detailed. The Legal Advisor should identify himself or herself and state their qualifications. The PHO or counsel for the government should also explain why it was 1) not practicable to appoint a certified judge advocate as PHO or 2) why there were exceptional circumstances in the interest of justice that required the convening authority to appoint an uncertified judge advocate as PHO. Uncertified PHOs must be administered an oath by the Legal Advisor).

I (am/am not) equal to or senior in grade to [all] military counsel detailed to represent the government and the accused.

(If PHO is not equal to or senior in grade to all military counsel, the PHO or counsel for the government should explain why it was not practicable for the PHO to be equal to or senior in grade to all military counsel.)

I have not acted in any way that would disqualify me from serving as the preliminary hearing officer. [My involvement thus far in this case has consisted of _____. (e.g., reviewing the charge sheet and appointment letter, setting a preliminary hearing date, having a teleconference with the counsel to discuss logistics of the hearing, reviewing counsel for the government's/defense counsel/victim's counsel request for closed sessions)] Are counsel for either side aware of any grounds that might disqualify me from conducting this hearing?

(The Article 32 statute and R.C.M. 405 do not provide a per se exclusion or disqualification if the PHO is assigned to the legal office that supports the SPCMCA or is rated by the SPCMCA or his/her SJA)

GC: The government is aware of none.

DC: The defense is aware of none.

PHO: (Accused's Grade) (Name), please remain seated throughout these proceedings. Do you have a copy of the charge sheet(s) in front of you?

The charge(s) that I have been appointed to conduct a preliminary hearing on are contained on (a charge sheet/charge sheets) dated _____ [and _____]. Basically, you are accused of the following offense(s):

(e.g.: Desertion from your unit from _____ to _____; Use of cocaine at or near _____ AFB on or about _____.)

PHO: (Accused's Grade) (Name), would you like me to read the formal charges to you?

ACC: _____.

(If the answer is “yes,” PHO then reads the charges to the accused.)

(PHO checks off block 10a on the DD Form 457.)

PHO: You have been accused of these charges by (Grade) (Full name), (commander of the _____squadron).

(PHO checks off block 10b on the DD Form 457.)

PHO: Now I will inform you of your rights during these proceedings. If there is any portion of these rights that you do not understand, please ask me about it.

First, you have all the rights afforded you by Article 31 of the Uniform Code of Military Justice. Article 31 reads as follows:

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received as evidence against him in a trial by court-martial.

Basically, what that all means is that you have the right under Article 31, UCMJ, not to incriminate yourself. This means that you have the right to remain silent during this hearing and at other times as well. You don't have to say or do anything that might tend to incriminate you. In addition, if you do say or write something and give up that right, you should know that whatever you say can be used against you in these proceedings as well as in a trial by court-martial and also in administrative proceedings.

Do you understand these rights?

ACC: _____

(PHO checks off block 10c of the DD Form 457.)

PHO: I now will advise you of the purposes of this preliminary hearing.

This preliminary hearing is limited to an examination of those issues necessary to determine whether:

- 1) There is probable cause to conclude that an offense or offenses have been committed and that you committed them;**

- 2) To determine whether a court-martial would have jurisdiction over the offense(s);
- 3) To consider the form of the charge(s); and
- 4) To recommend the disposition that should be made of the charge(s).

This preliminary hearing is not intended to serve as a means for discovery.

Do you have any questions about the purposes of this preliminary hearing?

ACC: _____.

(PHO should check off block 10d on the DD Form 457.)

PHO: You also have the right to be present with your counsel during this hearing throughout the taking of evidence. However, if you are voluntarily absent or disruptive, your right to be present may be considered to be waived.

Do you understand this right?

ACC: _____.

(PHO should check off block 10e of the DD Form 457.)

PHO: You have the right to notice of any witnesses that the government intends to call at this preliminary hearing.

I expect the following witnesses to testify:

PHO: Do you understand this right?

ACC: _____.

PHO: You also have the right to a copy of or access to any written or recorded statement made by those witnesses that relate to the subject matter of any charged offense that are in the possession of the government.

PHO: Do you understand this right?

ACC: _____.

PHO: You have the right to notice of, and reasonable access to, any other evidence that the government intends to offer at the preliminary hearing.

I expect the counsel for the government to offer the following evidence:

PHO: Do you understand this right?

ACC: _____.

PHO: You have the right to notice, and reasonable access to, evidence that is within the possession or control of counsel for the government that negates or reduces your degree of guilt for any offense charged.

Do you understand this right?

ACC: _____.

(PHO should check off block 10f of the DD Form 457.)

PHO: You also have the right to cross-examine any witnesses called by the counsel for the government on matters relevant to the limited scope and purpose of this preliminary hearing.

Do you understand this right?

ACC: _____.

(PHO should check off block 10g of the DD Form 457.)

PHO: You also have the right to present matters in defense and mitigation relevant to the limited scope and purpose of this preliminary hearing. This means, subject to the rules of evidence governing this hearing, you may present matters that show that you are not guilty of any offense that you're charged with, or matters which show that your guilt is in a lesser degree than that alleged. Matters in mitigation are defined as matters that may serve to explain the circumstances surrounding a charged offense.

Do you understand this right?

ACC: _____.

(PHO should check off block 10h of the DD Form 457.)

PHO: You also have the right to make an unsworn or sworn statement relevant to the limited scope and purpose of this hearing. You can make your statement either orally or in writing by yourself or through counsel - the choice is yours. Remember, however, as I advised you before, anything you say in a sworn or unsworn statement - even if it's only in writing and you don't actually say it - can be used against you in a trial by court-martial.

Do you understand this right?

ACC: _____.

(PHO should check off block 10i on the DD Form 457.)

PHO: That completes my advice to you of your rights during these proceedings.

MENTAL RESPONSIBILITY:

PHO: Does either counsel feel there are grounds to believe that the accused was not mentally responsible at the time of the alleged offense(s) and/or not competent to participate in (his/her) defense? (If so consult R.C.M. 706)

DC: _____.

GC: _____.

ARTICLE 32 PROCEDURES:

PHO: Now, let me go over with you the procedures I will use to conduct this preliminary hearing. First, (the counsel for the government) will call any relevant witnesses and offer evidence relevant to the limited scope and purpose of this hearing. Defense counsel will be given an opportunity to cross-examine these witnesses after they have testified. Defense counsel will also be allowed to examine any evidence offered. I will explain in a minute how I intend to handle objections.

Second, after the government completes its presentation, the defense will be permitted to call witnesses and offer evidence which is relevant to the limited scope and purpose of this hearing. Any defense witness will be subject to cross-examination by counsel for the government.

I am permitted to ask questions of the witnesses. If I believe that additional evidence is necessary to meet the specific requirements of this hearing then I may provide the counsel for government and defense counsel an opportunity to present additional testimony or evidence relevant to the limited scope and purpose of this hearing.

Any victim's counsel will be allowed to appropriately advocate for his/her client during the hearing. For example, the victim's counsel may ask that I close all or part of the proceedings to the public, seal records, or redact personally identifiable information such as social security numbers or date of birth. The victim's counsel may also object during their client's testimony if a question has been asked which is outside the scope of this preliminary hearing or which violates evidentiary rules in effect for this hearing.

HANDLING OBJECTIONS:

PHO: I will handle any objections in the following fashion. This preliminary hearing does not require me to rule on the admissibility of evidence like a military judge does at trial. But I will rule on objections on matters related to relevancy, cumulativeness, necessity, the limited scope and purpose of this preliminary hearing, and the rules of evidence that do apply to this hearing.

I will consider hearsay testimony and evidence if I determine it is reliable and relevant to the limited scope and purpose of this preliminary hearing.

Generally, the Military Rules of Evidence do not apply in these proceedings. Those that do apply are the rule prohibiting compulsory self-incrimination, the rule of privilege for any mental examination of the accused, the rule on degrading questions, the rule requiring that a suspect who is subject to the code be warned of rights afforded by Article 31 before being questioned, [the rule (M.R.E. 412) regarding inadmissibility of evidence of a victim's

past sexual behavior or alleged sexual predisposition however the exception under M.R.E. 412(b)(1)(C) shall not apply], and the rules on privileges contained in Section V of the Military Rules of Evidence, except for M.R.E. 505(f)-(h) and (j); 506(f)-(h), (j), (k), and (m); and 514(d)(6) shall not apply.

OBJECTIONS MUST BE IN WRITING TO BE PRESERVED:

PHO: I am required to note objections in my report of preliminary hearing. But I am also allowed to require that a party making an objection file the objection in writing. So, the rule we will follow in these proceedings is that if any counsel that makes an objection they must file that objection with me in writing within 24 hours after the close of this preliminary hearing. Are there any questions?

GC: _____.

DC: _____.

EXAMINATION OF WITNESSES AND EXHIBITS:

(if a Court Reporter or Interpreter are detailed to the hearing)

PHO: (Mr./Ms.) (Name) has been appointed (reporter/interpreter) for this hearing and (has been previously sworn/will be sworn):

If not previously sworn, administer the following oath: Do you (swear/affirm) that you will faithfully perform the duties of (reporter/interpreter) to this hearing, so help you God?

CR/INT: I do.

PHO: Counsel for the Government, do you have any documentary evidence to present?

(Counsel for the government shall identify the need for any closed sessions for evidence being offered under M.R.E.s 412, 513, 514. The PHO and parties will comply with all necessary procedures, including providing the victim/patient and if applicable VC a reasonable opportunity to be heard).

GC: I offer PHO Exhibit ____, (describe exhibit).

PHO: Defense, any objection.

DC: _____.

PHO: Counsel for the Government, how do you respond to the objection?

PHO: (The objection is (sustained/overruled). I will/will not consider PHO Exhibit __).

(Defense you may submit that objection in writing as described earlier. I will note in my report whether I considered PHO Exhibit __).

PHO: Counsel for the Government, you may call your first witness.

GC: I call as the first witness (Grade) (Full name). The witness will testify (live/telephonically/via video teleconference).

GC: Do you (swear/affirm) that the evidence you are about to give shall be the truth, the whole truth, and nothing but the truth [so help you God]?

WIT: I do.

GC: Please state your full name [and Grade].

WIT: _____.

GC: (Military) What is your organization and station?
(Civilian) In what city do you live?

WIT: _____.

GC: (Civilian) Does the counsel for the government or defense counsel have a way of contacting you in the event we need to speak with you again?

WIT: _____.

GC: Do you know the accused, (Grade) (Name), the subject of this preliminary hearing?

If this case is referred to trial, it may be some time before that trial is actually conducted. Do you know of any reasons, such as your PCS, TDY, date of separation, etc., you might not be available for trial?

WIT: _____.

[If there is a prior statement, having the witness adopt it is optional.]

GC: I show you PHO exhibit [] which purport to be _____ (identify exhibits-prior statements of the witness, items of evidence, etc.). Can you identify (this/these) item[s]?

WIT: _____.

GC: Do you wish to adopt (this/these) statement[s] as part of your testimony at this hearing?

(Note: The PHO should use caution to ensure personally identifiable information is not unnecessarily included in the evidence (like social security numbers, home addresses) unless relevant to the charged offenses.

WIT: _____.

GC: (direct examination relevant to limited purpose and scope of hearing.)

PHO: Defense counsel, you may cross-examine the witness.

DC: _____.

PHO: Counsel for the government, any re-direct?

GC: _____.

(Upon completion of the examination by the parties, the PHO may ask questions of the witness.)

PHO: Are there further questions from either side for this witness based on my questions?

GC: _____.

DC: _____.

PHO: Thank you for your testimony, you are excused. Your testimony was recorded and will be included as an attachment to my report.

(Proceed with other witnesses in the same fashion, giving the above oath.)

GC: The government has no further witnesses or evidence. The government rests.

PHO: Defense counsel, do you have documentary evidence to present?

(Defense Counsel shall identify the need for any closed sessions for evidence being offered under M.R.E.s 412, 513, 514. The PHO and parties will comply with all necessary procedures, including providing the victim/patient and if applicable VC a reasonable opportunity to be heard).

DC: I offer PHO Exhibit ____ (describe exhibit).

PHO: Counsel for the government, any objection.

GC: _____.

PHO: Defense Counsel, how do you respond to the objection?

PHO: (The objection is (sustained/overruled). I will/will not consider PHO Exhibit ____). (Government Counsel you may submit that objection in writing as described earlier. I will note in my report whether I considered PHO Exhibit ____).

PHO: Defense Counsel, you may call your first witness.

DC: I call as the first witness (Grade) (Full name). The witness will testify (live/telephonically/via video teleconference).

GC: Do you (swear/affirm) that the evidence you are about to give shall be the truth, the whole truth, and nothing but the truth [so help you God]?

WIT: I do.

GC: Please state your full name [and Grade].

WIT: _____.

GC: (Military) What is your organization and station?

(Civilian) In what city do you live?

WIT: _____.

GC: (Civilian) Does the counsel for the government or defense counsel have a way of contacting you in the event we need to speak with you again?

WIT: _____.

GC: Do you know the accused, (Grade) (Name), the subject of this preliminary hearing?

If this case is referred to trial, it may be some time before that trial is actually conducted. Do you know of any reasons, such as your PCS, TDY, date of separation, etc., you might not be available for trial?

WIT: _____.

DC: (direct examination relevant to limited purpose and scope of hearing, defense and mitigation.)

PHO: Counsel for the government, you may cross-examine the witness.

GC: _____.

PHO: Defense Counsel, any re-direct?

DC: _____.

(Upon completion of the examination by the parties, the PHO may ask questions of the witness.)

PHO: Are there further questions from either side for this witness based on my questions?

DC: _____.

GC: _____.

PHO: Thank you for your testimony, you are excused. Your testimony was recorded and will be included as an attachment to my report.

(after all defense witnesses have testified and defense evidence offered)

PHO: Does the accused wish to make a statement - sworn or unsworn?

DC: _____.

(If accused makes a sworn statement, the GC administers the oath.)

CLOSING:

PHO: That completes all the witnesses and evidence. Just so that everyone is aware of what documentary evidence I intend to consider, let me state for the record that I intend to consider the following documents:

PHO: Does either party have any objections to my consideration of these documents that have not already been stated?

GC: _____.

DC: _____.

PHO: [Very well, I will consider your objection. If you wish me to note that objection in my report, you must file it with me in writing within 24 hours.]

GC: _____.

DC: _____.

(The PHO may allow both sides to offer brief argument.)

PHO: This preliminary hearing is closed.

ATTACHMENTS

Attachment 1 – Letter of Appointment

MEMORANDUM FOR PRELIMINARY HEARING OFFICER

FROM: WG/CC

SUBJECT: Article 32 Preliminary Hearing, U.S. v. *(name, grade, squadron of accused)*

1. You are hereby designated as the Preliminary Hearing Officer (PHO) pursuant to Article 32, UCMJ, to conduct a preliminary hearing examining the attached charges against *(name, grade, and squadron of accused)*. The preliminary hearing is your primary duty until its completion. You shall ensure that you meet all requirements of serving as a PHO. You shall review the AFLOA/JAJM Article 32 Preliminary Hearing Officer's Guide, dated 18 June 2015, before beginning the preliminary hearing..
2. In conducting the preliminary hearing, you will comply with the provisions of Article 31, UCMJ, and Article 32, UCMJ, (as amended by Section 1702 of the FY14 National Defense Authorization Act (NDAA) and effective for preliminary hearings occurring on or after 26 December 2014 pursuant to Section 531(g)(1) of the FY15 NDAA).
3. As required by Article 32, the preliminary hearing will be recorded by the government. A copy of the recording will be provided to you following the close of the hearing. You are required to include in your report, at a minimum, a summary of the substance of all testimony. (Attaching a recording of the preliminary hearing to your report will satisfy this requirement.)
4. A verbatim transcript of the testimony of a witness will only be prepared with the approval of my Staff Judge Advocate.
5. Within two days of your appointment, you will issue a written memorandum, to the counsel for the government, the defense counsel, and victims' counsel providing guidance for the upcoming preliminary hearing under the Article 32 statute. A sample memorandum is found at Attachment 2 of the Article 32 PHO Guide.
6. Your report and recommendations using the revised DD Form 457, Preliminary Hearing Officer's Report, will be submitted within eight days through my Staff Judge Advocate (SJA) in an original and five copies.
7. The Article 32 preliminary hearing in this case is scheduled for _____. Pursuant to R.C.M. 707, you are hereby delegated authority to approve delays in the Article 32 hearing date. Your decision granting a delay must be noted in the report. Any delay beyond eight days in submitting your report will be fully explained in your report. My SJA will provide any required assistance and support.

Brigadier General, USAF
Commander

Attachment 2 – Letter to Counsel for the Government, Defense Counsel, and Victims’ Counsel

MEMORANDUM FOR GC
DC
VC

FROM: Article 32 Preliminary Hearing Officer

SUBJECT: Article 32 Preliminary Hearing - _____

1. This is to inform you that an Article 32 preliminary hearing examining the charge(s) against _____ has been set for _____, at _____ in the Legal Office courtroom, _____ AFB.
2. The uniform of the preliminary hearing will be _____.
3. Counsel for the Government (GC) shall ensure that the preliminary hearing will be recorded by a suitable government recording device.
4. No later than (*date that is 5 business days after date Article 32 appointing order is signed*) GC shall provide to the Defense Counsel (DC) the following information or matters:
 - a. Charge Sheet;
 - b. Article 32 appointment letter;
 - c. Documents accompanying the charge sheet on which the preferral decision was based;
 - d. Documents provided to the convening authority when deciding to direct the preliminary hearing;
 - e. Documents the government intends to present at the hearing; and
 - f. Access to tangible objects the government intends to present at the hearing.
5. Prior to the preliminary hearing, the GC shall provide to DC:
 - a. Notice of any witnesses the government intends to call at the preliminary hearing;
 - b. Subject to R.C.M. 405(h), copies of or access to any written or recorded statements made by the witnesses the government intends to call that relate to the subject matter of any charged offense;
 - c. Notice of, and reasonable access to, any other evidence the government intends to offer at the preliminary hearing; and
 - d. Notice of, and reasonable access to, evidence that is within the possession or control of counsel for the government that negates or reduces the degree of guilt of the accused for an offense charged.
6. No later than (*date established by PHO*) DC shall provide to GC the names of both proposed military and civilian witnesses whom the accused requests the government produce to testify at the preliminary hearing and the requested form of the testimony for each requested witness. DC shall also provide to GC a list of evidence under the control of the government and evidence that is not under the control of the government that the accused requests the government produce to the defense for introduction at the preliminary hearing.

- a. No later than *(date established by PHO)* GC shall respond that either 1) the government agrees that the requested witness testimony or evidence is relevant, not cumulative, and necessary; or 2) that the government objects on the grounds that the witness testimony or evidence is irrelevant, cumulative, or unnecessary.
- b. If the government objects, DC may request, in writing, that I determine whether a requested witness or evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing. The DC must file this request with me by *(date established by PHO)*.

7. [Add paragraph if there is a victim in the case] GC shall ensure that the victim(s) named in the specification(s) under consideration, and their victims' counsel, have been provided reasonable, accurate, and timely notice of the preliminary hearing. The victim(s) (has)(have) the reasonable right to confer with GC. The victim(s) (has)(have) the right not to be excluded from any portion of the preliminary hearing, unless I, after receiving clear and convincing evidence, determine that testimony by the victim would be materially altered if the victim heard other testimony at the preliminary hearing.

7. Should you have any questions concerning the Article 32 preliminary hearing, please contact me at _____.

Preliminary Hearing Officer

Attachment 3 – Invitation to Civilian Witness to Provide Testimony

__AW/JA

Address

Base/ZIP

Mr./Ms. _____

Address

City/State/ZIP

Dear Mr./Ms.

You are invited to appear as a witness in proceedings under Article 32, Uniform Code of Military Justice, against _____. You are requested to appear at the Office of the Staff Judge Advocate, _____, AFB, at _____ a.m. on _____.

You are entitled to witness fees and transportation allowances to cover your attendance. You may collect these fees and allowances after completing your testimony.

Please inform me by _____ if you can appear on this date so I can prepare the necessary paperwork in advance to pay you right after your testimony and so I can arrange your access to the installation. My phone number is _____.

[For witnesses who must travel long distances: If you require advance travel assistance, please let me know and I will arrange for government-provided transportation to and from the proceedings.]

[If international travel is required: If you do not have a passport, please let me know]

Sincerely

_____, Captain, USAF

Chief, Military Justice**

*** It is better practice to send these letters out well in advance of the Article 32 preliminary hearing. That is why we have used the chief of military justice's signature block. The counsel for the government may also send these invitations out, time permitting.*

Attachment 4 – Sample Article 32 Report of Preliminary Hearing

SAMPLE ARTICLE 32 REPORT OF PRELIMINARY HEARING

Continuation of Item 13a

Exhibit No.	Description	Location of Original
1	Charge Sheet	62 AW/JA
2	Air Force Drug Testing Laboratory Drug Testing Report	Attached
3	Order to Report for Urinalysis Testing	Attached
4	Copy of Urinalysis Log Book	Attached
5	Summarized Testimony of Lt Col O’Bryant	Attached
6	Availability Letter from CC of Lt Col O’Bryant	Attached
7	Summarized Testimony of MSgt O’Day	Attached
8	Availability Letter from CC of MSgt O’Day	Attached
9	Summarized Testimony of Amn Smith	Attached
10	Availability Letter from CC of Amn Smith	Attached
11	Summarized Testimony of Mr. March	Attached
12	Summarized Testimony of TSgt Jones	Attached
13	Availability Letter from CC of TSgt Jones	Attached
14	Summarized Testimony of TSgt Lambert	Attached
15	Availability Letter from CC of TSgt Lambert	Attached
16	Defense Objections	Attached

Continuation of Item 23, Preliminary Hearing Officer's Report, DD Form 457, December 2014

a. PHO Qualifications. The Preliminary Hearing Officer (PHO) is Major Thomas Bowie (myself). I am on active duty. I am a designated judge advocate who is certified under Article 27(b). I am senior in rank to the accused and equal or senior in rank to counsel for the government (GC) and defense counsel (DC). I am not aware of any grounds for bias, prejudice, or impropriety that would disqualify me from serving as a PHO in the present case. The DC did not object to me serving as the PHO.

b. Defense Counsel. The accused was represented by Captain James Morgan. Capt Morgan serves as the Area Defense Counsel at (_____) AFB). His contact number is (____). He is assigned to AFLOA. He was present throughout the hearing of evidence.

c. Victims’ Counsel. (No Victims’ Counsel (VC) represented the victim). (_____) provided Notice of Representation as a VC for (____). Thereafter, I directed GC to provide VC with copies of the charge sheet, PHO appointment letter, and notice of/access to any evidence procured from his/her client. I also directed GC to redact personally identifiable information from those materials. The VC’s contact number is (____). He is assigned to AFLOA. He was present throughout the taking of evidence.)

d. Delays. The date, place, and uniform of the day for the hearing were established by the Staff Judge Advocate (SJA), Lieutenant Colonel Herbert Hawthy. There were no objections or requested delays from the GC or DC (or the VC).

e. Recording. The hearing was recorded using a microcassette recorder. Staff Sergeant William Shears operated the recorder throughout the hearing and ensured the machine worked properly at various intervals. SSgt Shears is assigned to the wing legal office.

f. Format and Personal Data on the Charge Sheet. The charge sheet was reviewed by the PHO, GC, and DC. DC noted that the pay on the Charge Sheet was in error and needed correction to reflect the accused's pay at his new rank.

g. Subpoena Duces Tecum. The DC did not request books, papers, documents, data, electronically stored information, or other objects not under the government's control; therefore, no subpoena for documents was denied.

h. Military Witness Request.

(1) Prior to the preliminary hearing, DC requested that Technical Sergeant Henrietta Lambert, a laboratory technician at the AFDTL, Joint Base San Antonio, Texas, appear at the hearing to testify concerning the circumstances of testing irregularities noted in the AFDTL reports in this case. I found the witness relevant, not cumulative, and necessary. In accordance with R.C.M. 405, GC contacted Colonel John D. Carlson, the Commander, AFDTL, and asked him to make Technical Sergeant Lambert available for the hearing. Colonel Carlson stated he could not let Technical Sergeant Lambert travel because to do so would negatively affect the ability of the laboratory to perform its mission. Several other technicians were on leave, the laboratory was working extra shifts to analyze urine samples, and Technical Sergeant Lambert's absence from her job would cause a significant logjam at the laboratory and prevent the laboratory from quickly and efficiently testing urine specimens for the Air Force. Thus, he would not let her travel, but would allow her to testify telephonically from the laboratory. GC arranged for the telephonic testimony.

(2) DC also requested that Mr. Thomas Friedman appear at the hearing. Mr. Friedman apparently was present at a party attended by the accused and would testify that he saw persons unknown to him sprinkling a white powdery substance into a bowl of punch which was then consumed by many of the party attendees. I initially determined that Mr. Friedman's testimony was relevant, not cumulative, and was necessary for the limited scope and purpose of the preliminary hearing. GC contacted Mr. Friedman, invited him to appear at the hearing, and offered to pay necessary expenses. Mr. Friedman told GC that he would not attend the preliminary hearing under any circumstances and that the only way GC could get him to attend would be to subpoena him. Lacking subpoena power I had no alternative but to declare him not reasonably available to appear at the hearing. DC did not offer a prior statement of Mr. Friedman.

i. Relevant Victim Issues:

(1) None. (VC informed the PHO, GC, and DC that his client had chosen not to testify through a memorandum dated (PHO Exhibit ____)). However, the victim chose to observe the preliminary hearing from the gallery and the DC objected. Considering both GC and DC had interviewed the victim, the victim had provided a written statement to AFOSI agents, and there was no clear and convincing evidence that the victim's subsequent testimony would be materially altered if (he)(she) heard the other testimony at the proceeding, (he)(she) was

permitted to observe the entire preliminary hearing along with (his)(her) VC and Victim Advocate.)

(2) There were no relevant MRE 412 issues.

(3) There were no relevant MRE 513 issues and there are no sealed documents in the PHO Report.

j. Misc. Mr. Daniel Defoe from the local newspapers asked the PHO for a comment on the case. The reporter was referred to the SJA.

k. Case and Testimony Synopsis.

(1) On 20 May 2013, the Commander, 22nd Communications Squadron, decided that he would do an inspection of his entire squadron via urinalysis. He consulted with the chief of military justice, Capt Ginny Tea and the drug demand reduction program office and determined that Tuesday, 28 May, would be a good day for the inspection since it fell on the day after a 3-day weekend. (PHO Ex. 6, 8, 10)

(2) On 27 May 2013, the Commander met with his First Sergeant to go over the logistics of the inspection. *Id.* After finalizing the plan, the first sergeant printed out letters for each squadron member telling the member to report to the drug demand reduction program office NLT 0730 on 28 May 2013. (PHO Ex. 6, 8)

(3) On 28 May 2013, the Commander signed all of the letters and issued a squadron-wide recall at 0600 with a report time of 0700 at the 22nd CS headquarters building. Once all squadron members were present, the letters were issued to each person, to include the accused (PHO Ex. 4), and the squadron members boarded busses and were taken to the drug demand reduction program office. (PHO Ex. 8)

(4) The accused signed the urinalysis log book at 0745 and, while observed, provided a specimen in excess of 60 ml. (PHO Ex. 5) This specimen was subsequently tested at the Air Force Drug Testing Laboratory (AFDTL), Joint Base San Antonio, Texas which detected and confirmed the presence in it of benzoylecgonine, a cocaine metabolite. (PHO Ex. 3) The lab reported the positive result to base authorities on 7 July 2013, a medical officer reviewed the accused's medical files, and a single charge alleging cocaine use was preferred against the accused on 10 October 2013.

l. Elements of The Offense Charged. The specification of the charge alleges that the accused wrongfully used cocaine at or near McConnell Air Force Base, Kansas between 20-28 May 2013, in violation of Article 112a, UCMJ. The elements of this offense are:

(1) That at or near McConnell Air Force Base, Kansas, between 20-28 May 2013, the accused used cocaine;

(2) That the accused actually knew he used the substance;

(3) That the accused actually knew that the substance he used was cocaine or of a contraband nature, and

(4) That the use by the accused was wrongful.

m. Discussion of the Evidence. Potential issues in this case are the location of the accused's use and whether his use was knowing and wrongful. In regard to the location of use, since the use most likely occurred over a weekend, it is probably impossible to establish the exact location of the use. Master Sergeant O'Day stated that the accused had been present for duty the work week of 20-24 May and that he had reported to his duty section at 0730 on Tuesday, 28 May. (PHO Ex 8) Airman Smith, 62 CS, who lives down the hall from the accused in the Communications Squadron dormitory, said he saw the accused in the dormitory on Saturday afternoon. (PHO Ex. 10). Thus, I conclude there is good reason to believe that the offense occurred "at or near McConnell Air Force Base," as alleged. With respect to wrongfulness, the medical review officer testified/wrote that the accused had no prescription for cocaine and his Commander testified that the accused was not acting in a law enforcement capacity during the charged time frame. Moreover, as there was no evidence to the contrary introduced at the hearing, wrongfulness of the use may be inferred at this point, [MCM, Part IV, para 37c(5)], as may be knowledge of the presence of the controlled substance by the presence of the controlled substance in the accused's body [MCM, Part IV, paragraph 37c(10)].

n. Legal Issues. Defense objected in writing to one aspect of the preliminary hearing. (PHO Ex. 17). Defense counsel objected to hearsay contained in the testimony of Master Sergeant O'Day. This objection related to what Master Sergeant O'Day had been told by the accused's supervisor as to the accused's duty status during the week before the urinalysis. Hearsay may be considered in this preliminary hearing. R.C.M. 405(h).

o. Probable Cause Examination. Pursuant to Article 32(a)(2), UCMJ, I find the following:

(1) There (is) (is not) probable cause to believe an offense has been committed. There (is) (is not) probable cause to believe the accused committed the offense.

(2) A court-martial (would) (would not) have jurisdiction of the offense and the accused.

(3) The form of the charge (is) (is not) proper. I recommend that a minor (pursuant to R.C.M. 603) amendment be made to the form of the charge. I recommend that the words "between on or about" be inserted into the specification before the dates "20 May" and "28 May" appearing in the specification.

(4) I recommend the charge and its specification be disposed as follows: (_____).

p. Chronology:

10 October – Appointed Preliminary Hearing Officer

11 October – Set date and time for hearing

12 October – Hearing began at 1300.
Hearing ended at 1700.

13 October – Prepared brief synopsis of witness statements and wrote report.

14 October – Completed report. Delivered to SJA at 1600.

SUMMARIZED TESTIMONY OF LT COL PHILLIP J. O'BRYANT

Lt Col Phillip J. O'Bryant appeared at the preliminary hearing, was sworn, and testified substantially as follows:

I am the commander of the 22d Communications Squadron. On 20 May 2013, after consulting with the chief of military justice, Capt Ginny Tea, the head of the drug demand reduction program office, Mr. Johnny March, and my first sergeant, Sergeant O'Day, I decided to do a squadron wide urinalysis inspection on the Tuesday following the 3 day weekend over Memorial Day.

On 27 May 2013, I met with Sergeant O'Day to go over the logistics of the inspection. After finalizing the plan, the first sergeant printed out letters for each squadron members telling the member to report to the drug demand reduction program office NLT 0730 on 28 May 2013. (I.O. Ex. 5, 6)

On 28 May 2013, I signed all of the letters early in the morning and issued a squadron recall at 0600 with a report time of 0730 at the 22 Communications Squadron headquarters building. I have 30 military members in my squadron. Only 28 people were recalled because 2 were on leave. The letters were issued to each person, to include Sergeant Johnson. Once everyone had their letter, the squadron boarded busses and were taken to the drug demand reduction program office. (I.O. Ex. 6)

That's the last I heard until we received a report back from the lab that Sergeant Johnson's sample had tested positive for cocaine. Sergeant Johnson is a communications troop and not a security forces troop. I have not assigned him to any law enforcement role and I am not aware of him working for law enforcement. To my knowledge, none of my troops have a prescription for cocaine.

I declare under penalty of perjury that the foregoing is true and correct. Executed at _____ Air Force Base, _____, on _____ 20____.

/s/ Phillip J. O'Bryant
PHILLIP J. O'BRYANT, Lt Col, USAF

I declare under penalty that the foregoing is a true and correct (not verbatim/verbatim) summary of the testimony given by the witness. Executed at _____ Air Force Base, _____, on _____ 20____.

Preliminary Hearing Officer

Attachment 5 – DD Form 457, Preliminary Hearing Officer’s Report

PRELIMINARY HEARING OFFICER'S REPORT <i>(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)</i>			
1a. FROM: <i>(Name of Preliminary Hearing Officer - Last, First, MI)</i>	b. GRADE	c. ORGANIZATION	d. DATE OF REPORT
2a. TO: <i>(Name of Officer who directed the Preliminary Hearing - Last, First, MI)</i>	b. TITLE	c. ORGANIZATION	
3a. NAME OF ACCUSED <i>(Last, First, MI)</i>	b. GRADE	c. ORGANIZATION	d. DATE OF CHARGES
<i>(Check appropriate answer)</i>			
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I CONDUCTED A PRELIMINARY HEARING CONCERNING THE CHARGES APPENDED HERETO (Exhibit 1)			YES NO
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)			YES NO
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d) (2), 502(d)			YES NO
7a. NAME OF DEFENSE COUNSEL <i>(Last, First, MI)</i>	b. GRADE	8a. NAME OF ASSISTANT DEFENSE COUNSEL <i>(if any)</i>	b. GRADE
c. ORGANIZATION <i>(if appropriate)</i>		c. ORGANIZATION <i>(if appropriate)</i>	
d. ADDRESS <i>(if appropriate)</i>		d. ADDRESS <i>(if appropriate)</i>	
9. TO BE SIGNED BY ACCUSED IF ACCUSED WAIVES COUNSEL. <i>(If accused does not sign, preliminary hearing officer will explain in detail in item 23.)</i>			
a. PLACE		b. DATE	
I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED AT THIS PRELIMINARY HEARING BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL AT THIS PRELIMINARY HEARING.			
c. SIGNATURE OF ACCUSED			
10. AT THE BEGINNING OF THE PRELIMINARY HEARING, I INFORMED THE ACCUSED OF: <i>(Check appropriate answer)</i>			YES NO
a. THE NATURE OF THE CHARGE(S)			
b. THE IDENTITY OF THE ACCUSER			
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31			
d. THE PURPOSE OF THE PRELIMINARY HEARING			
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE			
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED THE GOVERNMENT TO PRESENT			
g. THE RIGHT TO CROSS-EXAMINE WITNESSES			
h. THE RIGHT TO PRESENT MATTERS IN DEFENSE AND MITIGATION			
i. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING			
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE <i>(If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)</i>			
b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL			
NOTE: If additional space is required for any item, enter the additional material in Item 23 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading. <i>(Example: "7c")</i> . Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."			

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH:				
NAME (Last, First, MI)	GRADE (If any)	ORGANIZATION/ADDRESS (Whichever is appropriate)	YES	NO
b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES IS ATTACHED				
c. AT THE HEARING, EVIDENCE WAS OFFERED UNDER MILITARY RULES OF EVIDENCE <input type="checkbox"/> 412 <input type="checkbox"/> 513 <input type="checkbox"/> 514 (Check appropriate box(es))				
d. PORTIONS OF THE HEARING WERE CLOSED				
e. SEALED MATERIALS ARE INCLUDED IN THIS REPORT				
13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH				
DESCRIPTION OF ITEM	LOCATION OF ORIGINAL (If not attached)			
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED				
14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOT COMPETENT TO PARTICIPATE IN THE DEFENSE (See R.C.M. 909, 916(k))				
15. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL				
16. AN EXPLANATION OF ANY DELAYS IN THE HEARING IS ATTACHED HERETO				
17. THE CHARGE(S) AND SPECIFICATION(S) ARE IN PROPER FORM				
18. THERE IS PROBABLE CAUSE TO BELIEVE AN OFFENSE HAS BEEN COMMITTED AND THAT THE ACCUSED COMMITTED THE OFFENSE				
19. THE UNITED STATES HAS JURISDICTION OVER THE OFFENSE(S) AND THE ACCUSED				
20. ADDITIONAL UNCHARGED MISCONDUCT WAS CONSIDERED AND A RECOMMENDATION FOR DISPOSITION IS ATTACHED HERETO				
21. I AM NOT AWARE OF ANY GROUNDS THAT WOULD DISQUALIFY ME FROM ACTING AS A PRELIMINARY HEARING OFFICER				
22. I RECOMMEND:				
a. TRIAL BY: <input type="checkbox"/> SUMMARY <input type="checkbox"/> SPECIAL <input type="checkbox"/> GENERAL COURT-MARTIAL				
b. <input type="checkbox"/> OTHER (Specify) _____				
23. REMARKS (Include, as necessary, explanation for any answers above.)				
24a. TYPED NAME OF PRELIMINARY HEARING OFFICER		b. GRADE	c. ORGANIZATION	
d. SIGNATURE OF PRELIMINARY HEARING OFFICER			e. DATE	

DD FORM 457 (BACK), DEC 2014

Attachment 6 – Article 32, UCMJ

ART. 32. PRELIMINARY HEARING

(a) Preliminary Hearing Required .-(1) No charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing unless such hearing is waived by the accused.

(2) The purpose of the preliminary hearing shall be limited to the following:

(A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.

(B) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.

(C) Considering the form of charges.

(D) Recommending the disposition that should be made of the case.

(b) Hearing Officer.

(1) A preliminary hearing under subsection (a) shall be conducted by an impartial judge advocate certified under section 827(b) of this title (article 27(b)) whenever practicable or, in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a judge advocate. If the hearing officer is not a judge advocate, a judge advocate certified under section 827(b) of this title (article 27(b)) shall be available to provide legal advice to the hearing officer.

(2) Whenever practicable, when the judge advocate or other hearing officer is detailed to conduct the preliminary hearing, the officer shall be equal to or senior in grade to military counsel detailed to represent the accused or the Government at the preliminary hearing.

(c) Report of Results.-After conducting a preliminary hearing under subsection (a), the judge advocate or other officer conducting the preliminary hearing shall prepare a report that addresses the matters specified in subsections (a)(2) and (f).

(d) Rights of Accused and Victim.

(1) The accused shall be advised of the charges against the accused and of the accused's right to be represented by counsel at the preliminary hearing under subsection (a). The accused has the right to be represented at the preliminary hearing as provided in section 838 of this title (article 38) and in regulations prescribed under that section.

(2) The accused may cross-examine witnesses who testify at the preliminary hearing and present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing, as provided for in paragraph (4) and subsection (a)(2).

(3) A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.

(4) The presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to the limited purposes of the hearing, as provided in subsection (a)(2).

(e) Recording of Preliminary Hearing.-A preliminary hearing under subsection (a) shall be recorded by a suitable recording device. The victim may request the recording and shall have access to the recording as prescribed by the Manual for Courts-Martial.

(f) Effect of Evidence of Uncharged Offense.-If evidence adduced in a preliminary hearing under subsection (a) indicates that the accused committed an uncharged offense, the hearing officer may consider the subject matter of that offense without the accused having first been charged with the offense if the accused-

(1) is present at the preliminary hearing;

(2) is informed of the nature of each uncharged offense considered; and

(3) is afforded the opportunities for representation, cross-examination, and presentation consistent with subsection (d).

(g) Effect of Violation.-*The requirements of this section are binding on all persons administering this chapter, but failure to follow the requirements does not constitute jurisdictional error.*

(h) Victim Defined.-*In this section, the term "victim" means a person who-*

(1) is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered; and

(2) is named in one of the specifications.