

# **THE ARTICLE 32 INVESTIGATING OFFICER'S GUIDE**



**MILITARY JUSTICE DEPARTMENT**

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## **OVERVIEW**

Article 32 of the Uniform Code of Military Justice (UCMJ) requires an independent investigation of all charges and specifications against an accused prior to a general court-martial (GCM). This requirement protects the accused from baseless charges, provides the convening authority (CA) with information with which to determine whether to refer the charges to a trial by court-martial or other disciplinary proceeding, and provides the defense with pretrial discovery. *See* MCM, R.C.M. 405(a) discussion. As the Investigating Officer (IO), you will play a quasi-judicial role in the proceeding and independently assess the evidence before making a recommendation on the disposition of the case to the CA. The Article 32 investigation, then, is something more than a mere report on the charges, yet it is something less than a full trial. Fundamentally, your investigation should be conducted as an impartial process for gathering information, and not as a full-blown adversarial proceeding. This manual is designed to serve as your guide for the proper conduct of an Article 32 investigation. Before you go on with this guide, however, it is essential that you read two sections of the *Manual for Courts-Martial (MCM)*; Article 32 of the UCMJ, and Rule for Courts-Martial (RCM) 405 are the primary authorities that will govern your investigation and the way the proceedings are conducted. Familiarity and compliance with these references can protect the rights of an accused service member and also prevent needless delay in the military justice process. *See* MCM, R.C.M. 405(a) discussion.

## **PRELIMINARY MATTERS**

### **1. SUBSTITUTES FOR THE ARTICLE 32 INVESTIGATION**

Other quasi-judicial proceedings may serve as an alternative which satisfies Article 32's requirements. Thus, when "an investigation of the subject matter of an offense has been conducted before the accused is charged with an offense," and the accused has been afforded the same rights given by Article 32(b), no Article 32 investigation need be held. UCMJ art. 32(c) (2012); MCM, R.C.M. 405(b). For example, if the accused was given the rights of a party before a formal Court of Inquiry, or perhaps already had a previous Article 32 hearing for the same charges, such investigation may be used to satisfy the requirements of Article 32. *See United States v. Gandy*, 26 C.M.R. 135, 138–139 (C.M.A. 1958); *Diaz v. United States*, 54 M.J. 880, 882 (N-M Ct. Crim. App. 2000). Nevertheless, the accused has the right to demand additional investigation, including the right "to recall witnesses for further cross-examination and to offer new evidence in his own behalf." UCMJ art. 32(c) (2012); MCM, R.C.M. 405(b). If the accused asserts these rights, an Article 32 hearing is the proper forum in which to perform additional investigation.

### **2. WAIVER OF THE ARTICLE 32 INVESTIGATION**

Although the plain language of Article 32 suggests that pretrial investigation is required prior to referral of any case to a GCM, military courts have indicated that the right to a pre-trial investigation may be waived by the accused, and RCM 405 allows for the investigation to be waived. *See United States v. Donaldson*, 49 C.M.R. 542, 543 (C.M.A. 1975); MCM, R.C.M. 405(k). If the accused indicates a desire to waive the Article 32 hearing, as is often the case following plea negotiations, you should immediately inform the CA who appointed you. Note, however, that the accused does not have a right to waive the investigation. Accordingly, the appointing authority may direct an investigation to proceed despite the accused's waiver request.

## **PARTIES TO THE ARTICLE 32 INVESTIGATION**

Looking broadly at the language of the UCMJ and RCM 405, the only parties that are truly indispensable at the Article 32 investigation are an accused and an independent IO who carries it out. Most of the time, however, there are other participants as well, including counsel for the accused, a government representative, witnesses, and others.

### **1. THE ACCUSED**

The accused has the right to be present throughout the proceeding and has numerous procedural rights outlined in Article 32 and RCM 405. At the investigation, therefore, you must assure that the accused is present, is capable of aiding in his or her own defense, and is apprised of his or her rights in the investigation.

#### **A. MENTAL CAPACITY**

As a preliminary matter, the accused must have the mental “capacity” to understand the proceedings and therefore be able to assist in his or her own defense. *See* MCM, R.C.M. 909(a). This is a different question than whether the accused was mentally “responsible” at the time of the alleged offense. *See* MCM, R.C.M. 916(k). In general, it can be said that there is a presumption that the accused has the “capacity” to understand the Article 32 investigation. *See* MCM, R.C.M. 909(b). A mere assertion by the defense to the contrary does not furnish a basis for recommending the accused be referred to a sanity board under RCM 706, and thereby delay the investigation. There must be some reasonable grounds other than a bare assertion by the accused or counsel of a lack of competency to participate in the hearing. Such grounds might include a preliminary diagnosis by a medical officer, coupled with a recommendation for a psychiatric evaluation. If (based on appropriate evidence) you find that such grounds exist, you may wish to adjourn (not close) the hearing. You should then explain the reasons in your report, and refer the matter to the CA with the recommendation that he or she convene an RCM 706 board. If you receive a written medical report into evidence on the issue of mental “capacity” or “responsibility,” that evidence should be attached to your report.

#### **B. RIGHTS OF ACCUSED**

The specific rights of the accused at the investigation are the right to: 1) be informed of the charges under investigation; 2) be informed of the identity of the accuser; 3) be present throughout the taking of evidence; 4) be represented by counsel; 5) be informed of the witnesses and other evidence known to the IO; 6) be informed of the purpose of the investigation; 7) be informed of the right against self-incrimination; 8) cross-examine government witnesses; 9) have witnesses produced; 10) have evidence produced; 11) present anything in defense, extenuation or mitigation; and 12) make a statement in any form. MCM, R.C.M. 405(f)(1)–(12); *see also* U.S. Dep’t of Def., DD Form 457, Investigating Officer’s Report (Aug. 1984).

## **2. INVESTIGATING OFFICER**

Independence from any previous investigation against the accused regarding the charged offenses, impartiality, and freedom from command influence are the most important characteristics for the IO. Thoroughness and attention to detail are other useful traits. There are numerous legal requirements for the IO outlined in Article 32, RCM 405, and case law.

### **A. STATUTORY DUTY**

Under Article 32(a) you are responsible for "inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline."

### **B. STATUS**

To be qualified for appointment as an IO, you must be a commissioned officer. MCM, R.C.M. 405(d)(1). Although any commissioned officer can serve as an IO, there is a preference that an IO be at least a major or lieutenant commander, or that the IO be an officer who has had "legal training." MCM, R.C.M. 405(d)(1) discussion. The appointment of an IO who is junior in rank to the accused has been described as a "gross breach of protocol and courtesy" and something "to be avoided even if not strictly prohibited." *United States v. Reynolds*, 24 M.J. 261, 263 (C.M.A. 1987).

### **C. IMPARTIALITY**

An accused has a right to a "thorough and impartial investigation." UCMJ art. 32(a). Accordingly, you must be impartial, and your impartiality will be evaluated by the same standards that are applied to military judges. *See e.g., United States v. Castleman*, 11 M.J. 562, 564 (A.F.C.M.R. 1981) ("Article 32 Investigating Officers, whose functions are judicial and quasi-judicial, are held to the same standard as military judges"); MCM, R.C.M. 902 (stating reasons for disqualification of military judges). Your impartiality can be questioned by counsel for the accused or by the government representative. Additionally, your impartiality may be questioned before you start the investigation, during the course of the investigation, or after you have submitted your report to the CA. If your impartiality becomes an issue on appeal, the question will be whether a reasonable person observing the proceeding would believe that its "legality, fairness or impartiality" was put in doubt by your actions. *United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007).

#### **I. DISQUALIFICATION BY PRIOR KNOWLEDGE OR ASSOCIATION**

If you are an accuser, you cannot serve as an IO. MCM, R.C.M. 405(d)(1); *United States v. Lopez*, 42 C.M.R. 268, 269 (C.M.A. 1970). Likewise, an officer who is a close personal friend of the accuser is also disqualified from serving. *See Castleman*, 11 M.J. at 564–65. An IO is not disqualified solely by virtue of his or her position in the legal office. *Reynolds*, 24 M.J. at 263 ("There is no absolute bar to all contact between an Article 32 officer and all members of a staff judge advocate's office."). Note, however, that an IO who supervises the accused's defense counsel is disqualified and should be recused. *See United States v. Davis*,

20 M.J. 61, 64–66 (C.M.A. 1985). If the IO discloses all grounds for any possible bias, prejudice, or impropriety and the defense fails to object at the investigation, it is generally construed as a waiver of the issue. *See Lopez*, 42 C.M.R. at 269; *United States v. Martinez*, 12 M.J. 801, 806–807 (N.M.C.M.R. 1981).

## II. DISQUALIFICATION FOR INVESTIGATION OF RELATED CASES

An IO who has previously had a role in inquiring into the offense to be investigated is disqualified. *Lopez*, 42 C.M.R. at 269; *United States v. Parker*, 19 C.M.R. 201, 208–209 (C.M.A. 1955). However, this disqualification can be waived by an accused. *United States v. Donaldson*, 49 C.M.R. 542, 543 (C.M.A. 1975); *United States v. Mickel*, 26 C.M.R. 104, 106 (C.M.A. 1958) (“[U]nder ordinary circumstances, the failure to make timely objection to a defect in the pretrial investigation is a waiver of the defect.”). Unlike situations involving multiple related investigations of one servicemember, a joint investigation of multiple servicemembers is still proper because the IO begins the investigation 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 members are charged with a joint offense, a joint investigation is permissible. The mechanics of arranging for a joint investigation are more difficult, however, and the IO is required to submit a separate report with separate recommendations on each accused servicemember.

## III. IMPROPER RECEIPT OF LEGAL ADVICE

It is legal error if an individual performing a prosecutorial function furnishes any advice to you during the course of the investigation. *United States v. Rushatz*, 30 M.J. 525, 532 (A.C.M.R. 1990). Likewise, it is error for anyone else to provide *ex parte* legal or substantive advice about the case that you are investigating without the knowledge, presence or consent of all parties. *Id.*; *see also, United States v. Grimm*, 6 M.J. 890, 892–894 (A.C.M.R. 1979). If you intend to seek outside legal advice on substantive issues, you must give notice to all parties (i.e., defense counsel, accused, and government representative, if any) before obtaining the advice. *See United States v. Payne*, 3 M.J. 354, 356 (C.M.A. 1977) (citing ABA Standards, The Function of the Trial Judge § 1.6 (1972)). Failure to do so may constitute error that will be tested for prejudice if raised at trial. It may also be preferable to note the receipt of such advice on the record of the hearing or in your investigative report. *See ABA Standards for Criminal Justice, Special Functions of the Trial Judge*, 6-2.1 (2000). During the investigation, you should avoid substantive communications with any government representative unless you give the defense adequate notice of the time and location of such communications so that the defense can participate. Upon request of the defense, you should note the number and nature of any such communications in the report of investigation.

## IV. DISQUALIFICATION BY SUBSEQUENT ACTION

If you do anything during or after the investigation that creates the appearance of impropriety, it could be subject to judicial scrutiny at trial or at a subsequent appeal. You must therefore strive to avoid any appearance of partiality. *United States v. Holt*, 52 M.J. 173, 183–85 (C.A.A.F. 1999) (holding that *ex parte* communications between IO and trial

counsel in which the IO provided post-report advice on how to improve government case was error, but did not prejudice the accused). If you have concerns in this area, advise the staff judge advocate (SJA) to the CA.

### **3. DEFENSE COUNSEL**

The accused is entitled to be represented by a detailed defense counsel certified under Article 27(b). DD Form 457, part of the IO's report, requires that you verify that detailed defense counsel is so qualified. The accused may request a particular military lawyer be assigned as counsel and may also be represented by a civilian attorney at his or her expense. MCM, R.C.M. 405(d)(2). At the hearing, counsel representing the accused will be allowed to present evidence, cross-examine government witnesses, argue for the appropriate disposition of the matter, and otherwise perform the normal functions of counsel. That being said, the accused has a broad right to self-representation, and may waive the appearance of defense counsel, but it is not an absolute right. *See United States v. Bramel*, 29 M.J. 958, 965–66 (A.C.M.R. 1990) (holding that IO was permitted to deny the accused an opportunity to represent himself and cross-examine the child victim in a rape case when the request for self-representation was a “ploy” to prevent the child from testifying). Defense counsel could be disqualified if he or she has a supervisor-subordinate relationship with other parties, including the accused, the IO, opposing counsel, the SJA, or the CA if such potential conflict-of-interest is not waived by the accused. In addition, previous work for the prosecution is an “automatic” disqualification without the informed consent of the accused. *See United States v. Sparks* 29 M.J. 52, 58–59 (C.M.A. 1989).

### **4. GOVERNMENT REPRESENTATIVE**

There is no requirement for trial counsel or any lawyer representing the government to be present at an Article 32 hearing. It is common practice, however, to appoint a judge advocate as government representative to present the government's side of the case.

#### **A. APPOINTMENT**

RCM 405 allows the commander directing the investigation to appoint the government representative as a matter of discretion. MCM, R.C.M. 405(d)(3). As a practical matter, the CA typically requests services from the local Region Legal Service Office.

#### **B. ROLE**

The government representative's primary responsibility is to establish the validity of the charges and to develop the government's case. Additionally, the representative provides logistical support for you. This is particularly important when you are not stationed locally. As soon as the government representative has been appointed, he or she should contact you to determine what must be done to ensure a smooth investigation. At a minimum, the government representative must assemble the necessary documents for you. Upon your request, the government representative can also make travel arrangements for witnesses, and handle other logistical preparations for the investigation.

### **C. DISQUALIFICATION**

The government representative will be disqualified if he or she has a financial or improper personal stake in a prosecution. *See United States v. Strother*, 60 M.J. 476, 478–84 (C.A.A.F. 2005) (describing reasons for potential disqualification of trial counsel as “interested party” or as previously being an “investigating officer”). The government representative could also be disqualified if he or she has had improper communications about the case with the IO or the SJA, or if he or she has a supervisor-subordinate relationship with other parties, including the accused, the IO, opposing counsel, the SJA or the CA. *See UCMJ art. 27(a)(2)* (2012). If there is an appearance of impropriety or conflict-of-interest, another government representative should be assigned.

### **5. LEGAL ADVISOR**

If you are not a judge advocate, you should be assigned a judge advocate to provide legal assistance, or you should seek the advice of a judge advocate who is not party to the case. Anyone who serves in this advisory role must be impartial. After consulting with your legal adviser, you should provide any detailed defense counsel, retained private defense counsel or government representative with the opportunity to comment on the issue. Remember to avoid communications with government counsel outside the presence of the defense. Also remember that these counsel are not permitted to serve as a legal advisor to you. *See Payne*, 3 M.J. at 357 (adopting the dissenting opinion in *United States v. Young*, 32 C.M.R. 134, 141 (1962) (Ferguson, J., dissenting)).

### **6. OTHERS**

The court-martial convening authority may detail a court reporter, interpreter, and others to aid your investigation. MCM, R.C.M. 405(d)(3).

## **PREPARING FOR THE INVESTIGATION**

Once you are appointed as an IO, you will find that there are numerous logistical hurdles and legal duties that you must navigate in order to accomplish the assignment given to you by the CA. It is important to remember, however, that it is your investigation, and not the CA's, the accused's or the government representative's. Accordingly, planning an effective strategy to carry out your assigned task is critically important, and it is your responsibility to ensure that it is done in compliance with Article 32 and RCM 405.

### **1. REVIEW LETTER OF APPOINTMENT**

As an IO, you should receive and carefully review your letter of appointment issued by the court-martial convening authority who has directed the investigation under RCM 405. This letter sets forth the charges that you will be investigating and delegates to you the authority necessary to interview witnesses, secure documents, and obtain cooperation from commanders and other military members. It also may detail counsel to the case, set a date for the investigation, set a deadline for the completion of your report, and delegate to you the CA's power to grant a continuance. Your appointment letter is likely to direct you to make the investigation your primary duty until its completion. In any case, you should conduct the investigation promptly and diligently through completion, unless you are relieved. A sample letter of appointment is included as Enclosure (1), though you should be aware that appointment letters may place various limits on your authority.

### **2. REVIEW THE CHARGE SHEET**

The only other documentation that you typically receive at the first stage of the investigation is the charge sheet, DD Form 458. You should review the charge sheet and ensure that the information is correct and the charges are in the proper form. Although RCM 603(b) prohibits you from making any changes to the charge sheet – even minor ones – you should identify and recommend any necessary changes. An example of a charge sheet is included as Enclosure (2).

#### **A. CORRECTIONS TO THE PERSONAL DATA**

Review the accused's personal data for accuracy. If you identify deficiencies in the personal data section, notify the SJA who may correct them at anytime. Pen and ink changes by the SJA should be mentioned in your report.

#### **B. CORRECTIONS TO THE CHARGES**

Compare each specification with the sample specification format found in the *MCM*, Part IV. You can also find samples in the Military Judge's Benchbook. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK ch. 3 (1 Jan. 2010). If you identify deficiencies in the specifications, notify the SJA. He or she can arrange for the charges to be corrected before you start your investigation. *MCM*, R.C.M. 603(a). To avoid the appearance of impropriety, you should inform defense counsel before communicating with the SJA about this problem and you should not be present when the corrections are made.

### **3. CONSULT WITH LEGAL ADVISOR**

Shortly after your appointment and throughout the investigation, if you are not a judge advocate, you are encouraged to seek legal advice from your legal adviser, so long as the parties are informed of the nature of the advice. Although you will receive legal advice from this person, the conclusions to be drawn from the evidence in the case and the recommendations concerning the disposition of the case are matters solely within your judgment and responsibility. You may not rely upon anyone else's opinions and recommendations to make these determinations.

### **4. HOLD A PRELIMINARY CONFERENCE**

You should arrange a preliminary conference with the government representative and defense counsel as soon as possible in order to ensure that the investigation proceeds smoothly. The purpose is primarily to coordinate logistical issues, but it is also useful to highlight potential points of contention before the hearing, and thereby prevent unnecessary delays on the day of the investigation. Although it is not required, the accused may also participate in the conference. The conference can be conducted in person or by telephone. There is no mandatory format or required list of items which must be considered. You may wish to consider addressing the topics covered in Enclosure (3), which suggests an agenda for a preliminary conference.

### **5. SCHEDULE THE HEARING**

Your appointment letter may set a date for the hearing, but if it does not then you must choose one. One of the most difficult tasks in preparing for the investigation is getting all of the necessary parties together. Depending on your personal style, you may feel more comfortable having the government representative handle logistics. This will have the benefit of insulating you from some accusations of any improper communication with parties or witnesses. Note, however, that it is your responsibility to ensure that the logistics are handled and to ensure that it is all accomplished in a timely manner. This is especially important when the accused is in pre-trial restraint.

#### **A. DATE, TIME AND LOCATION**

If it has not been done, you should set a date, time, and location for the proceedings. Since this is your primary duty and you have been tasked with the expeditious investigation of the charges, the date for the Article 32 investigation should be scheduled as soon as possible and all interested parties should be notified in writing of your decision.

#### **B. PRE-TRIAL RESTRAINT**

If an accused is in confinement, the government must take "immediate steps" to dismiss the charges or bring the accused to trial. UCMJ art. 10 (2012). One potential remedy to a violation of Article 10 is dismissal of all charges with prejudice – i.e. the charges will never be prosecutable. You as the IO are a significant participant in the speedy-trial process, and without due diligence you can be a significant roadblock. Although you are independent and impartial for purposes of Article 32, you are part of the government for purposes of counting delays attributable to the government. *See* MCM, R.C.M. 707. Accordingly, you should move immediately to conduct the hearing and submit your report.

## C. CONTINUANCE REQUESTS

After the hearing has been scheduled, the defense or government may request that your investigation be delayed. As a preliminary matter, keep in mind that you can only grant a continuance if the appointment letter or some other written document from the CA delegates this power to you. MCM, R.C.M. 707(c)(1) discussion. Ultimately, if you have been given that authority, you may approve the continuance request, deny the request, or approve a shorter period of delay than that which was requested. Note that your response to defense requests, such as requests for a continuance, may be reviewed by appellate courts as an indicator of your impartiality. Enclosure (4) is an example of a sample continuance request.

### I. EVALUATING A REQUEST

In evaluating a continuance request, you will need to carefully and impartially balance the need for speedy disposition of charges and a party's legitimate need for more preparation time. *See* UCMJ arts. 10 & 33; MCM, R.C.M. 707. To do this, you should require the parties to put their requests and reasons for delay in writing. There should be no ambiguities in the request and the other party should be given an opportunity to respond to the requested delay. Although not required, after giving prior notice to all parties, you should discuss the continuance request with the SJA to learn the command's position. In the end, you must independently weigh the evidence and arguments from both sides, approve only reasonable delays, have a sufficient evidentiary basis for your decision, and document in detail the reasons for your decision. It is important to include this information and your reasoning in your report. As a general rule, any reasonable continuance request should be granted – especially if both parties are not opposed to it. If the accused requests a continuance in order to retain civilian counsel or ensure the presence of his counsel of choice, you should consult your legal adviser before denying it. Nevertheless, you should avoid open-ended continuances, require reasonable estimates of the time necessary to complete the pending action or conduct additional preparation, and set a date.

### II. CHRONOLOGY

In developing the necessary record, at a minimum, you should ascertain and include in your report when defense counsel first learned of the case, when he or she received the case file, and why he or she is unable to proceed at the appointed time. If defense alleges that other cases require attention, find out what other cases have prevented or will prevent adequate preparation. If, after you review the defense's position, you conclude that he or she needs more time in the interests of justice, then you should grant the continuance. *See e.g., United States v. Miro*, 22 M.J. 509, 511 (A.F.C.M.R. 1986) (holding that that an IO's refusal to grant a defense request for a continuance due to inadequate preparation time – less than 24 hours – was reversible error that required a new Article 32 investigation). Consider creating a chronology sheet that documents the dates and reasons for all your actions in conducting the investigation and attach it to your report. *See* MCM, R.C.M. 405(j)(2)(F).

### **III. THE ACCUSED’S RIGHT TO A SPEEDY TRIAL**

Granting a defense or government request for a continuance is not the same as excluding the delay from the government's speedy trial clock. *See United States v. Thompson*, 46 M.J. 472, 474–76 (C.A.A.F. 1997) (holding that accused’s speedy trial right was not violated by extensions granted by IO that were later ratified by CA, but not deciding whether IO had “inherent power” to grant delay under RCM 707). While you may be authorized to grant a continuance in your investigation, only the CA or the military judge may exclude the time from the government's speedy trial clock. MCM, R.C.M. 707(c); *see also United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993) (“Article 10 [of the UCMJ] does not require instantaneous trials, but the mandate that the Government take immediate steps to try arrested or confined accused must ever be borne in mind”).

#### **D. PUBLIC ACCESS**

In general, an Article 32 hearing is presumptively a public proceeding, and so it is generally inadvisable to close the hearings unless there is a substantial need to do so. *See United States v. Davis*, 62 M.J. 645, 647 (A.F. Ct. Crim. App. 2006) *aff’d* 64 M.J. 445 (C.A.A.F. 2007) (holding that it was error for the Article 32 hearing to be closed in order to save rape victims from embarrassment). Accordingly, Article 32 proceedings are open to the public “whenever possible,” but either you or the CA who directed the investigation may close the hearing, or may restrict spectators to only certain parts of the proceedings. MCM, R.C.M. 405(h)(3) (“access by spectators to all or part of the proceedings may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer.”). When such a decision is made, you must make specific findings of fact that justify your decision, and you must include them in your report. A decision to close part or all of a hearing should be made only after careful consideration, and must be “narrowly tailored to achieve the overriding interest that justified the closure.” MCM, R.C.M. 405 (h)(3); *see also, ABC, Inc. v. Powell*, 47 M.J. 363, 365–66 (C.A.A.F. 1997). If you have information that a journalist wants to attend the proceedings, you should immediately advise the CA and the public affairs office.

## **6. ANALYZE THE CASE FILE**

### **A. REVIEW APPLICABLE LAW**

You should learn the required elements for each charged offense by reviewing the discussion of the offenses in the *MCM*, Part IV or chapter 3 of the Military Judge’s Benchbook. If you are unable to find such a discussion or have questions about any aspect of it, you may consult your legal adviser about the required elements of the charged offenses.

### **B. DETERMINE WHICH EVIDENCE YOU NEED TO EXAMINE**

In preparing for the investigation, you should consider what evidence will be necessary to conduct a thorough and impartial investigation. MCM, R.C.M. 405(g)(1)(B) discussion. In order to assist you in making this determination, you may review the charge sheet, civilian or military police reports, Naval Criminal Investigation Service Reports of Investigation, witness statements or summaries, and other documentary evidence. You may not, however, formally

consider such matters as substantive evidence unless they are properly presented at the investigation and the parties have been permitted to examine them. *See* MCM, R.C.M. 405(h)(1)(B). You will also need to consider which alternatives to real or documentary evidence, if any, are permissible under the circumstances.

### **I. CONSULTATION WITH THE PARTIES**

Through consultations with the parties, you must determine what evidence, including documents or physical objects, should be produced for your consideration. Subject to Military Rule of Evidence (MRE) Section V dealing with privileges (and in particular MRE 505 relating to classified information), evidence which is under the control of the government and which is relevant to the investigation and not cumulative shall be produced if reasonably available. *See* MCM, R.C.M. 405(g)(1)(B). If familiarity with the scene of the alleged offense would assist you, you may visit the scene as long as you request the parties to accompany you. To ensure that all evidentiary requests receive proper consideration, you could require counsel for to provide a timely summary that describes the desired evidence, demonstrates its relevance, and details the location and custodian of the evidence. If the government opposes any evidentiary request made by the accused, you should require the government representative to provide a detailed summary of the reasons it opposes such a request. If you decide to limit evidence requested by either party, explain your reasoning and invite counsel to use alternative forms of evidence if permitted under the circumstances.

### **II. REASONABLE AVAILABILITY OF EVIDENCE**

For logistical reasons you can consider the accessibility of evidence before the hearing, but your actual findings on whether something is “reasonably available” for your consideration will be noted on the day of the investigation. A best practice may be for the investigating officer to ask what evidence the parties intend to introduce in advance and whether counsel have perceived accessibility issues in order to avoid last minute problems. The same practice is helpful for determinations of witness availability. The evaluation of “reasonable availability” is a balancing test. Evidence is “reasonably available” if its significance outweighs the difficulty, expense, delay and effect on military operations of obtaining the evidence. *See* MCM, R.C.M. 405(g)(1)(B). You should review RCM 405(g), particularly subsections (1), (2) and (5), to determine whether evidence is reasonably available and whether alternatives to the original evidence may be considered. Before you make your final determination that the evidence is not reasonably available, you should attempt to persuade the custodian to produce the evidence and document correspondence.

### **III. CUMULATIVE EVIDENCE**

Cumulative evidence is evidence that provides the same information or is offered to prove the same point as other evidence. *See* MCM, MIL. R. EVID. 403 (stating that relevant evidence may be excluded at a court-martial if there would be “needless presentation of cumulative evidence.”). When evaluating potentially cumulative evidence, you should weigh the value of such evidence against any related hardship.

Your goal should be to thoroughly and impartially inquire into the truth of the matters set forth in the charges against the accused. When in doubt, you should err on the side of allowing potentially cumulative evidence to be produced and presented during the proceedings.

### **C. ALTERNATIVES TO EVIDENCE**

Before the investigation you should begin thinking about which alternatives to evidence you will allow if evidence cannot be produced for one reason or another. On paper this task may seem complicated, but in practice it can be deceptively simple, so long as you follow the logic of RCM 405(g)(5). The rule places limits on the use of alternative forms of evidence that can be presented by the government if the defense objects. In contrast, the defense will be given the opportunity to present evidence and may do so in any fashion.

#### **I. WITHOUT DEFENSE OBJECTION**

Unless the defense objects, you may consider, regardless of availability of the witness: 1) testimony describing the evidence; 2) an authenticated copy, photograph, or reproduction of similar accuracy of the evidence; 3) an alternative to testimony in which the evidence is described; 4) a stipulation of fact, document's contents, or expected testimony; 5) an unsworn statement describing the evidence; or 6) an offer of proof concerning pertinent characteristics of the evidence. MCM, R.C.M. 405(g)(5)(A)(i)–(vi).

#### **II. OVER DEFENSE OBJECTION**

Even if the defense objects, you may consider, when the evidence is not reasonably available: 1) testimony describing the evidence; 2) an authenticated copy, photograph, or reproduction of similar accuracy of the evidence; or 3) an alternative to testimony in which the evidence is described. MCM, R.C.M. 405(g)(5)(B)(i)–(iii).

### **D. DETERMINE WHICH WITNESSES NEED TO BE CALLED**

In consultation with the parties, you must determine which witnesses to call during the proceedings, which witnesses will have “alternatives” to live testimony, and which witnesses are not reasonably available. Unless an alternative to testimony is authorized by R.C.M. 405(g)(4)(A), any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available. *See* MCM, R.C.M. 405(g)(1). To ensure that all witness requests receive proper consideration, you should require the accused to provide a timely witness list with a synopsis of the expected testimony that demonstrates why the witness is relevant, non-cumulative, and available. If the government opposes any witness request, you should require the representative to provide a detailed summary of the reasons it opposes such a request. If you decide to limit witnesses, you should invite counsel to present the witness using an alternative form of testimony and document your offer. Most witnesses who testify will do so upon invitation by the government and may receive compensation for travel. An example of a letter inviting a witness to testify at the Article 32 hearing is included as Enclosure (5).

## **I. REASONABLE AVAILABILITY OF WITNESSES**

Generally, a witness is “reasonably available” when he or she is located within 100 miles of the site of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness’s appearance. MCM, R.C.M. 405(g)(1)(A). The distance the witness would have to travel is but one factor in performing the balancing test. Even in cases where a witness is located beyond the 100 miles, you may still deem the witness reasonably available by weighing the significance of the live testimony against the relative difficulty and expense of obtaining the witness’ presence at the hearing. *See* MCM, R.C.M. 405(g)(1)(A) discussion; *United States v. Marrie*, 43 M.J. 35, 40 (C.A.A.F. 1995) (noting that there is not a *per se* rule making witnesses located beyond 100 miles unavailable). As a general rule, if a witness would be unavailable at trial under the provisions of MRE 804(a)(1)–(6), the section of the MREs that defines witness unavailability, that witness should also not be “reasonably available” for your investigation. If you determine a military witness is reasonably available under RCM 405(g)(2), yet the witness’s immediate commander declines to make the witness available, you should obtain the commander’s reasons for the determination of non-availability and include this information in your report. Similarly, if you determine a military witness is not reasonably available you should inform all parties and provide the reasons for your determination in your report. In any case, unless both parties agree a witness is unavailable, you should attempt to persuade the witness to appear and document your efforts. *See* paragraph 5(B)(II) for a description of a best practice to determine availability in advance of the hearing.

## **II. CUMULATIVE WITNESSES**

Cumulative witnesses are those additional witnesses that provide the same testimony or are offered to prove the same point as other witnesses. When evaluating potentially cumulative testimony, you should weigh the value of such testimony against any related hardship. Repetitive testimony, even if virtually identical, can be highly relevant—especially if it corroborates the accused’s story. Accordingly, since your goal is to thoroughly and impartially inquire into the truth of the matters set forth in the charges against the accused, when in doubt, you should err on the side of allowing potentially cumulative witnesses to be called during the proceedings.

## **E. ALTERNATIVES TO TESTIMONY**

During the investigation, the defense will be given the opportunity to present testimony and may do so in any fashion including submitting witness testimony in an alternative form. In contrast, the law places limits on the use of alternative forms of testimony that can be introduced by the government. This rule for testimony is similar to the rule for alternatives to physical evidence.

### **I. WITHOUT DEFENSE OBJECTION**

Unless the defense objects, you may consider, regardless of the availability of the witness: 1) sworn statements; 2) statements under oath taken by telephone or similar means providing each party the opportunity to question the witness under circumstances by which you may

reasonably conclude that the witness' identity is as claimed; 3) prior testimony under oath; 4) depositions; 5) stipulations of fact or expected testimony; 6) unsworn statements; and 7) offers of proof of expected testimony of that witness. MCM, R.C.M. 405(g)(4)(A).

## **II. OVER DEFENSE OBJECTION**

Even if the defense objects, you may consider, when the witness is not reasonably available: 1) sworn statements; 2) statements under oath taken by telephone or similar means providing each party the opportunity to question the witness under circumstances by which you may reasonably conclude that the witness' identity is as claimed; 3) prior testimony under oath; 4) depositions; and 5) unsworn statements in time of war. MCM, R.C.M. 405(g)(4)(B).

## **7. SECURE RELEVANT EVIDENCE**

After you have made the decision that certain evidence should be produced or witnesses called, you should immediately attempt to secure this documentary and testimonial evidence for the investigation. If one has been detailed, it is appropriate to task the government representative with obtaining the evidence and witnesses. If no government representative has been detailed and the local legal office cannot assist you, then you will have to attempt to secure this evidence yourself. In either case, you must limit your communications with potential witnesses to administrative and logistical matters.

### **A. SECURING DOCUMENTS AND OTHER PHYSICAL EVIDENCE**

Before the hearing itself begins you will have to consider how evidence will actually be produced for the hearing. In most investigations you will also have to consider which alternatives to the production of actual evidence will be permitted. In order for you to consider evidence in making your recommendation, it must be subject to challenge by the accused. Remember, though, that the purpose of your investigation is not to perfect the case for the government, therefore you need not consider everything that might be potentially relevant, but only those things which will weigh on your recommendation to the CA on the disposition of the case.

#### **I. EVIDENCE UNDER THE CONTROL OF THE GOVERNMENT**

Evidence that is under the control of the government (and reasonably available) shall be produced at the hearing. MCM, R.C.M. 405(g)(1)(B). You or the government representative should contact the appropriate command or authority and arrange for the evidence, or some suitable alternative to the evidence, to be available at the investigation. An example of a suitable alternative might be a photograph of a firearm involved in an alleged offense instead of the firearm itself. *See* MCM, R.C.M. 405(g)(5)(B)(ii).

#### **II. EVIDENCE NOT UNDER THE CONTROL OF THE GOVERNMENT**

The process for evidence not under the control of the government is somewhat different. You or the government representative should notify the custodian of the time, place, and date that the evidence is needed, and request that the custodian send or deliver the evidence.

## **B. SECURING PRESENCE OF WITNESSES**

You may not talk with or interview witnesses on anything substantive outside the presence of counsel. *United States v. Whitt*, 21 M.J. 658, 659–60 (A.C.M.R. 1985). If it is necessary to talk with witnesses, you may communicate only for the limited purpose of arranging appearances at the hearing, and for the production of evidence within the control of witnesses.

### **I. MILITARY WITNESSES**

You or the government representative should request a military witness's presence, either directly or through his or her commanding officer. If the witness's immediate commanding officer determines that the witness is not reasonably available, he or she should give the reasons for that determination to you. *See* MCM, R.C.M. 405(g)(2)(A) discussion. If these reasons are memorialized in writing, include that writing as an attachment to your report. If they are not, you must attempt to summarize how the balancing test of RCM 405(g)(1)(A) was applied by the commanding officer and include this summary in your report. Of course, if you question the commanding officer's availability determination, communicate that fact immediately to the SJA for the CA and ask for advice on how to proceed. Ultimately, the commander's determination is not subject to appeal, but it may be reviewed at a later court-martial by the military judge under RCM 906(b)(3).

### **II. CIVILIAN WITNESSES**

You or the government representative should invite witnesses to appear at the hearing and, when appropriate, inform them that their transportation expenses and a per diem allowance will be paid. MCM, R.C.M. 405(g)(3) discussion. A sample letter to do this is found at Enclosure (5). If the witness refuses to appear or to testify, you do not have authority to subpoena them. MCM, R.C.M. 703(e)(2)(C). Your only tools for dealing with these witnesses are persuasion and invitational travel orders. MCM, R.C.M. 405(g). You may also arrange for transportation for yourself, the accused, and counsel to a place convenient to the civilian witness. In most cases, civilian employees of the government can be required to testify at an Article 32 as a condition of their employment. *See* MCM, R.C.M. 703(e)(2) discussion.

## **C. ORDERING DEPOSITIONS**

If a potentially important civilian witness refuses to appear and there are no alternatives to that witness' testimony, you should recommend to the CA that a deposition officer be appointed with subpoena powers under RCM 702. Testimony from a deposition is a permissible alternative to testimony at an Article 32 hearing, and the deposed testimony may also be used at a later trial. *See* MCM, R.C.M. 405(g)(4)(A)(iv) & (g)(5)(B)(iv); 702(i)(2). Depositions of witnesses may be taken for any number of reasons, although the most common reason is preserve the testimony of a witness who will be unavailable at the time of the investigation or court-martial. *See* MCM, R.C.M. 702(a) discussion. The deposition may take the form of an oral deposition or a written deposition. Written depositions are rare in practice and require the

consent of opposing counsel. MCM, R.C.M. 702(c)(3)(B). Additionally, if a witness is located at a great distance from the Article 32 investigation and the expense or delay involved in bringing the witness to the site of the investigation is prohibitive, a deposition may be taken by an officer at or near the witness's location.

## **CONDUCTING THE INVESTIGATION**

You have broad discretion in how the hearing is conducted. That being said, you are strongly encouraged to follow the Article 32 Investigating Officer's Script included with this guide as Enclosure (6). Use of the script will cover all the important requirements on the DD Form 457, Investigating Officer's Report, and other requirements of Article 32 and RCM 405. Missing a procedural requirement can lead to prejudice to the rights of an accused servicemember or a waste of judicial resources. *See e.g.*, MCM, R.C.M. 405(a) discussion; *Mickel*, 9 C.M.R. at 107 ("...if an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial."). As a practice pointer, it may be helpful to you to put the script in a word processor and to adapt it to specific needs of your case. Ultimately you will weigh the credibility of the evidence presented at the hearing, and determine if "reasonable grounds exist to believe that the accused committed the offenses alleged." MCM, R.C.M. 405(j)(2)(H).

### **1. PRODUCTION OF DOCUMENTS AND OTHER EVIDENCE**

During your investigation you are allowed to consider all evidence which is relevant and not cumulative, including documents and physical evidence. MCM, R.C.M. 405(g)(1)(B). First you are required to tell the parties what documents or other evidence you anticipate considering during your investigation. Then you must let all parties examine this evidence. RCM 405 allows you to consider a variety of documentation in your investigation that might not be admissible at a trial, such as evidence which has been obtained illegally or evidence that has chain-of-custody problems. You may also consider hearsay – out-of-court statements made by someone other than a witness on the stand (or contained within a document) that is offered to prove the truth of that statement. *See e.g.*, MCM, MIL. R. EVID. 801(c), 1101(d), and *U.S. v. Matthews*, 15 M.J. 622 (N.M.C.M.R. 1982). Subject only to the evidentiary provisions of RCM 405(g) described below, you may consider hearsay that would be inadmissible at a court-martial. If you intend to consider a document or writing, tell counsel that you intend to consider it and show it to the parties and ask if either party has an objection. If counsel objects, first you must ensure that it complies with what evidence can be reviewed over counsel's objection per R.C.M. 405, and then evaluate the basis of the objection.

#### **A. ACCUSED'S CONFESSION**

The longstanding practice under Article 32 and RCM 405 is that an accused's written confession qualifies as a "document or other physical evidence" that may be considered by an IO. *See* MCM, R.C.M. 405(g)(1)(B). Note, however, that a confession doesn't qualify as an alternative to testimony under RCM 405(g)(4)(B). The discussion to RCM 405(e) makes it clear that an IO may be required to inquire into the legality of a confession as part of the investigation, but the IO is not required to rule on its admissibility. You may therefore consider an illegally obtained confession, but you must also note potential legal issues with the confession in your report.

## **B. WITNESS CONFESSIONS AND STATEMENTS**

While the written confession of an accused is a “document or physical evidence” that you may consider, the statements of third-party witnesses, on the other hand, are not. If they were, the alternatives-to-evidence-and-testimony rules of RCM 405(g)(4) and (5) would be rendered meaningless because they would be easily avoided by virtue of having been reduced to a document. Accordingly, witness statements cannot be considered over a defense objection unless they qualify as an alternative to testimony under RCM 405(g)(4)(B).

## **C. REPORTS**

Reports (such as those written by military and civilian law enforcement agencies or others) are compilations of documents. Absent objection, they may be considered as "other evidence" under RCM 405(h)(1)(B). Note, however, that if the defense objects, the investigating officer should carefully examine the different parts of the report under RCM 405(g) to determine which parts should be considered and which parts should not. At your hearing, you may properly consider the individual sworn statements as alternatives to testimony subject to the requirements of RCM 405(g)(4). You may also consider the sworn statements alone – again subject to the requirements of RCM 405(g)(4) – without considering the report as a whole. When you consider something over an objection, make a note of it in the report, and indicate potential legal issues with the evidence.

## **2. PRESENTATION OF EVIDENCE**

There is no required order for the presentation of documentary and testimonial evidence. There are few rules about what can and cannot be presented. It can be safely said that you should only consider “relevant evidence,” meaning evidence that has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MCM, MIL. R. EVID. 401. The convention is for the government to present its case first, and for the defense to present its case last. The standard practice is to proceed with examinations much as you would at a trial by court-martial, with open-ended direct examination followed by leading questions in a cross-examination. These formalities, however, need not be observed (and indeed may not be helpful to developing your recommendation) because of the inapplicability of the MRE at Article 32 hearings. You may therefore direct the conduct of the hearing in any way that reasonably advances your investigation, though you are required to give the accused “wide latitude in cross-examining witnesses.” MCM, R.C.M. 405(h)(1)(A).

### **A. MILITARY RULES OF EVIDENCE**

The MRE do not apply to Article 32 investigations, except for MRE 301 (privilege concerning compulsory self-incrimination), MRE 302 (privilege concerning mental examination of the accused), MRE 303 (degrading questions), MRE 305 (warnings about rights), MRE 412 (sex offense cases; relevance of alleged victim’s sexual behavior or sexual predisposition) and MREs 501 to 514 (privileges). MCM, R.C.M. 405(i). This means that subject only to the provisions of RCM 405(g) concerning the production of witnesses and evidence and alternatives, you may consider hearsay and other evidence which would be inadmissible at a court-martial. *See e.g.*,

*United States v. Matthews*, 15 M.J. 622, 625–626 (N.M.C.M.R. 1982). It also means that you do not rule on evidentiary objections. If a party requests that you respond to particular objections in writing, such objections must be noted in your report. Furthermore, potential evidentiary problems that may arise at trial should be noted in your report.

## **B. PAST SEXUAL HISTORY OR PREDISPOSITION EVIDENCE**

Evidence of the prior sexual history or predisposition of an alleged victim of a sex crime is generally inadmissible in an Article 32 hearing, as it is in a court-martial. *See* MCM, MIL. R. EVID. 412(a), R.C.M. 405(i). There are three notable exceptions to this general rule. These are allowing the evidence if it is offered: 1) to prove semen or injury was from a source other than the accused; 2) to establish prior sexual behavior between the victim and accused offered to prove consent; or 3) evidence of a constitutional dimension which cannot be excluded without impinging on the rights of the accused. MCM, MIL. R. EVID. 412(b)(1)(A)–(C). If you are not a judge advocate, you need to seek advice from an impartial source on the proper handling of evidence implicating sexual history of a victim of an alleged sexual offense.

### **I. NOTICE**

Any party who wishes to introduce evidence under one of the enumerated exceptions to MRE 412 must notify you and the opposing party at least 5 days in advance of the hearing.

### **II. HEARING**

Before admitting MRE 412(b) evidence, the IO must conduct a closed hearing. At the closed hearing the parties may call witnesses, including the victim, and the rules for production of witnesses and evidence apply as they would for the rest of the Article 32 hearing. The victim whose sexual history or predisposition is in issue must be afforded a reasonable opportunity to attend and to be heard.

### **III. ORDER**

You must determine whether the proffered evidence satisfies one of the exceptions in MRE 412(b) and whether the probative value of such evidence outweighs the danger of unfair prejudice. It is only admissible if it meets both criteria. You must specify which evidence may be offered in the Article 32 hearing itself and the subjects upon which the victim or other witnesses may be questioned.

## **C. CLASSIFIED EVIDENCE**

The government is privileged from producing classified information at an Article 32 investigation, even though the information sought is “under the control of the government” for the purposes of RCM 405(g)(1)(B). *See* MCM, MIL. R. EVID. 505(a). If the government chooses to allow for the production of classified evidence, the CA may issue a protective order which allows the information to be examined and rebutted by the accused (and therefore considered by you), but protects against compromise of the information. MCM, R.C.M. 405(g)(6). The accused has an absolute right to be present at the entire proceeding, so it is not

permissible to exclude an accused service member for the presentation of classified evidence. *See* MCM, R.C.M. 405(f)(3). If classified information is sought by the defense, and the government claims the privilege, then the CA must respond in writing to the request before charges can be referred. MCM, MIL R. EVID. 505(d).

### **3. PRESENTATION OF TESTIMONY**

With the exception of the accused, all witnesses are required to testify under oath. The accused is permitted to make an unsworn statement. The actual oath for witnesses is found in the discussion to RCM 405(h)(1)(A). Enclosure (8), the IO script, also contains the oath. Remember, you have broad discretion in conducting the hearing, including the manner in which witnesses are questioned.

#### **A. SEQUESTERING WITNESSES**

As a general rule, you should not permit prospective witnesses to hear, examine, or discuss the testimony or statements of other witnesses. Military judges on their own motion or by motion of counsel are permitted to exclude witnesses from a court-martial. MCM, MIL R. EVID. 615. While MRE 615 is not necessarily applicable at Article 32 hearings, the practice of sequestering witnesses in order to prevent contamination of their testimony is common and is within your discretion during your investigation. It is also within your discretion to permit certain potential witnesses, such as experts, investigators, or a parent in a child sexual abuse case, to be present if you consider their presence helpful to the investigation. *See* MCM, R.C.M. 405(h)(3). Finally, you must warn (or order) witnesses who have testified not to discuss the case or their testimony with anyone, as suggested by the script in Enclosure (8).

#### **B. TAKING TESTIMONY**

While the IO need not perfect the case for the government, you should either conduct a thorough direct examination of witnesses or ensure the counsel do so. The question of how much questioning you should undertake yourself during the investigation is dependent on personal style and the facts of each case. It is safe to say that you should feel free to ask questions, at any time, that will help clarify your understanding of the facts and enable you to make a well-informed recommendation as to the disposition of the charges. The practice of simply bringing witnesses to the hearing, providing them with their prior statements to the police, asking them to adopt their statements, and then yielding examination of the witnesses to the defense is inadvisable. This process contributes nothing to the development of information that should be considered by the CA. Note also that you must attempt to ascertain whether a witness will be available at the time of a potential future trial as suggested by the script in Enclosure (8), and must note potential future unavailability in your report to the CA.

#### **I. AUDIO RECORDINGS AND VERBATIM TRANSCRIPTS**

Recording the testimony of witnesses at an Article 32 investigation is not addressed in the *MCM*, and the decision to record or not record is within your sound discretion. *See United States v. Svoboda*, 12 M.J. 866, 867–68 (A.F.C.M.R. 1982). Although it is not required, it is generally preferable to generate an audio recording of the entire hearing. Under most circumstances, you should record key witness testimony verbatim – either an audio

recording or through using a court reporter to create a transcript. Memorializing the hearing has many benefits. First, the record allows you to make a more accurate report to the CA. Second, it allows you to protect the integrity of your hearing from subsequent attack at trial or on appeal. Third, it provides a useful tool for both counsel to use at any subsequent trial as grounds for impeaching or bolstering witnesses. Furthermore, in many cases victims sometime recant or become uncooperative right before trial. In such cases, the recording or verbatim transcript might be admitted for use at trial. *See e.g.*, MCM, MIL. R. EVID. 804(b)(1) (hearsay exception for former testimony for an unavailable witness). If a recording is made, the government should always retain a copy in case it is later requested by the defense after a government witness has testified at trial. *See Jencks Act*, 18 U.S.C. § 3500 (2012); *United States v. Marsh*, 21 M.J. 445, 450–52 (C.M.A. 1986). If operational or technical considerations prohibit recording, make your summaries as thorough as possible.

## **II. TAPE RECORDINGS BY DEFENSE OR OTHERS**

If you deny a defense request to tape record testimony, it would be appropriate to state your reasons in the report. If you permit the defense counsel or accused to tape record the testimony, you should make clear to all parties that your summary of witness testimony is the official record. Of course, it is your responsibility to summarize the testimony accurately. If testimony is tape recorded by the defense, a Jencks Act issue may arise, even when only summarized testimony is prepared and included in your report. Therefore, the defense must be cautioned to retain the tapes. *See Marsh*, 21 M.J. at 450–52.

## **III. REDUCING THE TESTIMONY TO WRITING**

You will be required to include a summary of the substance of all testimony in the report of investigation. It is therefore helpful if you ensure that a proper recording of the entire proceeding is made, and that you refer to it often while writing your report. Depending on your personal style and on the facts of the case, you may wish to bring your laptop to the proceeding and begin writing witness summaries while the witnesses are on the stand, or you may take hand-written notes as each witness testifies. After the hearing, you must summarize each witnesses' testimony for inclusion in your report, or from a recording.

## **C. SELF-INCRIMINATION**

If a military witness “appears likely to incriminate himself or herself” then you should advise the witness of his or her rights against self-incrimination under the UCMJ. MCM, MIL R. EVID. 301(a). A script for witnesses is included here as Enclosure (9), although you may also use the “blue card” NJS Form 2/9, which contains the substance of the required warnings under Article 31 and MRE 301, or any other warning that complies fully with the requirements of Article 31, the text of which is also included in the Enclosure. Enclosure (9) also contains a generic warning about rights against self-incrimination and right to counsel under the United States Constitution, which you may give to a civilian witness who is incriminating himself or herself, although this is probably a step you would only take out of an abundance of caution, as explained more fully in the enclosure itself.

#### **4. OBJECTIONS**

Handling objections is one of the most misunderstood aspects of Article 32 proceedings. If you keep in mind the purpose of the investigation, everything else will fall into place. Your goal is to ascertain and compile the facts so that you can make an informed recommendation as to the proper disposition of the case, and the CA in turn can make an informed referral decision. Since you are not a judge but an investigator, generally speaking, you should obtain and sift through as much information as possible, keeping in mind that very few rules of evidence apply. The proper basis of an objection, in most cases, will either be on relevance grounds, or failure to comply with the procedural requirements of RCM 405. Generally speaking, you do not have to issue rulings on objections made by either party, but you may do so if you believe that it is appropriate. MCM, R.C.M. 405(h)(2) discussion. If the defense correctly objects to your consideration of evidence (for example, your consideration of impermissible alternatives to evidence) then you are not permitted to consider it in evaluating the evidence or making your recommendation to the CA. If you disagree with an objection, and decide to overrule it, your basis for doing so should be included in the report. Any inadmissible evidence should not be considered by you, but should be appended to the investigative report. *See* MCM, R.C.M. 601(d)(1) (allowing CA to consider objectionable or inadmissible evidence as basis for referral).

#### **5. INVESTIGATING UNCHARGED OFFENSES**

Your investigation need not be limited to the issues raised by the charges, but may also look into new uncharged offenses so long as the accused is present at the investigation, is informed of the nature of the uncharged offenses, is represented by counsel, and is afforded an opportunity to present evidence and to cross-examine witnesses. UCMJ, art. 32(d); MCM, R.C.M. 405(e). Similarly, you are not limited to examination of the witnesses and evidence presented by the government representative and defense counsel. Your goal should be to compile enough information so that the CA can assess whether the admissible evidence warrants trial by court-martial. Thus, if you feel that additional evidence or testimony is necessary to make a proper and thorough recommendation to the CA, you may call those witnesses yourself or direct that the evidence be presented. MCM, R.C.M. 405(g)(1)(A).

## **PREPARING THE REPORT**

In preparing the report of investigation, you should keep in mind your statutory obligation to conduct a "thorough and impartial" examination of the charges and evidence accumulated to date. UCMJ art. 32(a). If you find that misconduct occurred, the *MCM* requires that your report of the investigation and the IO exhibits include no substantial errors and show a *prima facie* case – “reasonable grounds exist to believe that the accused committed the offenses alleged.” *MCM*, R.C.M. 405(j)(2)(H). This means that the charges are warranted by the evidence. Article 32 only requires a report before a general court-martial, but you will almost always submit a report even if your recommendation is that there be no prosecution of any sort.

### **1. TIMING**

Under RCM 405(j)(1), you must submit a timely written report of your investigation to the CA. The appropriate amount of time required to complete the report will depend upon the nature of your investigation, though your appointment letter may give specific deadlines. That being said, your goal should be to submit the report as soon as possible after the close of the investigative phase. Efficiency in completing your report is particularly important in cases where the accused is in confinement or under restraint. If, however, the thoroughness of your report is endangered by time constraints, you should ask the CA for an extension.

### **2. FORMAT**

The format of your report will vary depending on the nature of the case, upon personal style, or particular instructions from the SJA for the CA. Indeed, the different naval branches each utilize somewhat different conventions for the IO’s report. Some IO’s write what is essentially a memorandum of law in naval letter format containing enclosures. Others write a simple supplement to the DD Form 457. RCM 405 requires that the report include: 1) the name and contact information of defense counsel; 2) a summary of the testimony taken; 3) the “statements, documents, or matters considered” by you; 4) a statement of any reasonable ground for the belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation”; 5) a statement on the availability of witnesses for trial; 6) an explanation of any delays; 7) your conclusion with respect to the proper form of charges; 8) your conclusion on whether “reasonable grounds exist” to believe that the accused committed the offenses; and 9) your recommendation as to what disposition should be made in the case— everything from dismissal to referral to a general court-martial. *MCM*, R.C.M. 405(j)(2). The DD Form 457 is intended to ensure that your report satisfies all of these requirements. Therefore you are not required to supplement it to any great degree or to repeat anything that is already addressed on the form. Consider how you might incorporate the information below in a way that is understandable to the CA and to his or her SJA, and write your report accordingly.

#### **A. SUMMARIZE THE FACTS**

A brief factual summary of the case will help the CA to better understand your legal analysis. Usually, a chronological account is best. Cite the exhibits that show each fact you state in the summary. If evidence appears to be in conflict, you should outline any factual disputes, but you do not need to resolve them.

## **B. OUTLINE THE EVIDENCE PRESENTED**

Among other things, you must attach to the DD Form 457 a summary of each witness' testimony and the other evidence presented during the investigation. The level of description of the evidence that you should include depends greatly on the facts of each case. Using recordings or transcripts of the proceedings as well as your own notes, you should describe the physical and documentary evidence which you considered, summarize each witness's testimony, and analyze the significance of this evidence in terms of the broader facts.

## **C. ANALYZE THE REQUIRED ELEMENTS**

A good analytical approach is to copy the elements of each specification and discuss the evidence, element by element. If an element of proof is missing, you should not conclude that the charge is warranted by the evidence. Remember, though, that you can consider hearsay in deciding whether all the elements of proof are met. You may also comment on the credibility and demeanor of any witnesses who testified. Include your observations in your report but refrain from substituting your judgment on credibility for the judgment that the members or a military judge may make in a subsequent court-martial. In other words, if there is no evidence that a witness is lying, the best practice is to comment on the witness' demeanor and apparent credibility (or lack thereof) and then consider the testimony in determining whether the charges are founded.

## **D. RECOMMEND CHANGES TO THE CHARGES**

After hearing and seeing all the evidence, you should examine the form of the charges by comparing them to the model specifications, which can be found in Part IV of the *MCM* and in chapter 3 of the Military Judge's Benchbook. You may find some errors in the charges or wish to make recommendations regarding the referral of the charges to a court-martial. For example, your investigation may reveal that the date of an alleged offense is inaccurate or that a lesser included offense is warranted because evidence is lacking on a certain element of the offense currently charged. Remember, you may not make any changes to the charges. You are limited to making recommendations which the general court-martial convening authority may later effect.

### **I. MINOR CHANGES**

RCM 603 deals with changes to charges and specifications, which do not require redrafting or re-swearing by the accuser. "Minor" changes are defined as any change 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. When the CA makes a minor change the Article 32 investigation does not need to be reopened.

## II. MAJOR CHANGES

Any changes that are not "minor" are considered "major" by definition. For example, converting a specification that does not state an offense into one that does is a major change requiring charges to be re-sworn and an additional investigation to be conducted. *United States v. Garrett*, 17 M.J. 907, 909 (A.F.C.M.R. 1984); *United States v. Louder*, 7 M.J. 548, 551 (A.F.C.M.R. 1979). Changing a date or place in the specification is usually "minor" unless a clearly different offense than that contemplated by the accuser results. If a change is major, your recommendation may be to reopen the Article 32 investigation, unless the defendant was on notice of a potential change and was given the opportunity to challenge it.

### E. NOTE OBJECTIONS

You are required to note in your report objections made during the investigation by either party if the party so requests. MCM, R.C.M. 405(h)(2). The Article 32 script in Enclosure (8) suggests a procedure for handling objections. If written objections are received, you should respond to each in your report and cure any deficiencies, if necessary.

### F. EXPLAIN DELAYS

You are required to explain any delays in the investigation. MCM, R.C.M. 405(j)(2)(F). You should discuss continuance requests or other delays with the CA as they are requested, because exclusion of delay from the government's speedy trial clock under RCM 707 should be approved at the time the delay is approved. *See Thompson*, 46 M.J. at 474–75.

### G. HIGHLIGHT LEGAL ISSUES

One of the most important functions of an Article 32 Investigation from the point of view of the CA and his or her legal advisors is to point out legal problems that may come to pass at a court-martial. Although you are not required to rule on the admissibility of evidence, you are required to note any evidence which may not be admissible at trial. MCM, R.C.M. 405(e) discussion. Thus, you should briefly discuss any evidentiary or other legal issues you see. Do not go into a lengthy legal analysis. Cite the dispositive authorities to save others unnecessary labor, but keep your explanation and analysis brief. The SJA for the CA will do the necessary legal research before making a recommendation to refer the case to court-martial as required by Article 34. In determining whether the charges are in proper form, you should consider whether any of the charges are multiplicitous on their face and therefore subject to a motion to dismiss.

## 3. LENGTH

When drafting your report it is always useful to remember your target audience; there is a commanding officer in the fleet who needs to understand how best to handle a potentially serious disciplinary matter in a military command. When in doubt, you should provide in your report more detail rather than less in order to help the CA assess the comprehensiveness of the evidence, and avoid a trial on baseless charges. In most cases, you should include in your report a summation of the evidence – with citations to the exhibits – which substantiates each element of any charged offense. Comment on the apparent reliability of evidence and identify any significant legal issues.

#### **4. ASSEMBLY**

Like records of trial, reports of investigation under Article 32 are expected to generally follow a certain sequence. If you are unsure how to assemble your report ask the SJA how he or she would like the information presented. Note that the DD Form 457 and its supplemental pages are not IO Exhibits. A copy of the charge sheet is always IO's Exhibit 1. Do not use the original; it should be retained by the appointing authority and later forwarded to the general court-martial convening authority if a recommendation to refer the case to a general court-martial is made. Your appointment letter is attached as IO Exhibit 2. Other documents and witness statements which you considered should be marked as exhibits and form the rest of the report, generally in the order in which they were taken, although you may order statements in any way that makes sense for the SJA and the CA. Exhibits should be marked sequentially using Arabic numerals (i.e. "IO Exhibit 1," "IO Exhibit 2" and so on). Add page numbers to exhibits that have multiple pages in order to facilitate the understanding of the reader. If there are any documents that you did not consider, they should be forwarded with the report with an annotation that they were not considered as exhibits. Enclosure (10) is a simulated IO's report based on the required DD Form 457, though personal style and local practice may provide for many different variations in format for the written report.

##### **A. REPRODUCING THE REPORT**

You need not reproduce the report, but you must turn in a report of such quality that all of it can be reproduced clearly and legibly. It may go to a flag officer and must be carefully considered by the reviewing chain. Consult with the SJA on the format of your submission.

##### **B. DISTRIBUTION OF THE REPORT**

RCM 405(j)(3) requires you to deliver your report to the commander who directed the investigation, and it requires that the commander promptly serve a copy of your report upon the accused. The local SJA normally performs the function of delivery to the accused for the commander, and it is not your responsibility to do so unless otherwise directed. Normally your obligation ends when you deliver your report to the CA. That commander may, however, decide that your report is inadequate or deficient in some area and direct you to clarify certain aspects. The appointing authority may not, however, influence your impartial judgment. MCM, R.C.M. 405(a).

#### **5. DEFENSE COUNSEL'S RIGHT TO OBJECT**

After service of a copy of the report on the accused there is a 5-day period for defense counsel to make an objection to the report to the commander who appointed the IO. MCM, R.C.M. 405(j)(4). The day the report is delivered to the accused is not counted in calculating the 5-day period. MCM, R.C.M. 103(9). Failure to object to matters included or omitted from the report constitutes a waiver of such objections in the absence of good cause for relief from the waiver. MCM, R.C.M. 405(k). If timely objections are received, the appointing authority should comment on them. If they appear valid, he or she may consider reopening the investigation or taking other appropriate action to cure the defects. If the commander who appointed the investigation is only the special court-martial convening authority, and the report contains recommendations for a general court-martial, he or she

is not required to wait for expiration of the 5-day period before forwarding the charges and report of investigation to the general court-martial convening authority. MCM, R.C.M. 405(j)(4). If timely defense objections are received after the charges have been forwarded to the general court-martial convening authority, the SJA for the appointing authority should still comment on them. Meanwhile, the general court-martial convening authority's SJA should be alerted that the objections are being forwarded.

## **6. REOPENING THE INVESTIGATION**

There are several circumstances under which it may be necessary to reopen the investigation. If an uninvestigated charge or specification is referred to court-martial after the first investigation has been completed, then the investigation must be reopened. *See Louder*, 7 M.J. at 551. Other examples of times when an investigation must be reopened include if there has been a "major" change in a specification, or if additional evidence is required.

### **A. PROCEDURE**

You should convene the hearing as before and re-advise the accused of his or her rights and the nature of the charges. The second hearing should then proceed in the same manner as the first. If you are reconvening for an additional charge or specification, incorporate by reference all matters from the prior Article 32. It is not necessary to recall witnesses solely to repeat testimony relating to the original charges.

### **B. MODIFYING THE REPORT**

If the DD Form 457, Investigating Officer's Report, was not completed prior to the reopening, you should include all matters presented in one report. If the first report was completed, you may submit the additional matters as an addendum to the original package without completing another DD Form 457.

## **CONCLUSION**

Article 32 investigations are covered in the *MCM* in less than one column of print. RCM 405 covers the same topic in several pages, but even that is insufficient guidance for a new IO, or perhaps for someone who has not been an IO in some time. The intent of this guide is to fill that gap so that you as an Article 32 IO can promptly pursue an investigation to which you have been detailed, properly gather and compile the evidence, correctly resolve the issues which confront you, and make accurate recommendations on the disposition of charges that are "in the interest of justice and discipline."

## **SUGGESTIONS FOR FURTHER READING**

DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE* § 7, §§ 7-1 to 7-2(E) (7th ed., 2008) *available at* 1-7 *Military Criminal Justice: Practice and Procedure* § 7.

1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, *COURT-MARTIAL PROCEDURE* § 9, §§ 9-10.00 to 9-90.00 (Lexis, 2nd ed. 1999) *available at* 1-9 *Court-Martial Procedure* § 9.

DEP'T OF ARMY, PAM 27-17, *PROCEDURAL GUIDE FOR ARTICLE 32(b) INVESTIGATING OFFICER* (16 Sep. 1990) *available at* [http://www.apd.army.mil/pdf/files/p27\\_17.pdf](http://www.apd.army.mil/pdf/files/p27_17.pdf).

Major John R. Maloney, *Litigating Article 32 Errors After United States v. Davis*, *Army Law.*, (Sep. 2011), at 4, *available at* [https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/0/737e82340d7b554c8525795f005492e3/\\$FILE/Article 2 - By MAJ John R. Maloney.pdf](https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/0/737e82340d7b554c8525795f005492e3/$FILE/Article%20-%20By%20MAJ%20John%20R.%20Maloney.pdf).

Major Joseph B. Topinka, *Expanding Subpoena Power in the Military*, *Army Law.*, (Sep. 2003), at 15, *available at* [https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/c82df279f9445da185256e5b005244ee/e8798590aec0311a85256e5b0054ca1c/\\$FILE/Article 2.pdf](https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/c82df279f9445da185256e5b005244ee/e8798590aec0311a85256e5b0054ca1c/$FILE/Article%20.pdf).

Captain Mark Cremin, *Use of Article 32 Testimony at Trail – A New Peril for Defense Counsel*, *Army Law.*, (Jan. 1991), at 35, *available at* [https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/c82df279f9445da185256e5b005244ee/318e32de2f4f58ad85256e5b0055780e/\\$FILE/TAL 27-50-217 19910101.pdf](https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/c82df279f9445da185256e5b005244ee/318e32de2f4f58ad85256e5b0055780e/$FILE/TAL%2027-50-217%2019910101.pdf).

Major Larry A. Gaydos, *A Comprehensive Guide to the Military Pretrial Investigation*, 111 *MIL. L. REV.* 49 (1986) *available at* [http://www.loc.gov/rr/frd/Military\\_Law/Military\\_Law\\_Review/pdf-files/275C65~1.pdf](http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/275C65~1.pdf).

*Manual for Courts-Martial; Proposed Amendments*, 77 *Fed. Reg.* 64853, 64853–64855 (Oct. 23, 2012) *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-10-23/pdf/2012-25852.pdf>.



DEPARTMENT OF THE NAVY  
NAVAL EDUCATION AND TRAINING COMMAND  
U.S. NAVAL AIR STATION  
PENSACOLA, FL 32508

In Reply Refer To:  
5811  
CO/SJA  
11 Feb 13

From: Commander, Naval Education and Training Command  
To: Lieutenant Commander Edward Luu, USCG

Subj: APPOINTMENT AS ARTICLE 32 INVESTIGATING OFFICER IN CASE  
OF UNITED STATES V. LANCE CORPORAL CHRISTOPHER M. GIBSON, U.S.  
MARINE CORPS

Ref: (a) Article 32, Uniform Code of Military Justice (UCMJ)  
(b) R.C.M. 405, MCM (2012 edition)

Encl: (1) Charge sheet (DD Form 458) ICO U.S. v. LCpl Gibson

1. Pursuant to references (a) and (b), you are hereby appointed as an Investigating Officer to conduct a formal investigation into all matters set forth in the charges and specifications preferred against Lance Corporal Christopher M. Gibson, United States Marine Corps.

2. You shall conduct a thorough and impartial investigation which shall include an inquiry into the truth of the matters set forth in the charges, and shall submit your recommendation as to the disposition of the case. In conducting your investigation and in making your report, you will be guided by the provisions of references (a) and (b) and by such other legal authorities as may be applicable.

3. Captain Abigail Avery, USMC, certified in accordance with Article 27(b), UCMJ and previously sworn in accordance with Article 42(a), UCMJ, has been appointed government counsel.

4. Lieutenant Gabriel Martinez, JAGC, USN, certified in accordance with Article 27(b), UCMJ and previously sworn in accordance with Article 42(a), UCMJ, has been detailed as defense counsel.

5. You will notify the accused and respective counsels of the time and place of the convening of this investigation. You are specifically granted the authority to grant one continuance for a reasonable duration up to three weeks in the subject case. All continuance requests shall be submitted to you, in writing, and regardless of your decision, they shall be included in your final report.

C. THOMAS

Copy to: TC  
DC





11 Feb 2013

MEMORANDUM

From: Lieutenant Commander Edward Luu, USCG, Investigating Officer  
To: Captain Abigail Avery, USMC, Government Representative  
Lieutenant Gabriel Martinez, JAGC, USN, Counsel for Accused  
Mr. James W. Forrest, Counsel for the Accused

Subj: Preliminary Conference Agenda

1. I have been appointed by Commander, Naval Education and Training Command, to conduct an Article 32 investigation into the alleged offenses of Lance Corporal Christopher M. Gibson. The appointing letter indicates that you, Captain Avery, are the government counsel and you, Lieutenant Martinez, are the detailed defense counsel. According to my conversation concerning some logistics of this case with Captain Avery, I understand that Lance Corporal Gibson has also retained you, Mr. Forrest, as civilian counsel.

2. I would like to conduct a preliminary conference at 0900 on 1 March 2013 at the RLSO, Bldg 1456, Naval Air Station Pensacola. I expect that this meeting will take approximately one hour, and you are invited to attend in person, although a teleconference is acceptable to me as well. If this date is unworkable, please suggest an alternate time and date. During this meeting, I would like to address the specific subjects outlined below.

4. Government Counsel:

- a. Please state the elements of the charged offenses.
- b. Please provide a list of witnesses you intend to call and evidence you intend to introduce. Please provide the defense with a contact number for the witnesses and custodians of the evidence.
- c. If the Government will refuse to produce any witness or evidence requested by the defense, please provide the reason.

3. Defense Counsel:

- a. Are there any other counsel representing the accused? Do you expect any additional counsel in the future?

b. Please provide a list of any witness you request, along with contact information. If the Government has refused to produce a witness, please provide a synopsis of the expected testimony and an explanation of why the testimony is relevant and not cumulative, and why the witness is reasonably available.

c. Please provide a list of any documents or other physical evidence you want the Government to produce. Please provide its location, custodian, and an explanation why it is relevant, reasonably available, and non-cumulative.

5. Both government and defense counsel:

a. Please provide a list of any alternatives to testimony or evidence you intend to introduce for my consideration and please indicate as soon as possible via E-mail whether you intend to object to any alternatives to testimony or evidence opposing counsel intends to introduce.

b. Please suggest a time and date for the initial session of the Article 32 and provide an estimate of the time required for the whole investigation. Please discuss dates with each other and try to reach an agreement. Bring your calendars to the preliminary conference.

6. At this time I anticipate requiring you to submit witness lists by 8 March, and holding a one-day investigation on 15 March.

7. I intend to discuss the location of the hearing and any administrative support needed, as well as designation of the persons responsible for ensuring that the accused is present and in the proper uniform.

8. By 25 February 2013, please respond to the questions above and send me any additional information via e-mail. Please be sure to courtesy copy opposing counsel on all communications. My government email is edward.r.luul@navy.mil.

E. R. LUU  
Lieutenant Commander, USCG  
Investigating Officer

4 March 13

MEMORANDUM

From: Lieutenant Gabriel Martinez, JAGC, USN, Defense Counsel  
To: Lieutenant Commander Edward Luu, USCG, Investigating  
Officer in case of United States v. Lance Corporal Christopher  
M. Gibson, United States Marine Corps

Subj: REQUEST FOR CONTINUANCE OF THE ARTICLE 32 INVESTIGATION

Ref: (a) IO appointment letter of 10 February 2013  
(b) R.C.M. 405, Manual for Courts-Martial (2012 edition)  
(c) R.C.M. 707, Manual for Courts-Martial (2012 edition)

1. Pursuant to reference (a), paragraph (5), counsel for the accused respectfully requests that the Article 32 hearing in the case of Lance Corporal Christopher M. Gibson, United States Marine Corps, be continued until a date no earlier than 1 April 2013.

2. Because of the serious and complex nature of the allegations against Lance Corporal Gibson and the relatively short time to prepare, the Defense requests that the Article 32 hearing be continued until no earlier than 1 April 2013.

3. Furthermore, the Defense requests that the deadline for submitting witness and evidence request for the Article 32 investigation be likewise extended from the date of 8 March 2013 to a date not earlier than 15 March 2013.

4. Pursuant to reference (b), paragraph (c), the Defense accepts any delay as a result of this request as excludable to the Government.

5. Thank you very much for your consideration and attention to this matter.

G. J. MARTINEZ

Copy to:  
Captain Abigail Avery, Government Counsel

5800  
Ser 123  
5 Mar 13

Ms. Eva Munroe  
724 W. Flagler St.  
Miami, Fl 33111

Dear Ms. Munroe,

You are invited to appear as a witness in proceedings under Article 32, Uniform Code of Military Justice, against Lance Corporal Christopher M. Gibson, United States Marine Corps. You are requested to appear at the office of the Region Legal Service Office, Bldg 1456, Naval Air Station, Pensacola, Florida on 1 April 2013 at 0900.

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 10 March 2013 if you can appear on this date so that I can prepare the necessary paperwork in advance to pay you right after your testimony. My phone number is (222) 555-1212.

If you require advance travel assistance, please let me know and I will arrange for government-provided transportation to and from the proceedings.

Sincerely,

A. S. AVERY  
Captain, USMC  
Trial Counsel

**INTRODUCTION AND PRELIMINARY MATTERS**

IO:	<p>This hearing will come to order. This investigation is convened by _____, Commanding Officer, by the appointing order dated _____. My name is _____. I have been detailed as investigating officer under Article 32(b) of the Uniform Code of Military Justice to inquire into the truth of the matters set forth on the charge sheet dated _____ in the case of _____, the accused. Copies of the charge sheet and appointing order have been furnished to me and all counsel, and will be inserted in the record as Investigating Officer Exhibits 1 and 2, respectively.</p> <p>Present at this hearing are myself _____, the detailed investigating officer; _____ the accused _____; _____ defense counsel _____; _____ and counsel for the government _____; [Present also is _____, who has been detailed as the reporter for this hearing]. [Present also is _____, who has been appointed to serve as translator];</p> <p>Are you _____, the accused in this case?</p>
ACC:	Yes/No, sir/ma'am.

**SUBSCRIPT FOR COURT REPORTER (WHO HAS NOT PREVIOUSLY BEEN SWORN)**

IO: \_\_\_\_\_, do you (**swear or affirm**) to faithfully perform the duties of reporter for this investigation (**so help you God**) ?

Rep: I do.

**SUBSCRIPT FOR INTERPRETER**

IO: \_\_\_\_\_, do you (**swear or affirm**) that in the case now in hearing you will interpret truly the testimony you are called upon to interpret (**so help you God**)?

Int: I do.

IO:	Counsel, at this time please state your legal qualifications, status as to oath, the authority by whom you were appointed and/or detailed, and any disqualifying capacity in which you may have acted.
GC:	I am _____. I am certified in accordance with Article 27(b) and sworn in accordance with Article 42(a) of the Uniform Code of Military Justice. I have been detailed to this investigation by _____, the convening authority. I have not acted in any disqualifying manner.
DC:	I am _____. I am certified in accordance with Article 27(b) and sworn in accordance with Article 42(a) of the Uniform Code of Military Justice. I have been detailed to this case by _____ and detailed to this investigation by _____, the convening authority. I have not acted in any disqualifying manner.

**SUBSCRIPT FOR CIVILIAN COUNSEL**

IO: Would civilian counsel representing the accused please identify yourself for the record, state your contact information, and tell me where you are currently licensed to practice law?

Civilian I am . I am a civilian attorney.

DC: My office is located at .  
My mailing address is .  
My office phone number is .  
I am a member in good standing of the bar.

IO: , 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)?**

Civilian I do.  
DC:

IO: It appears that defense counsel representing the accused **(has/have)** the requisite qualifications under Rule for Courts-Martial 405(d)(2).

VOIR DIRE AND ELECTION OF COUNSEL

IO:	<p>My name is _____ . I am a <b>(commissioned officer/Judge Advocate certified in accordance with Article 27(b) and sworn in accordance with Article 42(a) of the Uniform Code of Military Justice)</b>, qualified to serve as investigating officer in accordance with Rule for Courts-Martial 405(d)(1). I am not aware of any matters that I believe may be grounds to disqualify me as the investigating officer.</p> <p>Is the accused or counsel for either side aware of any grounds that might disqualify me from conducting this investigation, or does either side desire to question me, or raise any challenge now?</p>
GC/DC:	Yes/No, sir/ma'am.
IO:	<p>_____ are there grounds to assert that the accused was not mentally responsible for <b>(his /her)</b> actions at the time of the offense(s) charged or that the accused is not mentally competent to participate in the defense of <b>(his/her)</b> case in this hearing today?</p>
DC:	Yes/No, sir/ma'am.

**AN AFFIRMATIVE ANSWER REQUIRES THE IO TO DETERMINE IF THE ACCUSED IS ABLE TO “UNDERSTAND THE NATURE OF THE PROCEEDINGS” AND TO “CONDUCT OR COOPERATE INTELLIGENTLY IN THE DEFENSE OF THE CASE.” SEE MCM, R.C.M. 909(a). IF THE ACCUSED IS NOT ABLE TO ASSIST IN HIS OR HER OWN DEFENSE, THEN THE IO SHOULD CONSIDER ADJOURNING THE HEARING AND SEEKING INSTRUCTIONS FROM THE CA.**

IO:	<p>, has been appointed as counsel for the government at this investigation. <b>(He/she)</b> is not acting as counsel for the investigating officer. <b>(He/she)</b> is here solely to represent the government. <b>(He/she)</b> will not advise me as to what disposition I will recommend in this case, as that decision rests with me alone. After completing this investigation I shall recommend the disposition I deem appropriate for matters disclosed at this proceeding.</p> <p>Do you understand?</p>
ACC:	Yes/No, sir/ma'am.
IO:	Are there any questions by any party concerning my function or the function of government counsel?
ACC/ GC/DC:	Yes/No, sir/ma'am.
IO:	<p>, you have the right to be represented in this investigation by , your detailed defense counsel, or you may be represented by military counsel of your own selection, if the military counsel you request is reasonably available. Military counsel are provided to you free of charge. You are not entitled to be represented by more than one military lawyer, but, if you are represented by military counsel of your own selection, then you could request that your detailed defense counsel, continue to represent you, and the authority who detailed would have sole discretion to either grant or deny that request.</p> <p>Do you understand?</p>

ACC:	Yes/No, sir/ma'am.
IO:	In addition, you have the right to be represented by civilian counsel of your own selection, at no expense to the United States. Civilian counsel may represent you alone or along with your military defense counsel. Should you choose civilian counsel, you would be responsible for those expenses. If you are represented by civilian counsel, then your military counsel would continue to serve as an associate counsel unless you ask to excuse him/her.  Do you understand your rights to counsel?
ACC:	Yes/No, sir/ma'am.
IO:	Do you have any questions about your rights to counsel?
ACC:	Yes/No, sir/ma'am.
IO:	By whom do you wish to be represented at this hearing?
ACC:	<b><i>(Rank and name of detailed DC / rank and name of requested DC / name of civilian defense counsel)</i></b>

**SUBSCRIPT FOR WAIVER OF COUNSEL**

**USE IF ACCUSED INDICATES DESIRE TO PROCEED WITHOUT A LAWYER**

IO: \_\_\_\_\_, I caution you that the charge(s) against you are very serious and it is important that you understand all of your rights as well as the procedures that control this hearing. I suggest to you that you need the assistance of a lawyer to properly protect your rights and to otherwise help you. As I explained earlier, you have an absolute right to a qualified, free military lawyer who will provide that assistance. You are free, however, to give up this right.

Assistance of counsel is a right that you have under the United States Constitution and the Uniform Code of Military Justice, and is a due process protection that is intended to guard your interests.

Do you understand what you are giving up by waiving your right to counsel?

ACC: Yes, sir/ma'am.

IO: If you decide to proceed in this hearing without a lawyer, you do so at your peril and may, without meaning to do so, jeopardize your case.

Do you understand what I have just told you?

ACC: Yes, sir/ma'am.

IO: Do you wish to have a lawyer to represent you, or not?

ACC: I do not want a lawyer.

**IF THE IO IS SATISFIED THAT THE ACCUSED HAS MADE A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF THE RIGHT TO COUNSEL, THE OFFICER SHOULD COMPLETE BLOCKS 9(a) AND 9(b) OF THE DD FORM 457, AND ASK THE ACCUSED TO SIGN THE FORM IN BLOCK 9(c), INDICATING THE FACT OF THE WAIVER. IF THE ACCUSED REFUSES TO SIGN, THE IO WILL EXPLAIN THE REFUSAL IN BLOCK 21 OF THE FORM OR ADDENDA. IF THE IO IS NOT SATISFIED THAT THE ACCUSED HAS KNOWINGLY AND INTELLIGENTLY WAIVED THE RIGHT TO COUNSEL, THE OFFICER SHOULD PROCEED AS FOLLOWS:**

IO: I am not satisfied that you fully appreciate the consequences of not having a lawyer at this hearing. Therefore, I will direct to continue to act as your counsel.

PRELIMINARY ADVICE

IO:	, do you have a copy of the charge sheet in front of you?
ACC:	Yes, sir/ma'am.
IO:	<p>, please follow along on your copy of the charge sheet as I inform you of the general nature of the charges that I will be investigating.</p> <p>You are alleged to have committed the following violations of the Uniform Code of Military Justice:</p> <p>Specification 1 of Charge I alleges a violation of Article _____ of the UCMJ, which alleges that <b>[describe nature of all charges and specifications in plain language which the accused will understand]</b>.</p> <p>The charges were preferred by <b>(Box 11 a. of the Charge Sheet, DD Form 458)</b> a person subject to the UCMJ, as accuser, and were sworn to before <b>(affidavit in Part III of the Charge Sheet, DD Form 458)</b>, an officer authorized to administer oaths.</p> <p>A copy of the charge sheet will be appended to the record as IO Exhibit 1.</p> <p>Does either counsel desire that I read each charge and specification, or desire further examination of the charge sheet before we continue?</p>
GC/DC:	Yes/No, sir/ma'am.

**IO CAN NOW CHECK OF BOXES 10 a. & 10 b. OF THE DD FORM 457**

IO:	<p>, Under Article 31 of the Uniform Code of Military Justice, you have the right to remain silent and refuse to make a statement regarding any offense of which you are accused or suspected and that is being investigated. The fact that you may chose to exercise this right cannot be used against you in any way, and I may not consider your silence as evidence.</p> <p>Do you understand your right to remain silent?</p>
ACC:	Yes/No, sir/ma'am.

**IO CAN NOW CHECK OF BOX 10 c. OF THE DD FORM 457**

IO:	<p>, I am going to explain to you the purpose of the hearing and the rights which you have at this hearing. If you do not understand what I am telling you, let me know and I will explain it again until you and I are both satisfied that you understand.</p> <p>The purpose of this hearing is to investigate the charges and against you and to recommend to what action should be taken.</p> <p>I have been appointed to conduct a formal investigation under Article 32 of the Uniform Code of Military Justice to inquire into the truth of the matters set forth in the charges, the form of the charges, and to make a recommendation on the disposition which should be made of the case in the interest of justice and discipline. I know nothing at all about your case except for the information contained in the charge sheet and in the order that appointed me to investigate these charges;</p>
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	<p>[(I have also met with your counsel and with Government counsel to discuss some of the legal issues which may arise during this hearing, to identify the witnesses who are expected to testify, and to mark the exhibits which may be offered) and/or (I have reviewed _____ in order to make initial determinations regarding the availability of witnesses and evidence for this hearing)].</p> <p>I have formed no opinion as to what I will recommend. I will make a recommendation to _____ solely on the basis of the evidence that I receive during this hearing. You will have an opportunity to review the report in which I will submit my recommendations, and will have an opportunity to object to it as well.</p> <p>This hearing is not a trial. I am not here to determine your innocence or guilt. It is my duty to evaluate and impartially weigh all of the evidence for the sole purpose of formulating a recommendation. I will pursue equally and impartially all matters which tend to exonerate you, and all matters which tend to implicate you in violations of the UCMJ. I may recommend that the charges against you be referred for trial at a general court-martial, special court-martial, or summary court-martial. I also may recommend that the charges, or some of them, be dismissed or disposed of at a forum other than trial by court-martial, such as NJP.</p> <p>_____ is not bound by my recommendation.</p> <p>For example, if I recommend that a charge against you should be dismissed, <b>(he/she)</b> may still decide to send that charge to a court-martial. As my recommendations are only advisory in nature and are not binding on the convening authority, he or she will make the final decision on the disposition of the charges in this case.</p> <p>Do you understand the purpose of this hearing?</p>
ACC:	Yes/No, sir/ma'am.

**IO CAN NOW CHECK OF BOX 10 d. OF THE DD FORM 457**

IO: \_\_\_\_\_, you have the right to be present throughout this hearing, so long as your conduct is not disruptive.

**IO CAN NOW CHECK OF BOX 10 e. OF THE DD FORM 457**

IO: Evidence will be introduced in the hearing in the form of testimony from witnesses. As I understand it, the people who are going to testify at this hearing are **[IO identifies all witnesses of whom the IO is aware. IO may also submit this information to the accused in writing]**.

Other evidence may be presented in the form of exhibits. As I understand it, the exhibits that may be introduced at this hearing include **[IO describes all exhibits of which the IO is aware. IO may also submit this information to the accused in writing]**.

You have the right to examine all of the exhibits and to make appropriate objections, through your defense counsel, to my consideration of them.

Do you understand the evidence I expect to be presented?

ACC: Yes/No, sir/ma'am.

**IO CAN NOW CHECK OF BOX 10 f. OF THE DD FORM 457**

IO:	<p style="text-align: right;">, I am now going to advise you of other rights that you have at this investigation:</p> <p>You will have the right at the proper time to cross-examine all available witnesses against you;</p>
<b>IO CAN NOW CHECK OF BOX 10 g. OF THE DD FORM 457</b>	
IO:	<p>You have the right to examine, or to have your counsel, or myself, examine available witnesses or evidence requested by you;</p>
<b>IO CAN NOW CHECK OF BOX 10 h. OF THE DD FORM 457</b>	
IO:	<p>You have the right to present any evidence you might desire in your own behalf, either in defense, extenuation, or mitigation;</p>
<b>IO CAN NOW CHECK OF BOX 10 l. OF THE DD FORM 457</b>	

IO:	<p>, I advised you earlier that you have the right to remain silent, and that you do not have to make any statement regarding the offenses of which you are accused and that any statement that you do make may be used as evidence against you in a trial by court-martial.</p> <p>You also have the right to testify under oath, or to make an unsworn statement. If you testify under oath you may be cross-examined by the government counsel and questioned by me. If you decide to make an unsworn statement, you may not be cross-examined by government counsel or questioned by me. You may make an unsworn statement orally or in writing, personally or through your counsel, <b>(you may make a statement with respect to some charges or specifications and not others)</b>, or you may use a combination of these ways. If you do make a statement, whatever you say will be considered and weighed as evidence by me the same as the testimony of other witnesses.</p> <p>You have the right to make a statement, however if you decide to exercise your right to remain silent, then that cannot be held against you in any way.</p> <p>Do you understand your right to make a statement at this hearing?</p>
ACC:	Yes/No, sir/ma'am.
<b>IO CAN NOW CHECK OF BOX 10 j. OF THE DD FORM 457</b>	
IO:	Do you have any questions about any of your rights, or anything that we have discussed up to this point of the investigation?
ACC:	Yes/No, sir/ma'am.

IO:	<p>Now, let me go over with you all the procedures I will use to conduct this investigation.</p> <p>First, government counsel will produce any available documents which are relevant to this investigation. The accused will be given an opportunity to make objections or rebut any of this evidence. Then the government will conduct direct examinations of witnesses, and the defense will be permitted to cross-examine these witnesses. After each government witness has been examined by both sides, I will ask questions and then permit re-direct and re-cross as necessary.</p> <p>Second, after the government documents and witnesses have been produced, the defense will be permitted to put on any available documents and witnesses of its own which are relevant to this investigation. Any defense witness will be subject to cross-examination by government counsel. After each defense witness has been examined by both sides, I will ask questions, and then permit re-direct and re-cross as necessary.</p> <p>I remind counsel that they may make objections to the evidence presented here. Note, however, that the rules of evidence applicable to courts-martial are not generally applicable at this proceeding. The exceptions to that are the rules governing privileges and past sexual behavior by the victim of a sexual offense. I will also respond to objections based on relevancy grounds, and will not admit evidence that is not relevant under Military Rule of Evidence 401. I will be the sole judge of what evidence shall be admitted and considered. Generally, your objections will be noted for the record; however, I may rule on specific objections and you are to proceed accordingly. Finally, if either side makes any objection that you want me to note in the report of investigation, then you must notify me promptly, and file that objection with me in writing within 24 hours after the close of the investigation.</p> <p>Do counsel for either side have any questions regarding procedure or the way in which this investigation will be conducted?</p>
GC/DC:	Yes/No, sir/ma'am.

**IF POTENTIALLY RELEVANT, YOU SHOULD DETERMINE IF EITHER SIDE INTENDS TO INTRODUCE EVIDENCE THAT IS PROHIBITED BY MIL. R. EVID. 412(a), THE “RAPE SHIELD” RULE. IF THIS IS THE CASE, THE PROPONENT OF THE EVIDENCE MUST HAVE SERVED WRITTEN NOTICE UPON YOU AND UPON OPPOSING COUNSEL AT LEAST 5 DAYS BEFORE THE HEARING. IF THERE HAS BEEN NOTICE, AT AN APPROPRIATE TIME YOU MUST CONDUCT A CLOSED HEARING TO DETERMINE IF THE EVIDENCE IS BEING OFFERED UNDER ONE OF THE PERMISSIBLE EXCEPTIONS IN MIL. R. EVID. 412(b).**

IO:	Does counsel for the accused have any questions or wish to note any objections before we proceed with the investigation?
DC:	Yes/No, sir/ma'am.

<u>GOVERNMENT CASE</u>	
IO:	Is the government prepared to present evidence?
GC:	Yes, sir/ma'am.
IO:	Does the government have any real or documentary evidence to present?
GC:	Yes/No sir/ma'am. [ <b>Government presents real or documentary evidence</b> ].
<b>IO SHOULD EXAMINE REAL EVIDENCE FOR AUTHENTICITY, INQUIRE INTO THE LOCATION OF ORIGINALS, AND ASK DEFENSE COUNSEL FOR ANY OBJECTIONS. THE IO SHOULD ALSO RULE ON THE SUBSTITUTION OF PHOTOGRAPHS FOR ORIGINALS AND ON THE ADMISSIBILITY OF OTHER ALTERNATIVES TO EVIDENCE, IF APPLICABLE. SEE MCM, R.C.M. 405 (g)(2)(C) &amp; 405(g)(4)(B).</b>	
IO:	, please list all of the witnesses that the government intends to call.
GC:	[ <b>Government lists all witnesses that the government intends to call at investigation</b> ].
<b>IO SHOULD RULE ON THE REASONABLE AVAILABILITY OF WITNESSES AND MUST ALSO RULE ON THE ADMISSIBILITY OF ALTERNATIVES TO LIVE TESTIMONY, IF APPLICABLE. SEE MCM, R.C.M. (g)(2)(A), (g)(2)(B), &amp; 405(g)(4)(A).</b>	
IO:	The government may proceed.
GC:	[ <b>Oath administered to each witness before testimony</b> ]: Do you swear ( <b>or affirm</b> ) that the evidence that you are about to give in this case now in hearing will be the truth, the whole truth, and nothing but the truth ( <b>so help you God</b> )?

**THE TYPICAL ORDER IS FOR GC TO CONDUCT DIRECT EXAMINATION, FOLLOWED BY CROSS-EXAMINATION BY DC. REMEMBER THAT THE ACCUSED “SHALL BE GIVEN WIDE LATITUDE IN CROSS-EXAMINING WITNESSES.” MCM, R.C.M. 405(h)(1)(A). THE IO MAY ASK QUESTIONS AT ANY TIME, BUT WOULD USUALLY ASK QUESTIONS AFTER BOTH SIDES HAVE QUESTIONED THE WITNESSES. THE IO SHOULD PERMIT RE-DIRECT AND RE-CROSS AS NECESSARY.**

**ALTHOUGH IT IS CUSTOMARY FOR THE GC TO CONDUCT THE INITIAL EXAMINATION OF ALL GOVERNMENT WITNESSES, THE IO MAY CONDUCT THE INITIAL EXAMINATION, AND MUST DO SO IN THE UNUSUAL CIRCUMSTANCE WHERE NO GOVERNMENT COUNSEL HAS BEEN DETAILED. THE DEFENSE COUNSEL MAY THEN CROSS-EXAMINE. IF MORE THAN ONE DEFENSE COUNSEL APPEARS, THE IO MAY ALLOW ONE OR MORE CROSS-EXAMINATIONS AT HIS/HER DISCRETION. THE IO MAY THEN POSE QUESTIONS.**

**COUNSEL SHOULD ASK EACH WITNESS TO IDENTIFY HIMSELF OR HERSELF BY NAME, RANK AND/OR RATE AND DUTY STATION (OR, IN THE CASE OF CIVILIAN WITNESSES, ADDRESS AND OCCUPATION).**

IO:	Does counsel for either side desire further inquiry in light of my questions?
GC/DC:	Yes/No, sir/ma'am.

**AFTER EVERY WITNESS, THE IO MUST DETERMINE AVAILABILITY FOR TRIAL:**

IO:	in the event this case goes to trial by court-martial do you have any pending PCS orders, TAD, leave, or other situation that might interfere with your availability to testify in this case over approximately the next three months? If your status changes over the next few months then please inform the government counsel of the circumstances.
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**AFTER EVERY WITNESS, THE IO MUST GIVE A WITNESS WARNING:**

IO:

you are instructed not to discuss your testimony, or the testimony of any other witness in this investigation with anyone except counsel for the government or counsel for the accused. You will not allow any witness in this investigation to talk to you about the testimony he or she has given or which he or she intends to give. If anyone other than government counsel or counsel for the accused attempts to talk to you about your testimony in this investigation, you should make the circumstances known to the counsel who originally called you as a witness,

**IF WITNESS IS IN THE MILITARY:**

IO:

, note that my order instructing you not to discuss your testimony or the testimony of any other witness is a lawful order, the violation of which could subject you to penalties under the Uniform Code of Military Justice.

**SUBSCRIPT FOR UNAVAILABLE GOVERNMENT WITNESS**

**AFTER ALL AVAILABLE GOVERNMENT WITNESSES HAVE TESTIFIED, THE IO SHOULD CONSIDER ANY ALTERNATIVES TO TESTIMONY FOR WITNESSES WHO HAVE BEEN DETERMINED TO BE NOT REASONABLY AVAILABLE. SWORN STATEMENTS, STATEMENTS TAKEN UNDER OATH, PRIOR TESTIMONY UNDER OATH, DEPOSITIONS, AND IN TIME OF WAR, UNSWORN STATEMENTS, MAY BE CONSIDERED OVER THE OBJECTION OF ACCUSED IF A WITNESS IS NOT REASONABLY AVAILABLE. THE IO MAY ONLY CONSIDER STIPULATIONS, UNSWORN STATEMENTS OR OFFERS OF PROOF WITH THE CONSENT OF THE ACCUSED. MCM, R.C.M. 405(g)(4)(A) & 405(g)(4)(B).**

**IF THE IO DETERMINES THAT A GOVERNMENT WITNESS IS UNAVAILABLE, AND AN ALTERNATIVE REQUIRES CONSENT FROM THE DEFENSE, THEN PROCEED AS FOLLOWS:**

IO: I do not intend to call \_\_\_\_\_ because  
*(I have / his / her commanding officer has)* determined that *(he/she)* is not reasonably available due to *(describe circumstances; e.g., illness, deployment)*. However, I will consider the *(stipulation, unsworn statement of rank and name of witness, offer of proof)*, but only with the consent of the accused. \_\_\_\_\_, please show a copy of this *(stipulation, unsworn statement, offer of proof)* to the accused and *(his/her)* counsel. **[After the accused and counsel have had the opportunity to examine the alternative to testimony under RCM 405(g)(4)(A), then inquire:]** Do you consent to my consideration of this *(stipulation, unsworn statement, offer of proof)* as an alternative to the testimony in person of \_\_\_\_\_ ?

ACC/DC: Yes/No, sir/ma'am.

IO:	_____, does the government have any more evidence it wishes to introduce for my consideration in this investigation?
GC:	No, sir/ma'am.

**DEFENSE CASE**

**THE DEFENSE MAY NOW PRESENT MATTERS IN DEFENSE, EXTENUATION, AND MITIGATION. REMEMBER THAT RCM 405 ONLY PLACES LIMITS ON THE FORM OF EVIDENCE THAT THE GOVERNMENT CAN OFFER. THE DEFENSE MAY OFFER EVIDENCE IN ANY FORM IT CHOOSES.**

**IO:** \_\_\_\_\_, earlier I explained your right to present evidence and call witnesses to testify on your behalf in defense, extenuation, or mitigation.

Do you or your counsel have any evidence that you would like to present or witnesses that you would like to call?

**ACC/  
DC:** Yes/No, sir/ma'am.

**IO:** Does the defense have any real or documentary evidence to present?

**DC:** **[Defense presents real or documentary evidence].**

**IO SHOULD EXAMINE REAL EVIDENCE FOR AUTHENTICITY, INQUIRE INTO THE LOCATION OF ORIGINALS, RULE ON THE SUBSTITUTION OF PHOTOGRAPHS FOR ORIGINALS IF APPLICABLE, AND ASK GOVERNMENT COUNSEL FOR ANY OBJECTIONS.**

**IO:** \_\_\_\_\_, please list all of the witnesses that the defense intends to call.

**DC:** **[Defense lists all witnesses that the accused intends to call at investigation].**

<b>IO:</b>	The defense may proceed.
<b>DC:</b>	<b>[Calls witnesses for defense]:</b>
<b>GC:</b>	<p><b>[Oath administered to each witness before testimony]:</b></p> <p>Do you swear <b>(or affirm)</b> that the evidence that you are about to give in this case now in hearing will be the truth, the whole truth, and nothing but the truth <b>(so help you God)?</b></p>
<p><b>THE TYPICAL ORDER IS FOR DC TO CONDUCT DIRECT EXAMINATION, FOLLOWED BY CROSS-EXAMINATION BY GC, AND FINALLY AN EXAMINATION BY THE IO. THE IO SHOULD PERMIT RE-DIRECT AND RE-CROSS AS NECESSARY. THE DEFENSE IS PERMITTED TO “PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION,” A DEGREE OF FREEDOM NOT GIVEN TO THE GOVERNMENT. SEE MCM, R.C.M. 405(f)(11).</b></p>	
<b>IO:</b>	Does counsel for either side desire further inquiry in light of my questions?
<b>GC/DC:</b>	Yes/No, sir/ma’am.
<p><b>AFTER EVERY WITNESS, THE IO MUST DETERMINE AVAILABILITY FOR TRIAL:</b></p>	
<b>IO:</b>	<p style="text-align: right;">in the event this case goes to trial by court-martial do you have any pending PCS orders, TAD, leave or other situation that might interfere with your availability to testify in this case over approximately the next three months?</p> <p>If your status changes over the next few months then please inform the government counsel of the circumstances.</p>

**AFTER EVERY WITNESS, THE IO MUST GIVE A WITNESS WARNING:**

IO:

you are instructed not to discuss your testimony, or the testimony of any other witness in this investigation with anyone except counsel for the government or counsel for the accused. You will not allow any witness in this investigation to talk to you about the testimony he or she has given or which he or she intends to give. If anyone other than government counsel or counsel for the accused attempts to talk to you about your testimony in this investigation, you should make the circumstances known to the counsel who originally called you as a witness,

**IF WITNESS IS IN THE MILITARY**

IO:

, note that my order instructing you not to discuss your testimony or the testimony of any other witness is a lawful order, the violation of which could subject you to penalties under the UCMJ.

**SUBSCRIPT FOR UNAVAILABLE DEFENSE WITNESS:**

**IF A REQUESTED DEFENSE WITNESS HAS BEEN DETERMINED TO BE NOT REASONABLY AVAILABLE, THE IO SHOULD PUT THE FOLLOWING STATEMENT ON THE RECORD:**

IO: \_\_\_\_\_, you requested that \_\_\_\_\_ be called as a witness in your behalf. Despite your request, I do not intend to call this individual as a witness because **(I have) (his/her commanding officer has)** determined that **(he/she)** is not reasonably available due to **(state reasons for determining unavailability)**.

Do you wish to present any alternative to the live testimony of this witness?

DC: Yes/No, sir/ma'am.

IO:	_____, I previously advised you that, while you cannot be <i>compelled</i> to make any statement, you have the <i>right</i> to make a statement in any form you desire. I will not hold it against you in any way if you decide not to make a statement. Note, however, that I may consider anything that you do say, and any statements may also be used against you in the future. Bearing that advice in mind, consult with your counsel and advise me whether you wish to make a statement at this time or not.
DC/ACC:	<b>(I/rank and name of accused) (do/do not/does/doesnot)</b> desire to make a statement.

**IF THE ACCUSED MAKES AN ORAL STATEMENT, OR MAKES A STATEMENT THROUGH COUNSEL, THE IO SHOULD SUMMARIZE IT AND APPEND IT TO THE DD FORM 457 AS AN EXHIBIT. ANY WRITTEN STATEMENT BY THE ACCUSED SHOULD BE SIMILARLY APPENDED.**

FINAL MATTERS

IO:	<p>I find that there are no reasonable grounds for inquiring into the mental capacity of the accused at the time of the charged offenses, and I find that there are no reasonable grounds for inquiring into the mental capacity of the accused at the time of this proceeding.</p> <p>Do both sides agree?</p>
GC/DC:	Yes/No, sir/ma'am.
<p><b>IF THE IO RECEIVES ANY EVIDENCE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE OR WAS NOT COMPETENT TO ASSIST IN THE DEFENSE, THEN THE IO MUST CHECK "YES" IN BOX 14 OF THE DD FORM 457. IN THE REPORT THE IO MUST EXPLAIN FINDINGS WITH RESPECT TO COMPETENCE AND CITE SUPPORTING EXHIBITS AND SHOULD DISCUSS ANY EVIDENCE THAT BEARS ON THE ACCUSED'S RESPONSIBILITY FOR THE ALLEGED OFFENSES.</b></p>	
IO:	<p>I will hear brief closing comments as to the sufficiency of the evidence, the form of the charges, any recommended additional charges, and the disposition of the charges. <i>(I will also permit the submission of a closing statement in writing).</i></p> <p>Does either side desire to comment on the evidence and charges <i>(or does either side wish to submit a closing statement in writing)?</i></p>
GC/DC:	Yes/No, sir/ma'am.
IO:	Counsel for the government may proceed with a closing comment.

GC:	<b>[Presents argument].</b>
IO:	Counsel for the accused may proceed with a closing comment.
DC:	<b>[Presents argument].</b>
IO:	Unless counsel has anything further to offer, this investigation will now be closed.

**IF A REPORTER WILL PREPARE A VERBATIM OR SUMMARIZED TRANSCRIPT OF THE HEARING, OR IF THERE IS A RECORDING OF THE PROCEEDING, THE IO SHOULD AWAIT A COPY OF SUCH RECORDS BEFORE COMPLETING THE DD FORM 457. IN THE UNUSUAL CIRCUMSTANCE WHERE NO REPORTER IS DETAILED TO THE HEARING OR NO RECORDING HAS BEEN MADE, THE IO SHOULD USE HIS OR HER NOTES TO SUMMARIZE IN WRITING THE TESTIMONY OF EACH WITNESS. SUCH SUMMARIES SHOULD BE ATTACHED TO THE DD 457 AS IO EXHIBITS.**

**AFTER COMPLETING THE DD FORM 457, THE IO SHOULD FORWARD IT TO THE CA VIA THE SJA TOGETHER WITH A COPY OF THE TRANSCRIPT OR A COPY OF THE RECORDING, THE SUMMARIES OF TESTIMONY PREPARED BY THE IO, AND ALL DOCUMENTARY EXHIBITS. ALTHOUGH IT IS THE CA'S RESPONSIBILITY TO FURNISH A COMPLETE COPY OF THE REPORT TO THE ACCUSED UNDER RCM 405(j)(3), THE LOCAL PRACTICE MAY BE FOR THE IO TO FURNISH SUCH COPIES TO BOTH GOVERNMENT COUNSEL AND TO DEFENSE COUNSEL.**

**ARTICLE 31 RIGHTS WARNING FOR MILITARY WITNESS**

I advise you that you may be suspected of a violation of the Uniform Code of Military Justice in that *(state nature of accusation or suspicion)*.

I further advise you that under the provisions of Article 31 of the Uniform Code of Military Justice, you have the right to remain silent, that is, you have the right to say nothing at all. Any statement that you do make, oral or written, may be used as evidence against you in a trial by court-martial, or in other judicial or administrative proceedings.

You have the right to consult with a lawyer and to have a lawyer present. You have the right to military legal counsel free of charge. In addition to military counsel, you are entitled to civilian counsel of your own choosing, at your own expense. You may request a lawyer at any time during this proceeding. If you decide to answer questions, you may stop the questioning at any time.

Do you understand your rights?  
*(If the answer is no, then explain rights)*

Do you want a lawyer?  
*(If the answer is yes, cease all questions at this point)*

Are you willing to answer questions?  
*(If the answer is yes, then you may proceed)*

**IF THE WITNESS HAS POTENTIALLY GIVEN PREVIOUS STATEMENTS**

Although you have indicated a willingness to testify, I must make sure that you understand you are not required to testify simply because you have already made previous statements about this offense to other persons.

Regardless of the fact that you have talked about this potential offense before, you still have the right to remain silent now. The fact that you made those previous statements does not mean that you must testify at this hearing.

Do you understand your right to remain silent now, even though you have made previous statements?

## SELF-INCRIMINATION WARNING FOR CIVILIAN WITNESSES

My name is \_\_\_\_\_, and I am an investigating officer pursuing an investigation of the alleged offense(s) of \_\_\_\_\_ under Article 32 of the Uniform Code of Military Justice. Although the purpose of this hearing is not to investigate crimes outside of the military justice system, you should be aware that testimony which you give may be used in other judicial proceedings.

I advise you that under the Fifth Amendment to the United States Constitution, you have the right to remain silent, that is, you have the right to say nothing at all. Any statements that you make, oral or written, may be used as evidence against you in a trial or in other judicial proceedings. You have the right to consult with a lawyer before questioning, and to have a lawyer present at this hearing. You may obtain a civilian lawyer of your own choosing, at your own expense. You may request a lawyer at any time during this hearing. If you decide to answer questions, you have the right to stop the questioning at any time.

Do you understand your rights?  
**(If the answer is no, then explain rights)**

Do you want a lawyer?  
**(If the answer is yes, cease all questions at this point)**

Are you willing to answer questions?  
**(If the answer is yes, then you may proceed)**

The warning for civilians is here because of the potential for civilians to be subpoenaed to an Article 32 hearing, or to be called by military defense counsel who might wish to incriminate a civilian for tactical reasons. Generally speaking, Miranda warnings are a prophylactic procedural safeguard which are intended to prevent the admission of involuntary statements at a criminal trial. See *Miranda v. Arizona*, 384 U.S. 436 (1966); see also *Dickerson v. United States*, 530 U.S. 428 (2000); *United States v. Chatfield*, 67 M.J. 432, 439 (C.A.A.F. 2008) (“While Miranda warnings provide procedural safeguards to secure the right against self-incrimination during custodial interrogations, the Due Process Clauses of the Fifth and Fourteenth Amendments protect an accused generally against the admission of any involuntary statements, whether made in or out of custody.”) (citing *Dickerson*, 530 U.S. at 433–434). It is debatable whether a warning might be constitutionally required for a civilian witness at a military hearing because it is not clear whether the witness would be in a “custody” or whether questioning at the hearing would be “interrogation.” In the military justice system, the test for whether a person is in “custody” is to examine the circumstances surrounding the interrogation, and given those circumstances, determine if a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. *United States v. Miller*, 46 M.J. 80, 84–85 (C.A.A.F. 1997). An “interrogation” is any questioning where an incriminating response is sought or is a reasonable consequence of the questioning. MCM, MIL R. EVID. 305(b)(2). The weight of authority in federal courts indicates that witnesses – even those who have been subpoenaed – are not entitled to Miranda warnings. See *United States v. Mandujano*, 425 U.S. 564, 580 (1976) (plurality opinion); *United States v. Melendez*, 228 F.3d 19, 20 (1st cir. 2000); *United States v. Valdez*, 16 F.3d 1324, 1330–1332 (2nd Cir. 1994); *United States v. Kilgroe*, 959 F.2d 802, 804 (9th Cir. 1992). Nevertheless a generic warning is given above out of an abundance of caution and you may use it if you believe that a civilian witness has incriminated or is about to incriminate himself or herself in a crime.

**TEXT OF ARTICLE 31, UNIFORM CODE OF MILITARY JUSTICE**

Article 31, Compulsory self-incrimination prohibited

(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 in evidence against him in a trial by court-martial.

<b>INVESTIGATING OFFICER'S REPORT</b> <i>(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)</i>					
1a. FROM: <i>(Name of Investigating Officer - Last, First, MI)</i> LUU, EDWARD R.	b. GRADE LCDR	c. ORGANIZATION UNITED STATES COAST GUARD	d. DATE OF REPORT 20130415		
2a. TO: <i>(Name of Officer who directed the investigation - Last, First, MI)</i> THOMAS, CHARLES	b. TITLE COMMMANDER	c. ORGANIZATION NAVAL EDUCATION AND TRAINING COMMAND			
3a. NAME OF ACCUSED <i>(Last, First, MI)</i> GIBSON, CHRISTOPHER M.	b. GRADE LCPL	c. SSN	d. ORGANIZATION VT-99	e. DATE OF CHARGES 20130110	
<i>(Check appropriate answer)</i>				YES	NO
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)				<input checked="" type="checkbox"/>	
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)				<input checked="" type="checkbox"/>	
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d) (2), 502(d)				<input checked="" type="checkbox"/>	
7a. NAME OF DEFENSE COUNSEL <i>(Last, First, MI)</i> MARTINEZ, GABRIEL, J.	b. GRADE LT	8a. NAME OF ASSISTANT DEFENSE COUNSEL <i>(If any)</i> FORREST, JAMES, W.	b. GRADE CIV		
c. ORGANIZATION <i>(If appropriate)</i> NAVAL LEGAL SERVICES OFFICE PENSACOLA		c. ORGANIZATION <i>(If appropriate)</i> LAW OFFICES OF JAMES W. FORREST			
d. ADDRESS <i>(If appropriate)</i> BLDG 1456, NAVAL AIR STATION, PENSACOLA		d. ADDRESS <i>(If appropriate)</i> 136 COTTON STREET, PACE, FL, 32571			
9. <i>(To be signed by accused if accused waives counsel. If accused does not sign, investigating officer will explain in detail in Item 21.)</i>					
a. PLACE		b. DATE			
I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.					
c. SIGNATURE OF ACCUSED					
10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: <i>(Check appropriate answer)</i>				YES	NO
a. THE CHARGE(S) UNDER INVESTIGATION				<input checked="" type="checkbox"/>	
b. THE IDENTITY OF THE ACCUSER				<input checked="" type="checkbox"/>	
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31				<input checked="" type="checkbox"/>	
d. THE PURPOSE OF THE INVESTIGATION				<input checked="" type="checkbox"/>	
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE				<input checked="" type="checkbox"/>	
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT				<input checked="" type="checkbox"/>	
g. THE RIGHT TO CROSS-EXAMINE WITNESSES				<input checked="" type="checkbox"/>	
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED				<input checked="" type="checkbox"/>	
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION				<input checked="" type="checkbox"/>	
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING				<input checked="" type="checkbox"/>	
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>				<input checked="" type="checkbox"/>	
b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL					
NOT APPLICABLE					
NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading (Example: "7c"). Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."					

DD Form 457, AUG 84

EDITION OF OCT 69 IS OBSOLETE.

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Adobe Professional 8.0

U.S. Dep't of Def., DD Form 457, Investigating Officer's Report (Aug. 1984) available at <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0457.pdf>.

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: (Check appropriate answer)				
NAME (Last, First, MI)	GRADE (If any)	ORGANIZATION/ADDRESS (Whichever is appropriate)	YES	NO
MUNROE, EVA	CIV	724 W. Flagler St. Miami, FL 33111	<input checked="" type="checkbox"/>	
ALVAREZ, ENRIQUE	CIV	1234 Bay View Trailer Park Foley, AL 36535	<input checked="" type="checkbox"/>	
FARNEY, LOGAN	MSGT	VT-99	<input checked="" type="checkbox"/>	
NGUYEN, SAM	MAJ	VT-99	<input checked="" type="checkbox"/>	
b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED.				
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)			
CHARGE SHEET, IO EX-1	RLSO PENSACOLA			
IO APPOINTMENT LETTER, IO EX-2	RLSO PENSACOLA			
ACCUSED'S ENLISTMENT CONTRACT, IO EX-3	ACCUSED'S SERVICE RECORD			
ACCUSED'S HISTORY OF ASSIGNMENTS, IO EX-4	ACCUSED'S SERVICE RECORD			
SEE ATTACHED FOR FURTHER NOTATION				
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED			<input checked="" type="checkbox"/>	
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).)				<input checked="" type="checkbox"/>
15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT (If Yes, specify in Item 21 below.)			<input checked="" type="checkbox"/>	
16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL			<input checked="" type="checkbox"/>	
17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM			<input checked="" type="checkbox"/>	
18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED			<input checked="" type="checkbox"/>	
19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. (See R.C.M. 405(d) (1).)			<input checked="" type="checkbox"/>	
20. I RECOMMEND:				
a. TRIAL BY <input type="checkbox"/> SUMMARY <input type="checkbox"/> SPECIAL <input type="checkbox"/> GENERAL COURT-MARTIAL				
b. <input checked="" type="checkbox"/> OTHER (Specify in Item 21 below)				
21. REMARKS (Include, as necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.)				
DEFENSE REQUESTED A TWO-WEEK CONTINUANCE IN WRITING ON 4 MARCH 2013, BASED UPON NEED TO ADEQUATELY PREPARE FOR HEARING. MILITARY DEFENSE COUNSEL FIRST LEARNED OF THE CASE ON 21 JANUARY 2013, AND RECEIVED CASE FILE ON 11 FEBRUARY 2013. DEFENSE COUNSEL REQUESTED CONTINUANCE TO DEAL WITH COMPLEXITIES OF CASE AND SHORT PREPARATION TIME. CIVILIAN COUNSEL STATED SIMILAR REASONS FOR REQUESTING EXTENSION IN PERSON. GOVERNMENT COUNSEL EXPRESSED NO OBJECTION, AND ENDORSED DEFENSE REQUEST.				
PURSUANT TO AUTHORITY DELGATED TO ME THROUGH PARAGRAPH (5) OF THE LETTER OF APPOINTMENT DATED 11 FEBRUARY 2013, THE REQUEST WAS GRANTED FOR A PERIOD OF 14 DAYS.				
PLEASE SEE ATTACHED FOR ADDITIONAL INFORMATION.				
22a. TYPED NAME OF INVESTIGATING OFFICER	b. GRADE	c. ORGANIZATION		
EDWARD R. LUU	LCDR	UNITED STATES COAST GUARD, DISTRICT SEVEN LEGAL		
d. SIGNATURE OF INVESTIGATING OFFICER			e. DATE	
			20130411	

DD Form 457 Reverse, AUG 84

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Investigating Officer's Report, DD form 457, Supplemental page  
LCDR Edward R. Luu  
20130411

Block 13 a

IO Ex-1 Charge sheet	RLSO Pensacola
IO Ex-2 Appointment letter	RLSO Pensacola
IO Ex-3 Enlistment Contract	RLSO Pensacola
IO Ex-4 Service record	RLSO Pensacola
IO Ex-5 Drug test results	RLSO Pensacola
IO Ex-6 Photograph of Engine	NCIS Pensacola
IO Ex-7 Photograph of Paint	NCIS Pensacola
IO Ex-8 Print of Paint Ebay posting	RLSO Pensacola
IO Ex-9 Photograph of Borescope	NCIS Pensacola
IO Ex-10 Print of Borescope Ebay posting	RLSO Pensacola

Block 14

In response to my question, defense counsel raised no issue during the hearing concerning either the accused's mental responsibility at the time of the alleged commission of the offenses charged or of the accused's competency to participate in his own defense.

Block 21

The military justice system has subject matter jurisdiction over the offenses alleged to have been committed by the accused. *See* UCMJ arts. 80, 112a., & 121; MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. Part IV, paras. 4, 37 & 46 (2012). Since the accused was serving on active duty at the time he allegedly committed the offenses and is still so serving, as shown by IO Ex-3 and IO Ex-4, the military justice system has personal jurisdiction over him as well. *See Solorio v. United States*, 483 U.S. 435, 450–451 (1987).

**SUMMARY OF FACTS (OMITTED)**

**SUMMARY OF WITNESS TESTIMONY(OMITTED)**

**SUMMARY OF ELEMENTS OF OFFENSES (OMITTED)**

**RECOMMENDED CHANGES (OMITTED)**

**DELAYS (OMITTED)**

**LEGAL ISSUES (OMITTED)**

**RECOMMENDATIONS (OMITTED)**

**THE ARTICLE 32 INVESTIGATING OFFICER'S GUIDE**



**NAVAL JUSTICE SCHOOL  
360 ELLIOT STREET  
NEWPORT, RI 02841-1523**