

## **OVERVIEW: Military Service Article 32, UCMJ, Guidance**

### **1. Army:**

Department of the Army Pamphlet 27-17, Procedural Guide for Article 32 Preliminary Hearing Officer (18 June 2015) [28 pages]

- *Information and guidance for Article 32 preliminary hearing officers*
- *Article 32 preliminary hearing script*

Extract of Department of the Army Criminal Law Deskbook (Jan. 2019), Chapter 13: Article 32 Preliminary Hearing [16 pages]

### **2. Navy / Marine Corps:**

Naval Justice School, The Article 32 Preliminary Hearing Officer's Guide (Feb. 2019) [74 pages]

- *Information and guidance for Article 32 preliminary hearing officers*
- *Article 32 preliminary hearing script*
- *Sample Article 32 preliminary hearing report*

### **3. Air Force:**

Extract of Air Force Instruction 51-201, Administration of Military Justice (18 Jan 2019), Chapter 7: Article 32 Preliminary Hearings [6 pages]

Air Force Legal Operations Agency, Military Justice Division, Article 32 Preliminary Hearing Officer's Guide (24 June 2019) [49 pages]

- *Information and guidance for Article 32 preliminary hearing officers*
- *Article 32 preliminary hearing script*
- *Sample Article 32 preliminary hearing report (template)*



Legal Services

# **Procedural Guide for Article 32 Preliminary Hearing Officer**

Headquarters  
Department of the Army  
Washington, DC  
18 June 2015

**UNCLASSIFIED**

# ***SUMMARY of CHANGE***

DA PAM 27-17

Procedural Guide for Article 32 Preliminary Hearing Officer

This administrative revision, dated 15 July 2015--

- o Supersedes Army Directive 2015-09 (throughout).

This major revision, dated 18 June 2015--

- o Changes the title of the pamphlet from Procedural Guide for Article 32(B) Investigating Officer to Procedural Guide for Article 32 Preliminary Hearing Officer (cover).
- o Updates the purpose paragraph (para 1-1).
- o Updates guidance on the production of military and civilian witnesses and the process of securing the attendance of witnesses (para 2-3).
- o Updates guidance on the production of "other" evidence (para 2-4).
- o Updates the formal preliminary hearing process (chap 3).
- o Revises the completion of the new DD Form 457 (Preliminary Hearing Officer's Report) (chap 4).
- o Adds checklist for Article 32 preliminary hearing officer (app B).
- o Adds a list of common mistakes made by Article 32 preliminary hearing officers (app C).



## Legal Services


### Procedural Guide for Article 32 Preliminary Hearing Officer

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By Order of the Secretary of the Army:

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*General, United States Army*  
*Chief of Staff*

Official:



**GERALD B. O'KEEFE**  
*Administrative Assistant to the*  
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**History.** This publication is an administrative revision. The portions affected by this administrative revision are listed in the summary of change.

**Summary.** This pamphlet is intended to provide information and reference material for the Article 32 preliminary hearing officer. While it may suggest workable solutions to legal problems, it does not purport to promulgate Department of the Army policy. Comments concerning laws, regulations, cases, or other matters represent the opinions of individual specialists in military justice. Laws, regulations, and

court decisions published prior to 26 December 2014 have generally been considered and included in this text.

**Applicability.** This pamphlet applies to the Active Army, the Army National Guard/Army National Guard of the United States, and the U.S. Army Reserve, unless otherwise stated. It also applies to Department of the Army Civilians who are involved in any matter that falls under the responsibility and authority of The Judge Advocate General, regardless of whether such person is a member of the Judge Advocate Legal Services. This publication is applicable during mobilization.

**Proponent and exception authority.** The proponent of this pamphlet is The Judge Advocate General. The proponent has the authority to approve exceptions or waivers to this regulation that are consistent with controlling law and regulations. The proponent may delegate this approval authority, in writing, to a division chief within the proponent agency or its direct reporting unit or field operating agency, in the grade of colonel or the civilian equivalent. Activities may request a waiver to this regulation by providing justification that includes a full analysis of the expected benefits and must include formal

review by the activity's senior legal officer. All waiver requests will be endorsed by the commander or senior leader of the requesting activity and forwarded through their higher headquarters to the policy proponent. Refer to AR 25-30 for specific guidance.

**Suggested improvements.** Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to Office of The Judge Advocate General, Criminal Law Division (DAJA-CL), 2200 Army Pentagon, Room 3D548, Washington, DC 20310.

**Distribution.** This pamphlet is available in electronic media only and is intended for command levels C, D, and E for the Active Army; D and E for the Army National Guard/Army National Guard of the United States; and C, D, and E for the U.S. Army Reserve.

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#### Contents (Listed by paragraph and page number)

##### Chapter 1

##### Introduction, page 1

Purpose • 1-1, page 1

References • 1-2, page 1

Explanations of abbreviations and terms • 1-3, page 1

Key personnel • 1-4, page 1

##### Chapter 2

##### Preparing for the preliminary hearing, page 2

General considerations • 2-1, page 2

Sequence of preparation • 2-2, page 3

Production of military and civilian witnesses • 2-3, page 4

Production of "other" evidence • 2-4, page 5

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\*This regulation supersedes DA Pam 27-17, dated 24 July 2014.

## **Contents—Continued**

Consultation with counsel for the accused • 2–5, *page 5*

### **Chapter 3**

#### **The Formal Preliminary Hearing, *page 10***

General • 3–1, *page 10*

Procedure for opening session • 3–2, *page 10*

Procedures for taking testimony and examining evidence • 3–3, *page 10*

### **Chapter 4**

#### **Completion of the Preliminary Hearing Officer's Report, *page 17***

Report preparation • 4–1, *page 17*

Distribution of the report • 4–2, *page 17*

## **Appendixes**

**A.** References, *page 18*

**B.** Checklist for Article 32 Preliminary Hearing Officer, *page 18*

**C.** Common Mistakes, *page 20*

## **Figure List**

Figure 2–1: Preliminary advice to the accused, *page 6*

Figure 2–2: Notification to the accused, *page 7*

Figure 2–2: Notification to the accused—continued, *page 8*

Figure 2–3: Response of the accused, *page 9*

Figure 3–1: Arrangement of room for preliminary hearing, *page 12*

Figure 3–2: Procedure for opening session of the formal preliminary hearing, *page 13*

Figure 3–3: Oaths, *page 14*

Figure 3–4: Examination of witnesses, *page 15*

Figure 3–4: Examination of witnesses—continued, *page 16*

Figure 3–5: Examination of evidence, *page 16*

## **Glossary**

## Chapter 1 Introduction

### 1-1. Purpose

This guide is published for use by officers who have been appointed as preliminary hearing officers (PHOs) under Article 32 of the Uniform Code of Military Justice (UCMJ). Congress amended Article 32 in the National Defense Authorization Act for Fiscal Year 2014 and modeled it on Rule 5.1 of the Federal Rules of Criminal Procedure pertaining to Federal preliminary hearings. The purpose of the preliminary hearing is to determine whether probable cause exists to believe an offense was committed under the UCMJ, whether the accused committed it, whether the convening authority has court-martial jurisdiction over the offense and the accused, and whether the charges are in proper form. The hearing officer will also make a recommendation as to disposition of the matter.

### 1-2. References

See appendix A.

### 1-3. Explanations of abbreviations and terms

See the glossary.

### 1-4. Key personnel

*a. Preliminary hearing officer.* An Article 32 preliminary hearing shall be conducted by an impartial judge advocate certified under Article 27(b) whenever practicable, or in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a judge advocate. Whenever practicable, the PHO shall be equal or senior in grade to the military counsel detailed to represent the accused and to the counsel representing the Government at the preliminary hearing. As the PHO, you will conduct a preliminary hearing in order to determine whether there is probable cause to believe that an offense has been committed and the accused committed the offense; to determine whether the convening authority has court-martial jurisdiction over the offense and the accused; to consider the form of the charges; and to make a recommendation as to the disposition of the charges. Your assignment as an Article 32 PHO must take priority over other duties. As an officer detailed to conduct an impartial hearing, you will be performing a quasi-judicial function. The law requires that you make an individual determination of the matters at issue without reliance upon the opinions or recommendations of any other person. You must avoid *ex parte* inquiries by, or discussions with, judge advocates who might be perceived as lacking impartiality in the case (for example, defense counsel or Government counsel). Such discussions often give the appearance of partiality toward one side regardless of the motivation or real interest of the PHO.

*b. Sexual assault offenses.* In cases where the accused has been charged with a sexual assault-related offense, the convening authority must appoint a judge advocate PHO without exception. Sexual assault-related offenses include, but are not limited to, violations of: Article 120(a) (Rape) and (b) (Sexual assault), Article 120b (Rape and sexual assault of a child), and Article 125 (Forcible sodomy), UCMJ, and attempts to commit such offenses under Article 80, UCMJ.

*c. Legal advisor.* Upon initial appointment and throughout the hearing, a non-judge advocate PHO who is appointed by the convening authority due to exceptional circumstances in which the interests of justice warrant it, shall seek legal advice from a legal advisor made available by the Staff Judge Advocate (SJA). When a judge advocate PHO has been appointed, a legal advisor may be made available by the SJA upon request. It is imperative that advice come from a legal advisor who has no direct interest in the outcome of the proceedings. The legal advisor will answer questions of law or procedure which arise. For example, the legal advisor may provide information regarding which lesser offenses are included in an offense charged, or concerning what defenses may be applicable. You must not ask for nor accept advice from the legal advisor or any other person concerning what factual conclusions should be drawn from the evidence in the case or concerning your disposition recommendation. The determination of these matters is solely your responsibility.

*d. Accused.* The accused has a right to waive an Article 32 preliminary hearing. If the hearing is not waived, the accused is entitled to be present throughout the duration of the proceeding. The accused has the right to be represented by detailed military defense counsel or may request an individual military defense counsel by name and/or may hire a civilian attorney at no expense to the Government. The accused also has the right to cross-examine witnesses who testify at the preliminary hearing; to present additional evidence in defense and mitigation relevant to the limited scope and purpose of the hearing; and to make a statement, although he or she cannot be compelled to do so. Whenever the accused requests representation by an individual military counsel, you should forward the request to the convening authority who directed the preliminary hearing. The commander shall follow the procedures set forth in Rules for Courts-Martial (RCM) 506(b) and in AR 27-10.

*e. Counsel for the accused.* The accused may be represented during the hearing by a civilian lawyer of the accused's choice at no expense to the United States; by individual military counsel of the accused's selection (if reasonably available); or by military counsel certified under Article 27(b) and detailed for that purpose by competent authority. The accused may sometimes be represented by more than one defense counsel. The defense counsel will ensure that the procedural and substantive rights of the accused are protected. The defense counsel will be allowed to present

evidence on behalf of the accused that is relevant to the limited purposes of the preliminary hearing; to cross-examine witnesses who testify at the hearing; to argue for a disposition of the matter appropriate to the interests of the accused; and to protect the rights of the accused afforded him or her under Article 32, UCMJ; RCM 404A; and RCM 405.

*f. Counsel for the Government.* Although not required by regulation, trial counsel will normally be assigned to participate in an Article 32 preliminary hearing as the Government's representative. The Government counsel is not an impartial legal advisor to the hearing officer, but instead, represents the Government in a prosecutorial role as an adversarial party to the hearing. Accordingly, you must not seek legal advice from the Government counsel. The Government counsel will be allowed to present evidence, cross-examine witnesses, and argue for a disposition of the matter appropriate to the interest of the Government. If Government counsel is not assigned, consult with your legal advisor, if assigned.

*g. Reporter.* A reporter will usually be detailed to provide clerical support. The reporter will normally be the paralegal specialist assigned to the accused's unit. The reporter will assist you by coordinating the attendance of witnesses; coordinating the use of facilities and audio/visual support equipment; preparing and furnishing all correspondence to the accused, defense counsel, Government counsel, and other persons as required per your direction; preparing summarized transcripts of the testimony of witnesses and the conduct of the hearing; assisting with the final preparation of your report; and recording the preliminary hearing and maintaining such recordings. You should keep in mind that although this paralegal specialist provides valuable logistical support, you are ultimately responsible for the outcome of the proceeding. Additionally, the assigned paralegal usually works for the Government counsel. As such, you should take care to avoid having discussions that might compromise your ability to remain impartial.

## **Chapter 2**

### **Preparing for the preliminary hearing**

#### **2-1. General considerations**

*a. Case file.* The case file shall include a copy of the charge sheet; Article 32 appointment order; documents accompanying the charge sheet on which the preferral decision was based; documents provided to the convening authority when deciding to direct the preliminary hearing; documents the Government counsel intends to present at the hearing; and access to tangible objects the Government counsel intends to present at the hearing. The file should also include a letter of instruction from the convening authority who directed the preliminary hearing and for non-judge advocate PHOs, it should also contain instructions to arrange for a briefing with the legal advisor designated to assist you. If these documents are not in the file, you should coordinate with the detailed paralegal specialist or legal advisor assigned to you. You must keep in mind that the entire file should only be used for background information. You cannot use the documents contained in the file to make your recommendation, unless the documents have been admitted into evidence during the Article 32 preliminary hearing.

*b. Quasi-judicial proceeding.* The Article 32 preliminary hearing is a quasi-judicial proceeding and plays a necessary role in the due process of law in military justice. If the case is referred to court-martial, the preliminary hearing is subject to subsequent review at the trial and on appeal. The ultimate posture of the case may depend upon whether you properly performed your duties and whether you ensured the accused was fully informed of and afforded all applicable rights in connection with the preliminary hearing.

*c. Timeliness.* It is important to conduct the preliminary hearing expeditiously. Usually, the convening authority who directed the hearing will set a date for completion of the report. If you anticipate failing to meet that suspense, promptly report this fact in writing to the convening authority who directed the preliminary hearing and explain the cause of the delay in detail. Unnecessary delay on your part could result in prejudice to the accused and possibly dismissal of the charges.

*d. Delays.* The appointment order should specify whether you have been delegated the authority to grant a delay in the proceedings. If not, you should follow the procedure in the following discussion to consider delays, then make a recommendation to the convening authority who directed the preliminary hearing regarding whether or not to grant such requests.

(1) *Requests for delay by the accused/defense.* Such requests must be in writing or be provided via email message and must be attached to the report of preliminary hearing. The Government counsel should be afforded an opportunity to respond to the defense-requested delay. You should ensure there are no ambiguities in the request. Reasonable requests for delay by the accused should be granted. However, if the requested delay is beyond the scope of your authority as dictated in your appointment letter, you should refer the request to the convening authority who directed the preliminary hearing.

(2) *Requests for delay by the Government counsel.* The Government representative may ask you to approve a delay in the preliminary hearing. The Government counsel will also normally ask that you exclude the period of delay from Government speedy-trial accountability. You should require the Government counsel to put the request for delay and reasons for the request in writing or in an email message. When these requests are made, you should review RCM 707 and consult with your legal advisor, if assigned. Typically the convening authority will approve such delay, unless he

or she has delegated such responsibility to you (See RCM 707 discussion section). The Government must always establish that its request is for a “reasonable” period of delay. If you grant the delay, the defense counsel may ask the military judge to review your decision. You must therefore ensure that you gather sufficient evidence to support your decision and that you clearly explain your reasons for granting the delay. You may deny the Government’s request or approve a shorter period of delay than that requested. In short, you must hear evidence and arguments from both sides, approve only reasonable delays, have a proper basis for granting the delay, explain your basis for the decision, and include this information in your report.

*e. Chronology.* You should complete a chronology sheet documenting the dates of all your actions in conducting the preliminary hearing and the reasons for any delays in the hearing. You should attach this chronology sheet to your report.

## **2–2. Sequence of preparation**

After receipt of the case file, you should read Article 32, UCMJ; RCM 404A; RCM 405; and this guide, then study the file and take action in the sequence indicated below (*see* app B).

*a. Consult with the legal advisor.* If you are not a judge advocate, you should report to your designated legal advisor for an initial briefing on your duties as soon as possible, usually within two (2) business days of being appointed. You may consult with the legal advisor as often as necessary throughout the preliminary hearing for advice and assistance. While it is preferable to meet with the legal advisor in person, operational requirements may make this impossible. If you are unable to meet with the legal advisor in person, you should contact the legal advisor either telephonically or via email. You should avoid any discussions with any legal personnel performing adversarial roles in the case. You should inform counsel for the accused and the Government counsel of all substantive matters discussed with the legal advisor, give them advance notice of such discussions when practicable, and keep a record of all such discussions. In cases that are particularly complex, the legal advisor, at his or her discretion, may be present during the proceedings. This paragraph also applies to judge advocate PHOs who have been assigned a legal advisor by the servicing SJA.

*b. Examine the file.*

(1) You should examine the charge sheet and all other documents in the file.

(2) Additionally, you should ascertain whether the charges were sworn before a commissioned officer who is authorized to administer oaths. *See* Article 136, UCMJ; RCM 307. If they were not, confer with the accuser to determine whether he or she desires to swear to the charges. You should not, however, administer the oath for this purpose. If the accuser does not want to swear to the charges, or if it is impracticable to do so without unnecessary delay, you should consult with the convening authority who appointed you or your legal advisor for guidance on the matter.

*c. Determine whether you cannot be impartial.* If there is any reason you cannot conduct a fair and impartial preliminary hearing, you should promptly notify the convening authority who appointed you of this fact. Prior knowledge about the case should not disqualify you from acting as the PHO, provided you have not drawn conclusions about the guilt or innocence of the accused and have not assisted in perfecting a case against the accused.

*d. Determine the applicable law.*

(1) You should be familiar with the elements (essential facts) of the offense(s) charged. You should read the discussion of the offense or offenses in Part IV of the Manual for Courts-Martial (MCM). If the offense is charged as a violation of Article 134, UCMJ, and no discussion of the specific elements appears in the MCM or DA Pam 27–9, consult your legal advisor, if assigned, regarding the elements.

(2) You should ensure that each specification actually alleges an offense (*see* RCM 307(c)) and that each offense is charged as a violation of the proper article of the UCMJ. If you conclude that the wording of a specification departs so materially from an applicable form specification (*see* MCM, Part IV or DA Pam 27–9) that no offense is alleged consult with your legal advisor, if assigned, and note the deficiencies in your final report to the appointing authority.

(3) If the accused is charged with failure to obey a regulation or written order and a copy of the directive is not in the file, you should obtain copies of the directive for the report and familiarize yourself with its provisions.

*e. Establish a timeline for requests for the production of witnesses and other evidence.* You should establish a timeline to receive requests from both sides to produce witnesses and other evidence that permits you sufficient time to conduct the preliminary hearing and write the report in order to meet the suspense of the convening authority who appointed you. Setting a reasonable time prior to the hearing will help you avoid causing any unnecessary delay in the proceedings.

*f. Ensure that victims get timely notice of the hearing.* The victim(s) of an offense under the UCMJ has the right to reasonable, accurate, and timely notice of a preliminary hearing relating to the alleged offense. A “victim” is a person who is alleged to have suffered a direct, physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration. You should ensure that the Government counsel has notified any qualifying victims of the time, date, and place of the preliminary hearing. If the victim is represented by counsel, communication with the victim should only be through his or her counsel.

g. *Arrange for a place to conduct the hearing.* You should coordinate with the detailed paralegal specialist to reserve a suitable site for conducting the preliminary hearing.

## **2-3. Production of military and civilian witnesses**

a. *Military witnesses.* In accordance with the timeline you established for producing witnesses and other evidence, the defense counsel shall provide to the Government counsel the names of proposed military witnesses whom the accused requests testify at the hearing and the requested form of the testimony. The defense counsel will include a synopsis of expected testimony sufficient to show that it is relevant, not cumulative, and based on the limited scope and purpose of the hearing.

(1) If the Government counsel agrees that the testimony of the proposed defense military witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing, the Government counsel shall request that the commanding officer of that proposed military witness make that person available to provide testimony at the hearing. If a military witness's commanding officer has determined that the witness will testify, but not in person, the witness may testify by video teleconference, telephone, or similar means of remote testimony. No one means of communications is required over another, though the most efficient and least costly means is preferred. If the commanding officer determines that the military witness is unavailable altogether, you must obtain from the commander the reasons for that decision and you will note it in the hearing report.

(2) If the Government counsel objects to the proposed defense military witness, the defense counsel may request that you determine that the witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing. If you make such a determination, the Government counsel shall request that the commanding officer make the proposed military witness available to provide testimony at the hearing. If the military witness's commanding officer has determined that the witness will testify, but not in person, the witness may testify by video teleconference, by telephone, or similar means of remote testimony. If the commanding officer determines that the military witness is unavailable to testify altogether, you must obtain from the commander the reasons for that decision and you will note it in the hearing report.

b. *Civilian witnesses.* In accordance with the timeline you established, the defense counsel shall provide to the Government counsel the names of proposed civilian witnesses whom the accused requests testify at the hearing and the requested form of the testimony. The defense counsel will include a synopsis of expected testimony sufficient to show its relevance and necessity based on the limited scope and purpose of the hearing.

(1) If the Government counsel agrees that the testimony of the proposed civilian defense witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing, the Government counsel shall invite the civilian witness to provide testimony, and if the individual agrees, shall make arrangements for that witness's testimony. If expense to the Government is to be incurred, the convening authority who directed the preliminary hearing shall determine whether the witness testifies in person, by video teleconference, by telephone, or by other means of remote testimony. You are not authorized to obligate funds on behalf of the convening authority for witness travel. Government counsel will arrange with appropriate personnel within the command to obligate funds for travel expenditures.

(2) If the Government counsel objects to the proposed civilian defense witness, defense counsel may request that you determine if the witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing. If you make such a determination, the Government counsel shall invite the civilian witness to provide testimony, and if the individual agrees, shall make arrangements for that witness's testimony. If expense to the Government is to be incurred, the convening authority who directed the preliminary hearing shall determine whether the witness testifies in person, by video teleconference, by telephone, or by other means of remote testimony. You are not authorized to obligate funds on behalf of the convening authority for witness travel. Government counsel will arrange with appropriate personnel within the command to obligate funds for travel expenditures.

c. *Victim witnesses.*

(1) A victim of an offense under consideration at the preliminary hearing is not required to testify at the hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.

(2) Coordinate with your detailed paralegal specialist to contact the victim or his or her counsel to determine whether the victim chooses to be a witness during the preliminary hearing. Advise counsel of the proposed date, time, and place of the preliminary hearing. If counsel requests additional time for preparation, the request must be in writing and directed to you. You should not have contact with the victim outside the presence of his or her counsel; however, you can make arrangements to have the detailed paralegal specialist serve a copy of the written notice of the date, time, and place of the preliminary hearing on counsel for the victim.

d. *Delay due to inability to secure a witness.* You need *not* delay proceeding with the initial session of the preliminary hearing until *all* the witnesses or evidence requested by the accused is produced. Sound discretion on your part is essential. For example, if all witnesses requested by the accused are readily available but certain requested documentary evidence will not be available until several days later, you may proceed with the preliminary hearing. Keep in mind that your ability to conduct a proper preliminary hearing is not dependent upon having all of the evidence available at the same time, but only upon the ultimate examination of all of the witnesses and evidence you

deem to be relevant, not cumulative, and necessary for the limited scope and purpose of the hearing, in a manner that is as orderly as possible.

## **2–4. Production of “other” evidence**

*a. Evidence under the control of the Government.* In accordance with the timeline you established for producing witnesses and other evidence, the defense counsel shall provide to Government counsel a list of evidence under the control of the Government that the accused requests the Government produce to the defense for introduction at the preliminary hearing.

(1) If the Government counsel agrees that the proposed evidence is relevant, not cumulative, and necessary to the limited scope and purpose of the hearing, the Government counsel shall obtain the evidence.

(2) If the Government counsel objects to production of the evidence, the defense counsel may request that you determine that the evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing. If you make such a determination and direct that the evidence be produced, Government counsel shall obtain the evidence.

*b. Evidence not under the control of the Government.*

(1) Evidence not under the control of the Government may be obtained through noncompulsory means or by *subpoena duces tecum* issued by the Government counsel in accordance with the process established by RCM 703.

(2) In accordance with the timeline you established for producing witnesses and other evidence, the defense counsel shall provide to the Government counsel a list of evidence not under the control of the Government that the accused requests that the Government obtain.

(a) If the Government counsel agrees that the evidence is relevant, not cumulative, and necessary for the limited scope and purpose of the hearing, the Government counsel shall issue a *subpoena duces tecum* for the evidence.

(b) If the Government counsel objects to production of the evidence, the defense counsel may request that you determine whether the evidence is relevant, not cumulative, and necessary for the limited scope and purpose of the hearing. If you make such a determination and also determine that issuance of a *subpoena duces tecum* would not cause undue delay to the hearing, you may direct Government counsel to issue a *subpoena duces tecum* for the evidence. Failure of the Government counsel to issue a *subpoena duces tecum* after directed by you to do so shall be noted in the hearing report.

## **2–5. Consultation with counsel for the accused**

Coordinate with your detailed paralegal specialist to contact the defense counsel to ensure they have received the disclosures they are entitled to pursuant to RCM 404A and RCM 405. At this time, advise counsel of the proposed date, time, and place of the preliminary hearing and allow the defense counsel reasonable time for preparation of the case (*see* fig 2–2). It is not required, but it is preferable to make this notification in writing. If counsel requests additional time for preparation, the request must be in writing and directed to you *see* para 2–1). You should not have contact with the accused outside the presence of defense counsel; however, you can make arrangements to have the detailed paralegal specialist serve a copy of the written notice of the date, time, and place of the preliminary hearing on the accused.

The following procedure provides guidance for an introductory session with the accused.

PHO (to accused): I am (rank and name). By order of (rank and name of convening authority), I have been appointed preliminary hearing officer under Article 32 of the Uniform Code of Military Justice to inquire into (a) certain charge(s) against you. The charge(s) allege(s) in general, the offense(s) of (name of offense(s) and description(s) of conduct). The name of the accuser is (rank and name of accuser). The names of the witnesses thus far known to me are (name all known witnesses).

I am now going to advise you of your rights at this preliminary hearing. You have the right to be present throughout the taking of evidence so long as your conduct is not disruptive. You will have the right at the proper time to cross-examine the witnesses who testify against you at the hearing; to present evidence in defense and mitigation on your own behalf; to make a statement in any form at the proper time, to remain silent, or to refuse to make any statement regarding any offense that you are accused or suspected of committing. In addition, you are advised that any statement made by you might be used as evidence against you in a trial by court-martial. Do you understand?

As the preliminary hearing officer, it is my duty to ascertain and impartially weigh evidence presented in support of the charge(s) against you that are relevant to the limited scope and purpose of the hearing. This preliminary hearing shall include inquiries as to whether there is probable cause to believe an offense(s) has been committed under the UCMJ and whether you committed the offense(s), whether the convening authority has court-martial jurisdiction over the offense and you, the form of the charge(s), and an appropriate disposition which should be made of the case. You and your counsel will be given full opportunity to cross-examine witnesses who testify against you at the preliminary hearing and to present additional evidence either in defense or mitigation that is relevant to the limited scope and purpose of the hearing. I can recommend that the charge(s) against you be referred for trial to a general court-martial or to a different type of court-martial or that the charge(s) be dismissed or disposed of other than by trial by court-martial. It is not my purpose during this preliminary hearing to act as a prosecutor, but only as an impartial fact finder. Do you understand?

Note. If the accused is charged with rape or sexual assault under Article 120(a) or 120(b), rape or sexual assault of a child under 120b(a) or 120b(b), forcible sodomy under Article 125, or an attempt to commit such an offense under Article 80, UCMJ, and you recommend that any of those offenses be referred to court-martial, you should inform the accused that only a general court-martial has jurisdiction over those offenses and your recommendation must reflect that.

Before I begin the preliminary hearing and examination of any of the witnesses in this case, I must inform you that you have the right to be represented at all times by legally qualified counsel. This means that you have the right to be represented by a civilian lawyer of your choice, but at no expense to the United States; by military counsel of your own selection if that counsel is reasonably available; or by counsel detailed by the Trial Defense Service to represent you during the preliminary hearing. There is no cost to you for military counsel. Do you wish to be represented by counsel? If so, state the type of counsel you want to represent you.

Note. If the accused is hesitant about whether to ask for counsel, the preliminary hearing officer should encourage the accused to obtain legally qualified counsel. If the accused requests counsel other than a lawyer, you must advise the accused that such non-lawyer counsel cannot serve as defense counsel before a general court-martial or a special court-martial that can adjudge a bad-conduct discharge.

**Figure 2-1. Preliminary advice to the accused**





REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
ORGANIZATION NAME/TITLE  
STANDARDIZED STREET ADDRESS  
CITY, STATE, AND ZIP +4 CODE

OFFICE SYMBOL

MEMORANDUM FOR (name and address of accused)

SUBJECT: Article 32 Preliminary Hearing

1. On (date), at (time) in (building number),(room number), I will conduct a preliminary hearing pursuant to Article 32, UCMJ, to inquire into the facts and circumstances concerning (a) charge(s) preferred against you by (rank and name of person who preferred charge(s)). The charge(s) is/are (general nature of the charge(s)), in violation of (UCMJ article(s)).
2. You have the right to be present during the entire preliminary hearing. Additionally, you have the right to be represented at all times during the hearing by legally qualified counsel. Counsel may be a civilian lawyer of your choice provided at no expense to the United States; a qualified military lawyer of your selection, if reasonably available; or a qualified military counsel detailed by the Trial Defense Service. There is no cost to you for military counsel. You also have the right to waive representation by counsel. Send your decision to me by (suspense date).
3. The names of witnesses known to me, who will be asked to testify at the hearing are:
  - a. (Name of witness).
  - b. (Name of witness).
  - c. (Name of witness).
  - d. (Name of witness).
  - e. (Name of witness).

Additionally, I have been asked to examine and consider the following evidence:

- a. (Describe evidence and its location).
- b. (Describe evidence and its location).
- c. (Describe evidence and its location).

4. As preliminary hearing officer, I will try to arrange for the appearance of the witnesses you want to testify at the hearing so long as those witnesses are relevant, not cumulative, and necessary to the limited scope and purpose of the preliminary hearing. Send names, addresses, and synopses of expected testimony of such witnesses to me by (suspense date for witness notification). If, at a later time, you identify additional witnesses, inform me of their names and addresses.

Figure 2-2. Notification to the accused

---

OFFICE SYMBOL  
SUBJECT: Article 32 Preliminary Hearing

5. You may contact me by writing to: (hearing officer's rank, name, and military address).

(Name)  
(Rank, Branch)  
Preliminary Hearing Officer

Figure 2-2. Notification to the accused—continued

---



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
ORGANIZATION NAME/TITLE  
STANDARDIZED STREET ADDRESS  
CITY, STATE, AND ZIP +4 CODE

OFFICE SYMBOL

MEMORANDUM FOR (name and military address of preliminary hearing officer)

SUBJECT: Article 32 Preliminary Hearing

1. Receipt of basic communication is acknowledged.
2. I want to be represented by (select one of the six options):
  - a. Civilian counsel, who is (name and address).
  - b. An individual military counsel, who is (rank, name, and military address), if he or she is reasonably available.
  - c. A legally qualified military counsel detailed by the Trial Defense Service.
  - d. A civilian counsel, who is (name and address), and individually requested military counsel, who is (rank, name, and military address).
  - e. Detailed military counsel and civilian counsel, who is (name and address).
  - f. I do not want to be represented by counsel.
3. I understand that the Government will not cover the cost of a civilian attorney, but military attorneys will be furnished at no cost to me.
4. I want the following witnesses and/or evidence present at the hearing.
  - a. (Name and address of witness or description and location of evidence).
  - b. (Name and address of witness or description and location of evidence).

(Include information on where they can be contacted.)

(Accused)  
(Rank), U.S. Army

Figure 2-3. Response of the accused

## Chapter 3

### The Formal Preliminary Hearing

#### 3-1. General

The Article 32 preliminary hearing should be conducted in a formal and dignified manner. You should attempt to hold the preliminary hearing under conditions of relative quiet and without interruption. Whenever practicable, the hearing room should be arranged in the manner illustrated in figure 3-1. You will designate a time and place to begin the formal taking of evidence in the preliminary hearing and the actual interrogation of witnesses and examination of real evidence. You should use a copy of DD Form 457, the checklist provided at appendix B, and the provisions of this guide to assist you with the preliminary hearing.

#### 3-2. Procedure for opening session

Figure 3-2 sets forth the suggested procedure for the opening session with the accused, the accused's counsel, and the Government counsel. These procedures may be changed to account for special circumstances.

#### 3-3. Procedures for taking testimony and examining evidence

##### *a. Procedure.*

(1) *Form of testimony.* All testimony shall be taken under oath, except that the accused may make an unsworn statement.

(2) *Record of testimony.* You are required to include a summary of the substance of all testimony in the preliminary hearing report.

(a) The preliminary hearing must be recorded by a suitable recording device. The accused, a victim, or both, may request the recording and shall have access to the recording as prescribed by the MCM and Army regulations. When such recordings of testimony are made, you should ensure that they are preserved until final disposition of the case occurs, either by court-martial or through the withdrawal and dismissal of the charges. Ensure to have a copy of the recording available in the event the victim or the accused requests to have a copy of the recorded proceedings. A summarized transcript shall be prepared by the reporter.

(b) Ordinarily it is not necessary to give Article 31(b), UCMJ, warnings to witnesses who are not accused or suspected of a crime; however, if during the taking of testimony, it appears that a *witness subject to the UCMJ* might be suspected of committing any offense, stop and advise the witness of Article 31(b) rights and of the right to counsel (see DA Form 3881 (Rights Warning Procedure/Waiver Certificate)).

(c) If during the taking of testimony it appears that a civilian witness might be suspected of committing any offense, stop and advise the witness of the right against self-incrimination and of the right to consult with civilian counsel at their own expense.

(d) You should use DA Form 3881 when advising military and civilian witnesses of these rights. If the witness initially waives these rights, you may proceed with questioning. If the witness remains silent or requests to speak to an attorney, stop all questioning and note this fact on DA Form 3881. You should not initiate further questioning of this witness until the witness has consulted with counsel and has consented to further questioning after re-advisement of all rights (again use DA Form 3881). You should consult your legal advisor, if assigned, before determining if it is again permissible to question the witness. Some victims will request the presence of a special victim counsel (SVC) at the preliminary hearing. The victim has a right to have the SVC present at all stages of the preliminary hearing. Consult with the SVC if questions arise about the victim testifying at the preliminary hearing.

*b. Military Rules of Evidence.* The Military Rules of Evidence (MRE) do not apply at the preliminary hearing except as follows:

(1) Military Rules of Evidence 301, 302, 303, and 305 shall apply in their entirety.

(2) Military Rule of Evidence 412 shall apply in any case that includes a charge defined as a sexual offense in MRE 412(d), except that MRE 412(b)(1)(C) shall not apply.

(3) Military Rules of Evidence, Section V (Privileges), shall apply, except that MRE 505(f) through (h) and (j); 506 (f) through (h), (j), (k), and (m); and 514(d)(6) shall not apply.

(4) Failure to meet the procedural requirements of the applicable MREs shall result in exclusion of that evidence from the preliminary hearing, unless good cause is shown. If you have questions about the application of MREs during the preliminary hearing, consult with your legal advisor, if assigned.

*c. Refusal to testify.* If a witness, other than a victim witness described in paragraph 2-3c, above, who is a member of the military refuses to make a sworn statement and it does not appear that the statement is incriminating or otherwise privileged, allow the witness to consult with a legal assistance attorney or an attorney from the Trial Defense Service concerning the witness's rights and duty to testify. If the witness persists in refusing to testify, you may give an order for them to do so. Failure to comply with this order could result in disciplinary action. If a witness has previously

made a sworn written statement and now refuses to testify, you should show the witness the previous statement and inquire into the reasons for which he or she now refuses to make a sworn statement regarding the same subject matter. If you determine that the witness has a privilege not to testify or if you have determined that there is no privilege and ordered the witness to testify but the witness persists in refusing to do so, you may consider the prior sworn statement if it is relevant, not cumulative, and necessary to the limited scope and purpose of the hearing. If it appears that any witness who is apparently essential to subsequent proceedings is subject to early discharge, transfer, temporary duty, or other personnel action that might prevent his or her availability at a later proceeding, you should note this fact on DD Form 457, items 16 and 21.

*d. Spectators.* The accused, the press, and the public have an interest in being informed of the workings of the entire court-martial process. Therefore, the preliminary hearing is normally open to the public. Indeed, proceedings that are open to the public tend to ensure that all parties perform their functions more responsibly, encourage witnesses to come forward in a truthful manner, and discourage perjury. Although RCM 405(h)(4) provides you with the authority to restrict spectator access to all or part of the proceeding, you should only do so after consultation with your legal advisor, if assigned.

(1) If you conclude that closing the preliminary hearing may be appropriate, you must proceed on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis. Therefore, you may not close the proceeding without carefully articulating and documenting the reasons why the preliminary hearing should be closed, whose access will be restricted, how long the hearing will be closed, and why you decided to close that portion of the proceeding. Protecting the privacy of victims or guarding court members against potential tainting by outside influences alone are insufficient to warrant closing the entire proceeding. In addition, prospective witnesses in the case should not be permitted to hear or examine the testimony or statements of other witnesses. Witnesses should remain available outside the hearing room and should be called one at a time to testify. You should instruct witnesses not to discuss their testimony with other witnesses or other personnel. Remember that MRE 412 hearings shall be closed and that a victim has a right to not be excluded during an MRE 412 closed hearing. Counsel for the victim should be permitted to attend the closed hearing too.

(2) A victim of an offense under consideration at the preliminary hearing has the right not to be excluded from any portion of the hearing unless you determine, after receiving clear and convincing evidence, that the testimony by the victim would be materially altered if the victim heard other testimony at the proceeding.

*e. Oaths.* The procedure for administering the oath to a witness is set forth in figure 3-3.

*f. Examination of witnesses.* A procedure for examining witnesses is set forth in figure 3-4.

*g. Examination of evidence.* The procedure for examining evidence is set forth in figure 3-5.

*h. Inquiry into mental responsibility or capacity.* If, in your opinion, grounds exist for inquiring into the mental condition of the accused to determine whether the accused was mentally responsible at the time of the acts charged or has sufficient mental capacity to understand the nature of the Article 32 preliminary hearing and to conduct or cooperate intelligently in his or her defense, you should promptly notify the convening authority who appointed you. The appointing authority will take appropriate action. In addition, you should complete DD Form 457, item 14, as appropriate.

*i. Objections.* If either party objects to any of your decisions or otherwise objects to alleged defects in the preliminary hearing, you are not required to rule on those objections. You may, however, take corrective action in response to an objection if you believe such action is appropriate. If an objection raises a substantial question about the propriety of your conduct during the hearing (such as challenging your impartiality), you should consult with your legal advisor, if assigned, and inform the convening authority who directed the preliminary hearing before deciding whether any corrective action should be taken. You may require a party to file any objection in writing. You must note a party's objection in your report, if requested to do so.

*j. Uncharged misconduct.* If evidence introduced during the preliminary hearing indicates that the accused may have committed an uncharged offense(s), you may examine the evidence and hear the witnesses presented to you by the Government counsel relating to the subject matter of such offense(s), and make findings and recommendations without the accused first having been charged with the offense(s). The accused's rights are the same with regard to both charged and uncharged offenses. When considering uncharged offenses identified during the preliminary hearing, you shall inform the accused of the general nature of each uncharged offense(s) considered, and otherwise afford the accused the same opportunity for representation, cross-examination, and presentation afforded during the preliminary hearing of any charged offense. Much like for any charged offense(s), you may consider witnesses and other evidence requested by the parties pertaining to uncharged misconduct so long as it is relevant, not cumulative, and necessary to the limited scope and purpose of the hearing.

*k. Concluding the preliminary hearing.*

(1) After you receive all the evidence presented by the parties, and the accused and counsel have indicated that they have no further evidence to offer, you should declare the taking of evidence closed.

(2) After the evidentiary portion is closed, you should afford the accused or the defense counsel the opportunity to make a statement of what they consider an appropriate recommendation concerning the disposition of the charges in the case. You should consider their comments in deciding what disposition you will recommend to the convening

authority who directed the preliminary hearing. You should explain to the accused and counsel that your recommendation in the case is advisory only and is not binding upon the convening authority who directed the hearing or upon any superior authorities. You should also afford the Government counsel the opportunity to make a statement regarding an appropriate recommendation for disposition of the original charges and on any uncharged misconduct that was examined during the Article 32 preliminary hearing.

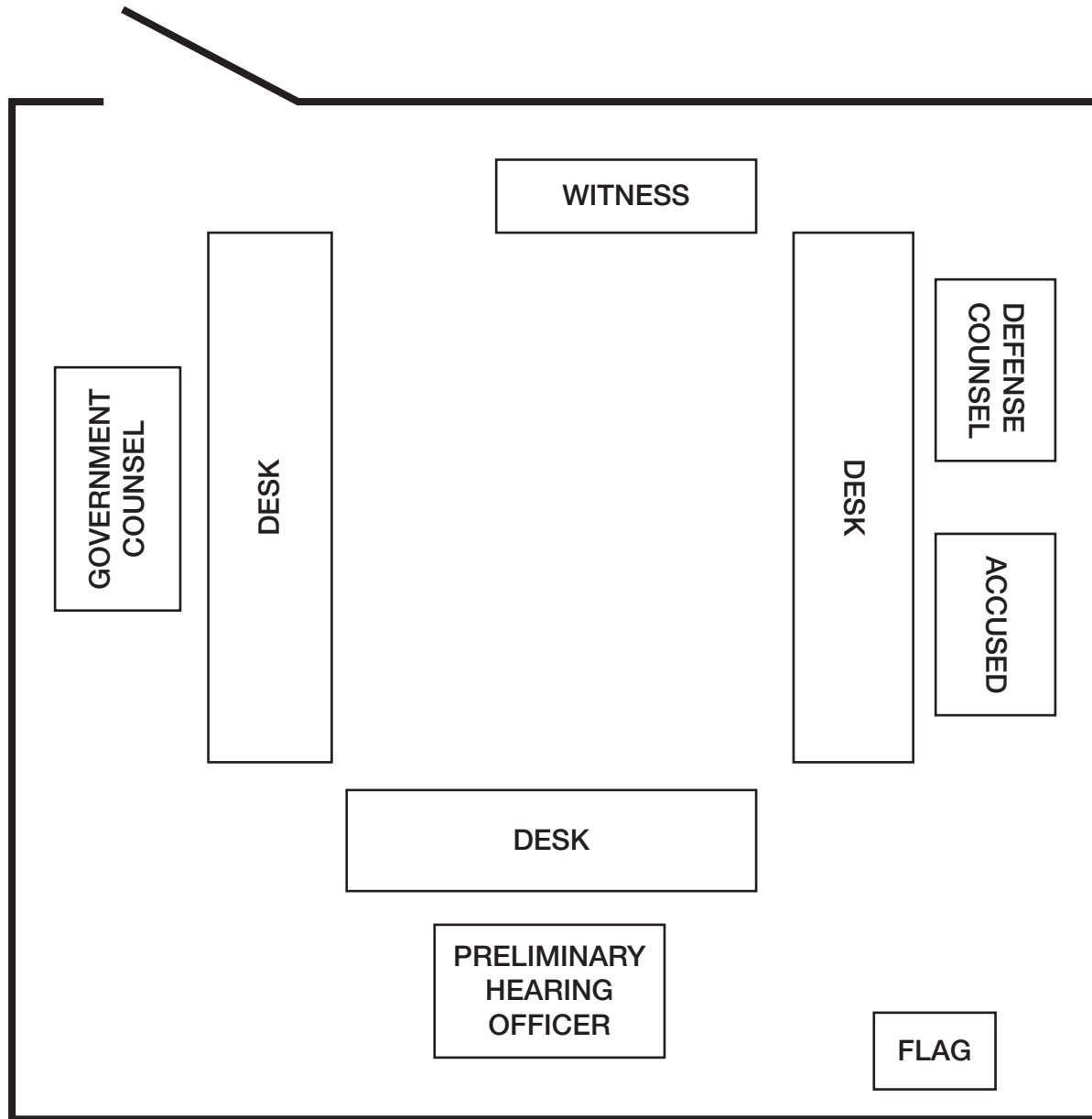


Figure 3-1. Arrangement of room for preliminary hearing

PHO (To accused-counsel): This is a formal preliminary hearing into (a)certain charge(s) against *(rank and name of accused)* ordered pursuant to Article 32, UCMJ, by *(rank and name of appointing authority)*. On *(date of notification)*, I informed you of your right to be represented by civilian counsel at no expense to the United States, military counsel of your own selection if reasonably available, or military counsel detailed by the Trial Defense Service. You informed me that you *(did not desire to be represented by counsel/desired to be represented by (name of civilian counsel)/desired to be represented by (rank and name of individually requested counsel)/desired to be represented by (rank and name of detailed military counsel))*.

Let the record show that *(name of civilian counsel/rank and name of individually requested military counsel who was available/rank and name of detailed counsel)* is here present with you.

*((Name of civilian counsel))*, I ask you to step forward and enter your appearance by filling out item 7a on the official Preliminary Hearing officer's Report, DD Form 457).

PHO (To accused-counsel): I want to remind you that my sole function as the Article 32 preliminary hearing officer in this case is to determine the relevant facts of this case, to weigh and evaluate those facts and determine whether an offense under the UCMJ has been committed and whether you committed it. I shall also consider whether a court-martial would have jurisdiction over the offense(s), the form of the charge(s), and make a recommendation concerning the disposition of the charge(s) that has/have been preferred against you. I will now read to you the charge(s). (At this point, the defense may waive reading of the charge(s).) It/They is/are as follows:

Charge (I): Violation of the Uniform Code of Military Justice, *(article number)*.

Specification (1): *(the specification)*.

Specification (2): *(the specification)*.

(Charge (II):(Additional Charge): Violation of the Uniform Code of Military Justice, *(article number)*.

Specification (1): *(the specification)*.

I will now show you the charge(s) and specification(s).

I advise you that you do not have to make any statement regarding the offense(s) of which you are accused and that any statement you do make may be used as evidence against you in a trial by court-martial. You have the right to remain silent concerning the offense(s) with which you are charged. You may, however, make a statement either sworn or unsworn and present evidence in defense and mitigation so long as it is relevant to the limited scope and purpose of this hearing. If you do make a statement, whatever you say will be considered and weighed as evidence by me just like the testimony of other witnesses.

You have previously been given a copy of the investigation file that has been compiled in your case. It contains *(list all documents contained in the case file)*. I will not consider any of this material in making my decisions, unless I give you an opportunity to object to it and I decide on the record to admit it into evidence for this preliminary hearing. It is my intention to hear as Government witnesses during this preliminary hearing *(list all witnesses who will be called to testify at the hearing)*. After these witnesses testify, you or your counsel will have the right to cross-examine them. You also have the right to produce other evidence in your behalf in defense and mitigation for the limited scope and purpose of the hearing. I have coordinated through the Government counsel for the appearance of those witnesses previously requested by you that I have determined to be relevant, not cumulative, and necessary to the limited scope and purpose of the hearing. I do not intend to consider as a witness *(name of witness)* (because it has been determined that the witness is unavailable or because the witness's commander has determined that they are unavailable). I therefore intend to consider the sworn statement of the witness in my recommendations as it is contained in the file.)

PHO (To accused-counsel): Before proceeding further I now ask you whether you have any questions concerning your right to remain silent, concerning the offense(s) of which you are accused, your right to make a statement either sworn or unsworn, the use that can be made of any statement you may make, your right to cross-examine witnesses against you, or your right to present evidence in your own behalf in defense or mitigation.

(Counsel-Accused): *(Yes/no)*.

*Note.* At this point, answer any questions that the accused may have with respect to rights or as to procedural or other matters concerning the preliminary hearing. You should not proceed further until convinced that the accused understands these rights. If the accused is represented by counsel, however, the latter will generally indicate that he or she has explained these matters to the accused and that they are understood.

**Figure 3–2. Procedure for opening session of the formal preliminary hearing**

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*Note.* The word “oath” as used in this appendix includes the word “affirmation.” All oaths and affirmations should be made in the presence of the accused. Generally, only witnesses need be sworn at an article 32 preliminary hearing. There is no requirement that you as the hearing officer or counsel be sworn. Interpreters must also be sworn before beginning their duties. The oath may be administered by you in the following manner: You should raise your right hand and have the person being sworn stand with right hand raised. You should then read or recite the appropriate oath and receive the appropriate response.

**Oath for Witnesses**

PHO: Do you swear that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

**Affirmation**

PHO: Do you affirm that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth?

*Note.* The “affirmation” is used when administering the oath to persons who have conscientious concerns against taking an oath or to persons who do not believe in the existence of a supreme being. *See* RCM 807. Persons who recognize special forms or rites as obligatory, and persons who do not believe in a supreme being may be sworn in their own manner or according to the ceremonies of the religion they profess and declare to be binding.

**Oath for Interpreter**

PHO: Do you (swear) (affirm) that in the case now in hearing you will interpret truly the testimony you are called upon to interpret (, so help you God).

*Note.* When testimony is given through an interpreter, the interpreter must first be sworn. *See* RCM 807. *The interpreter must translate questions and answers in verbatim form.*

**Figure 3–3. Oaths**

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Introductory questions to witnesses

(Swear witness) *See figure 3–3.*

PHO: State your full name and (for military witnesses: grade, organization, and armed force) (for civilian witnesses: residence address and occupation).

WITNESS: *(Complete response).*

PHO: Do you know the accused in this case?

WITNESS: *(Yes/no).*

*Note.* If the identification of the accused is not an essential part of the expected testimony of the witness, this question may be omitted. If the witness identifies the accused, the witness should normally be asked to state the accused's name and organization if known. If the identity of the accused is particularly relevant in a case, and the identity of the accused as the perpetrator of the offense depends upon the ability of the witness to identify the accused, the accused's counsel may request that the witness be required to identify the accused from a nonsuggestive lineup of persons similar in appearance to the accused. This request should be granted whenever possible. Otherwise the ability of the witness to identify the accused as the offender may be based on the fact that the accused is the only person whose conduct is being investigated. In any event in this situation, you should inquire into the basis for the witness's identification of the accused.

\*\*\*\*\*

#### **Government Witness**

*Note.* Government counsel will examine Government witnesses, followed by cross-examination by the accused or defense counsel, then followed by questioning by you only if you determine further clarification is necessary.

\*\*\*\*\*

#### **Cross-Examination of Government Witness**

*Note.* When Government counsel has completed an examination of a witness, you should advise the accused and counsel (if the accused is represented by counsel) substantially as follows:

PHO (To accused-counsel): You may now cross-examine this witness concerning any of his/her testimony, any knowledge possessed of the offense(s), or concerning the witness's worthiness of belief. (Since you are not represented by counsel, I will do this for you, if you wish, if you will inform me in a general way of the matters about which you want me to question the witness.) Do you wish to cross-examine this witness?

(Counsel) (Accused): *(Yes/no).*

*Note.* If the accused or counsel desires to cross-examine the witness proceed substantially as follows:

(Counsel) (Accused) (to the witness): Did you hear the subject of the argument between the accused and Sergeant Smith?

WITNESS: No sir, they were arguing at the time I came into the dayroom, and I did not hear what was said before I got there.

(Counsel) (Accused): Did you see any gestures made during the argument by Sergeant Smith?

WITNESS: I am not exactly sure what you mean, but . . . (witness continues to describe details of the incident).

PHO (to accused-counsel): Do you have any further questions you want this witness to answer?

(Counsel) (Accused): *(Yes/no).*

PHO: The witness is excused.

**Figure 3–4. Examination of witnesses**

#### Calling Defense Witnesses

PHO (to accused-counsel): All of the witnesses for the Government have been called and have revealed to you the evidence I intend to consider during the preliminary portion of this hearing. As I have previously advised you, you may now present evidence in defense or mitigation so long as it is relevant to the limited scope and purpose of this preliminary hearing. Do you have any witnesses to testify in your defense or mitigation? If so, you may call them at this time.

(Counsel) (Accused): *(No/yes, with name(s) and address(es)).*

*Note.* If witnesses are to be called to testify on the accused's behalf, you should advise the accused substantially as follows:

PHO (to accused-counsel): You or your counsel may question each of the witnesses who are to testify for you.

*Note.* If the accused is represented by counsel, you should assume that counsel will conduct the examination of the witness and present evidence in a planned procedure. If the accused has elected not to have counsel at the preliminary hearing, you should permit the accused to examine or cross-examine witnesses personally if desired. The procedure for administering the oath (fig 3-3) and for introductory questioning of the witness set forth above should be followed for defense witnesses. After the accused or counsel has completed examination of the defense witness, the Government counsel may cross-examine the witness.

#### Explanation of Accused's Rights as a Witness

*Note.* After all the witnesses have testified and the accused or his counsel indicate that they have no further evidence to present, you should inquire of accused and counsel, if the accused has not previously made a statement, substantially as follows:

PHO (to accused): Earlier in this preliminary hearing, I advised you of your rights to make a statement or to remain silent. Do you want me to repeat this advice?

(Counsel) (Accused): *(Yes/no).*

PHO (to accused): Do you desire to make a statement in any form?

(Counsel) (Accused): *(Yes/no).*

Figure 3-4. Examination of witnesses—continued

#### Real Evidence (Physical Objects)

PHO (To witness): This is a knife which the Government has introduced into evidence and I have designated as *(exhibit number)*.

PHO (To accused-counsel after questioning the witness further as to the circumstances under which the knife was found, and after cross-examination, if any, of the witness): Do you have any objection to my considering this exhibit as evidence?

(Counsel) (Accused): *(Yes, stating reason(s)/no).*

#### Documentary Evidence Authenticated Official Record

PHO (to accused-counsel): I have SIDPERS document of *(unit designation)*, for *(inclusive dates)*, which the Government has introduced into evidence and I have designated *(exhibit number)*. It appears to be certified as a true copy by *(rank, name, organization, and duty position of authenticating official)*. I now hand you this exhibit for your examination.

PHO (to accused-counsel after permitting him to examine the document): Do you have any objection to my considering this exhibit as evidence?

(Counsel) (Accused): *(Yes, stating reason(s)/no).*

Figure 3-5. Examination of evidence

## **Chapter 4**

### **Completion of the Preliminary Hearing Officer's Report**

#### **4-1. Report preparation**

*a.* Use the notes that you took during the hearing, the audio/visual recordings or transcribed testimony, the evidence collected during the hearing, and DD Form 457 (see fig 4-1) to assist you in preparing the report for the convening authority who directed the preliminary hearing. The detailed paralegal specialist will assist you with compiling the report. The preliminary hearing report shall include—

- (1) The names and organizations or addresses of defense counsel and whether the defense counsel was present throughout the taking of evidence, or if not present, the reason(s) why;
- (2) The substance of the testimony taken on both sides, including any stipulated testimony;
- (3) Any other statements, documents, or matters you considered. If it is not possible to include these items, you must discuss the nature of the evidence;
- (4) A statement that an essential witness may not be available for trial;
- (5) An explanation of any delays in the preliminary hearing;
- (6) A notation if counsel for the government failed to issue a *subpoena duces tecum* that was directed by the preliminary hearing officer;
- (7) Your determination as to whether there is probable cause to believe the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing occurred;
- (8) Your determination as to whether there is probable cause to believe the accused committed the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing;
- (9) Your determination as to whether a court-martial has jurisdiction over the offense(s) and the accused;
- (10) Your determination as to whether the charge(s) and specification(s) are in proper form; and
- (11) Your recommendations regarding disposition of the charge(s).

*b.* Additionally, some reports may include—

- (1) A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the preliminary hearing (*see* RCM 909 and RCM 916(k)); or
- (2) A statement of any additional uncharged misconduct that was considered and your recommendation as to disposition.

#### **4-2. Distribution of the report**

*a.* Attach all papers furnished to you, together with all evidence produced at the preliminary hearing, to the DD Form 457. Provide the original report to the convening authority who directed the preliminary hearing as expeditiously as possible after you obtain a legal review by the legal advisor, if assigned. Refer to the appointment memorandum for guidance as to the appropriate timelines.

*b.* After providing the original report to the convening authority who directed the preliminary hearing, ensure the detailed paralegal specialist also provides a copy to the accused, the government counsel, and the defense counsel.

## **Appendix A**

### **References**

#### **Section I**

##### **Required Publications**

##### **DA Pam 27-9**

Military Judge's Benchbook (Cited in para 2-2d(1).)

##### **MCM 2012**

Manual for Courts Martial (Cited in para 1-1.)

#### **Section II**

##### **Related Publications**

A related publication is a source of additional information. The user does not have to read it to understand this publication.

##### **AR 25-30**

The Army Publishing Program

##### **AR 27-10**

Military Justice

##### **DFAS-IN Regulation 37-1**

Finance and Accounting Policy Implementation

##### **Federal Rules of Criminal Procedure**

Rule 5.1: Preliminary Hearing

##### **National Defense Authorization Act for Fiscal Year 2014**

Public Law 113-66

#### **Section III**

##### **Prescribed Forms**

Unless otherwise indicated, DD forms are available on the Office of the Secretary of Defense (OSD) Web site (<http://www.dtic.mil/whs/directives/infomgt/forms/index.htm>).

##### **DD Form 457**

Preliminary Hearing Officer's Report (Prescribed in para 3-1.)

#### **Section IV**

##### **Referenced Forms**

Unless otherwise indicated, DA forms are available on the Army Publishing Directorate (APD) Web site (<http://www.apd.army.mil>).

##### **DA Form 2028**

Recommended Changes to Publications and Blank Forms

##### **DA Form 2823**

Sworn Statement

##### **DA Form 3881**

Rights Warning Procedure/Waiver Certificate

## **Appendix B**

### **Checklist for Article 32 Preliminary Hearing Officer**

This checklist is intended as a resource that will help you meet the legal requirements for an Article 32 preliminary hearing. This checklist is not a comprehensive list of all the tasks you must accomplish for the hearing.

### **B-1. Review the file**

- a.* Verify there is an appointment memorandum.
- b.* Ensure the charge sheet is properly completed.
- c.* Ensure the charge(s) and specification(s) contain the elements of the offense(s) as specified in the UCMJ.
- d.* Ensure that you can be fair and impartial.
- e.* Verify whether the file contains all necessary documentary evidence.
- f.* Determine if further evidence is required in order to complete the proceedings. (If so, see your legal advisor, if assigned.)
- g.* Plan a preliminary timeline for completion of the preliminary hearing.
- h.* Plan a preliminary timeline for requests for the production of witnesses and other evidence.
- i.* Determine whether the appointment memorandum gives you the authority to grant delays. If so, for how long?
- j.* Determine what procedure is required if the requested delay is longer than the period authorized in the appointment memorandum.
- k.* Start a detailed chronology to note all actions and delays in the preliminary hearing.

### **B-2. Initial contacts**

- a.* Complete initial briefing with the legal advisor, if assigned.
- b.* Make initial contact with the detailed paralegal specialist (reporter).
- c.* Contact the counsel for both sides to inform them of the preliminary hearing and the timeline. If the accused does not have a counsel, the paralegal specialist can contact the accused on your behalf regarding initial administrative matters.
- d.* Ensure that the victim(s) is notified of the time, date, and location of the hearing. Either you or the Government counsel may provide notice. If the victim is represented by counsel, you must communicate through their counsel.

### **B-3. Case preparation**

- a.* Ensure the list of witnesses and evidence includes those submitted by the accused or the defense counsel. Ensure that the witnesses and/or evidence requested by the accused is evidence in defense or mitigation and is also relevant to the limited scope and purpose of the hearing.
- b.* Ensure that the commander of any proposed military witness has made a determination whether or not the witness will be made available to testify and by what means. If not, determine by what other remote means the witness will testify.
- c.* Ensure that qualifying victims understand that they have the right not to testify at the preliminary hearing and note in the hearing report that they were made aware of and understood this right.
- d.* Coordinate for the set up of all necessary equipment and a site at which to hold the hearing.

### **B-4. Hearing**

- a.* Provide the opportunity for both the Government and defense counsel to deliver opening statements.
- b.* Receive all real and documentary evidence at the hearing that is relevant to the limited scope and purpose of the preliminary hearing.
- c.* Ensure that each party has contacted their witnesses and informed them of the time, date, and place of the hearing in order to avoid unnecessary delay.
- d.* Determine whether all appropriate defense witnesses have been called.
- e.* Give the accused the opportunity to make a sworn or unsworn statement.
- f.* Close the taking of evidence.
- g.* Provide the opportunity to both the Government and defense counsel to make closing arguments.

### **B-5. Report**

- a.* Ensure the chronology contains sufficient detail to identify causes for unusual delays and that the delays are reflected in the DD Form 457.
- b.* Detail the facts, findings, and recommendations in a logical sequence.
- c.* Ensure that the recommendation is supported by evidence showing probable cause to believe an offense has been committed and the accused committed it and that the convening authority has jurisdiction over the offense and the accused.
- d.* Assemble the evidence in a logical and coherent fashion, with the exhibits and enclosures marked in the order that they are discussed.
- e.* Ensure the recommendation is responsive to the tasking in the appointment memorandum.
- f.* Ensure the report contains all objections made by counsel.
- g.* Provide an explanation for any evidence that was requested by the defense but was not considered by you at the hearing.

- h.* Discuss all admissibility issues with the evidence.
- i.* Ensure the DD Form 457 is completed properly.

## **B-6. Recording**

- a.* Record the hearing with a suitable recording device.
- b.* Make copies of the recording in the event a victim or the accused, makes a request for such a copy.

## **Appendix C Common Mistakes**

### **C-1. Failing to maintain impartiality**

Your duties are similar to those of a judicial officer. As such, you should avoid any appearance of partiality to either side. You should express no opinions and should avoid all outside discussion with the command about the substance of the preliminary hearing. If you have prior knowledge of the facts of the case that would endanger your impartiality, you should contact your legal advisor, if assigned, immediately.

### **C-2. Legal advice**

If you reach a point when you are unsure of how to proceed, you should consult with your legal advisor, if assigned. If you are not assigned a legal advisor but wish to consult with one at any stage during the proceeding, make a request through the convening authority to have a legal advisor appointed to you. Your legal advisor is the only person with whom you may discuss your questions concerning the case. The legal advisor is there to help you make sense of any procedural or substantive questions you may have throughout the course of the hearing. However, your legal advisor may not give you any advice on how you should dispose of the case, or what you should recommend. Finally, if you meet with your legal advisor to discuss substantive issues, you must notify both sides about the substantive areas that you discussed, and the advice that you received.

### **C-3. Failing to properly account for delays**

You are responsible for conducting the preliminary hearing in a timely manner, while protecting the rights of the accused. If a party requests a delay and it is for good cause, you may grant the delay if you are authorized to do so in your appointment orders. However, you must account for all such delays in your final report to the appointing authority. Therefore, you should keep a detailed chronology showing all delays and the reasons for them. Keep in mind that most appointment orders limit the amount of days of delay that you are authorized to grant, and provide procedures if the requested delay is for longer than that authorization. If you are unsure about whether to grant a delay, you should consult your legal advisor, if assigned.

### **C-4. Improper admission of evidence**

You often will be given the investigative file and other information when you are appointed as the PHO. This information is to be used as background information only. When making your recommendation, you may only consider evidence that has properly been admitted during the hearing. This means that you may only consider information in the packet that you officially admit into evidence during the hearing. If you fail to admit evidence during the preliminary hearing, you may not consider that evidence in making your recommendation, even if the evidence was contained in the original case packet you received upon your appointment.

### **C-5. Mishandling witnesses**

Ensure witnesses waiting to testify remain outside of the hearing room to prevent their testimony from being tainted. Finally, after a witness is excused, make sure you properly admonish the witness not to discuss his or her testimony with anyone other than counsel until after the case has concluded.

### **C-6. Assuming too high a standard of proof**

You are not at trial; you need not try to prove or disprove the case beyond a reasonable doubt. Your job is to determine whether **probable cause exists to believe that an offense was committed under the UCMJ and whether the accused committed the offense charged** and to make recommendations to the appointing authority on that basis. This is a preliminary hearing, not a rehearsal for the trial. Remember to tailor the hearing accordingly.

**C-7. Failing to find evidence of each element of the offenses**

Familiarize yourself with each element of every offense, then determine whether the evidence shows probable cause to believe the accused committed *each element of the offense*. Character is irrelevant unless it is a defense to an element of an offense, or it is provided as evidence in mitigation that is relevant to the specific purposes of the preliminary hearing. The military character of an accused may not be considered as a factor in deciding how to dispose of the case.

**C-8. Not understanding available dispositions**

A recommendation may depend on assumptions concerning the availability of dispositions in a case. Ensure that you understand the levels of court-martial and other available dispositions.

## **Glossary**

### **Section I Abbreviations**

#### **AR**

Army regulation

#### **DA**

Department of the Army

#### **DA Pam**

Department of the Army Pamphlet

#### **GCM**

general courts-martial

#### **MCM**

Manual for Courts-Martial

#### **MRE**

Military Rules of Evidence (found in the MCM)

#### **RCM**

Rules for Courts-Martial

#### **UCMJ**

Uniform Code of Military Justice

### **Section II Terms**

#### **Active duty**

Full-time duty in the active military service of the United States including full time training duty, annual training duty, and attendance, while in the active military Service, at a school designated as a Service school by law or by the Secretary of the Army.

#### **Counsel**

Judge advocates or civilian attorneys certified under Article 27(b) of the UCMJ.

#### **Deposition**

A legal proceeding in which a witnesses' testimony is recorded verbatim and both Government counsel and defense counsel are provided the opportunity to question and cross-examine the witness.

#### **Elements**

The specific actions necessary to complete an offense under the UCMJ. All elements of a charged offense must be supported by evidence.

#### **Evidence**

Anything (item, document, or testimony) that tends to prove or disprove a fact in issue.

#### **Military judge**

A judge advocate officer who has been certified by The Judge Advocate General as qualified to preside over GCM and/or special courts-martial (SPCM).

#### **Mitigation**

Any evidence that supports a lower level of punishment for an offense.

#### **Probable cause**

A reasonable belief that an offense was committed and the accused committed it.



**Staff Judge Advocate (SJA)**

A judge advocate so designated by The Judge Advocate General of the Army.

**Section III****Special Abbreviations and Terms****PHO**

Preliminary hearing officer

**SVC**

Special victim counsel

**UNCLASSIFIED**

**PIN 023443-000**

# Criminal Law Deskbook

## Practicing Military Justice

### January 2019

Note: This version of the Criminal Law Deskbook reflects changes to the military justice system resulting from the Military Justice Act of 2016, most of which took effect as of 1 January 2019. The July 2018 version of the Criminal Law Deskbook was the most recent version to address pre-Military Justice Act law and procedure.



Criminal Law Department  
The Judge Advocate General's Legal Center and School  
U.S. Army

## **CHAPTER 13**

### **ARTICLE 32 PRELIMINARY HEARING**

- I. References
- II. What is an Article 32 Preliminary Hearing?
- III. When is a Preliminary Hearing Necessary?
- IV. What are its Purposes?
- V. Scope of the Preliminary Hearing
- VI. Participants
- VII. Witness and Evidence Production
- VIII. Procedure for Conducting the Hearing
- IX. Report of Preliminary Hearing
- X. Treatment of Defects

#### **I. REFERENCES**

- A. U.C.M.J., Article 32
- B. Rules for Courts-Martial (RCM) 404A and 405
- C. DA Pam 27-17, *Procedural Guide for Article 32 Preliminary Hearing Officer* (18 Jun 15).

#### **II. WHAT IS AN ARTICLE 32 PRELIMINARY HEARING?**

- A. The preliminary hearing is a formal preliminary hearing conducted prior to referral of charges. Article 32(a)(1)(A), UCMJ reads: “a preliminary hearing shall be held before referral of charges and specifications for trial by a general court-martial.” Note that the preliminary hearing is only required when charges will be referred to a general court-martial. RCM 405(a).
- B. The preliminary hearing has been labeled the “military equivalent” of a civilian grand jury proceeding. *United States v. Bell*, 44 M.J. 403 (C.A.A.F. 1996); *United States v. Powell*, 17 M.J. 975 (A.C.M.R. 1984).
- C. Note that older caselaw cited in this chapter may refer to the preliminary hearing as an “investigation” and may refer to the preliminary hearing officer as the “investigating officer” or “IO.” This reflects the terminology in use at the time those cases were decided.

#### **III. WHEN IS A PRELIMINARY HEARING NECESSARY?**

- A. The preliminary hearing is a prerequisite to trial by General Court-Martial. UCMJ art. 32(a)(1); RCM 405(a).
  - 1. Not required for trial by special court-martial.
  - 2. Not required for trial by summary court-martial.
- B. Exceptions to the preliminary hearing requirement.
  - 1. Earlier preliminary hearing. Another preliminary hearing is not required where there has already been a preliminary hearing into the subject matter of the charges before the accused is charged, the accused was present at that hearing, and was afforded the rights to counsel, cross-examination, and presentation of evidence required by RCM 405. RCM 405(b).

- a. *United States v. Diaz*, 54 M.J. 880 (N-M. Ct. Crim. App. 2000): After the Article 32, the accused identified a defect in the preferral of the initial charges, which were dismissed, and new charges preferred. The accused requested a new Article 32, contending that the preferral defect meant that no charges had been investigated by the first Article 32. The Navy Court held the first hearing was valid and satisfied the requirements of Article 32.
  - b. *United States v. Burton*, 2007 CCA LEXIS 281 (A.F. Ct. Crim. App. 2007) (unpublished): A rape charge was preferred against the accused and the charge was investigated in accordance with UCMJ, Article 32. At the investigation, the accused was represented by counsel and had an opportunity to cross-examine the victim. The charge was referred to trial, but subsequently withdrawn because the accused committed additional misconduct. The rape charge was re-preferred (along with several other charges) in an identical fashion except the accused's unit had changed. The charges were once again sent to an Article 32 investigating officer. The defense counsel noted that the Government intended to rely on the previous Article 32 investigation for the rape charge and objected, demanding further investigation into the rape charge under RCM 405(b) because of new evidence calling the victim's credibility into question. The investigating officer did not investigate the rape charge, but simply attached a copy of the previous Article 32 investigation to the report of the investigation for the three new charges. The defense objected that the original rape charge had not been re-investigated and filed a motion to dismiss at trial. The military judge denied the motion to dismiss, finding that the original rape charge was identical to the new rape charge (except for the unit) and that charge had been properly investigated, so no new investigation was required. The AFCCA held that the military judge abused his discretion in failing to order a new Article 32 investigation into the rape charge. The court found that: "[W]hen the government relies on a previously completed Article 32 . . . hearing to support re-referral of dismissed charges, with no new recommendations by an investigating officer, the investigation is covered by Article 32(c) . . . and an accused has the opportunity to demand further investigation." However, the court held that the error was harmless beyond a reasonable doubt because the convening authority had been given the information concerning victim credibility, the SJA had commented on the victim's credibility in the Article 34 advice, and the defense conducted a detailed cross-examination of the victim at trial.
2. Accused may waive the preliminary hearing, although the convening authority may decide to conduct the preliminary hearing notwithstanding the waiver. UCMJ art. 32(a)(1)(B); RCM 405(m).
- a. Personal right of the accused. *United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004): Accused must personally waive right to preliminary hearing (attorney cannot waive it for him).
  - b. May be waived for personal reasons. If waived for personal reasons, withdrawal of the waiver permitted upon a showing of good cause. *United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993); *United States v. Nickerson*, 27 M.J. 30 (C.M.A. 1988).
  - c. May be waived as a condition of a pretrial agreement. RCM 705(c)(2)(E); *United States v. Shaffer*, 12 M.J. 425 (C.M.A. 1982).
    - 1) *United States v. Von Bergen*, 67 M.J. 290 (C.A.A.F. 2008): The military judge abused his discretion in denying appellant an Article 32 investigation on rehearing where the appellant had waived the investigation in a pretrial agreement, but then pled not guilty at rehearing. The appellant's improvident original plea had the effect of canceling the pretrial agreement according to its terms.

## IV. WHAT ARE ITS PURPOSES?

A. The preliminary hearing is limited to the following purposes. UCMJ art. 32(a)(1)(B)(2); RCM 405(a); RCM 405(e):

1. Determine whether each specification alleges an offense;
2. Determine whether there is probable cause to believe the accused committed the offense(s) charged;
3. Determine whether the convening authority has court-martial jurisdiction over the offense and the accused; and
4. Recommend the disposition that should be made of the case.

B. Discovery is not a valid purpose. “The preliminary hearing is not intended to perfect a case against the accused and is not intended to serve as a means of discovery or to provide a right of confrontation required at trial.” RCM 405(a) discussion.

C. Preservation of testimony.

1. Preliminary hearing testimony might be admissible as substantive evidence at trial, as a prior inconsistent statement under MRE 801(d)(1) or as prior testimony under MRE 804(b)(1). But counsel must use caution. *United States v. Austin*, 35 M.J. 271 (C.M.A. 1992): Child victim testified in detail at the Article 32 but recanted her testimony at trial and refused to talk about the offense. Over defense objection, trial court admitted the 15-page transcript of the Article 32 testimony as a prior inconsistent statement pursuant to MRE 801(d)(1)(A) and as former testimony under MRE 804(b)(1). The transcript was both read to the panel and given to the panel to take into the deliberation room. Held: reversible error to send transcript back to deliberation room with the panel. The transcript was not an exhibit under RCM 921.

a. *United States v. Ureta*, 44 M.J. 290 (C.A.A.F. 1996): Article 32 transcript admissible as prior inconsistent statement and substantive evidence on issue of guilt in case of rape and carnal knowledge of 13-year-old daughter, under MRE 801(d)(1). Accused’s wife testified at Article 32 that accused confessed. After Article 32 terminated, wife refused to discuss her testimony with Government. Unsure whether wife would recant her Article 32 testimony at trial, Government called wife as witness, she recanted, acknowledged inconsistency, and over defense objection, Article 32 transcript was admitted and taken into deliberations. CAAF held that Article 32 transcript was not admissible under MRE 608(b) (no extrinsic evidence of prior inconsistent statement when witness available and testifies, admits making prior statement, and acknowledges specific inconsistencies), but Article 32 transcript admissible under MRE 801(d)(1)(A) as substantive evidence and Government can call witness to establish foundation for admission. Error to send transcript into deliberations, but harmless because unlike *Austin*, transcript was not the only evidence against accused.

b. Article 32 testimony may be admissible at trial as former testimony under MRE 804(b)(1), when the witness is unavailable. *United States v. Austin*, 35 M.J. 271 (C.M.A. 1992); *United States v. Connor*, 27 M.J. 378 (C.M.A. 1989) (“If the defense counsel has been allowed to cross-examine the Government witness without restriction on the scope of cross-examination, then the provisions of M.R.E. 804(b)(1) and of the 6th Amendment are satisfied, even if that opportunity is not used, and the testimony can later be admitted at trial.”); *United States v. Ortiz*, 35 M.J. 391 (C.M.A. 1992) (government must establish that the witness was unavailable before former testimony may be properly admitted); *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989) (stating when Article 32 testimony is offered at

trial, the proponent must establish the unavailability of the witness per MRE 804(b)(1) and the 6th Amendment).

2. Article 32 testimony may be admissible at trial as residual hearsay for unavailable declarants under MRE 807. *United States v. Cabral*, 47 M.J. 268 (C.A.A.F. 1997): Five-year-old victim of sexual abuse appeared for trial but refused to testify. Witness declared “functionally unavailable” and Article 32 videotaped testimony, which had “particularized guarantees of trustworthiness” (language suitable for 5 year old, described acts not common to experience of 5 year old, use of non-leading questions, no motive to fabricate) was admissible as residual hearsay.

## V. SCOPE OF THE PRELIMINARY HEARING

A. The preliminary hearing is limited to the examination of evidence and witnesses relevant to (RCM 405(e)(1)):

1. A determination whether each specification alleges an offense;
2. A determination whether there is probable cause to believe the accused committed the offense(s) charged;
3. A determination whether the convening authority has court-martial jurisdiction over the offense and the accused; and
4. Recommendation as to the disposition that should be made of the case.

B. Consideration of uncharged offenses. UCMJ art. 32(f); RCM 405(e)(2): If evidence adduced in a preliminary hearing indicates the accused may have committed uncharged offense(s), the Preliminary Hearing Officer (PHO) may consider subject matter of uncharged offense(s) without preferral of additional charge(s), provided the accused is present at the preliminary hearing, and notice of the nature of the uncharged charge(s) considered and certain rights (representation, cross-examination, and presentation) are afforded to the accused.

1. If the PHO considers uncharged offenses, the PHO may examine evidence and hear witnesses regarding those offenses. The accused must be afforded all the rights listed in RCM 405(f), and must be afforded the opportunity to seek production of witnesses and evidence under RCM 405(h) so long as doing so would not cause undue delay to the proceedings. RCM 405(e)(2).
2. If charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matter. *United States v. Bender*, 32 M.J. 1002 (N.M.C.M.R. 1991).

## VI. PARTICIPANTS

A. Appointing authority.

1. Any court-martial convening authority may direct a preliminary hearing. RCM 405(c).
2. Usually, the special court-martial convening authority will order the preliminary hearing.

B. Preliminary hearing officer.

1. Whenever practicable, the PHO should be an impartial judge advocate. When it is impracticable to appoint a judge advocate due to exceptional circumstances, the convening authority may appoint an impartial commissioned officer, so long as that PHO has an impartial judge advocate available to provide legal advice to the PHO. UCMJ art. 32(b); RCM 405(d)(1)(A).

- a. Whenever practicable, the PHO should be equal or senior in grade to the trial counsel and defense counsel. UCMJ art. 32(b)(3); RCM 405(d)(1)(B).
  - b. The PHO must maintain impartiality throughout the proceedings, and must avoid becoming an advocate for either side. RCM 405(d)(1)(D).
  - c. PHOs are disqualified from later acting in the case in any capacity. RCM 405(d)(1)(D); *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004).
2. Controls the proceedings. It was not error for the investigating officer (IO) to limit redundant, repetitive, or irrelevant questions by the defense counsel. *United States v. Lewis*, 33 M.J. 758 (A.C.M.R. 1991).
3. Must be impartial.
  - a. PHO must be impartial, but not disqualified merely because of:
    - 1) Prior knowledge about the case. *United States v. Schreiber*, 16 C.M.R. 639 (A.F.B.R. 1954).
    - 2) Investigated a related case. *United States v. Collins*, 6 M.J. 256 (C.M.A. 1979).
  - b. The PHO is partial and is disqualified if:
    - 1) Played a prior role in perfecting the case against the accused. *United States v. Lopez*, 42 C.M.R. 268 (C.M.A. 1970); *United States v. Parker*, 19 C.M.R. 201 (C.M.A. 1955).
    - 2) Previously formed or expressed an opinion about the accused's guilt. *United States v. Natallelo*, 10 M.J. 594 (A.F.C.M.R. 1980).
    - 3) Served as DSJA in the OSJA. *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985).
    - 4) Anytime his/her impartiality might reasonably be questioned. *United States v. Castleman*, 11 M.J. 562 (A.F.C.M.R. 1981) (IO was close friend of accuser and vacationed with accuser two days before Article 32); *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985) (IO was XO of NLSO and was defense counsel's supervisor).
4. Advice. Legal advisors should be impartial, and should limit their advice to matters of law or procedure. Any substantive advice given by the legal advisor must be disclosed to the parties to provide them an opportunity to respond.
  - a. Persons performing prosecutorial functions are not neutral. *United States v. Grimm*, 6 M.J. 890 (A.C.M.R. 1979).
  - b. With regard to substantive matters, any advice received must be from a neutral source. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977).
  - c. Advice must not be given ex parte. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977): After receiving the advice, notice must be given of the person consulted, the substance of the advice, and the parties must be afforded a reasonable opportunity to respond.
5. Ex parte communication with the PHO. Ex parte communication between trial counsel and the PHO regarding substantive matters constitutes error that will be tested for prejudice. Ex parte communication has a presumption of prejudice that may be rebutted by the trial counsel. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977) (seven meetings with trial counsel); *United States v. Whitt*, 21 M.J. 658 (A.C.M.R. 1985) (two "informal" ex parte interviews with three witnesses); *United States v. Francis*, 25 M.J. 614 (C.G.C.M.R. 1987) (meeting with CO, trial counsel, and accuser); *United States v. Rushatz*, 30 M.J. 532 (A.C.M.R.), *aff'd*, 31 M.J. 450 (C.M.A. 1990) (contacting CID, visiting housing & finance offices, talking with potential witness).



- a. *United States v. Argo*, 46 M.J. 454 (C.A.A.F. 1997): Staff Judge Advocate's request to IO (a subordinate officer not under his supervision) to reopen investigation to look into issue of unlawful command influence and reject the defense's interpretation of precedent regarding "no-contact" order did not constitute unlawful command influence. Accused suffered no prejudice by a full investigation of the unlawful command influence issues. Although SJA's ex parte contact violated the rule, there was no prejudicial impact because the IO consulted her own SJA for legal advice and exercised independent judgment and the defense did not enter an objection at any stage of the court-martial process.
  - b. *United States v. Holt*, 52 M.J. 173 (C.A.A.F. 1999): IO's post-Article 32 furnishing trial counsel with name and phone number of blood spatter expert who later provided helpful blood test and spatter testimony at trial created at least the appearance of impropriety by providing trial counsel with what was, in effect, a supplementary report that was neither transmitted to the commander who ordered the investigation nor served on the accused. Such communication did not prejudice the accused, although the CAAF held that, in the future, such supplementary communications must be reported promptly to the command and to the accused. If such a matter arises after referral, the information shall be provided promptly to the commander who referred the case to trial, the military judge, and the accused. The parties will be in the best position to determine whether any motions or objections are warranted based upon the nature of the information.
  6. Delay authority. *United States v. Lazauskas*, 62 M.J. 39 (C.A.A.F. 2005): RCM 707(c) excludes, for 120-day speedy trial clock calculation purposes, any delay approved by the PHO if the convening authority previously delegated authority to the PHO to approve delays. RCM 707(c) discussion.
- C. Accused.
1. Trial counsel must provide the defense with the following no later than five days after the direction of a preliminary hearing (RCM 404A(a)(2)):
    - a. The order directing the preliminary hearing;
    - b. Statements within the control of military authorities of witnesses the trial counsel intends to call at the preliminary hearing;
    - c. Evidence the trial counsel intends to present at the preliminary hearing; and
    - d. Any matters provided to the convening authority when deciding to direct the preliminary hearing.
  2. The accused has the following rights at the hearing (UCMJ art. 32(d); RCM 405(f)):
    - a. To be advised of the charges under consideration;
    - b. To be represented by counsel;
    - c. To be informed of the purpose of the preliminary hearing;
    - d. To be informed of the right against self-incrimination under Article 31;
    - e. To be present throughout the taking of evidence unless the accused is voluntarily absent or disruptive (see RCM 405(j)(4));
    - f. To cross-examine witnesses on matters relevant to the purpose of the hearing;
    - g. Present matters relevant to the purpose of the hearing;
    - h. Make a sworn or unsworn statement relevant to the purpose of the hearing.

D. Defense counsel.

1. Military counsel will be detailed to represent the accused. RCM 405(d)(3)(A). Accused may also request individual military counsel (IMC). RCM 405(d)(3)(B).
2. Accused may be represented by civilian counsel at no expense to the government. The accused will be provided reasonable time to employ civilian counsel and have that civilian counsel present at the preliminary hearing. But, the hearing will not be unduly delayed for this purpose. RCM 405(d)(3)(C); *United States v. Pruner*, 33 M.J. 272 (C.M.A. 1991).

E. Trial counsel. A judge advocate, not the accuser, will serve as counsel for the government. RCM 405(d)(2).

F. Reporter. The convening authority may detail a reporter (i.e., paralegal) to assist the PHO in executing the preliminary hearing and preparing the report. RCM 405(d)(4). The reporter is usually the paralegal assigned to the accused's unit, and the PHO must therefore take care to avoid substantive communications with the reporter. The reporter can assist the PHO with coordinating witnesses, coordinating a location for the preliminary hearing, acquiring and operating recording and communications equipment, preparing correspondence for the PHO, and assisting the PHO with compiling the report of the preliminary hearing. DA Pam 27-17, para. 1-4g (18 June 2015).

## VII. WITNESS AND EVIDENCE PRODUCTION

A. Notice of witnesses and evidence. In accordance with timelines set by the PHO, the parties must provide to the PHO and the opposing party notice of the names and contact information for witnesses the party intends to call at the preliminary hearing, evidence the party intends to offer at the preliminary hearing, and any supplemental information the party intends to submit pursuant to RCM 405(k). RCM 405(h)(1).

B. Witness production. RCM 405(h)(2):

1. Prior to the preliminary hearing, defense counsel shall provide trial counsel a list of witnesses they want the government to produce for the preliminary hearing, and the form of their testimony (i.e., in person, telephonic, video conference).
2. Trial counsel must then respond to defense counsel as to whether the witness's testimony is relevant, not cumulative, and necessary for the purpose of the hearing (see RCM 405(a)).
3. If trial counsel objects to a witness, defense counsel may ask the PHO to determine whether the witness is relevant, not cumulative, and necessary.
4. Military witnesses. RCM 405(h)(2)(A):
  - a. If government does not object to a defense-requested military witness, or if the PHO determines a military witness is relevant, not cumulative, and necessary, trial counsel will ask the witness's commander to make the individual available to testify.
  - b. The witness's commander will make the final decision as to whether the individual is available based on "operational necessity or mission requirements." The commander will also decide if the witness will testify in person, telephone, or other means of remote testimony. The commander's determination is final.
  - c. In any case, a named victim who has suffered a direct physical, emotional, or pecuniary harm as a result of the misconduct being considered and who declines to testify is not required to testify at the preliminary hearing. UCMJ art. 32(d)(3).
5. Civilian witnesses. RCM 405(h)(2)(B):

- a. If government does not object to a defense-requested civilian witness, or if the PHO determines a civilian witness is relevant, not cumulative, and necessary, trial counsel will invite the witness to provide testimony at the hearing. The civilian witness will decide whether or not to appear; civilian witnesses cannot be compelled to appear at the preliminary hearing.
  - b. If any expense will be incurred to produce the civilian witness, the convening authority will decide if the witness will testify in person, telephone, or other means of remote testimony. The commander's determination is final. Civilian witnesses may not be compelled to provide testimony at a preliminary hearing.
6. Immunized witnesses. Only a General Court-Martial Convening Authority (GCMCA) or designee has the authority to grant immunity to witnesses to testify at a preliminary hearing (or court-martial). RCM 704(c); *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991) (no abuse of discretion in denying defense requested immunity for two witnesses at Article 32).
- C. Evidence production. RCM 405(h)(3):
  1. Prior to the preliminary hearing, defense counsel shall provide trial counsel a list of evidence they want the government to produce for introduction at the preliminary hearing.
  2. Trial counsel must then respond to defense counsel as to whether the evidence is relevant, not cumulative, and necessary for the purpose of the hearing (see RCM 405(a)).
  3. If trial counsel objects to the evidence, defense counsel may ask the PHO to determine whether the evidence is relevant, not cumulative, and necessary.
  4. Evidence under the control of the government. RCM 405(h)(3)(A): If government does not object to the evidence, or if the PHO determines the evidence shall be produced, trial counsel will make reasonable efforts to obtain the evidence from the government custodian.
  5. Evidence not under the control of the government. RCM 405(h)(3)(B):
    - a. If government does not object to the evidence, or if the PHO directs the trial counsel to produce the evidence after determining that the evidence is relevant, not cumulative, and necessary, and that compelling production would not cause undue delay, the trial counsel can request that the evidence custodian produce the evidence, or can seek a pre-referral investigative subpoena (see Chapter 11 for details on the pre-referral investigative subpoena).
    - b. If the PHO determines that the defense-requested evidence is relevant, not cumulative, and necessary, and the trial counsel refuses to seek a pre-referral investigative subpoena, the PHO must include a written statement from the trial counsel explaining the reasons for the refusal in the PHO's report.
  6. Production of privileged matters not permitted. RCM 405(h)(3)(A)(iii), 405(h)(3)(B)(iv): The PHO "may not order the production of any privileged matters; however, when a party offers evidence that an opposing party claims is privileged, the [PHO] may rule on whether a privilege applies."

## VIII. PROCEDURE FOR CONDUCTING THE HEARING

- A. General procedure.
  1. RCM 405 provides detailed guidance on how to conduct the preliminary hearing. Normally, the procedures in DA Pam 27-17 that are not inconsistent with Article 32, UCMJ or RCM 405 will also be followed. In addition to these, the convening authority is authorized to prescribe specific procedures for conducting the preliminary hearing. RCM 405(c); *United States v.*

*Bramel*, 32 M.J. 3 (C.M.A. 1990) (appointing authority's instructions to IO to place a partition between the child witness and the accused okay).

- a. The preliminary hearing begins with the PHO informing the accused of his/her rights under RCM 405(f).
  - b. Trial counsel will then present the government evidence and government witnesses. Defense counsel and the PHO may examine the government witnesses.
  - c. Defense counsel will then present defense evidence and defense witnesses. Trial counsel and the PHO may examine the defense witnesses.
  - d. Witnesses may testify in person, by video teleconference, telephone, or similar remote means. All testimony must be under oath, except the accused may make an unsworn statement. The PHO can consider only testimony that is relevant to the purpose of the preliminary hearing.
  - e. The PHO may consider other evidence besides testimony, including statements, tangible evidence, etc., that the PHO determines to be reliable. The PHO must preclude any evidence not relevant to the purpose of the preliminary hearing.
  - f. The PHO may provide the parties an opportunity call additional witnesses or present additional evidence, however, the PHO may not call witnesses sua sponte or consider any evidence not offered by the parties during the hearing or in the parties' RCM 405(k) submissions. RCM 405(j).
2. The convening authority should require expeditious proceedings and set a deadline for receipt of the report of the preliminary hearing. The convening authority should also specify the extent of the PHO's authority to grant excludable delay pursuant to RCM 707. RCM 707(c) discussion; *United States v. Thompson*, 46 M.J. 472 (1997) (defense requested delays that were granted by the Article 32 investigating officer and later ratified by the convening authority after the fact were properly excluded from the speedy trial calculations under RCM 707).
- B. Military Rules of Evidence. RCM 405(i)(1): MREs do not apply other than:
1. MRE 301 (self-incrimination), 302 (statements from mental examination), 303 (degrading questions), and 305 (rights warning);
  2. MRE 412(a) as supplemented by RCM 405(i)(2) (rape shield);
  3. Section V (privileges), except the following DO NOT apply: MRE 505(f)-(h) and (j) (dealing with classified information), MRE 506(f)-(h), (j), (k), and (m) (dealing with other government information); and MRE 514(d)(6) (victim advocate communications).
  4. The PHO shall assume the role of the "military judge" as referenced in the MREs listed above. The PHO will have the same authority as a military judge to exclude evidence from the hearing, and will follow the procedures as stated in those rules. Unless good cause is shown, evidence offered in violation of the procedural provisions of the rules above must be excluded from the preliminary hearing.
    - a. The PHO "may not order the production of any privileged matters; however, when a party offers evidence that an opposing party claims is privileged, the [PHO] may rule on whether a privilege applies." RCM 405(h)(3)(A)(iii), 405(h)(3)(B)(iv).
  5. Application of MRE 412 to preliminary hearings. RCM 405(i)(2).
    - a. Prior to the amendments to RCM 405 pursuant to the Military Justice Act of 2016, the PHO was directed to apply the provisions of MRE 412 itself during preliminary hearings.

The amended RCM 405 now contains detailed guidance in the RCM itself for applying the general rule of privilege set forth in MRE 412(a).

b. In any proceeding involving an alleged sexual offense, evidence offered to prove a victim engaged in other sexual behavior and evidence offered to prove a victim's sexual predisposition is not admissible at the preliminary hearing unless:

1) The evidence is:

- (a) Evidence of specific instances of a victim's sexual behavior offered to prove that someone other than the accused was the source of semen, injury, or other physical evidence; OR
- (b) Evidence of specific instances of a victim's sexual behavior with the accused offered by the accused to prove consent or offered by the prosecution; AND

2) The evidence is relevant, not cumulative, and necessary to a determination of the purposes of the preliminary hearing IAW RCM 405(a). RCM 405(i)(2)(A).

c. Procedure to determine admissibility. RCM 405(i)(2)(B):

1) Notice: the party intending to offer the evidence subject to MRE 412(a) must give written notice via a motion no later than 5 days before the preliminary hearing begins describing the evidence and stating why the evidence is admissible. The PHO can provide a different deadline, but notice must be given before the hearing begins.

2) The opposing party can respond to the motion providing notice with their own written motion.

3) The trial counsel must serve the motion and any responses to the victim and the victim's counsel, or to the victim's guardian or representative.

4) The PHO has the following options with respect to the motion:

- (a) Deny the motion; or
- (b) Conduct a hearing to determine admissibility of the evidence. The hearing must be closed and should be conducted at the end of the preliminary hearing after all other evidence offered has been admitted. The parties may call witnesses and offer evidence at the closed hearing, and the victim must be afforded reasonable opportunity to attend and be heard. The motions, evidence, and record of the admissibility hearing must be sealed in accordance with RCM 1113. RCM 405(i)(2)(C)-(D).

C. Victim rights at the preliminary hearing. RCM 405(g):

1. Victim for these purposes is any person who has suffered direct physical, emotional, or pecuniary harm from the alleged misconduct at issue.

2. Rights include:

- a. Reasonable, accurate, and timely notice of the preliminary hearing.
- b. Reasonable right to confer with the trial counsel.

c. Right not to be excluded from any public portion of the preliminary hearing. PHO can exclude a victim based on clear and convincing evidence that the victim's testimony would be materially altered if the victim observed the proceedings, if governmental privilege is

invoked, or if evidence is offered under MRE 412, MRE 513, or MRE 514 regarding another victim.

d. Named victim is not required to testify. RCM 405(h)(2)(A)(iii).

e. A named victim can request access to, or a copy of, the recording of the proceedings, and the trial counsel must provide the recording or a transcript (with sealed material redacted) after dismissal or adjournment of the court-martial. RCM 405(j)(5).

D. Open vs. closed hearing. RCM 405(j)(3): Ordinarily, preliminary hearings should be open to the public. The proceedings may be closed to the public by the convening authority or PHO under limited circumstances where: (1) there is an overriding interest that outweighs the value of an open preliminary hearing; (2) any closure is narrowly tailored to protect the overriding interest; (3) the convening authority or PHO concludes that no lesser methods short of closing the preliminary hearing can be used to protect the overriding interest; and (4) specific findings of fact in writing are made to support the closure (which are included in the report).

1. *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997): SPCMCA's reasons supporting decision to close *entire* investigation (maintain integrity of military justice system, prevent dissemination of evidence that might not be admissible at trial, and shield alleged victims from possible news reports about anticipated attempts to delve into each woman's sexual history) were insufficient and closure of the entire proceedings was overly broad. The CAAF held that the accused has a qualified right to an open Article 32 hearing.

a. Closure determination must be a "reasoned," not "reflexive" one, made on a "case-by-case, witness-by-witness, and circumstance-by-circumstance basis whether closure in a case is necessary to protect the welfare of a victim. . . ."

b. The press enjoys the same right to a public Article 32 and has standing to complain if access is denied.

2. *United States v. Davis*, 62 M.J. 645 (A.F. Ct. Crim. App. 2006), *aff'd*, 64 M.J. 445 (C.A.A.F. 2007): The IO closed the Article 32 hearing during testimony of two victims of alleged sexual assault "due to the sensitive and potentially embarrassing nature of the testimony and in order to encourage complete testimony about the alleged sexual offenses." The IO failed to speak to either witness and no evidence existed that the witnesses were reluctant to testify in a public hearing. The MJ held that the IO's decision was not supported by the evidence and was error, but the MJ declined to fashion any relief because he could determine no "articulable harm" to the accused. The AFCCA agreed that the IO erred in closing the hearing but held that once the MJ found that the accused's rights to a public hearing were violated, "the [MJ]—without a showing of prejudice or articulable harm—. . . should have dismissed the affected charges to allow for reinvestigation under Article 32." The AFCCA, however, did not reverse or order a new Article 32 hearing because the closure did not adversely affect the accused's rights at trial so setting aside his conviction was not warranted. On appeal, CAAF affirmed, clarifying that, on appeal, Article 32 issues will be reviewed under Article 59(a). CAAF noted that the AFCCA was correct in holding that the MJ erred by requiring a showing of prejudice before providing a remedy.

3. *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996): Court denied newspaper's extraordinary writ to reverse by mandamus IO's decision to close hearing, over defense objection, concerning O-4 charged with murder of 11-year old girl. While Article 32 investigations are presumptively public hearings, the IO did not abuse discretion, and articulated good reasons supporting her action (citing a need to protect against the dissemination of information that might not be admissible in court; to prevent against contamination of a potential jury pool; to maintain a dignified, orderly, and thorough hearing; and to encourage the

complete candor of witnesses called to testify). The court reasoned that RCM 405(h)(3) is unclear how competing interests are to be weighed in deciding whether to close a hearing, or whether the entire hearing could be closed, so mandamus was not appropriate for this area of law that is “developing” and “subject to differing interpretations.”

4. *Denver Post Corp. v. United States*, 2005 CCA LEXIS 550 (Army Ct. Crim. App. 2005): The IO conducted preliminary matters in an open forum and then closed the proceeding to hear testimony from a security specialist regarding classified information. After receiving the security specialist’s testimony, the IO closed the *entire* hearing. Additional witnesses testified to non-classified information in a closed session later in the day. *Denver Post* filed a writ demanding a stay of the proceeding until ACCA could rule on the hearing’s closure. ACCA granted the stay and ruled the IO erred in closing the entire proceeding. Closing a proceeding is only warranted when a “compelling showing [exists] that such was necessary to prevent the disclosure of classified information.” An IO may only close a proceeding “after consideration of the specific substance of the testimony of individual witnesses expected by the parties and a factual determination that all of the expected testimony of such a witness will reveal classified information.”

- E. Supplementary information submitted after closure of the preliminary hearing. RCM 405(k):
1. Parties can submit supplementary material after closure of the hearing that the submitting party “deems relevant to the convening authority’s disposition of the charges and specifications.”
  2. Supplementary information can be submitted to the PHO (with copies provided to the other parties) by the trial counsel, defense counsel, or a named victim within 24 hours of closure of the hearing.
    - a. The defense counsel can submit to the PHO (with copies provided to the trial counsel) additional material rebutting any supplementary information submitted by the trial counsel or a named victim within 5 days of closure of the hearing. RCM 405(k)(2).
  3. Upon receipt of supplementary information, the PHO must take the following actions (RCM 405(k)(3)):
    - a. Examine the supplementary information and seal any matters the PHO deems privileged or otherwise not subject to disclosure.
    - b. Provide a written summary and analysis of supplementary information that is not sealed and is relevant to disposition to be included in the report of preliminary hearing.
    - c. Provide a written analysis of supplementary information that is sealed and is relevant to disposition to be included in the report of preliminary hearing. The analysis itself should also be sealed. The PHO should generally describe the sealed materials and detail the basis for sealing them in a separate cover sheet accompanying the sealed materials.

## **IX. REPORT OF PRELIMINARY HEARING**

- A. PHO must submit a timely written report of the preliminary hearing to the convening authority. The report is advisory and does not bind the SJA or the convening authority. RCM 405(l)(1).
- B. The report of preliminary hearing must include the following (RCM 405(l)(2)):
1. Names and organizations/address of trial counsel and defense counsel, and a statement why any counsel were absent during the preliminary hearing;
  2. An audio recording of the preliminary hearing;

3. The PHO's "reasoning and conclusions with respect to the issues for determination [under RCM 405(a)]..., including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations concerning the testimony of witnesses and the availability and admissibility of evidence at trial" for each specification;
4. A statement as to whether any essential witness may not be available for court-martial;
5. An explanation of any delays in conducting the preliminary hearing;
6. Notation if the trial counsel refused to issue a pre-referral investigative subpoena that was directed by the PHO and the trial counsel's statement of reasons for the refusal;
7. Recommended modifications to the form of the charges;
8. A statement regarding whether the PHO considered any uncharged offenses, and the PHO's reasoning and conclusions regarding whether there is probable cause to believe the accused committed the uncharged offense, and whether the convening authority would have court-martial jurisdiction over the offense if charged;
9. Notation of any objections that a party requested be included in the PHO's report;
10. The PHO's recommendation as to disposition of the charges, including consideration of all evidence admitted during the preliminary hearing and matters submitted under RCM 405(k); and
11. The PHO's summary and analysis of materials submitted pursuant to RCM 405(k).

C. Form of the report. The report will consist of at least the DD Form 457 (Preliminary Hearing Officer's Report), the PHO's reasoning and analysis pursuant to RCM 405(1)(2)(C), and the recording of the preliminary hearing. Other elements listed above will also be required based on the particular facts of each case.

D. Distribution of the report. RCM 405(1)(4):

1. PHO will provide the preliminary hearing report to the convening authority. The convening authority will provide a copy of the report to the accused.
  - a. Defense counsel must make objections to the report to the convening authority via the PHO. These are due within 5 days after receiving the report. RCM 405(1)(5).
2. PHO can order exhibits, proceedings, or other materials sealed in accordance with RCM 1113. RCM 405(j)(8). Matters that the PHO should consider sealing include: testimony taken during closed proceedings, contraband (e.g., child pornography), and privileged material offered into evidence but not considered.

## **X. TREATMENT OF DEFECTS**

A. Failure to follow the requirements of Article 32 does not constitute jurisdictional error. UCMJ art. 32(g).

B. Objections must be timely made. Defects observed during the preliminary hearing or defects in the preliminary hearing report must be made to the convening authority through the PHO via an objection in a timely manner (within 5 days of receipt of the report). RCM 405(1)(5). Failure to make a timely objection under RCM 405 to the conduct of the preliminary hearing or to the report constitutes forfeiture of the objection. The convening authority who directed the preliminary hearing, a superior convening authority, or the military judge may grant relief from the forfeiture for good cause shown. RCM 405(m).



C. Motion for appropriate relief to the military judge based on defects in the preliminary hearing must be made before a plea is entered. RCM 905(b)(1). Failure to raise the matter before pleas forfeits the error. RCM 905(e)(1).

1. Types of defects.

a. Preliminary hearing improperly convened. *United States v. Donaldson*, 49 C.M.R. 542 (C.M.A. 1975): Accused is denied a substantial pretrial right when the Article 32 investigation is ordered by an officer who lacks proper authority.

b. Partiality of the PHO. *United States v. Cunningham*, 30 C.M.R. 402 (C.M.A. 1961): Partiality of the PHO will be tested for prejudice.

c. Denial of right to counsel/ineffective assistance of counsel:

1) The right to the assistance of counsel of one's own choice during the pretrial investigation is a substantial pretrial right of the accused. *United States v. Maness*, 48 C.M.R. 512 (C.M.A. 1974); *United States v. Miro*, 22 M.J. 509 (A.F.C.M.R. 1986) ("An unprepared counsel is tantamount to no counsel at all.").

2) Improper denial of counsel and denial of effective assistance of counsel at the Article 32 should be tested for prejudice. *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985); *United States v. Freedman*, 23 M.J. 820 (N.M.C.M.R. 1987).

2. Remedy.

a. Ordinarily the remedy is a continuance to re-open the preliminary hearing. RCM 906(b)(3) discussion.

b. If the charges have already been referred, re-referral is not required following a re-opening of the preliminary hearing; affirmance of the prior referral is sufficient. *United States v. Clark*, 11 M.J. 179 (C.M.A. 1981).

D. During post-trial appeal, relief for a defective preliminary hearing may only be granted where an accused can show violation of his substantial rights. UCMJ art. 59 ("A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.").

1. *United States v. Von Bergen*, 67 M.J. 290 (C.A.A.F. 2009) ("Article 32, UCMJ, errors are tested on direct review for prejudice as defined by Article 59(a)."): It may be very difficult to show prejudice. *Von Bergen* noted military courts have a long history of deciding that the Article 32 proceedings are "superseded" by the trial procedures, so the accused's rights at an Article 32 "merge into his rights at trial." Because these rights merge, the court held the accused suffered no prejudice, even though he was erroneously denied his right to an Article 32 hearing.

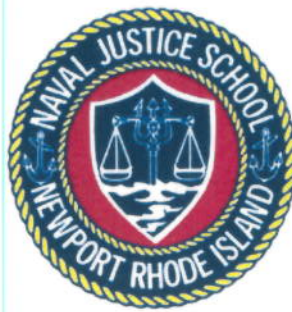
2. *United States v. Allen*, 5 C.M.A. 626 (1955) (quoting testimony of Mr. Larkin at *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 998 (1949)): "[I]n the event that a pretrial investigation, less complete than is provided here, is held and thereafter at the trial full and complete evidence is presented which establishes beyond a reasonable doubt the guilt of the accused, there doesn't seem to be any reason ... that the case should be set aside if lack of full compliance doesn't materially prejudice his substantial rights .... Now, if it has, that is and should be grounds for a reversal of a verdict of guilty."

3. *United States v. Mickel*, 26 C.M.R. 104 (C.M.A. 1958): "[I]f an accused is deprived of a substantial pretrial right on a timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at trial. At that stage of the proceedings, he is perhaps the best judge of the benefits he can obtain from the pretrial right.

Once the case comes to trial on the merits, the pretrial proceedings are superseded by the procedures at trial; the rights accorded to the accused at the pretrial stage merge into his rights at trial. If there is no timely objection to the pretrial proceedings or no indication that these proceedings adversely affected the accused's rights at the trial, there is no good reason in law or logic to set aside his conviction."

4. *United States v. Davis*, 64 M.J. 445 (C.A.A.F. 2007): Case involves closing an Article 32 and clarifies the standard for appellate review. "The time for correction of [procedural errors in the Article 32] is when the military judge can fashion an appropriate remedy . . . before it infects the trial . . ." CAAF explains that, on appeal, the standard of review of Article 32 procedural errors is under Article 59(a), UCMJ, which states, "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error *materially prejudices the substantial rights of the accused*."

# **THE ARTICLE 32 PRELIMINARY HEARING OFFICER'S GUIDE**



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**FEBRUARY 2019**

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## TABLE OF CONTENTS

OVERVIEW.....	4
WAIVER OF THE ARTICLE 32 PRELIMINARY HEARING.....	5
ARTICLE 32 PRELIMINARY HEARING PERSONNEL.....	6
1.    PRELIMINARY HEARING OFFICER .....	6
A.    DUTIES.....	6
B.    QUALIFICATIONS .....	6
C.    IMPARTIALITY .....	6
I.    Disqualification by prior knowledge or association.....	7
II.   Disqualification for preliminary hearing of related cases.....	7
III.  Improper receipt of legal advice .....	7
IV.  Disqualification by subsequent action.....	7
2.    THE ACCUSED.....	7
A.    RIGHTS OF ACCUSED .....	7
B.    MENTAL CAPACITY.....	8
3.    DEFENSE COUNSEL.....	8
A.    SELECTION OF COUNSEL .....	8
B.    ROLE .....	9
C.    DISQUALIFICATION.....	9
4.    COUNSEL FOR THE GOVERNMENT.....	9
A.    APPOINTMENT AND DETAILING.....	9
B.    ROLE .....	9
C.    DISQUALIFICATION.....	10
5.    LEGAL ADVISOR.....	10
6.    OTHER PERSONNEL.....	10
PREPARING FOR THE PRELIMINARY HEARING .....	11
1.    REVIEW LETTER OF APPOINTMENT .....	11
2.    REVIEW THE CHARGE SHEET.....	11
A.    CORRECTIONS TO THE PERSONAL DATA SHEET .....	11
B.    CORRECTIONS TO THE CHARGES.....	11
C.    CONSULT WITH LEGAL ADVISOR .....	11
3.    HOLD A PRELIMINARY CONFERENCE.....	12
4.    SCHEDULE THE PRELIMINARY HEARING .....	12
A.    PRE-TRIAL RESTRAINT .....	12
B.    CONTINUANCE REQUESTS.....	12
I.    Evaluating a request .....	13
II.   Excludable delay and the accused's right to speedy trial.....	13

III. Chronology .....	13
5. ARTICLE 32 PROCEDURAL PROCESS.....	14
A. REVIEW APPLICABLE LAW .....	14
B. RIGHTS OF VICTIMS OF ALLEGED OFFENSES .....	14
C. EVIDENCE .....	15
I. Defense requests for evidence .....	15
II. Authority of the PHO .....	16
III. Form of the evidence.....	16
D. WITNESSES .....	17
I. Government witnesses .....	17
II. Defense witnesses .....	17
III. Military witnesses.....	17
IV. Civilian witnesses .....	17
V. Victims .....	18
VI. Limitations on the PHO.....	18
E. PUBLIC ACCESS.....	18
CONDUCTING THE PRELIMINARY HEARING .....	19
1. PRESENTATION OF EVIDENCE .....	19
A. MILITARY RULES OF EVIDENCE.....	19
B. PRESENTATION OF TESTIMONY .....	20
C. SEQUESTRATION OF WITNESSES .....	21
D. TAKING TESTIMONY .....	21
E. AUDIO RECORDING .....	21
F. SELF-INCRIMINATION .....	21
2. OBJECTIONS .....	22
3. UNCHARGED OFFENSES.....	22
4. QUESTIONS BY THE PRELIMINARY HEARING OFFICER.....	22
5. SUBMISSION OF MATTERS UNDER R.C.M. 405(k) .....	23
PREPARING THE REPORT .....	24
1. TIMING .....	24
2. FORMAT.....	24
A. SUMMARIZE THE FACTS.....	25
B. OUTLINE THE EVIDENCE PRESENTED .....	25
C. ANALYZE THE ELEMENTS .....	25
D. RECOMMEND CHANGES TO THE CHARGES .....	26
I. Minor Changes .....	26
II. Major Changes .....	26
E. OBJECTIONS.....	26
F. EXPLAIN DELAYS .....	27
G. HIGHLIGHT LEGAL ISSUES.....	27



H.	MATTERS SUBMITTED UNDER R.C.M. 405(k)	27
I.	DISPOSITION RECOMMENDATION	27
3.	LENGTH	28
4.	ASSEMBLY	28
A.	REPRODUCING THE REPORT	28
B.	DISTRIBUTION OF THE REPORT	28
5.	RIGHT TO OBJECT	29
6.	REOPENING THE PRELIMINARY HEARING	29
A.	PROCEDURE	29
B.	MODIFYING THE REPORT	29
CONCLUSION		30

## OVERVIEW

Article 32 of the Uniform Code of Military Justice (UCMJ) requires an impartial preliminary hearing on all charges and specifications against an accused prior to referral of charges to a general court-martial (GCM).

The Article 32 preliminary hearing is limited in both scope and purpose. The job of the preliminary hearing officer (PHO)—generally a judge advocate—is to determine:

- 1) Whether or not the specification alleges an offense under the UCMJ;
- 2) Whether or not there is probable cause to believe that the accused committed the offense(s) charged;
- 3) Whether or not the Convening Authority (CA) has court-martial jurisdiction over the accused and the offense; and
- 4) A recommendation as to the disposition that should be made of the case.

As the PHO, you will assume a quasi-judicial role in the proceeding and impartially make these determinations and recommendation. The Article 32 preliminary hearing, while more than a mere report on the charges, is limited to the scope and purposes set forth above. It is not a wide-ranging investigation or forum for discovery.

This manual is designed to serve as your guide for the proper conduct of an Article 32 preliminary hearing. Before you proceed, it is essential that you read Article 32, UCMJ, and R.C.M. 405 as the primary authorities that will govern your preliminary hearing. This guide covers the amendments to Article 32, UCMJ, made in the National Defense Authorization Act of 2016 of 23 December 2016, and amendments to R.C.M. 405 made in Executive Order 13825 of 1 March 2018, both of which became effective on 1 January 2019. Both are published in the Manual for Courts-Martial, 2019 edition, at Appendix 2 and Part II, respectively.

These changes became effective on 1 January 2019. As such, all preliminary hearings conducted after 1 January 2019 must follow the procedures set out in Article 32 and R.C.M. 405, as amended. *See* Executive Order 13825, 1 March 2018.



## **WAIVER OF THE ARTICLE 32 PRELIMINARY HEARING**

The accused can request a waiver of the preliminary hearing. Article 32(a)(1)(B); R.C.M. 405(m). If the accused indicates a desire to waive the Article 32 hearing, as may be the case following plea negotiations, you should immediately inform the CA who appointed you. Note, however, that the accused does not have an absolute right to waive the preliminary hearing. Accordingly, the appointing authority may direct a hearing to proceed despite the accused's waiver request. Article 32(a)(1)(B); R.C.M. 405(m).

## **ARTICLE 32 PRELIMINARY HEARING PERSONNEL**

### **1. PRELIMINARY HEARING OFFICER**

#### **A. DUTIES**

Under Article 32(b) and (c), the PHO must conduct a preliminary hearing and submit a written report to the convening authority.

#### **B. QUALIFICATIONS**

Under Article 32(b)(1)(A), the PHO should, whenever practicable, be a judge advocate certified under Article 27(b)(2). When it is impracticable due to exceptional circumstances, the convening authority may detail an impartial commissioned officer as the preliminary hearing officer. Article 32(b)(1)(B). In such cases, an impartial judge advocate certified under Article 27(b)(2) must be available to provide legal advice to the detailed preliminary hearing officer. Article 32(b)(2).

Article 32(b)(3) also requires that, whenever practicable, the hearing officer must be equal or senior in grade to the military counsel who are detailed to represent the accused or the government at the preliminary hearing.

*Navy:* For preliminary hearings covering sex-related offenses (violations of Articles 120, 120b, 120c, or 125 [forcible sodomy for offenses committed prior to 1 January 2019], or attempts to commit those offenses under Article 80, UCMJ), the PHO must be a judge advocate, qualified and certified under Article 27(b) and sworn under Article 42(a) of the UCMJ. In exceptional circumstances, not involving allegations of sexual assault and in which the interests of justice warrant, the PHO may be a line officer. JAGMAN, Chapter I, Section 0130(e). For additional requirements in preliminary hearings convened by Marine Corps convening authorities, *see* MCO P5800.16A.

#### **C. IMPARTIALITY**

Article 32(b) requires a hearing by an impartial PHO. Accordingly, you must be impartial, and your impartiality will be evaluated by the same standards that are applied to military judges as set forth in R.C.M. 902. Your impartiality can be questioned by counsel for the accused or by counsel for the government. Additionally, your impartiality may be questioned before you start the preliminary hearing, during the course of the preliminary hearing, or after you have submitted your report to the CA. You shall not depart from your impartial role or become an advocate for either side. R.C.M. 405(d)(1)(D). After serving as PHO, you may not later act in the same case in any other capacity. *Id.*

## **I. Disqualification by prior knowledge or association**

An accuser cannot serve as a PHO. R.C.M. 405(d)(1)(A). Likewise, an officer who is a close personal friend of the accuser is normally disqualified from serving as a PHO. A PHO is not disqualified solely by virtue of his or her position in the legal office. However, a PHO who supervises counsel for either side is disqualified and must be recused. If you believe you should be disqualified from serving as the PHO, you must disclose this information to the counsel for both sides.

## **II. Disqualification for preliminary hearing of related cases**

A PHO who has previously served as the PHO in cases related to the offense(s) under consideration is normally disqualified. This differs from a joint preliminary hearing of multiple service members because the PHO begins the joint preliminary hearing with no preconceived ideas as to the legal sufficiency of the evidence and has made no prior decisions that he or she might seek to vindicate. The mechanics of arranging for a joint preliminary hearing are more difficult, however, and the PHO is required to make the requisite determinations and submit a separate report regarding each accused service member.

## **III. Improper receipt of legal advice**

The preliminary hearing officer may seek legal advice concerning the preliminary hearing officer's responsibilities from an impartial source, but may not obtain such advice from counsel for any party or counsel for a victim. R.C.M. 405(d)(1)(D), Discussion. Likewise, it is improper for anyone else to provide *ex parte* legal or substantive advice about the matters related to the preliminary hearing without the knowledge, presence, or consent of all parties. If you intend to seek outside legal advice on substantive issues, you must give notice to all parties (i.e., defense counsel, accused, and counsel for the government) before obtaining the advice. You shall also note the receipt of such advice on the record of the preliminary hearing and in your report.

## **IV. Disqualification by subsequent action**

If you do anything during or after the preliminary hearing 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. If you have concerns in this area, you must notify counsel for both sides and, when warranted, notify the staff judge advocate (SJA) to the CA or the appropriate command services judge advocate.

# **2. THE ACCUSED**

## **A. RIGHTS OF ACCUSED**

You must ensure the accused is informed of his or her rights at the preliminary hearing. At the hearing, the accused has the right to: 1) be advised of the charges under consideration at the



preliminary hearing; 2) be represented by counsel; 3) be informed of the purpose of the hearing; 4) be informed of the right against self-incrimination under Article 31; 5) except for the circumstances described in R.C.M. 804(c)(2), be present throughout the taking of evidence; 6) cross-examine witnesses on matters relevant to the issues for determination under R.C.M. 405(a); 7) present matters relevant to the issues for determination under R.C.M. 405(a); and 8) make a sworn or unsworn statement relevant to the issues for determination under R.C.M. 405(a). R.C.M. 405(f).

## **B. 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. R.C.M. 909(a). This is a different question than whether the accused was mentally responsible at the time of the alleged offense. R.C.M. 916(k). In general, there is a presumption that the accused has the capacity to understand the Article 32 preliminary hearing. R.C.M. 909(b). 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 preliminary hearing to form a basis for recommending the accused be referred to a sanity board under R.C.M. 706, and thereby delay the preliminary 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 preliminary 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 R.C.M. 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.

## **3. DEFENSE COUNSEL**

### **A. SELECTION OF COUNSEL**

Military counsel certified under Article 27(b) shall be detailed to represent the accused. R.C.M. 405(d)(3)(A). The accused may request individual military counsel through procedures found in R.C.M. 506(b) and service regulations (R.C.M. 405(d)(3)(B) and JAGMAN Chapter I, Section 0131), and may also be represented by a civilian attorney at his or her own expense (R.C.M. 405(d)(3)(C)). The accused is still entitled to his or her military attorney, even when he or she has retained civilian counsel. *Id.* As such, the accused will sometimes be represented by more than one defense counsel. The accused also has a broad right to self-representation. If the accused indicates a desire to exercise that right, you will need to conduct some additional research on this issue and should consult the pro se accused colloquy in the Military Judge's Benchbook. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK (series) [hereinafter Military Judge's Benchbook].

## **B. ROLE**

The defense counsel will ensure that the procedural and substantive rights of the accused are protected. The defense counsel will be allowed to present evidence on behalf of the accused that is relevant to the issues for determination under R.C.M. 405(a), to cross-examine witnesses who testify at the hearing on matters relevant to the issues for determination under R.C.M. 405(a), to argue for a disposition of the matter appropriate to the interests of the accused, and to conduct any other defense functions reasonably necessary to protect the interests of the accused.

## **C. DISQUALIFICATION**

The defense counsel could be disqualified if he or she has supervisor-subordinate relationship with other parties or currently represents the government in any matter. If there is an appearance of impropriety or conflict of interest, this matter should be raised with counsel, the accused and, when appropriate, the detailing authority and the CA.

# **4. COUNSEL FOR THE GOVERNMENT**

## **A. APPOINTMENT AND DETAILING**

*Navy:* The CA shall appoint a judge advocate to represent the government at the preliminary hearing. As a practical matter, the CA typically requests services from the local Region Legal Service Office (RLSO). In practice, the counsel for the government has usually been detailed to the case by his or her chain of command, may have been involved in certain aspects of the investigation, and may have prepared the charge sheet. Government counsel (GC) is not required to be impartial, but rather is guided by rules of professional responsibility, case law, and the Manual for Courts-Martial.

*Marine Corps:* The appropriate detailing authority will detail a judge advocate to represent the government at the preliminary hearing. For special victim cases, the lead judge advocate must be qualified as a special victim trial counsel as set forth in paragraph 1203.3 of MCO P5800.16A.

## **B. ROLE**

Government counsel is not an impartial legal advisor to the hearing officer, but instead represents the government in a prosecutorial role as an adversarial party to the hearing. Accordingly, you must not seek legal advice from the government counsel. As is described in more detail below, the government counsel makes the initial decision as to whether witnesses and evidence requested by the defense will be produced. The government counsel will also present evidence and cross-examine witnesses relevant to the issues for determination under R.C.M. 405(a) and may argue for a disposition of the matter appropriate to the interests of the government. Additionally, government counsel is responsible for logistical support. This is



particularly important when you are not stationed locally. As soon as the government counsel has been appointed, he or she should contact you to determine what must be done to ensure a smooth preliminary hearing.

### **C. DISQUALIFICATION**

Government counsel will be disqualified if he or she has a financial or improper personal stake in a prosecution. The government counsel could also be disqualified if he or she has had improper communications about the case with the PHO or the SJA, or if he or she has a supervisor-subordinate relationship with other parties, including the accused, the PHO, opposing counsel, the SJA, or the CA. If there is an appearance of impropriety or conflict of interest, this matter should be raised to the CA.

### **5. LEGAL ADVISOR**

If you are not a judge advocate, you must be assigned a judge advocate, certified in accordance with Article 27(b), to provide legal advice. R.C.M. 405(d)(1)(A). Anyone who serves in this advisory role must be impartial with no direct interest in the outcome of the proceeding. The legal advisor will answer questions of law or procedure which arise. For example, the legal advisor may provide information regarding which lesser offenses are included in an offense charged or concerning what defenses may be applicable. You must not ask for or accept advice from the legal advisor or any other person concerning what factual conclusions should be drawn from the evidence in the case or concerning your disposition recommendation. You, as the PHO, are responsible for independently making each of the determinations set out in R.C.M. 405(a). When you consult with your legal adviser, you should inform defense counsel and government counsel and provide them an opportunity to comment.

### **6. OTHER PERSONNEL**

The CA may detail a court reporter, interpreter, and others to aid the preliminary hearing. R.C.M. 405(d)(4).

## **PREPARING FOR THE PRELIMINARY HEARING**

Once you are appointed as the PHO, plan an effective strategy to carry out your assigned duties in compliance with Article 32 and R.C.M. 405.

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

Once appointed, you should carefully review the letter of appointment issued by the CA that directs the preliminary hearing. This letter sets forth the charges that you will be reviewing and delegates certain authorities. It may detail counsel to the case, set a date for the preliminary hearing, set a deadline for the completion of your report, and delegate to you the CA's power to grant a continuance and excludable delay. Your appointment letter is likely to direct you to make the preliminary hearing your primary duty until its completion. In any case, you should conduct the preliminary hearing promptly and diligently through completion, unless relieved. A sample letter of appointment is included as Enclosure (1).

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

Other documentation typically received at the first stage of the preliminary hearing includes the charge sheet, DD Form 458. You should review the charge sheet and ensure that the information is correct and that the charges are in the proper form. Although R.C.M. 603(a) prohibits you from making any changes to the charge sheet itself—even minor ones—you should identify and recommend any necessary changes in your report.

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

Review the accused's personal data for accuracy. If you identify deficiencies in the personal data section, notify the government counsel and defense counsel for correction. Recommended or completed corrections to the personal data shall be noted in your report.

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

Compare each specification with the sample specification format found in the Manual for Courts-Martial, Part IV and the Military Judge's Benchbook. If you identify deficiencies in the specifications, notify the government counsel and defense counsel. Government counsel may choose to correct the charges before you commence the preliminary hearing. R.C.M. 603(a). To avoid the appearance of impropriety, avoid *ex parte* communications concerning corrections to the charges and avoid being present when corrections are made.

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



If you are not a judge advocate, you are encouraged to seek legal advice from your legal advisor, 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 your recommendations about the issues for determination under R.C.M. 405(a) are 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 counsel for the government and defense as soon as possible to ensure that the preliminary hearing proceeds smoothly. If civilian counsel for the accused intends to participate in the preliminary conference, you should request a notice of appearance from them before allowing them to participate in the process. The primary purposes of the preliminary conference are to ensure that all pre-hearing disclosures required by R.C.M. 404A(a) have been made, coordinate logistical issues, and determine how long the hearing is expected to last. It is useful to highlight potential points of contention to prevent unnecessary delay. Although 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 should memorialize the outcome of the conference in a memo like the one provided at Enclosure (2).

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

Your appointment letter may set a date for the preliminary hearing; if it does not, you must set a date. The date should be scheduled as soon as reasonably possible and all interested parties should be notified in writing of your decision. One of the most difficult tasks in preparing for the preliminary hearing is coordinating the availability of parties. Government counsel is responsible for all preliminary hearing logistics. However, it is your responsibility to ensure that all logistical requirements are met and that the preliminary hearing is conducted in a timely manner. This is especially important when the accused is in pre-trial restraint.

##### **A. PRE-TRIAL RESTRAINT**

If an accused is in pre-trial arrest or confinement, the government must take "immediate steps" to dismiss the charges or bring the accused to trial. Article 10. One potential remedy to a violation of Article 10 is dismissal of all charges with prejudice, i.e. the government is foreclosed from future prosecution. Do not delay in completing the preliminary hearing or submitting a written report, especially when the accused is in pre-trial confinement.

##### **B. CONTINUANCE REQUESTS**

After the preliminary hearing has been scheduled, the defense or government may request that the preliminary hearing be continued until a later date. 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. 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, your response to defense requests, such as requests for a continuance, may be reviewed by appellate courts to determine your impartiality. Enclosure (3a) is a sample request for continuance and Enclosure (3b) is a sample letter granting a such a continuance request.

### **I. Evaluating a request**

In evaluating a continuance request, you must carefully and impartially balance the need for speedy disposition of charges against a party's need for additional preparation time. Review Article 10 and R.C.M. 707 prior to making your decision. You should require the parties to reduce their requests to writing, and give the other party an opportunity to respond. In the end, you must independently weigh the evidence and arguments from both sides, approve only reasonable continuances, 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 neither party objects. If the accused requests a continuance to retain civilian counsel or ensure the presence of his counsel of choice, reasonable latitude should be granted, and your reasons for denial should be carefully documented. *But see* R.C.M. 405(d)(3)(C) (“the preliminary hearing shall not be unduly delayed for [the] purpose [of obtaining civilian counsel]”). Nevertheless, you should avoid open-ended continuances and require reasonable estimates of the time necessary to complete the pending action or conduct additional preparation, and set a date.

### **II. Excludable delay and the accused's right to speedy trial**

Granting a defense or government request for a continuance is not the same as excluding the delay from the speedy trial clock. The CA may additionally grant you the authority to make a finding as to whether any delay, such as those caused by an approved continuance, may be excluded for the purposes of R.C.M. 707(c). *United States v. Lazauskas*, 62 M.J. 39 (C.A.A.F. 2005); R.C.M. 707(c)(1), Discussion. If the CA does grant you this authority, you should affirmatively state in all continuance requests whether you consider the delay to be excludable for the purposes of the government's speedy trial clock. In determining whether delay should be excludable, you should consider who is requesting the delay, the length of the delay, the reasonableness of the request, and the reason for the delay. R.C.M. 707(c)(1), Discussion.

### **III. Chronology**

In developing the necessary record for granting a continuance, at a minimum, you should ascertain and include in your report when counsel first learned of the case, when he or she received disclosures under R.C.M. 404A, and why he or she is unable to proceed at the appointed time. If the defense alleges that other cases require attention, find out how those 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. Consider creating a chronology sheet that documents the dates and reasons for all your actions in conducting the preliminary hearing and attach it to your report.

## **6. ARTICLE 32 PROCEDURAL PROCESS**

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

You should review the required elements for each charged offense in Part IV of the Manual for Courts-Martial and the Military Judge's Benchbook. You may also conduct legal research to determine how military courts have interpreted the offenses concerned. If you are not a judge advocate, you may consult your legal advisor about the required elements of the charged offenses.

### **B. RIGHTS OF VICTIMS OF ALLEGED OFFENSES**

For purposes of the preliminary hearing, "victim" means a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ. R.C.M. 405(g)(1). In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the victim may have an individual designated to assume the victim's rights. Article 6b(c).

In many cases, the victim may be represented by Victims' Legal Counsel (called Special Victim's Counsel in the Coast Guard, Army, and Air Force) or civilian legal counsel. Note, there exist service differences concerning victim counsel services eligibility. When the victim is represented by counsel, all communications with the victim or the individual designated to assume the victim's rights, other than those made during the victim's testimony, should normally be made through the victim's counsel. You should note in your report the contact information for the victim's counsel and any comments or objections submitted by the victim's counsel.

Victims have the right to reasonable, accurate, and timely notice of the preliminary hearing. R.C.M. 405(g)(2). You should ensure the government counsel has notified all qualifying victims, through counsel if applicable, of the time, date, and place of the preliminary hearing. Article 32(d)(3).

A victim, who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration, shall not be required to testify at a preliminary hearing. Article 32(d)(3); R.C.M. 405(h)(2)(A)(iii). A victim who declines to testify is deemed to be not available for the purposes of the preliminary hearing. Article 32(d)(3).

Victims have the right not to be excluded from any public proceeding of the preliminary hearing unless you determine, after receiving clear and convincing evidence, that testimony by the victim would be materially altered if the victim heard other testimony at the preliminary hearing.



Article 6b(a)(3); R.C.M. 405(g)(3); R.C.M. 806(b)(3). Before a final decision to exclude a victim from the hearing, you should consider whether you can hear the evidence in a different order (e.g., calling the victim first) so as to negate the need to exclude the victim from the preliminary hearing. You may, however, exclude the victim during closed portions of the hearing. R.C.M. 405(j)(3).

Finally, a victim has a right to be reasonably heard, through counsel if applicable, on all issues arising under Military Rules of Evidence 412, 513, and 514 that directly relate to that victim. *See* Article 6b(e).

### **C. EVIDENCE**

The government bears the burden of demonstrating that each specification alleges an offense under the UCMJ, there is probable cause to believe that the accused committed the offense(s) in question, and the convening authority has jurisdiction over the accused and the offense. The government may also present information relevant to a disposition recommendation.

In preparing for the preliminary hearing, you should consider what information you believe will be necessary to conduct the preliminary hearing. To assist you in making this determination, you may review the charge sheet and copies of other documentary evidence provided by the government and defense, so long as those documents have been provided to the other party. You may not, however, formally consider such matters as evidence unless they are properly presented at the preliminary hearing.

#### **I. Defense requests for evidence**

While R.C.M. 404A establishes a timeline for the disclosure by the government of specific documents prior to the preliminary hearing, R.C.M. 405(h) requires you to set timelines for the parties to exchange notice of witnesses, evidence, and additional information to be submitted under R.C.M. 405(k). The defense has an opportunity to request witnesses and evidence under R.C.M. 405(h)(2) and (3). A best practice is for you 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.

If evidence is under the control of the government, and the government declines to produce the information requested by the defense, the defense may request that you determine whether the evidence sought is relevant, not cumulative, and necessary for the determination of the issues under R.C.M. 405(a). R.C.M. 405(h)(3)(A). These issues should be discussed with the parties and you should then determine whether the requested evidence is relevant, non-cumulative, and necessary for the determination of the issues under R.C.M. 405(a). If you so determine, direct government counsel to produce the evidence. R.C.M. 405(h)(3)(A)(ii). The government shall make reasonable efforts to obtain the evidence. *Id.*

Evidence not under the control of the government may be obtained through noncompulsory means or by a pre-referral investigative subpoena issued by a military judge under R.C.M. 309 or counsel for the government in accordance with the process established by R.C.M. 703(g)(3). R.C.M. 405(h)(3)(B). If the government declines to produce evidence that is not under government control, the defense may also request you to determine whether the evidence should be produced. *Id.* In such cases, you must determine not only that the evidence is relevant, not cumulative, and necessary to a determination under R.C.M. 405(a), but also that producing the evidence will not cause unreasonable delay. R.C.M. 405(h)(3)(B)(iii). If you so determine, direct the government counsel issue a pre-referral investigative subpoena for the evidence. If counsel for the government refuses, he or she must explain the reasons for the refusal in a written statement, which should be included in your report. *Id.* An unsuccessful effort by the government to secure the requested evidence by issuance of a subpoena shall be noted in the Article 32 report. Article 32 preliminary hearings shall not be unreasonably delayed to secure this type of requested evidence; however, the missing evidence should be noted in the Article 32 report. A flowchart demonstrating both processes to follow is included as Enclosure (4).

## **II. Authority of the PHO**

While the PHO may direct the government counsel to produce or seek evidence that is requested by the defense, the PHO has no independent authority to order production of evidence or issue either a *subpoena duces tecum* or a pre-referral investigative subpoena. R.C.M. 405(h). If the government declines to produce the requested evidence or declines to issue a subpoena for the requested information, the PHO shall note that fact in the Article 32 report. R.C.M. 405(h)(3)(B)(iii).

## **III. Form of the evidence**

The PHO may consider other forms of evidence at the preliminary hearing, even if those forms of evidence would not be admissible at court-martial, so long as the evidence is relevant to the limited scope and purpose of the preliminary hearing and not cumulative. This includes witness testimony provided in person, by video teleconference, by telephone, or similar means of remote testimony. This also includes other evidence, in addition to or in lieu of witness testimony, including statements, tangible evidence, or reproductions thereof, offered by either side, that you determine reliable. R.C.M. 405(j)(2)(B). If familiarity with the scene of the alleged offense would assist you, you may, subject to approval of the CA, visit the scene as long as you request the parties accompany you.



## **D. WITNESSES**

### **I. Government witnesses**

The government may call witnesses, relevant to a determination under R.C.M. 405(a), in person, via telephone or video teleconference, or by other means that provide reasonable opportunity to question the witness and for the defense to cross-examine the witness. R.C.M. 405(j)(2)(A).

### **II. Defense witnesses**

The defense shall be afforded the opportunity to call witnesses to testify to issues relevant to a determination under R.C.M. 405(a). The defense may call witnesses in person, via telephone, or video teleconference, or by other means that provide reasonable opportunity to question the witness and for the government counsel to cross-examine the witness. R.C.M. 405(j)(2)(A). In situations where the defense is requesting government assistance or expenditure of any government funds to facilitate witness testimony, and government counsel objects to the witness, then defense counsel may request a determination by the PHO of the necessity of the witness. If the PHO finds the witness testimony to be relevant, non-cumulative, and necessary to a determination under R.C.M. 405(a), then the PHO shall direct the government to facilitate the witness testifying as explained below. R.C.M. 405(h)(2).

### **III. Military witnesses**

For military witnesses, the government shall contact the witness's command and request the witness be made available to testify. The witness's commanding officer shall determine the availability of the requested witness based on operational requirements and mission accomplishment. R.C.M. 405(h)(2)(A)(iii). The commanding officer also determines the form of testimony that the witness will provide. *Id.* Given the broad discretion the commanding officer has to determine the form of the testimony the witness will provide, there will normally not be an operational requirement that cannot be overcome to take the testimony of a witness. However, a commanding officer's determination of non-availability of a witness is final and is not subject to review by the PHO. *Id.* A flowchart demonstrating the process to follow is included as Enclosure (5).

### **IV. Civilian witnesses**

If the witness is a civilian, the government shall invite the civilian witness to provide testimony and, if the civilian witness agrees, make appropriate arrangements. R.C.M. 405(h)(2)(B)(iii). If testimony by the civilian witness would incur expense to the government, the CA who directed the preliminary hearing, or the CA's delegate, determines whether the witness will testify in person or by some alternate means. *Id.* A flowchart demonstrating the process to follow is included as Enclosure (5). A sample civilian witness invitation letter is included as Enclosure (6).

## **V. Victims**

Victims, including military victims, of offenses under consideration at the Article 32 preliminary hearing may not be required to testify at the preliminary hearing. Article 32(d)(3); R.C.M. 405(h)(2)(A)(iii).

## **VI. Limitations on the PHO**

While the PHO may recommend that a party call a witness to testify, the PHO may not *sua sponte* call a witness to testify. R.C.M. 405(j). Similarly, while the PHO may suggest which form of testimony will be most helpful to the PHO, the PHO has no authority to mandate the form of the testimony provided by any witness.

## **E. PUBLIC ACCESS**

In general, an Article 32 preliminary hearing is presumptively a public proceeding, and so it is generally inadvisable to close the preliminary hearings unless there is an overriding interest that outweighs the value of an open preliminary hearing. R.C.M. 405(j)(3). In such cases, the preliminary hearing officer or convening authority may restrict or foreclose access by spectators to all or part of the proceedings. *Id.* The restriction or closure must be narrowly tailored to protect the overriding interest involved. *Id.* Before ordering any restriction or closure, the preliminary hearing officer or convening authority must determine whether any reasonable alternatives to such restriction or closure exist, or if some lesser means can be used to protect the overriding interest in the case. *Id.* Specific findings of fact about the closure must be made and included in the preliminary hearing report. Examples of circumstances when closure or restriction may be necessary include: preventing psychological harm or trauma to a child witness or to an alleged victim of sexual crime, protecting the safety or privacy of a witness or an alleged victim, protecting classified information, or receiving evidence where a witness is incapable of testifying in an open setting. R.C.M. 405(j)(3), Discussion.

Note that closure of or restriction of access to a hearing under R.C.M. 405(j)(3) is different from closing a portion of a hearing when making determinations about evidence under Mil. R. Evid. 412 or Mil. R. Evid. Section V (Privileges). When making such determinations, you, as the PHO, are required to conduct closed proceedings when the rule of evidence in question so requires. *See* R.C.M. 405(i)(1)(B). When you are conducting closed hearings because you are addressing matters under a rule of evidence that requires closure, you need not make a determination balancing the interests of closure, but you should note in your report that you conducted a closed hearing in accordance with the rule of evidence in question.

All inquiries by the media concerning the preliminary hearing should be referred to the public affairs office.



## **CONDUCTING THE PRELIMINARY HEARING**

Due to the nature of the preliminary hearing, you have limited discretion in how the preliminary hearing is conducted. However, you are responsible for maintaining the decorum of the proceeding and restricting the presentation of evidence and witnesses to the scope and purpose of the preliminary hearing. You are strongly encouraged to follow the Article 32 Preliminary Hearing Officer's Script included with this guide as Enclosure (7). Use of the script will cover all the important requirements on the DD Form 457, Preliminary Hearing Officer's Report, and other requirements of Article 32 and R.C.M. 405. Missing a procedural requirement can lead to prejudice to the rights of an accused service member or victim or to the waste of judicial resources. Ultimately, you will weigh the credibility of the evidence presented at the preliminary hearing and determine (1) whether each specification alleges an offense; (2) whether there is probable cause to believe that the accused committed the offense or offenses charged; (3) whether the convening authority has court-martial jurisdiction over the accused and over the offense; and (4) a recommendation as to the disposition that should be made of the case. The preliminary hearing shall begin with the PHO informing the accused of his or her rights at the hearing. Government counsel will then present evidence, including potentially witness testimony. Upon the conclusion of government counsel's presentation of evidence, defense counsel may present matters. Both parties should then be afforded an opportunity to provide closing comments before the hearing is closed.

### **1. PRESENTATION OF EVIDENCE**

The government may present its case in any manner it deems suitable and is not required to call witnesses or introduce specific evidence if probable cause can be met without such presentation. Any questioning by any party (government, defense, PHO), whether on direct or cross-examination, must be relevant to the issues for determination under R.C.M. 405(a).

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

Only the following Military Rules of Evidence apply to Article 32 preliminary hearings:

- Mil. R. Evid. 301-303 and 305 (privilege concerning compulsory self-incrimination, privilege concerning mental examination of the accused, degrading questions, warnings about rights). R.C.M. 405(i)(1)(A)(i).
- In cases involving any allegation of a sexual offense, Mil. R. Evid. 412 applies, except that Mil. R. Evid. 412(b)(1)(C) ("the Constitutionally required" exception) specifically does not apply to Article 32 preliminary hearings. R.C.M. 405(i)(1)(A)(ii).
- Privileges under the Military Rules of Evidence Section V apply, except for Mil. R. Evid. 505(f)-(h) and (j); 506(f)-(h), (j), (k), and (m); and 514(d)(6) (the "Constitutionally required" exception). R.C.M. 405(i)(1)(A)(iii).

Pursuant to R.C.M. 405(i)(1)(B), when applying these rules to the preliminary hearing, the term “military judge,” as used in the evidentiary rules, means the PHO. The PHO assumes the military judge’s authority to exclude evidence from the preliminary hearing and follows the procedures set forth in those specific evidentiary rules. However, the PHO shall not assume the military judge’s authority to order production of privileged matters, though the PHO may determine and rule on whether a privilege applies should a party seek to offer evidence that another party claims is privileged. Evidence at a preliminary hearing may only be produced in accordance with R.C.M. 405(h).

Failure to meet the procedural requirements of the applicable rules of evidence, to include all notice requirements, shall result in the PHO excluding that evidence from the preliminary hearing, unless the offering party can show good cause as to why the procedural rules need not be followed. R.C.M. 504(i)(1)(B). You should note in your report both the reason for exclusion of the offered evidence and, if applicable, the good cause shown by the offering party as to why you allowed evidence in violation of the procedural requirements of the rules.

In proceedings related to Mil. R. Evid. 412, 513, and 514, including admissibility hearings, the PHO shall allow the victim to be heard on such matters, including through the victim’s legal counsel. However, the hearing may not be unduly delayed for this purpose. R.C.M. 405(i)(2)(C); M.R.E. 412 (c)(2); M.R.E. 513(e)(2); M.R.E. 514(e)(2). If, at the conclusion of an admissibility hearing, the PHO determines that evidence under Mil. R. Evid. 412, 513, or 514 should be admitted, the victim may directly petition the Court of Criminal Appeals for a writ of mandamus pursuant to Article 6b. The preliminary hearing may be abated pending action by the Court of Criminal Appeals. Article 6b(e); R.C.M. 405(i)(2)(C). Denial of a request by victim’s legal counsel to present matters related to Mil. R. Evid. 412, 513, or 514 shall be explained in the Article 32 report.

The PHO must seal motions, related papers, and records of admissibility hearings under Mil. R. Evid. 412 in accordance with R.C.M. 1113. R.C.M. 405(i)(2)(D). The preliminary hearing officer also has the authority to order exhibits, recordings of proceedings, or other matters sealed as described in R.C.M. 1113. R.C.M. 405(j)(8).

The PHO must ensure that any evidence containing information protected by the Privacy Act of 1974, 5 U.S.C. § 552a, is appropriately marked and protected.

## **B. PRESENTATION OF TESTIMONY**

With the exception of the accused, all witnesses are required to testify under oath. R.C.M. 405(j)(2)(A). The accused is permitted to make an unsworn statement. *Id.* The PHO shall only consider testimony that is relevant to the issues for determination under R.C.M. 405(a). *Id.* If the PHO finds that evidence offered by either party is not within the scope of the hearing, the PHO shall inform the parties and halt the presentation of that information. R.C.M. 405(j)(1), Discussion.



### **C. SEQUESTRATION OF 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. M.R.E. 615. While Mil. R. Evid. 615 is not necessarily applicable at Article 32 preliminary hearings, the practice of sequestering witnesses in order to prevent contamination of their testimony is common and is within your discretion to exercise during the preliminary hearing. However, as explained earlier, a victim of an offense under consideration at the preliminary hearing has a right not to be excluded from any portion of the hearing related to the alleged offense. In order to exclude a victim of the alleged offense(s), you must determine by clear and convincing evidence that the testimony of the victim would be materially altered if that victim heard other testimony. Your findings in this respect should be put on the record of the preliminary hearing and noted in your report to the CA. It is within the PHO's 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 preliminary hearing. Finally, you must warn (or order) witnesses who have testified not to discuss the case or their testimony with anyone other than counsel, as suggested by the script in Enclosure (7).

### **D. TAKING TESTIMONY**

It is not the PHO's duty to perfect the case for the government or to advocate for either side. The government counsel should conduct an examination of witnesses sufficient to meet the government's burden for the limited purposes of the preliminary hearing. As the PHO, you are permitted to question witnesses, but you should take care not to abandon your role as an impartial officer. To that end, you should ask questions to clarify your understanding of the facts and enable you to make a well-informed recommendation as to the disposition of the charges. However, it is the role of government counsel to present sufficient evidence to meet the government's burden. R.C.M. 405(j)(2)(A), Discussion. 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 (7), and must note potential future unavailability in your report to the CA. R.C.M. 405(l)(2).

### **E. AUDIO RECORDING**

The Article 32 shall be recorded by a suitable recording device. Article 32(e); R.C.M. 405(j)(5). Government counsel is responsible for ensuring that such a recording is made, but the PHO should verify this statutory requirement is being met at regular intervals of the proceeding.

### **F. 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. R.C.M. 405(j)(2)(A),

Discussion; M.R.E. 301(c), Discussion. A script for witness advisement of rights is included in Enclosure (7).

## **2. OBJECTIONS**

Objections made at Article 32 proceedings fall into two different categories: (1) evidentiary objections and (2) objections alleging failure to comply with R.C.M. 405. You must rule on objections related to the evidentiary rules that apply at preliminary hearings (R.C.M. 405(i)). You should also rule on objections alleging that the evidence in question is cumulative, or not relevant or necessary to the determination of the issues under R.C.M. 405(a).

You are not required to rule on objections alleging that the procedures in R.C.M. 405 were not followed. Under R.C.M. 405(j)(7), any objections must be made to you promptly upon discovery of the alleged error. If the person objecting so requests, you must include the objection in your report. You should require the person objecting to submit the objection in writing.

## **3. UNCHARGED OFFENSES**

During the preliminary hearing, evidence may be adduced that the accused committed an uncharged offense. If the accused is present at the preliminary hearing and you inform him or her of the nature of each uncharged offense, then you may consider evidence and testimony related to the subject matter of that offense without the accused having previously been charged with that offense. The accused must be afforded the same opportunities for representation, cross-examination, and presentation related to such uncharged offenses as were given during the Article 32 preliminary hearing for the charged offenses. R.C.M. 405(e)(2).

## **4. QUESTIONS BY THE PRELIMINARY HEARING OFFICER**

As the PHO, you have no authority to *sua sponte* call witnesses, however, you may question witnesses called by either party in order to clarify facts and circumstances of their testimony or as it relates to the determination of issues under R.C.M. 405(a). R.C.M. 405(j)(1). You must take care not to become an advocate for either party and you must maintain your impartial role with both the nature and tone of questions asked. R.C.M. 405(j)(2)(A), Discussion.

While you may not *sua sponte* call witnesses or request, compel, or present evidence, you may inform government or defense counsel that more information is required in order to make the determinations required by R.C.M. 405(a). R.C.M. 405(j)(1). You are encouraged to inform the parties of matters about which further information would be useful in your decision-making process, but neither government counsel nor the defense counsel can be compelled to present more evidence.

## **5. SUBMISSION OF MATTERS UNDER R.C.M. 405(k)**

No later than 24 hours after the closure of the preliminary hearing, counsel for the government, defense counsel, and any victim named in one of the specifications under consideration (or counsel for that victim, if applicable), may submit to you (copying government and defense counsel) any additional information that the submitter deems relevant to the convening authority's disposition of the charges and specifications. R.C.M. 405(k)(1).

Defense counsel may submit additional matters that rebut the submissions of counsel for the government or any victim. These additional submissions must be made to you and counsel for the government within 5 days of the closure of the preliminary hearing. R.C.M. 405(k)(2).

Preliminary hearing officers have the discretion to seal any such supplementary matters that they deem should be protected from disclosure. Should you do so, follow the procedures set forth in R.C.M. 1113 and ensure you provide an explanation as to the purpose of sealing the information and, if applicable, the parameters for examination by or disclosure to those persons whose interests are being protected. R.C.M. 405(k)(2), Discussion.

## **PREPARING THE REPORT**

In preparing the preliminary hearing report, you should keep in mind your statutory obligations. Your report must specifically answer the four primary questions of the Article 32 preliminary hearing, and should provide a basis for your determinations and recommendations.

### **1. TIMING**

In addition to completing DD Form 457 (Enclosure (8)), you must submit a timely written report of the preliminary hearing to the CA. R.C.M. 405(i)(1). The appropriate amount of time required to complete the report will depend upon the nature of the preliminary hearing, though your appointment letter may give specific deadlines. Your goal should be to submit the report as soon as possible after the close of the preliminary hearing. Efficiency in completing your report is especially important in cases where the accused is in confinement or under restraint. If the thoroughness of your report is endangered by time constraints, ask the CA for an extension.

### **2. FORMAT**

The format of your report will vary depending on the nature of the charges under consideration, your personal style, and instructions from the CA. Some PHOs will write what is essentially a memorandum of law in letter format containing enclosures. Others may write a simple supplement to the DD Form 457. Enclosure (9) is a sample report that you may use as a baseline format for completing your detailed report to the CA. At a minimum, the report must include:

- a) The name and contact information of government and defense counsel and, if applicable, a statement of why either counsel was not present at any time during the proceedings;
- b) The recording of the preliminary hearing;
- c) For each specification, your reasoning and conclusions with respect to the issues for determination under R.C.M. 405(a), including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations concerning the testimony of witnesses and the availability and admissibility of evidence at trial;
- d) If applicable, a statement that an essential witness may not be available for trial;
- e) An explanation of any delays;
- f) A notation if government counsel refused to issue a pre-referral investigative subpoena that was directed by you, and the counsel's statement of the reasons for such refusal;
- g) Recommendations for any necessary modifications to the form of the charges and specifications;
- h) A statement of whether you examined evidence or heard witnesses relating to any uncharged offenses in accordance with R.C.M. 405(e)(2), and, for each such offense, your reasoning and conclusions as to whether there is probable cause to believe that the accused committed the uncharged offense(s) and whether the convening authority would have court-martial jurisdiction over the offense(s) if charged;
- i) A notation of any objections, alleging failure to comply with R.C.M. 405;

- j) Your recommendation as to the disposition that should be made of the charges and specifications in the interest of justice and discipline; and
- k) A written summary and analysis of the matters submitted under R.C.M. 405(k).

The DD Form 457 is an executive summary covering the basic requirements of what must occur during the preliminary hearing. You are not required to repeat anything that is already addressed in DD Form 457, but you must provide a more detailed report that includes the information described above. In the detailed report, 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**

At a minimum, you must include in your report a summary of the relevant witness testimony taken on both sides and the other evidence presented during the preliminary hearing. A summary of each witness's testimony is not required. You should, however, discuss how the witness testimony and evidence presented led you to your determinations under R.C.M. 405(a). The level of description of the evidence that you should include depends greatly on the facts of each case. You should describe the evidence and witness testimony which you considered and analyze the significance of this evidence in terms of the broader facts.

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

As you consider the elements of the offenses, a good approach is to copy the elements of each specification and discuss the evidence that supports or refutes each element. If the government failed to offer any evidence related to an element, you should conclude that the specification is not supported by probable cause. Remember, you may consider hearsay or other inadmissible evidence in deciding whether all the elements of proof are met. R.C.M. 405(e), Discussion. 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 the preliminary hearing and presentation of the evidence, you should review the form of the charges by comparing them to the model specifications. 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, the preliminary hearing 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 a court-martial convening authority may later adopt. You may also recommend that additional charges be preferred.

### **I. Minor Changes**

Rule for Courts-Martial 603 deals with changes to charges and specifications that do not require re-drafting 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 preliminary hearing does not need to be re-opened. Minor changes include correcting the accused's name, alleging the proper article number, and changing a more serious offense to a less serious one, such as reducing the value of an allegedly stolen item in a larceny specification.

### **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 or requiring charges to be re-sworn. Changing a date or place in the specification is usually minor, unless a clearly different or more serious offense than was contemplated by the accuser results. If a change is major, you may recommend re-opening or conducting a new Article 32 preliminary hearing, unless the accused was advised of the potential change and was given the opportunity to challenge it at the preliminary hearing.

## **E. OBJECTIONS**

Under R.C.M. 405(j)(7), you are not required to rule on objections alleging that the procedures in R.C.M. 405 were not followed, but you must include them in your report if requested by the party objecting. You may set a reasonable amount of time from the closing of the preliminary hearing for the parties, and, if applicable, victim's legal counsel, to submit written objections. If written objections are received, you may, but are not required to, respond to each in your report as appropriate to explain the basis of your decision. The written objections submitted by either party or the legal counsel for the victim should be appended to your report.

## **F. EXPLAIN DELAYS**

You are required to explain any delays in the preliminary hearing. R.C.M. 405(l)(2)(E). You may attach continuance requests and a chronology of events related to the delays to your report.

## **G. HIGHLIGHT LEGAL ISSUES**

One of the most important functions of an Article 32 preliminary hearing is to identify legal issues related to whether charges state offenses and whether probable cause and jurisdiction exists. 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.

## **H. MATTERS SUBMITTED UNDER R.C.M. 405(k)**

You should review matters submitted under R.C.M. 405(k) and divide them into two categories: (1) matters that are relevant to disposition and (2) matters that are not relevant to disposition. First analyze the relevant matters submitted. Next, determine whether any of these matters should be sealed, i.e. because they are privileged or not subject to disclosure. If any of the submitted matters should be sealed, your analysis of that same information should also be sealed. Then, create a cover sheet that generally describes those matters and the basis for sealing them. Separately, for any supplementary matters that need not be sealed and are relevant to disposition, include a summary and analysis of the non-sealed matters and attach them to your report. R.C.M. 405(k)(3).

If any party submits matters that you deem not relevant to disposition, you may give the offering party an opportunity to explain how these matters are relevant to disposition. *See* R.C.M. 405(k)(1) (noting that the offering party can submit supplementary matters that it deems relevant to the CA's disposition of the charges and specifications). Matters that are not relevant to the disposition need not be analyzed, but you should still include them and any arguments as to their relevance or non-relevance as attachments to your report unless the offering party withdraws the materials, for example, if they were submitted in error. You should briefly explain why you did not consider the matters relevant.

If the government or the victim, through his or her counsel, as applicable, submit any information under R.C.M. 405(k), ensure a copy has been provided to the accused and allow the accused and defense counsel 5 days from the closure of the hearing to rebut the submitted matters and/or provide additional supplementary information. R.C.M. 405(k)(2).

## **I. DISPOSITION RECOMMENDATION**

When making a disposition recommendation, you should consider all the evidence submitted during the preliminary hearing, in addition to matters submitted under R.C.M. 405(k). You may

also consider the Non-Binding Disposition Guidance at Appendix 2.1 of the Manual for Courts-Martial. You may conduct additional legal analysis as to any of the factors or other issues relating to disposition. For example, if you believe a key piece of evidence will not be admissible at trial, you should discuss this in your report.

### **3. LENGTH**

When drafting your report, remember your target audience and recall that the CA needs to be able to use your report to determine how to address the alleged misconduct. When in doubt, you should provide in your report more detail rather than less in order to help the CA assess the evidence. In most cases, you should include in your report a summation of the evidence—with citations to the exhibits—that 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 a preliminary hearing 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 recommends the information be presented. Note that the DD Form 457 and your detailed report are not preliminary hearing exhibits. A copy of the charge sheet is always 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 should be attached as Exhibit 2. Other documents and witness statements provided should be marked as exhibits generally in the order in which they were submitted at the hearing, 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 (e.g. "Exhibit 1," "Exhibit 2" and so on). Add page numbers to exhibits that have multiple pages in order to facilitate the reader's understanding of the material. Enclosure (9) is a sample PHO report, though personal style and local practice may provide for many different variations in format for the written report.

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

In most jurisdictions, your report may be submitted electronically. Your appointing order should give directions as to how the report must be submitted. Consult with the SJA regarding forwarding and safeguarding any sealed matters.

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

You are required to deliver your report to the commander who directed the preliminary hearing, and the commander is responsible for delivering the report to the accused. The CA's SJA normally delivers a copy of your report to accused on behalf of the commander, and this is not your responsibility to do so unless otherwise directed. Normally your obligation ends when you



deliver your report to the CA. Remember, the CA is the release authority for the report and is the only one who may authorize distribution. The CA may decide that your report is inadequate or deficient in some area and may direct you to clarify certain aspects. The CA may not, however, influence your impartial judgment.

## **5. RIGHT TO OBJECT**

After the accused receives a copy of the report, there is a 5-day period for objections to the report to be made to the CA, which shall be made via the PHO. R.C.M. 405(l)(5). The day the report is delivered to the accused is not counted in calculating the 5-day period. Failure to object to matters included or omitted from the report constitutes a waiver of such objection, but the convening authority, a superior convening authority, or a military judge may grant relief from that forfeiture for good cause shown. R.C.M. 405(m). You may, but are not required to, comment on the objections before forwarding them to the convening authority. You must, though, forward the objections received as soon as practicable. The CA is not prohibited from referring any charge or taking any other action within the 5-day period. R.C.M. 405(l)(5).

## **6. RE-OPENING THE PRELIMINARY HEARING**

There are several circumstances under which it may be necessary to re-open the preliminary hearing. If a charge or specification not contemplated at the preliminary hearing is preferred with the intention of referring it to the same court-martial after the first preliminary hearing has been completed, then the preliminary hearing must be re-opened. R.C.M. 405(b). Other examples include if there has been a "major" change in a specification or if additional evidence is required.

### **A. PROCEDURE**

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

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

If the DD Form 457 and Preliminary Hearing Officer's Report were not completed prior to the hearing being re-opened, 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 and potentially consider completing another DD Form 457 so as to ensure the second preliminary hearing covered all of the required items annotated in the DD Form 457.

## **CONCLUSION**

The intent of this guide is to provide a comprehensive manual so that the PHO may properly conduct a preliminary hearing, correctly resolve any issues, and make accurate determinations as required by Article 32 and R.C.M. 405.



DEPARTMENT OF THE NAVY  
NAVAL EDUCATION AND TRAINING COMMAND  
250 DALLAS STREET  
PENSACOLA, FL 32508-5220

IN REPLY REFER TO

5811

N00J

11 Feb 19

From: Commander, Naval Education and Training Command

To: Lieutenant Commander Peter H. Oslo, JAGC, USN

Subj: APPOINTMENT AS ARTICLE 32 PRELIMINARY HEARING OFFICER IN  
CASE OF UNITED STATES V. LANCE CORPORAL MAY B. GUILTY, U.S.  
MARINE CORPS

Ref: (a) Article 32, Uniform Code of Military Justice (UCMJ)  
(b) Rule for Courts-Martial (R.C.M.) 405

Encl: (1) Charge sheet (DD Form 458) ICO United States v. LCpl M. B. Guilty

1. Pursuant to references (a) and (b), you are hereby appointed as preliminary hearing officer to conduct a preliminary hearing into all matters set forth in the charges and specifications preferred against Lance Corporal May B. Guilty, United States Marine Corps.
2. You shall conduct an impartial preliminary hearing which shall be limited to a determination of whether or not the specifications allege an offense under the UCMJ, whether or not there is probable cause to believe the accused committed the offenses charged, whether or not the convening authority has court-martial jurisdiction over the accused and over the offenses, and a recommendation as to the disposition that should be made of the case. In conducting this preliminary hearing 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 Fabio Gallo, 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 David Costa, 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. Lieutenant Jane Goodall, USCG, certified in accordance with Article 27(b), UCMJ, and previously sworn in accordance with Article 42(a), UCMJ, has been detailed as counsel for A.V.

Enclosure (1)

Subj: APPOINTMENT AS ARTICLE 32 PRELIMINARY HEARING OFFICER IN  
CASE OF UNITED STATES V. LANCE CORPORAL MAY B. GUILTY, U.S.  
MARINE CORPS

6. You will notify the accused, defense counsel, government counsel, and legal counsel for the victim of the time and place of the convening of this preliminary hearing.

7. The hearing is scheduled for [TIME] on [DATE] at [LOCATION]. You are specifically granted the authority to grant one continuance for a reasonable duration up to three weeks in the subject case and, where appropriate, exclude the time from the government's R.C.M 707 speedy trial clock. All continuance requests must be submitted to you, in writing, and, regardless of your decision, they must be included in your final report.

C. B. OFFICER

Copy to:

DC

GC

VLC [or SVC, as appropriate]

12 Feb 19

MEMORANDUM

From: Lieutenant Commander Peter H. Oslo, JAGC, USN, Preliminary Hearing Officer  
To: Captain Fabio Gallo, USMC, Counsel for the Government  
Lieutenant David Costa, JAGC, USN, Counsel for Accused  
Mr. Christopher D. Chance, Esq., Counsel for Accused

Subj: ARTICLE 32 PRELIMINARY HEARING ICO UNITED STATES v. LCpl M. B. GUILTY, USMC

1. This is to inform you than an Article 32 preliminary hearing has been set for [TIME] on [DATE] at [LOCATION].
2. The uniform for the preliminary hearing will be [UNIFORM].
3. Counsel for the government (GC) shall ensure that the preliminary hearing will be recorded by a suitable government recording device.
4. No later than [DATE – 5 business days after the date the Article 32 appointing order is signed], GC shall provide to the Defense Counsel (DC) the following, under R.C.M. 404A:
  - a. The order directing the Article 32 preliminary hearing;
  - b. Statements, within the control of military authorities, of witnesses that GC intends to call at the preliminary hearing;
  - c. Evidence GC intends to present at the preliminary hearing; and
  - d. Any matters provided to the Convening Authority when deciding to direct the preliminary hearing.
5. Production of witnesses and evidence.
  - a. No later than [DATE – set by PHO], DC shall provide to the GC the names of both the proposed military and civilian witnesses whom the accused requests the government produce to testify at the preliminary hearing and the requested form of the testimony for each requested witness. DC shall also provide to GC a list of evidence under control of the government and evidence that is not in control of the government that the accused requests the government produce to the defense for introduction at the preliminary hearing.
  - b. No later than [DATE – set by PHO], GC shall respond that either 1) the government agrees to produce the requested witness or evidence, or 2) the government objects to the production of the witness or evidence on grounds that the witness or evidence would be irrelevant, cumulative, or unnecessary to a determination of the issues under R.C.M. 405(a).

Enclosure (2)

Subj: ARTICLE 32 PRELIMINARY HEARING ICO UNITED STATES v. LCpl M. B. GUILTY, USMC

- c. If the government objects, DC may request, in writing, that I determine whether a requested witness or evidence is relevant, not cumulative, and necessary to a determination of the issues under R.C.M. 405(a). The DC must file this request with me by [DATE – *set by PHO*].
6. No later than [DATE – *set by PHO*], GC and DC shall exchange:
  - a. Notice of the name and contact information for each witness the party intends to call at the hearing;
  - b. Notice of any other evidence that the party intends to offer at the hearing;
  - c. Notice of intent to offer any evidence under Mil R. Evid. 412, 513, or 514 (please provide such notice to me, and to counsel for any victim concerned, as well). [*No later than 5 business days before the preliminary hearing, DC must submit a motion to the PHO requesting to introduce evidence under M.R.E. 412. GC and any victim's counsel should have an opportunity to provide a written response prior to the preliminary hearing.*]
  - d. Any motion to exclude a victim from public portions of the preliminary hearing because there is clear and convincing evidence that the testimony of the victim would be materially altered if the victim heard other testimony at the hearing. *See Article 6b(a)(3); R.C.M. 405(g)(3), R.C.M. 806(b)(3).*
7. No later than [DATE – *can be later than that in Paragraph 6, but before the preliminary hearing*], provide notice of any additional information the party intends to submit under R.C.M. 405(k);
8. [*Add this paragraph if there is a victim as defined in Article 32(h) in the case*] Government Counsel shall ensure that the victim(s), as defined in R.C.M. 405(g), and their counsel have been provided reasonable, accurate, and timely notice of the preliminary hearing. The victim(s) (has) (have) the right not to be excluded from any public portion of the preliminary hearing unless I, after receiving clear and convincing evidence, determine that testimony by the victim would be materially altered if the victim heard other testimony at the preliminary hearing.
9. If you have any questions, you may reach me at [pete.h.oslo@navy.mil](mailto:pete.h.oslo@navy.mil) or 401-841-3800.

/s/

P. H. OSLO  
LCDR, JAGC, USN  
Preliminary Hearing Officer

Copy to: VLC [*or SVC*]

12 Feb 19

MEMORANDUM

From: Lieutenant David Costa, JAGC, USN, Defense Counsel

To: Lieutenant Commander Peter H. Oslo, JAGC, USN, Preliminary Hearing Officer

Subj: REQUEST FOR CONTINUANCE OF THE ARTICLE 32 PRELIMINARY HEARING

Ref: (a) PHO appointment letter of 11 February 2019

1. Pursuant to reference (a), counsel for the Accused respectfully requests that the Article 32 preliminary hearing in the case of Lance Corporal May B. Guilty, United States Marine Corps, be continued until a date no earlier than 1 April 2019.
2. The reason for the request is the serious and complex nature of the allegations against LCpl Guilty and the relatively brief time defense counsel has to prepare.
3. Defense also requests that the deadline for submitting witness and evidence request for the Article 32 Preliminary hearing be likewise extended from the date of 25 February 2019 to a date not earlier than 15 March 2019.
4. Thank you very much for your consideration and attention to this matter.

D. C. COSTA

Copy to:

Captain Fabio Gallo, Government Counsel

Enclosure (3a)

13 Feb 19

MEMORANDUM

From: Lieutenant Commander Peter H. Oslo, JAGC, USN, Preliminary Hearing Officer  
To: Lieutenant David Costa, JAGC, USN, Defense Counsel  
Captain Fabio Gallo, USMC, Trial Counsel

Subj: GRANT OF REQUEST FOR CONTINUANCE OF THE ARTICLE 32  
PRELIMINARY HEARING

Ref: (a) Defense Counsel letter of 12 February 2019  
(b) PHO appointment letter of 11 February 2019

1. In reference (a), counsel for the Accused requested that the Article 32 preliminary hearing in the case of Lance Corporal May B. Guilty, United States Marine Corps, be continued until a date no earlier than 1 April 2019. Under the authority delegated to me in reference (b), I grant this request. The preliminary hearing is now set for 1 April 2019. The deadline for submitting witnesses and evidence is also extended to 15 March 2019.

2. This delay is requested by and therefore attributed to the defense. Pursuant to the authority delegated to me in reference (b), the time period from the originally scheduled date of the hearing through 1 April 2019 will be excluded from the government's R.C.M. 707 speedy trial clock.

3. Counsel for the government is directed to notify the victim of the alleged offenses of the date change.

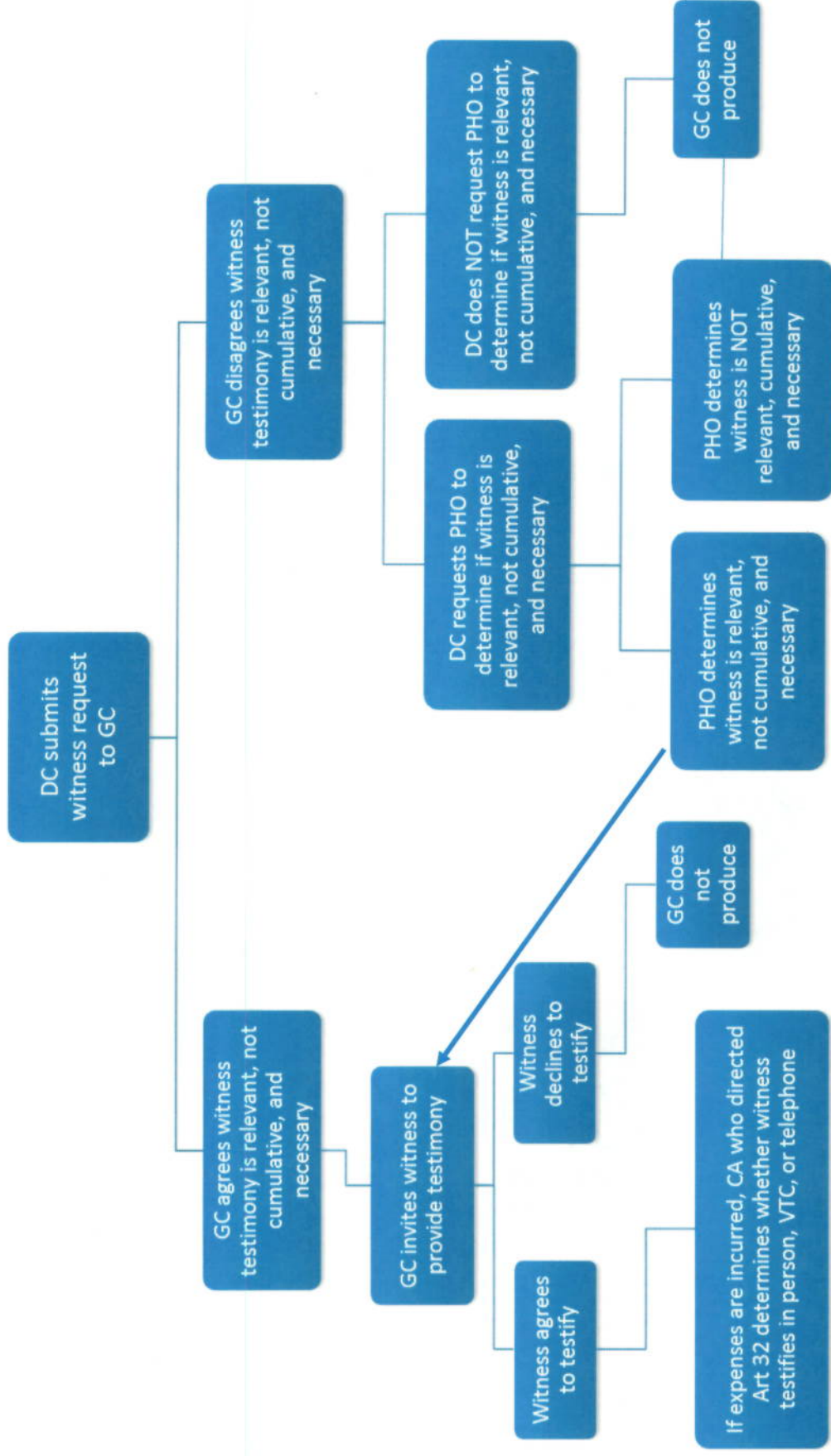
P. H. OSLO

Copy to:  
SJA to CA

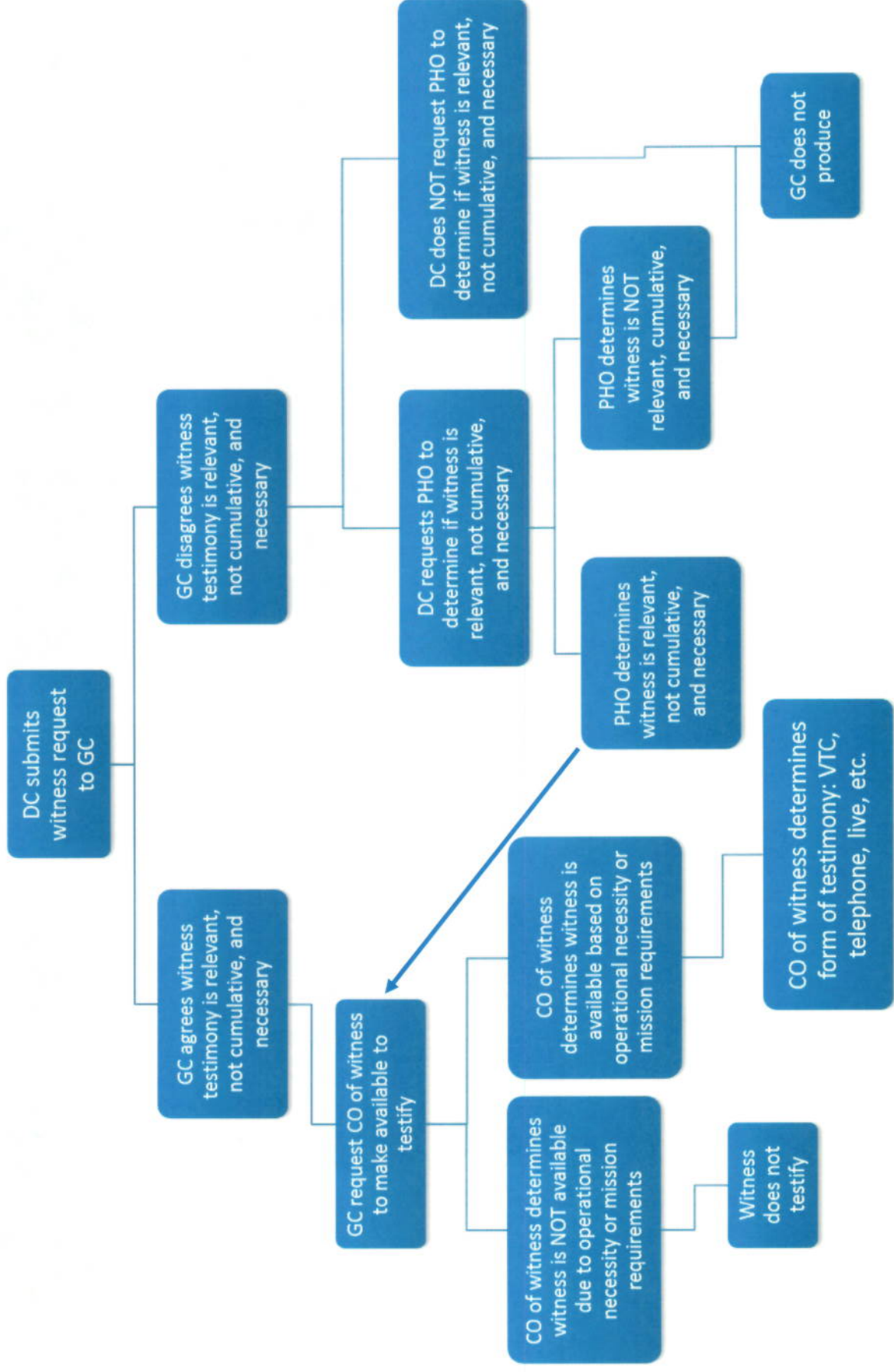
Enclosure (3b)



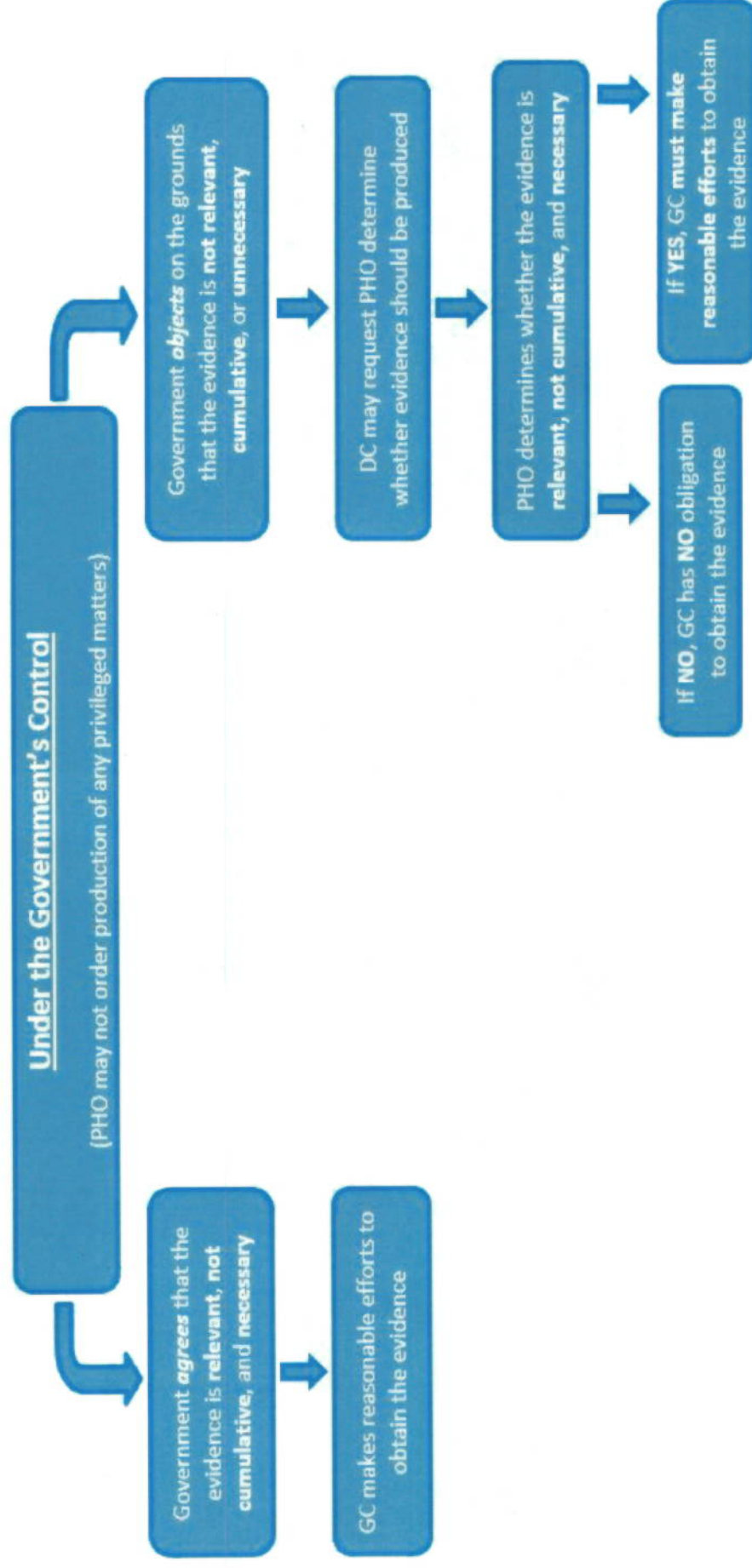
# **PRODUCTION OF CIVILIAN WITNESSES** **R.C.M. 405(h)(2)(B)**



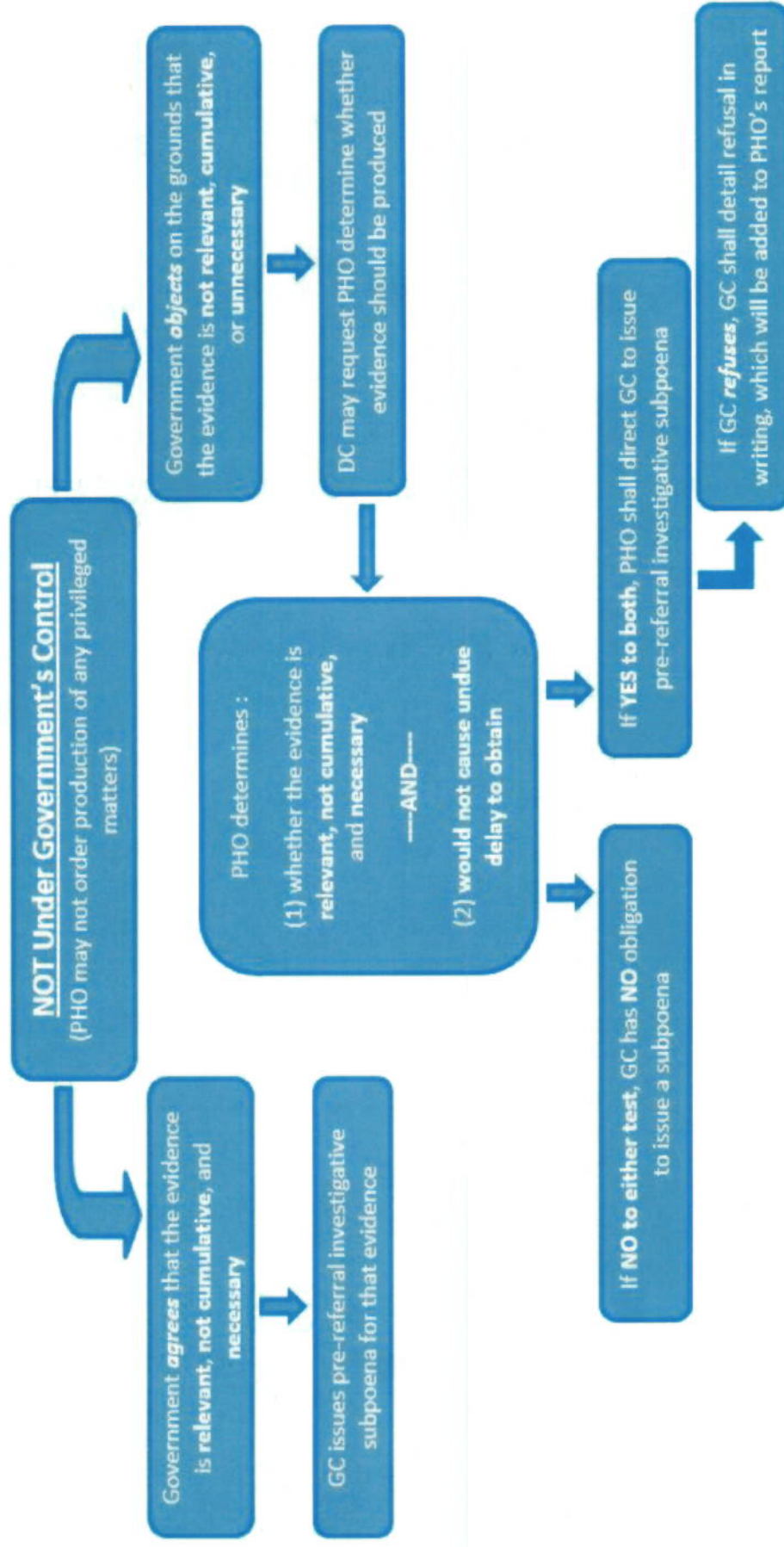
# **PRODUCTION OF MILITARY WITNESSES** **R.C.M. 405(h)(2)(A)**



**PRODUCTION OF EVIDENCE UNDER CONTROL OF THE GOVERNMENT**  
**R.C.M. 405(h)(3)(A)**



PRODUCTION OF EVIDENCE NOT UNDER CONTROL OF THE GOVERNMENT  
R.C.M. 405(h)(3)(B)







DEPARTMENT OF THE NAVY  
REGION LEGAL SERVICE OFFICE SOUTHEAST  
NAVAL AIR STATION  
P.O. BOX 116  
JACKSONVILLE, FL 32212-0116

5800  
Ser 123  
March 5, 2019

Ms. Eva Munroe  
123 Anywhere St.  
Nowheresville, NA 12345

Dear Ms. Munroe:

SUBJECT: INVITATION TO PROVIDE WITNESS TESTIMONY FOR A PRELIMINAR  
HEARING IN THE CASE OF UNITED STATES V. LCpl MAY B. GUILTY

You are invited to appear as a witness in proceedings under Article 32, Uniform Code of Military Justice, against Lance Corporal May B. Guilty, United States Marine Corps. You are requested to appear at the office of the Region Legal Service Office Southeast, Building 1456, Naval Air Station, Pensacola, Florida on April 1, 2019 at 0900.

If you would incur expenses associated with your travel and testimony in the proceedings, you may be entitled to compensation for travel and expenses. Please inform me by March 10, 2019 if you can appear in person on the date of your requested testimony on April 1, 2019, and if you would incur any expenses. In such cases, we will request authorization from the appropriate government officials to reimburse you or to provide you an advance for your expenses prior to your travel. Accordingly, please contact me by March 10, 2019 if you can appear on the date of your requested testimony in order to draft the necessary paperwork to pay your promptly for your expenses. My phone number is (222) 555-1212 and e-mail is f.b.gallo@usmc.mil.

Sincerely,

F. B. GALLO  
Captain, U.S. Marine Corps  
Government Counsel

Enclosure (6)

# **SAMPLE SCRIPT FOR ARTICLE 32 PRELIMINARY HEARING**

## **TABLE OF CONTENTS**

I.	INTRODUCTION & PRELIMINARY MATTERS .....	2
	<i>SUBSCRIPT: COURT-REPORTER WHO HAS NOT PREVIOUSLY BEEN SWORN</i> .....	3
	<i>SUBSCRIPT: INTERPRETER WHO HAS NOT PREVIOUSLY BEEN SWORN</i> .....	3
	<i>SUBSCRIPT: CIVILIAN COUNSEL</i> .....	4
II.	VOIR DIRE AND ELECTION OF COUNSEL.....	5
	<i>SUBSCRIPT: WAIVER OF COUNSEL</i> .....	7
III.	PRELIMINARY ADVICE .....	9
IV.	GOVERNMENT CASE .....	14
V.	DEFENSE CASE.....	17
VI.	FINAL MATTERS .....	20
VII.	SUBMISSION OF MATTERS UNDER R.C.M. 405(k) .....	20
VIII.	SUBSCRIPT: ARTICLE 31 WARNINGS FOR MILITARY WITNESSES. ....	21



# **I. INTRODUCTION & PRELIMINARY MATTERS**

PHO:

(Verifies recording)

This preliminary hearing will come to order. This preliminary hearing is convened by *(rank and name of CA)*, Commanding Officer, *(organization)* by the appointing order dated *(date of letter of appointment)*.

My name is *(rank, name, and service of PHO)*. I am a *(Judge Advocate certified in accordance with Article 27(b) and sworn in accordance with Article 42(a) of the Uniform Code of Military Justice/commissioned officer)*. I have been detailed as preliminary hearing officer under Article 32(b) of the Uniform Code of Military Justice to inquire into the matters set forth on the charge sheet dated *(date of referral)* in the case of *(rank, name, and service of accused)*, 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 Preliminary Hearing Officer Exhibits 1 and 2, respectively.

Present at this hearing are myself *(rank, name, and service of PHO)*, the detailed preliminary hearing officer; the accused *(rank, name, and service of accused)*; defense counsel *(rank, name, and service of DC, if military; Mrs./Ms./Mr. and name, if civilian)*; and counsel for the government *(rank, name, and service of GC)*;

[Present also is *(rank, name and service of reporter)*, who has been detailed as the reporter for this preliminary hearing].

[Present also is *(rank, name, and service of translator)*, who has been appointed to serve as translator];

[Present also is the reported victim in this case, *(rank, name, and service of victim; Mrs./Ms./Mr. and name, if civilian)* along with his/her counsel *(rank, name, and service of VLC/SVC; Mrs./Ms./Mr. and name, if civilian)*.]

Are you *(rank and name of accused)*, the accused in this case?

ACC:

Yes/No, sir/ma'am.

<b>SUBSCRIPT: COURT-REPORTER WHO HAS NOT PREVIOUSLY BEEN SWORN</b>	
PHO:	<i>(Rank and/or name of reporter)</i> , do you <i>(swear or affirm)</i> to faithfully perform the duties of reporter for this preliminary hearing <i>(so help you God)</i> ?
CR:	I do.
<b>SUBSCRIPT: INTERPRETER WHO HAS NOT PREVIOUSLY BEEN SWORN</b>	
PHO:	<i>(Rank, name, and service of interpreter)</i> , do you <i>(swear or affirm)</i> that in this preliminary hearing you will interpret truly the testimony you are called upon to interpret <i>(so help you God)</i> ?
INT:	I do.
PHO:	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>(rank, name, and service of GC)</i> . 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 preliminary hearing by <i>(rank, name and command)</i> , the convening authority. I have not acted in any disqualifying manner.
DC:	I am <i>(rank, name, and service of DC)</i> . 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 <i>(official and authority)</i> . I have not acted in any disqualifying manner.
VLC/SVC:	I am <i>(rank, name, and service of DC)</i> . I am an attorney and licensed to practice law in the state(s) of _____. I am a member in good

	standing of the ( ) bar(s). I have not acted in any manner which might tend to disqualify me in this court-martial.
<b>SUBSCRIPT: CIVILIAN COUNSEL</b>	
PHO:	Would civilian counsel representing the accused please identify yourself for the record, state you contact information, and tell me where you are currently licensed to practice law?
CDC:	I am ( <i>Mrs./Ms./Mr. and name of civilian DC</i> ). I am a civilian attorney. My office is located at ( ). My mailing address is ( ). My office phone number is ( ). I am a member in good standing of the ( ) bar.
PHO:	( <i>Mrs./Ms./Mr. and name of civilian DC</i> ), do you ( <i>swear/affirm</i> ) that you will faithfully perform all the duties of defense counsel in the case now in preliminary hearing ( <i>so help you God</i> )?
CDC:	I do.
PHO:	Would civilian counsel representing the victim please identify yourself for the record, state you contact information, and tell me where you are currently licensed to practice law?
CVC:	I am ( <i>Mrs./Ms./Mr. and name of civilian victim counsel</i> ). I am a civilian attorney. My office is located at ( ). My mailing address is ( ). My office phone number is ( ). I am a member in good standing of the ( ) bar.
PHO:	It appears that defense counsel representing the accused ( <i>has/have</i> ) the requisite qualifications under R.C.M. 405(d)(3).



II. VOIR DIRE AND ELECTION OF COUNSEL	
PHO:	<p>My name is <i>(rank, name, and service of PHO)</i>. I am a <i>(Judge Advocate certified in accordance with Article 27(b) and sworn in accordance with Article 42(a) of the Uniform Code of Military Justice/commissioned officer)</i>, qualified to serve as preliminary hearing officer in accordance with Article 32 and R.C.M. 405(d)(1). I am not aware of any matters that I believe may be grounds to disqualify me as the preliminary hearing officer.</p> <p>Is the accused or counsel for either side aware of any grounds that might disqualify me from conducting this preliminary hearing, or does either side desire to question me, or raise any challenge now?</p>
GC/DC:	Yes/No, sir/ma'am.
PHO:	<i>(Rank and name of DC)</i> are there grounds to assert that the accused was not mentally responsible for <i>(his/her)</i> actions at the time of the offense(s) charged or that the accused is not mentally competent to participate in the defense of <i>(his/her)</i> case in this preliminary hearing today?
DC:	Yes/No, sir/ma'am.
<p><i>An affirmative answer requires the PHO 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." R.C.M. 909(a). If the accused is not able to assist in his or her own defense, the PHO should consider adjourning the preliminary hearing and seeking instruction from the CA.</i></p>	
PHO:	<p><i>(Rank and name accused)</i>, <i>(rank and name of GC)</i> has been appointed as counsel for the government at this preliminary hearing. <i>(He/she)</i> is not acting as counsel for the preliminary hearing officer. <i>(He/she)</i> is here solely to represent the government. <i>(He/she)</i> will not advise me as to my determination of probable cause or what disposition I will recommend in this case, as those decisions rest with me alone. After completing this preliminary hearing, I shall make determinations and</p>

	<p>recommendations I deem appropriate for matters disclosed at this proceeding.</p> <p>Do you understand?</p>
ACC:	Yes/No, sir/ma'am.
PHO:	Are there any questions by any party concerning my function or the function of government counsel?
ACC/ GC/DC:	Yes/No, sir/ma'am.
PHO:	<p><i>(Rank and name of the accused)</i>, you have the right to be represented in this preliminary hearing by <i>(rank and name of detailed DC)</i>, 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 <i>(rank and name of detailed DC)</i>, your detailed defense counsel, continue to represent you, and the authority who detailed <i>(rank and name of detailed DC)</i> would have sole discretion to either grant or deny that request.</p> <p>Do you understand?</p>
ACC:	Yes/No, sir/ma'am.
PHO:	<p>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 defense counsel unless you ask to excuse him/her.</p> <p>Do you understand your rights to counsel?</p>

ACC:	Yes/No, sir/ma'am.
PHO:	Do you have any questions about your rights to counsel?
ACC:	Yes/No, sir/ma'am.
PHO:	By whom do you wish to be represented at this preliminary hearing?
ACC:	<i>(Rank and name of detailed DC / rank and name of requested DC / name of civilian defense counsel).</i>
<b>SUBSCRIPT: WAIVER OF COUNSEL</b>	
<i>Use if accused indicates desire to proceed without a lawyer.</i>	
PHO:	<p><b><i>(Rank and name of accused)</i></b>, 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 preliminary 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.</p> <p>Do you understand what you are giving up by waiving your right to counsel?</p>
ACC:	Yes/No, sir/ma'am



PHO:	<p>If you decide to proceed in this preliminary hearing without a lawyer, you do so at your peril and may, without meaning to do so, jeopardize your case.</p> <p>Do you understand what I have just told you?</p>
ACC:	Yes/No, sir/ma'am.
PHO:	Do you wish to have a lawyer represent you or not?
ACC:	I do/do not want a lawyer.
<p><i>If the PHO 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. If the accused refuses to sign, the PHO will explain the refusal in Block 24 of the form or addenda. If the PHO is not satisfied that the accused has knowingly and intelligently waived the right to counsel, the officer should proceed as follows:</i></p>	
PHO:	<p><b>(Rank and name of accused)</b>, I am not satisfied that you fully appreciate the consequences of not having a lawyer at this preliminary hearing. Therefore, I will direct <b>(rank and name of DC)</b> to continue to act as your counsel.</p>
<p><b>III. PRELIMINARY ADVICE</b></p>	
PHO:	<p><b>(Rank and name of accused)</b>, do you have a copy of the charge sheet in front of you?</p>
ACC:	Yes, sir/ma'am.
PHO:	<p><b>(Rank and name of accused)</b>, 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 reviewing at this preliminary hearing.</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 <i>(rank, name, and service of accuser on in Box 11.a of the Charge Sheet, DD Form 458)</i> a person subject to the UCMJ, as accuser, and were sworn to before <i>(name of officer who signed affidavit in Part III of the Charge Sheet, DD Form 458)</i>, an officer authorized to administer oaths.</p> <p>A copy of the charge sheet will be appended to the record as PH Exhibit 1.</p> <p>Does either counsel desire that I read each charge and specification, or desire further review of the charge sheet before we continue?</p>
GC/DC:	Yes/No, sir/ma'am.
PHO can now check off boxes 10.a and 10.b of the DD Form 457.	
PHO:	<p><i>(Rank/rate and name of accused)</i>, 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 choose 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.
PHO can now check off box 10.c of the DD Form 457.	



<p>PHO:</p>	<p><b>(Rank and name of accused)</b>, I am going to explain to you the purpose of the preliminary hearing and the rights which you have at this preliminary 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 preliminary hearing is to determine whether or not the specifications (a) allege (an) offense(s); whether or not there is probable cause to believe that you committed the offense(s) charged; whether or not the convening authority has jurisdiction over you and over the offense(s) charged; and to recommend to <b>(rank and name of CA)</b> what action should be taken regarding the charges.</p> <p>I have been appointed to conduct a formal preliminary hearing under Article 32 of the Uniform Code of Military Justice. 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. <b><i>[(I have also met with your counsel and with government counsel to discuss some of the legal issues which may arise during this preliminary 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 preliminary hearing.)]</i></b></p> <p>I have formed no opinion as to probable cause, jurisdiction or what I will recommend. I will make a recommendation to <b>(rank and name of CA)</b> solely on the basis of the evidence that I receive during this preliminary 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 preliminary hearing is not a trial. I am not here to determine your innocence or guilt. It is my duty to impartially weigh the evidence to determine probable cause, jurisdiction, and the form of the charges, and to formulate a recommendation. I will consider all matters within the scope of the hearing 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><b>(Rank and name of CA)</b> is not bound by my recommendation. 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</p>
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	<p>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 preliminary hearing?</p>
ACC:	Yes/No, sir/ma'am.
<p><i>PHO can now check off box 10.d of the DD Form 457.</i></p>	
PHO:	<p><b>(Rank and name of accused)</b>, you have the right to be present throughout this preliminary hearing, so long as your conduct is not disruptive. Further, you are advised that should you voluntarily absent yourself from this preliminary hearing, you shall be considered to have waived the right to be present.</p> <p>Do you understand these rights as I have explained them to you?</p>
ACC:	Yes/No, sir/ma'am.
<p><i>PHO can now check off box 10.e of the DD Form 457.</i></p>	
PHO:	<p>(If applicable) Evidence will be introduced in the preliminary hearing in the form of testimony from witnesses. As I understand it, the people who are going to testify at this preliminary hearing are <b>[PHO identifies witnesses the parties [and/or VLC(SVC)] have identified as testifying]</b>.</p> <p>Other evidence may be presented in the form of exhibits. As I understand it, the exhibits that may be introduced at this preliminary hearing include <b>[PHO describes all exhibits of which the PHO is aware. PHO may also submit this information to the accused in writing]</b>.</p> <p>You have the right to examine all of the exhibits and to make appropriate objections, through your defense counsel, to my consideration of them.</p> <p>Do you understand the evidence I expect to be presented?</p>



ACC:	Yes/No, sir/ma'am.
<i>PHO can now check off box 10.f of the DD Form 457.</i>	
PHO:	<p><b>(Rank and name of accused)</b>, I am now going to advise you of other rights that you have at this preliminary hearing:</p> <p>You will have the right at the proper time to cross-examine witnesses called to testify at this hearing;</p>
<i>PHO can now check off box 10.g of the DD Form 457.</i>	
PHO:	<p>Within the rules governing Article 32 preliminary hearings, you have the right call witnesses relevant to the issues for determination at this hearing under R.C.M. 405(a).</p> <p>You have the right to present relevant documentary evidence on your own behalf, relevant to the issues for determination at this hearing under R.C.M. 405(a).</p>
<i>PHO can now check off box 10.h of the DD Form 457.</i>	
PHO:	<p><b>(Rank and name of accused)</b>, I advised you earlier that you have the right to remain silent, 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</p>

	<p>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 preliminary hearing?</p>
ACC:	Yes/No, sir/ma'am.
<p><i>PHO can now check off box 10.i of the DD Form 457.</i></p>	
PHO:	Do you have any questions about any of your rights, or anything that we have discussed up to this point of the preliminary hearing?
ACC:	Yes/No, sir/ma'am.
PHO:	<p>Now, let me go over with you all the procedures I will use to conduct this preliminary hearing.</p> <p>First, counsel for the government will present documents which are relevant to this preliminary hearing. Then the government will call any witnesses it intends to offer and will conduct direct examinations of those witnesses, and the defense will be permitted to cross-examine those witnesses. After each government witness has been examined by both sides, I may 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 offer any documents and witnesses of its own which are relevant to this preliminary hearing. 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</p>



	<p>courts-martial are not generally applicable at this proceeding. The exceptions to that are the rules governing privileges, degrading questions, 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 or VLC/SVC makes any objection that you want me to note in the report of preliminary hearing, then you must notify me promptly, and file that objection with the Convening Authority, via me, in writing within 24 hours after the close of the preliminary hearing.</p> <p>Do counsel for either side [or the VLC/SVC] have any questions regarding procedure or the way in which this preliminary hearing will be conducted?</p>
GC/DC:	Yes/No, sir/ma'am.
<p><i>If potentially relevant, you should determine if either side intends to introduce evidence that is prohibited by Mil. R. Evid. 412, 513, or 514. If this is the case, the proponent of the evidence must have served written notice upon you and upon opposing counsel (and counsel for the government must have notified the victim, or counsel for the victim, as applicable) at least 5 days before the preliminary hearing. If there has been notice, at an appropriate time you must conduct a closed preliminary hearing to determine if the evidence is being offered under one of the permissible exceptions (note: Mil. R. Evid. 412(b)(1)(C) does not apply at Article 32 proceedings). The legal counsel for the relevant victim shall be permitted to argue matters involving Mil. R. Evid. 412, 513, and 514.</i></p>	
PHO:	Does counsel for the accused have any questions or wish to note any objections before we proceed with the preliminary hearing?
DC:	Yes/No, sir/ma'am.
<b>IV. GOVERNMENT CASE</b>	
PHO:	Is the government prepared to present evidence?

GC:	Yes, sir/ma'am.
PHO:	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> .
PHO:	<b>(Rank and name of GC)</b> , please list all of the witnesses that the government intends to call and the form of their testimony (live, telephonic, VTC, etc.).
GC:	<b>[Government lists all witnesses that the government intends to call at the preliminary hearing]</b> .
PHO:	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 at this hearing will be the truth, the whole truth, and nothing but the truth <b>(so help you God)</b> ?
<p><i>The typical order is for the GC to conduct direct examination, followed by cross examination by the DC. Questions to witnesses must be relevant to the limited purpose of the preliminary hearing; the determinations set out in R.C.M. 405(a). The PHO may ask questions at any time, but usually asks questions after both sides have questioned the witness. The PHO may permit re-direct and re-cross as necessary.</i></p> <p><i>The GC should conduct the initial examination of all government witnesses; the Defense Counsel may then cross-examine. The PHO may then pose questions.</i></p> <p><i>Counsel for the government 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, city of residence, and occupation).</i></p>	



PHO:	Does counsel for either side desire further inquiry in light of my questions?
GC/DC:	Yes/No, sir/ma'am.
<i>After every witness, the PHO must determine availability for trial.</i>	
PHO:	<b>(Rank and/or name of witness)</b> , in the event this case goes to trial by court-martial do you have any pending PCS orders, TAD, leave, retirement, 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.
<i>After every witness, the PHO must give a witness warning.</i>	
PHO:	<b>(Rank and/or name of witness)</b> , you are instructed not to discuss your testimony, or the testimony of any other witness in this preliminary hearing with anyone except counsel for the government or counsel for the accused. You will not allow any witness in this preliminary hearing 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 preliminary hearing, you should make the circumstances known to the counsel who originally called you as a witness, <b>(rank and name of GC)</b> .
<i>If the witness is in the military, add the following:</i>	
PHO:	<b>(Rank and name of witness)</b> , 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.
PHO:	<b>(Name and rank of GC)</b> , does the government have any more evidence it wishes to introduce for my consideration in this preliminary hearing?

GC:	No, sir/ma'am.
<b>V. DEFENSE CASE</b>	
<i>The defense may now present matters relevant to the matters for determination under R.C.M. 405(a).</i>	
PHO:	<p><b>(Rank and name of accused)</b>, earlier I explained your right to present evidence and call witnesses to testify on your behalf in defense and mitigation.</p> <p>Do you or your counsel have any evidence that you would like to present or witnesses that you would like to call?</p>
ACC/DC:	Yes/No, sir/ma'am.
PHO:	Does the defense have any real or documentary evidence to present?
DC:	Yes/No, sir/ma'am. <b>[Defense presents real or documentary evidence.]</b>
PHO:	<b>(Rank and name of DC)</b> , please list the witnesses that the defense intends to call and the form of their testimony (live, telephonic, VTC, etc.).
DC:	<b>[Defense lists the witnesses that the accused intends to call at preliminary hearing].</b>
PHO	The defense may proceed.
DC:	<b>[Calls witnesses for defense]</b>

GC:	<p><b>[Oath administered to each witness before testimony]:</b></p> <p>Do you swear (<i>or affirm</i>) that the evidence that you are about to give at this hearing will be the truth, the whole truth, and nothing but the truth (<i>so help you God</i>)?</p>
<p><i>After every witness, the PHO must determine availability for trial.</i></p>	
PHO:	<p><b>(Rank and/or name of witness)</b>, in the event this case goes to trial by court-martial do you have any pending PCS orders, TAD, leave, retirement, 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.</p>
<p><i>After every witness, the PHO must determine availability for trial.</i></p>	
PHO:	<p><b>(Rank and/or name of witness)</b>, you are instructed not to discuss your testimony, or the testimony of any other witness in this preliminary hearing with anyone except counsel for the government or counsel for the accused. You will not allow any witness in this preliminary hearing 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 preliminary hearing, you should make the circumstances known to the counsel who originally called you as a witness, <b>(rank and name of DC)</b>.</p>
<p><i>If the witness is in the military, add the following:</i></p>	
PHO:	<p><b>(Rank and name of witness)</b>, 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.</p>
PHO:	<p><b>(Rank and name of accused)</b>, I previously advised you that, while you cannot be <i>compelled</i> to make any statement, you have the <i>right</i> to make</p>



	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)</b> (do/do not/does/does not) desire to make a statement.
<i>If the accused makes an oral statement, or makes a statement through counsel, the PHO should summarize it and append it to the DD Form 457, as an exhibit. Any written statement by the accused should be similarly appended.</i>	
<b>VI. FINAL MATTERS</b>	
PHO:	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.  Do both sides agree?
GC/DC:	Yes/No, sir/ma'am.
<i>If the PHO receives any evidence that the accused was not mentally responsible or was not competent to assist in the defense, then the PHO must check "Yes" in Block 14 of the DD Form 457. In the report, the PHO must explain findings with respect to competence, cite supporting exhibits, and should discuss any evidence that bears on the accused's responsibility for the alleged offenses.</i>	
PHO:	I will hear brief closing comments as to whether each specification alleges an offense; whether there is probable cause, and the disposition of the case. <b>(I will also permit the submission of a closing statement in writing).</b>



	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> )?
GC/DC:	Yes/No, sir/ma'am.
PHO:	Counsel for the government may proceed with a closing comment.
GC:	[Presents closing comments].
PHO:	Counsel for the accused may proceed with a closing comment.
DC:	[Presents closing comments].
<b>VII. SUBMISSION OF MATTERS UNDER R.C.M. 405(k)</b>	
PHO:	<p>No later than <b>(state the date and time 24 hours from the closure of the preliminary hearing)</b>, counsel for the government, defense counsel, and <b>(victim or victim's counsel, if victim is named in a specification under consideration)</b> may submit to me, additional information that you deem relevant to the convening authority's disposition of charges. Government counsel and defense counsel must be copied on all submissions.</p> <p>No later than <b>(state the date and time 5 days from the closure of the preliminary hearing)</b>, defense counsel may submit to me additional matters that rebut the submissions of counsel for the government or the victim. Submissions may be made electronically.</p> <p>Does either counsel (or victim or counsel for the victim) have any questions about such submissions?</p>
GC/DC/VLC/SVC:	Yes/No, sir/ma'am.
PHO:	Unless counsel has anything further to offer, this preliminary hearing will now be closed.

*The PHO should await a copy of the recording of the preliminary hearing before completing the DD Form 457. After completing the DD Form 457, the PHO should forward it to the CA via the SJA or legal officer, together with all matters and the report required by R.C.M. 405(l). The PHO must ensure that all evidence gathered at closed hearings is properly sealed under R.C.M. 1113. Although it is the CA's responsibility to furnish a complete copy of the report to the Accused under R.C.M. 305(l)(4), the local practice may be for the PHO to furnish such copies to both government counsel and to defense counsel.*

# **VIII. SUBSCRIPT: ARTICLE 31 WARNINGS FOR MILITARY WITNESSES**

PHO:

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, add the following:*

PHO:

Although you have indicated a willingness to testify, I must make sure that you understand you are not required to testify simply because you

	<p>have already made previous statements about this offense to other persons.</p> <p>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 preliminary hearing.</p> <p>Do you understand your right to remain silent now, even though you have made previous statements?</p>
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# **PRELIMINARY HEARING OFFICER'S REPORT**

*(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)*

*Use this version of DD Form 457 for hearings conducted on or after 1 January 2019*

1a. FROM: <i>(Name of Preliminary Hearing - Officer Last, First, MI)</i>		b. GRADE	c. ORGANIZATION	d. DATE OF REPORT
2a. TO: <i>(Name of Officer who directed the Preliminary Hearing - Last, First, MI)</i>		b. TITLE	c. ORGANIZATION	
3a. NAME OF ACCUSED <i>(Last, First, MI)</i>	b. GRADE	c. ORGANIZATION		d. DATE OF CHARGES
<i>(Check appropriate answer)</i>				
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I CONDUCTED A PRELIMINARY HEARING CONCERNING THE CHARGES APPENDED HERETO (Exhibit 1)				YES <input type="checkbox"/>
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (if not, see 9 below)				NO <input type="checkbox"/>
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d)(3), 502(d)(2)				<input type="checkbox"/>
7a. NAME OF DEFENSE COUNSEL <i>(Last, First, MI)</i>	b. GRADE	8a. NAME OF ASSISTANT DEFENSE COUNSEL <i>(If any)</i>		b. GRADE
c. ORGANIZATION <i>(If appropriate)</i>		c. ORGANIZATION <i>(If appropriate)</i>		
d. ADDRESS <i>(If appropriate)</i>		d. ADDRESS <i>(If appropriate)</i>		
9. TO BE SIGNED BY ACCUSED IF ACCUSED WAIVES COUNSEL. (If accused does not sign, preliminary hearing officer will explain in detail in item 24.)				
a. PLACE		b. DATE		
I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED AT THIS PRELIMINARY HEARING BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL AT THIS PRELIMINARY HEARING.				
c. SIGNATURE OF ACCUSED				
10. AT THE BEGINNING OF THE PRELIMINARY HEARING, I INFORMED THE ACCUSED OF: <i>(Check appropriate answer)</i>				
a. THE RIGHT TO BE ADVISED OF THE CHARGES UNDER CONSIDERATION				YES <input type="checkbox"/>
b. THE IDENTITY OF THE ACCUSER				NO <input type="checkbox"/>
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31, UCMJ				<input type="checkbox"/>
d. THE PURPOSE OF THE PRELIMINARY HEARING				<input type="checkbox"/>
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE (EXCEPT AS DESCRIBED IN R.C.M. 804(c)(2))				<input type="checkbox"/>
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED THE GOVERNMENT TO PRESENT				<input type="checkbox"/>
g. THE RIGHT TO CROSS-EXAMINE WITNESSES ON MATTERS RELEVANT TO THE ISSUES FOR DETERMINATION IN R.C.M. 405(a)				<input type="checkbox"/>
h. THE RIGHT TO PRESENT MATTERS RELEVANT TO THE ISSUES FOR DETERMINATION IN R.C.M. 405(a)				<input type="checkbox"/>
i. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT RELEVANT TO THE ISSUES FOR DETERMINATION IN R.C.M. 405(a)				<input type="checkbox"/>
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE (If the accused or counsel were absent during any part of the presentation of evidence, complete item 11b below.)				<input type="checkbox"/>
b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL				
NOTE: If additional space is required for any item, enter the additional material in item 24 or in the report referenced in Block 12b. Identify such material with the proper numerical and, if appropriate, lettered heading. (Example: "7c".)				

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH:				
NAME (Last, First, MI)	GRADE (If any)	ORGANIZATION/ADDRESS (Whichever is appropriate)	YES	NO
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
b. THE PRELIMINARY HEARING REPORT REQUIRED BY RCM 405(j) IS ATTACHED			<input type="checkbox"/>	<input type="checkbox"/>
c. AT THE HEARING, EVIDENCE WAS OFFERED UNDER MILITARY RULES OF EVIDENCE. (Check appropriate box(es))		<input type="checkbox"/> 412 <input type="checkbox"/> 513 <input type="checkbox"/> 514	<input type="checkbox"/>	<input type="checkbox"/>
d. PORTIONS OF THE HEARING WERE CLOSED			<input type="checkbox"/>	<input type="checkbox"/>
e. SEALED MATERIALS ARE INCLUDED IN THIS REPORT			<input type="checkbox"/>	<input type="checkbox"/>
13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH			<input type="checkbox"/>	<input type="checkbox"/>
DESCRIPTION OF ITEM	LOCATION OF ORIGINAL (If not attached)		<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED			<input type="checkbox"/>	<input 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 type="checkbox"/>	<input type="checkbox"/>
15. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL			<input type="checkbox"/>	<input type="checkbox"/>
16. AN EXPLANATION OF ANY DELAYS IN THE HEARING IS ATTACHED HERETO			<input type="checkbox"/>	<input type="checkbox"/>
17. EACH SPECIFICATION ALLEGES AN OFFENSE			<input type="checkbox"/>	<input type="checkbox"/>
18. THERE IS PROBABLE CAUSE TO BELIEVE AN OFFENSE HAS BEEN COMMITTED AND THAT THE ACCUSED COMMITTED THE OFFENSE			<input type="checkbox"/>	<input type="checkbox"/>
19. THE UNITED STATES HAS JURISDICTION OVER THE OFFENSE(S) AND THE ACCUSED			<input type="checkbox"/>	<input type="checkbox"/>
20. ADDITIONAL UNCHARGED MISCONDUCT WAS CONSIDERED AND A RECOMMENDATION FOR DISPOSITION IS ATTACHED HERETO			<input type="checkbox"/>	<input type="checkbox"/>
21. SUPPLEMENTARY MATERIALS SUBMITTED PURSUANT TO R.C.M. 405(k)			<input type="checkbox"/>	<input type="checkbox"/>
22. I AM NOT AWARE OF ANY GROUNDS THAT WOULD DISQUALIFY ME FROM ACTING AS A PRELIMINARY HEARING OFFICER			<input type="checkbox"/>	<input type="checkbox"/>
23. I RECOMMEND:				
a. TRIAL BY: <input type="checkbox"/> SUMMARY <input type="checkbox"/> SPECIAL <input type="checkbox"/> GENERAL COURT-MARTIAL				
b. <input type="checkbox"/> OTHER (Specify)				
24. REMARKS (Include, as necessary, explanation for any answers above.)				
25a. TYPED NAME OF PRELIMINARY HEARING OFFICER			b. GRADE	c. ORGANIZATION
d. SIGNATURE OF PRELIMINARY HEARING OFFICER			e. DATE	



11 Apr 19

PRELIMINARY HEARING OFFICER'S REPORT, DD FORM 457, SUPPLEMENTAL PAGE

From: LCDR Peter H. Oslo, JAGC, USN, Preliminary Hearing Officer

To: C. B. Officer, CAPT, USN, Convening Authority

Subj: PRELIMINARY HEARING OFFICER'S REPORT ICO UNITED STATES v. LCpl  
MAY B. GUILTY, USMC

Ref: (a) Your letter appointment ltr 5811 Ser N00J of 11 Feb 19  
(b) Article 32, Uniform Code of Military Justice (UCMJ)  
(c) Rule for Courts-Martial (R.C.M.) 405

1. In accordance with references (a) through (c), I am submitting my preliminary hearing report for your review and consideration if the case against LCpl May B. Guilty, U.S. Marine Corps. The following information is a supplement to DD Form 457 and includes the required information noted in R.C.M. 405(l).

2. The preliminary hearing was held on [DATE] at [LOCATION].

3. [Include if necessary] Block 11b. State the circumstances and describe the proceedings conducted in the absence of the accused or counsel.

4. [Include if necessary] Block 12a. The following witnesses testified under oath.

5. [Include if necessary] Block 13a. The following statements, documents or matters were considered; the accused was permitted to examine each.

Exhibit No.	Description	Location of original
1	Charge Sheet	RLSO Pensacola (copy attached)
2	Appointing Order	Attached
3	Recording of preliminary hearing (R.C.M. 405(l)(2)(B))	Attached
4	Enlistment Contract	Attached
5	Service Record	Attached
6	Drug test lab report	Attached
7	Photograph of engine	Attached
8	Photograph of paint	Attached
9	Print of paint e-bay posting	Attached
10	Photograph of borescope	Attached
11	Print of borescope E-bay posting	Attached

Enclosure (9)

Subj: PRELIMINARY HEARING OFFICER'S REPORT ICO UNITED STATES v. LCpl  
MAY B. GUILTY, USMC

12	GC's statement regarding non-issuance of investigative subpoena (R.C.M. 405(1)(2)(F))	Attached
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6. The following information is provided in accordance with R.C.M. 405(1)(2):

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

b. **Government Counsel.** The government was represented by Captain Fabio Gallo, U.S. Marine Corps. Capt Gallo serves as Government Counsel at [DUTY STATION]. He may be contacted at [OFFICE NUMBER AND E-MAIL]. He was present throughout the hearing.

c. **Defense Counsel.** The accused was represented by Captain David Costa. Capt Costa serves as Defense Counsel at [DUTY STATION]. He may be contacted at [OFFICE NUMBER AND E-MAIL]. *[If applicable]* He was present throughout the hearing of evidence. LCpl Guilty was also represented by civilian defense counsel, Mr. Christopher D. Chance, Esq., of [LAW FIRM AND ADDRESS], who was also present throughout the hearing of the evidence.

d. *[If applicable]* **Victim's Legal Counsel.** *[For each represented victim, state the following]* Victims' Legal Counsel (VLC) represented *[identify victim by initials]*, the victim of the offenses alleged in *[identify charges and specifications]*. VLC is assigned to [DUTY STATION/LOCATION] and may be contacted [OFFICE NUMBER AND E-MAIL]. *[For each unrepresented victim, state the following]* *[Identify victim by initials]* is a victim in this case as defined by R.C.M. 405(g)(1). No counsel appeared for *[(initials) (it appears that (initials) is ineligible for military VLC) (it appears that (initials) has been offered and declined military VLC)]*. I directed GC to advise *[initials]* of his/her rights under Article 6b, Article 32, and R.C.M. 405(g).

e. **Delays.** The date, place, and uniform of the day for the hearing were established by the Convening Authority in his/her letter of [DATE OF APPOINTING LETTER]. There were no objections or requested delays from the GC, DC, or VLC.

f. **Recording.** The hearing was recorded using a digital audio recorder. LN2 Chavez, of RLSO Pensacola, operated the recorder throughout the hearing and has verified that the hearing was correctly and completely recorded. A digital file of the recording is attached to this report as Enclosure 3.

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

Subj: PRELIMINARY HEARING OFFICER'S REPORT ICO UNITED STATES v. LCpl  
MAY B. GUILTY, USMC

h. **Issues related to production of evidence.** The DC did not request any evidence not under government control. *(The defense requested the victim's employment records, which were in possession of Darden Restaurants. The government objected to production of such evidence on grounds that it was not necessary to determination of the issues under R.C.M. 405(a). Under R.C.M. 405(h)(3)(B)(iii), defense requested me to determine whether production of the evidence was relevant, not cumulative, and necessary to the determination of the issues under R.C.M. 405(a). I determined that the evidence did meet such criteria, and that issuance of a pre-referral investigative subpoena would not cause undue delay to the preliminary hearing. I directed GC to issue a pre-referral investigative subpoena. GC submitted the matter to the CA for authorization to issue a pre-referral investigative subpoena under R.C.M. 703(g)(3)(D)(v), and authorization was denied. GC's statement about this issue is attached as PHO Ex. 12.)*

i. **Military Witnesses.** Prior to the preliminary hearing, DC requested that Petty Officer Henrietta Lambert, a laboratory technician appear to testify concerning the circumstances surrounding the testing irregularities noted on the drug lab report. The government objected to production of this witness. At defense request, I determined that the military witness was relevant, not cumulative, and necessary. GC contacted Captain Hook, Commander, NDSL Jacksonville and asked him to make Petty Officer Lambert available for the hearing. Captain Hook stated he could not let her travel because to do so would negatively affect the ability of the laboratory to perform its mission. Several other technicians were on leave, the laboratory was working extra shifts to analyze urine samples, and Petty Officer Lambert's absence from her job would cause a significant logjam at the laboratory and prevent the laboratory from quickly and efficiently testing urine specimens for the Navy. Thus, he would not let her travel, but would allow her to testify telephonically from the laboratory. GC arranged for telephonic testimony.

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

k. **Issues related to victims of alleged offenses.**

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

Subj: PRELIMINARY HEARING OFFICER'S REPORT ICO UNITED STATES v. LCpl  
MAY B. GUILTY, USMC

*the entire preliminary hearing along with his VLC and Victim Advocate.) (As a precaution, he/she testified first in order.)*

(2) There were no relevant issues under M.R.E. 412, 514, or 514.

(3) There are no sealed matters in the PHO's report.

**l. Case testimony and synopsis.**

(1) On [DATE], the accused provided a urinalysis sample pursuant to the command's urinalysis testing program....

(2) On [DATE], the [victim initials], who at the time was a Coast Guard dependent, made an unrestricted report to CGIS that the accused.... The victim was the former romantic partner of the accused, and also told CGIS at this time that the accused had various items of military property in his living quarters, and appeared to be listing them for sale on e-Bay. She voluntarily provided PHO Ex. 8 and 11, printouts from e-Bay showing listings of military property under the accused's account...

(3) On [DATE], based on the sworn statement of the victim, NCIS obtained a search authorization to search the accused's on-base home and computers for evidence of the offenses of abusive sexual contact and larceny of government property. Upon a search of the home, the agents found several items of government property. Photographs are attached as PHO Ex. 7, 8, and 10.

**m. Analysis of offenses.**

**(1) Charge I, Sole Specification**

**Elements**

**Summary of Testimony and Documentary Evidence (R.C.M. 405(I)(2)(C))**

**Observations regarding witness availability or admissibility of evidence at trial (R.C.M. 405(I)(2)(C) and (D))**

**Determination as to whether specification alleges an offense (R.C.M. 405(a))**

**Recommendations for changes to form of the charges (R.C.M. 405(I)(2)(G))**

**Determination as to probable cause (R.C.M. 405(a))**

**Determination as to jurisdiction (R.C.M. 405(a))**

**(2) Charge II, Sole Specification**

Subj: PRELIMINARY HEARING OFFICER'S REPORT ICO UNITED STATES v. LCpl  
MAY B. GUILTY, USMC

**Elements**

**Summary of Testimony and Documentary Evidence (R.C.M. 405(l)(2)(C))**

**Observations regarding witness availability or admissibility of evidence at trial (R.C.M. 405(l)(2)(C) and (D))**

**Determination as to whether specification alleges an offense (R.C.M. 405(a))**

**Recommendations for changes to form of the charges (R.C.M. 405(l)(2)(G))**

**Determination as to probable cause (R.C.M. 405(a))**

**Determination as to jurisdiction (R.C.M. 405(a))**

n. **Evidence of uncharged offenses.** No evidence of uncharged offenses was presented.

o. **Objections.** No objections alleging failure to comply with R.C.M. 405 were made. R.C.M. 405(j)(7).

p. **Chronology.**

Date	Appointed Preliminary Hearing Officer
Date	Set date and time for hearing
Date	Continuance requested and granted
Date	Hearing began at 0900 Hearing ended at 1300
Date	Matters under R.C.M. 405(k) submitted by victim
Date	Additional matters under R.C.M. 405(k)(2) submitted by defense counsel
Date	Report submitted to convening authority, GC, and DC

q. **Recommendation regarding disposition in the interest of justice and discipline (R.C.M. 405(l)(2)(J) and (k)(3)(A)).** In reaching a disposition recommendation, I considered the Non-Binding Disposition Guidance at Manual for Courts-Martial, Appendix 2.1 (NBDG). In addition to the testimony and documentary evidence received during the hearing, I have reviewed the following additional matters submitted under R.C.M. 405(k) prior to making this recommendation:

Att	Description	Proponent	Sealed?
1(a)	Letter from victim's mother describing negative effect on victim's mental health, including her inability to work	Victim	NO



Subj: PRELIMINARY HEARING OFFICER'S REPORT ICO UNITED STATES v. LCpl  
MAY B. GUILTY, USMC

2	<b>Accused's rebuttal of the victim's submission</b> , alleging that despite the victim and her mother's claims, the victim continued to work after the alleged incident, including the day of the incident. The letter restates the importance of obtaining the victim's employment records in order to assess her credibility on this issue.	Accused	NO
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I find that the information in attachments 1 and 2 are relevant to NBDG disposition factor 2. If (the extent of harm caused to any victim of the offense), and 2.h (whether admissible evidence will likely be sufficient to obtain and sustain a conviction in trial by court-martial). While the victim clearly alleges serious harm to herself, if she can be impeached by contradiction or by inconsistent statements about issues such as her whereabouts after the incident, this will weaken the government's case significantly.

However, there are no evidentiary issues related to the larceny and drug offenses committed by the accused. Based on the seriousness of those offenses alone, and their impact on military good order and discipline, I recommend that all charges and specifications be referred to a general court-martial.

7. Should you need to contact me with any additional questions or for further discussion, my phone number is [NUMBER] and e-mail is [E-MAIL].

P. H. OSLO



**BY ORDER OF THE  
SECRETARY OF THE AIR FORCE**

**AIR FORCE INSTRUCTION 51-201**

**18 JANUARY 2019**



**LAW**

**ADMINISTRATION OF MILITARY  
JUSTICE**

**COMPLIANCE WITH THIS PUBLICATION IS MANDATORY**

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OPR: AFLOA/JAJM

Certified by: AF/JAA  
(Mr. Conrad Von Wald)

Supersedes: AFI 51-201, 8 December 2017

Pages: 395

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## Chapter 7

### ARTICLE 32 PRELIMINARY HEARINGS

**7.1. Preliminary Hearings.** Conduct preliminary hearings in accordance with the guidance and procedures prescribed in R.C.M. 405.

**7.2. Preliminary Hearing Personnel.**

**7.2.1. Preliminary Hearing Officer (PHO).**

7.2.1.1. Appointment. A convening authority directs an Article 32 preliminary hearing by appointing the PHO in writing. A sample appointment memorandum is located on the Virtual Military Justice Deskbook as Template 0701.

7.2.1.2. Qualifications of the PHO. The convening authority directing a preliminary hearing will appoint an impartial judge advocate as the PHO. (T-0) The PHO should be certified under Article 27(b), UCMJ. If precluded by military necessity or other compelling circumstances, the PHO may be a judge advocate who is not certified under Article 27(b), UCMJ, including Reserve/Guard judge advocates who may be detailed to serve as a PHO while on active duty or performing inactive duty training. Article 136(b), UCMJ, authorizes Reserve judge advocates to administer oaths while on active duty or performing inactive duty training. Air National Guard judge advocates must be on Title 10 orders. (T-0) The accuser may not serve as the PHO. Whenever practicable, the PHO shall be equal to or senior in grade to military counsel detailed to represent the accused and the government at the preliminary hearing. (T-0) The PHO may be a military judge. Requests for a military judge to serve as a PHO are coordinated with AF/JAT. No judge who has served on a pre-referral proceeding pursuant to Article 30a, UCMJ, may be detailed to an Article 32 preliminary hearing in the same case.

**7.2.2. Counsel.**

7.2.2.1. Counsel for the Government. A judge advocate, who is not the accuser, serves as counsel to represent the United States. The judge advocate serving as the counsel for the government need not be certified under Article 27(b), UCMJ.

7.2.2.2. Counsel for the Accused. The accused has the right to be represented by military defense counsel certified under Article 27(b), UCMJ, and sworn under Article 42(a), UCMJ. The accused may also be represented by civilian defense counsel at no expense to the government. Article 38, UCMJ. Civilian defense counsel must take an oath to perform his or her duties faithfully when representing an accused. The PHO administers this oath. Upon request of the accused, the accused is entitled to a reasonable time to obtain civilian counsel and have civilian counsel at the preliminary hearing. However, the preliminary hearing shall not be unduly delayed for the accused to obtain and have present civilian counsel. (T-0) See R.C.M. 405(d)(3). The accused may represent him or herself, but this right is not absolute. See *United States v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990), *aff'd*, 32 M.J. 3 (C.M.A. 1990).

7.2.3. A court reporter, interpreter, or both may be detailed by JAT or other appropriate authority.

**7.3. Scheduling and Pre-Hearing Matters.**

**7.3.1. Delays and Resulting Speedy Trial Issues.** The convening authority may approve a delay of the Article 32 preliminary hearing. The period of time of such approved delays are excluded when determining whether the period in R.C.M. 707(a) has run. The convening authority may delegate the authority to grant a delay to an Article 32 PHO. The convening authority may also grant the PHO the authority to exclude time under R.C.M. 707(c). The PHO has no independent authority to exclude time under R.C.M. 707(c).

**7.3.2. Disclosures Prior to Preliminary Hearing.**

7.3.2.1. R.C.M. 404A Disclosures. As soon as practicable but no later than five days after the convening authority directs the preliminary hearing, counsel for the government must provide the defense copies of, or if impracticable, permit the defense to inspect the matters listed in R.C.M. 404A. (T-0)

7.3.2.2. Should government counsel fail to comply with the provisions of R.C.M. 404A, the PHO shall note the issue in the preliminary hearing report. (T-1) Further, if the convening authority has given the PHO the authority to grant delays, the PHO may grant a reasonable delay to allow government counsel to comply with the above disclosure requirements.

7.3.2.3. R.C.M. 405(h) Disclosures. Prior to the preliminary hearing, government and defense counsel shall provide to opposing counsel and the PHO notice of the matters listed in R.C.M. 405(h). (T-0) The PHO may set earlier timelines for such disclosures which must be followed by counsel.

**7.3.2.4. Victims' Rights Regarding the Preliminary Hearing.**

7.3.2.4.1. A victim of an offense is any person named in one of the specifications being considered at the preliminary hearing who has allegedly suffered direct, physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ. See Article 32(h), UCMJ.

7.3.2.4.2. A victim of an alleged offense has the right to reasonable, accurate and timely notice of a preliminary hearing related to the alleged offense and the reasonable right to confer with counsel for the Government. Article 6b, UCMJ.

7.3.2.4.3. Victims may not be excluded from the preliminary hearing, except to the extent a similarly situated victim would be excluded at trial. (T-0) See Article 6b, UCMJ. If a PHO excludes a victim from the hearing, the PHO shall provide specific findings of fact in writing that support the exclusion and includes the written findings of fact in the preliminary hearing report. (T-0)

7.3.2.4.4. A victim of an alleged offense is not required to testify at a preliminary hearing related to that alleged offense, pursuant to Article 32(d)(3), UCMJ. However, the PHO may consider other evidence, including a victim's prior written statements. Declination to testify at a preliminary hearing cannot be used as the sole basis for ordering a deposition of the alleged victim.

7.3.2.4.5. SVC Access to Hearing. SVCs are entitled to attend all open sessions (i.e., open to the public) and all closed sessions (i.e., not open to the public) involving their clients. (T-0)



**7.3.3. Production of Witnesses.** Follow the rules and procedures in R.C.M. 405(h) for the production of witnesses.

7.3.3.1. Notice. The parties must provide notice of the name and contact information for each witness they intend to call at the preliminary hearing to the PHO and the opposing party in accordance with timelines established by the PHO. (T-0)

7.3.3.2. Defense Witness Requests. All defense requests for witnesses must be in writing. (T-1) This includes requests the defense provides to the PHO in the event the Government objects to producing the requested witness(es).

7.3.3.3. Victim Testimony. An alleged victim may not be compelled to testify regardless of whether the victim is a civilian or military member. (T-0)

7.3.3.4. Civilian Witnesses. A template letter to invite civilian witnesses to testify at a preliminary hearing is available on the Virtual Military Justice Deskbook.

**7.3.4. Production of Evidence.** Follow the rules and procedures in R.C.M. 405(h) for the production of evidence.

#### **7.4. Recording the Preliminary Hearing.**

**7.4.1. Video and Audio Recording of the Preliminary Hearing.** Government counsel shall ensure the preliminary hearing is recorded by a suitable government recording device. (T-1) Government counsel may also use a secondary suitable recording device to create a back-up recording.

**7.4.2. Transcribing the Preliminary Hearing.** The SJA may authorize the completion of a verbatim transcript following the hearing; though a verbatim transcript is not required.

**7.4.3. Providing Preliminary Hearing Recording to the Victim(s).** Upon written request from a victim named in one of the specifications at the preliminary hearing (or victim's counsel), government counsel shall provide the victim with access to, or a copy of, the recording. (T-0) Do not provide any portions of the recording ordered sealed by the PHO to the victim or victim's counsel. (T-0) Trial counsel is not normally required to redact the recording except as indicated below. However, to maintain compliance with the Privacy Act, the government should release the recording in the following manner:

7.4.3.1. If the victim is represented by an SVC, the unredacted recording should be provided to the victim's SVC as a For Official Use only disclosure under the Privacy Act. See DoD 5400.11-R, *Department of Defense Privacy Program*, paragraph C4.2. The SVC must maintain the recording in accordance with the Privacy Act. (T-0)

7.4.3.2. An unredacted recording may be provided directly to the victim only if the victim is not represented by counsel. The recording is provided to an unrepresented victim as a routine use disclosure under the Privacy Act system of records notice for Air Force court-martial records. See SORN F051 AF JA 1. Child victim testimony must be redacted from recordings provided directly to victims unless the recipient of the recording is the child victim, parent or legal guardian, or representative appointed in accordance with Article 6b, UCMJ. (T-1) In no case shall the parent or legal guardian to whom the child victims' recordings are provided be the accused. (T-1)

7.4.3.3. The Government may, in its discretion, provide a transcript to the victim or victim's counsel instead of a recording. See R.C.M. 405(j)(5). Personally identifiable information should be redacted from transcripts provided directly to victims.

7.4.4. **Providing Preliminary Hearing Recording to the Accused.** The Accused will receive a copy of the preliminary hearing report, which includes a copy of the recording. (T-0) Do not provide any portions of the recording ordered sealed by the PHO to the accused or counsel. (T-0)

**7.5. Conducting the Preliminary Hearing.** Conduct the preliminary hearing in accordance with R.C.M. 405(j).

**7.5.1. Public Access.**

7.5.1.1. Ordinarily, preliminary hearings are open to the public, including access by news media, whenever possible.

7.5.1.2. Access by spectators to all or part of the proceeding may be restricted or foreclosed at the discretion of the convening authority who directed the preliminary hearing, or at the PHO's discretion when an overriding interest exists that outweighs the value of an open preliminary hearing. The PHO should follow the procedures in R.C.M. 405(j)(3) in making the determination to close the hearing.

7.5.2. **Potential Witnesses.** Although potential witnesses are normally excluded from watching the proceedings, the PHO has the authority to permit some potential witnesses (e.g., experts) to be present if the PHO considers their presence helpful to the proceedings. Victims have an Article 6b right to be present at the preliminary hearing regardless of whether they testify.

**7.5.3. Uncharged Offenses.**

7.5.3.1. Authority to Examine Other Offenses. The PHO may consider uncharged offenses as outlined in R.C.M. 405(e)(2).

7.5.3.2. Later Preferral of Uncharged Offenses Examined at Preliminary Hearing. If an uncharged offense examined by the PHO in the preliminary hearing is later preferred, the GCMCA may refer the offense to court-martial without convening an additional preliminary hearing, provided the SJA's Article 34, UCMJ pretrial advice addresses the offense. See R.C.M. 601(d)(2).

**7.6. Supplementary Information.**

7.6.1. No later than 24 hours after the preliminary hearing closes, the following parties may submit supplemental information to the PHO that is relevant to the convening authority's disposition decision:

7.6.1.1. Government counsel;

7.6.1.2. Defense counsel;

7.6.1.3. SVC (or equivalent victim's counsel) on behalf of a named victim, if a victim is so represented; and

7.6.1.4. Any victim(s) named in a specification under consideration by the preliminary hearing, if the victim(s) are not represented by an SVC (or equivalent counsel).

7.6.2. The parties and the victim(s) must follow the procedures in R.C.M. 405(k) when submitting supplemental information to the PHO. (T-0)

7.6.3. The PHO must follow the procedures in R.C.M. 405(k) for the handling, sealing and examination of supplementary information. (T-0)

**7.7. Assembly of the PHO Report.** The PHO shall assemble the preliminary hearing report in accordance with R.C.M. 405(l). (T-0) In addition to those items listed in the rule, the preliminary hearing report will contain: DD Form 457, *Preliminary Hearing Officer Report*, and any attachments; DD Form 458, *Charge Sheet*, and any attachments; and the PHO appointment letter. (T-1) Additionally, the PHO must include a copy of the preliminary hearing recording. (T-0)

**7.8. Distributing the PHO Report.**

7.8.1. The PHO shall deliver the PHO Report to the appropriate SJA within eight days after the closure of the preliminary hearing or timely receipt of supplementary information under R.C.M. 405(k), whichever is later. (T-1) The SJA, in turn, delivers the report to the convening authority who directed the preliminary hearing. The convening authority must cause the PHO Report to be served on the accused. (T-0) Government counsel must obtain a receipt from the accused upon service of the PHO Report. (T-1)

7.8.2. The SJA shall provide the recording of the preliminary hearing to the victim and the accused in accordance with paragraphs 7.4.3 and 7.4.4. (T-1)

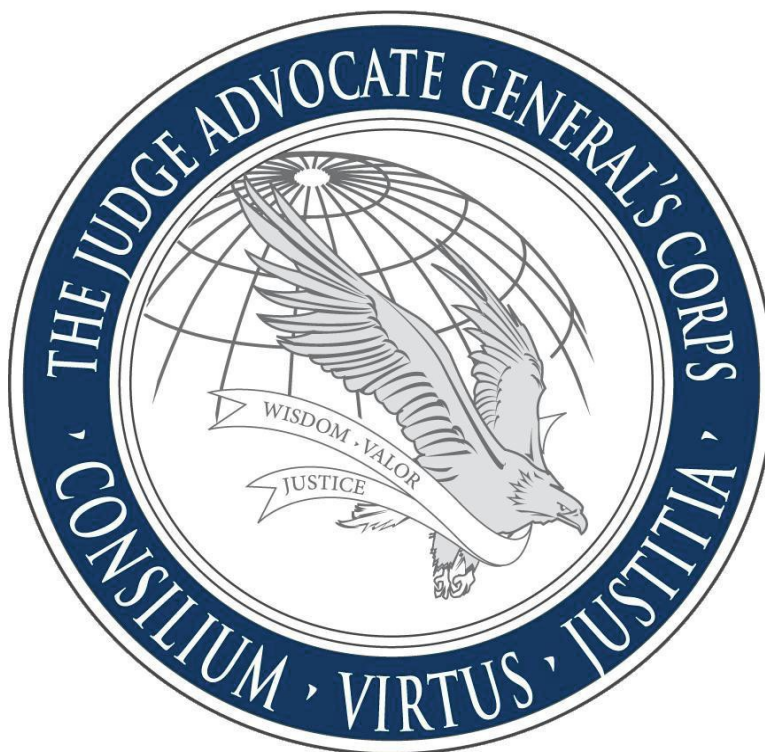
**7.9. Objecting to the PHO Report.** Any objections to the PHO Report must be submitted in accordance with R.C.M. 405(l)(5) within five days of receipt. (T-0) The day the accused receives the report is not counted in calculating the five-day window in which the accused may raise objections. The convening authority may refer the charge(s) or take other action within this five-day period. R.C.M. 405(l)(5).

**7.10. Forwarding the PHO Report to a Superior Convening Authority.**

7.10.1. If the convening authority who directed the preliminary hearing decides to forward the PHO report to a superior convening authority for disposition, the convening authority who directed the hearing must prepare a forwarding letter providing a recommendation for disposition of the charge(s). (T-1) The forwarding letter will include the following attachments: the charge sheet, the commander's indorsement to the charge sheet, and the PHO Report, with the attachments appended to the report. (T-1) This letter is forwarded to the superior convening authority through the superior convening authority's SJA.

7.10.2. If the subordinate convening authority recommends disposition by court-martial, then the superior convening authority's SJA should provide a list of court member nominees and member data to the superior convening authority in the event the superior convening authority decides to refer the case.

**7.11. Reviewing Sealed Materials in or Attached to a PHO Report.** Refer to R.C.M. 1103A for authority, limitations, and procedures relevant to review of sealed materials in or attached to a PHO Report.



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

**24 June 2019**

## AFLOA/JAJM

### Article 32 Preliminary Hearing Officer's Guide

<b>OVERVIEW .....</b>	<b>1</b>
<b>SECTION I .....</b>	<b>3</b>
<b>1. AUTHORITY .....</b>	<b>3</b>
2.1. Status .....	3
2.2. Grade .....	3
2.3. Impartiality .....	3
<b>3. QUALIFICATIONS OF OTHER PARTICIPANTS .....</b>	<b>5</b>
3.1. Counsel for the Government .....	5
3.2. Defense Counsel .....	6
3.3. Victims' Counsel .....	6
3.4. Other Participants .....	6
<b>4. YOUR RESPONSIBILITIES .....</b>	<b>6</b>
4.1. Statutory .....	6
4.2. Generally .....	7
4.3. Before the Preliminary Hearing .....	7
<b>5. REVIEWING THE CHARGE SHEET .....</b>	<b>8</b>
5.1. Format and Personal Data .....	8
5.2. Corrections to the Charges .....	8
<b>6. TIMING OF AND ACCESS TO THE HEARING .....</b>	<b>8</b>
6.1. Time and date .....	8
6.2. Public Access .....	8
<b>7. WITNESSES AND EVIDENCE.....</b>	<b>9</b>
7.1. Duties of the Counsel for the Government (GC) following issuance of the Article 32 appointing order. ....	9
7.2. Required Notice by the Parties .....	9
7.3. Defense Counsel Request for Production of Witnesses (R.C.M. 405(h)(2)) .....	10
7.4. Victim Testimony .....	10
7.5. Defense Counsel Request for Production of Evidence (R.C.M. 405(h)(3)).....	10
7.6. Depositions .....	11
<b>8. CONDUCTING THE PRELIMINARY HEARING .....</b>	<b>11</b>
8.1. Preliminary Advice and Inquiries .....	12
8.2. Military Rules of Evidence .....	12



8.3. Testimony .....	13
8.4. Other Evidence.....	13
8.5. Handling Objections.....	14
8.6. Sealed Exhibits and Proceedings.....	15
8.7. Handling Other Offenses (R.C.M. 405(e)(2)) .....	15
8.8. Supplementary Information after Close of Preliminary Hearing (R.C.M. 405(k)) .....	15
8.9. Reopening the Preliminary Hearing .....	15
8.10. Recording of the Preliminary Hearing .....	16
<b>9. PREPARING THE REPORT .....</b>	<b>16</b>
9.1. Role as the Preliminary Hearing Officer. ....	16
9.2. Contents of the Report .....	17
9.3. Format. ....	18
9.4. Assembly.....	19
9.5. Reproducing the Report .....	20
9.6. Distribution of the Report .....	20
9.7. Defense Counsel’s Right to Object .....	21
<b>10. DUTIES AFTER SERVICE AS THE ARTICLE 32 PHO.....</b>	<b>21</b>
10.1. Disqualification.....	21
<b>SUMMARY .....</b>	<b>21</b>
<b>SECTION II.....</b>	<b>22</b>
<b>PRELIMINARY HEARING OFFICER’S ARTICLE 32 SCRIPT.....</b>	<b>22</b>
<b>ATTACHMENTS .....</b>	<b>35</b>
Attachment 1 – Letter of Appointment .....	35
Attachment 2 – Letter to Counsel for the Government, Defense Counsel, and Victims’ Counsel .....	36
Attachment 3 – Invitation to Civilian Witness to Provide Testimony .....	38
Attachment 4 – Sample Article 32 Report of Preliminary Hearing .....	39
Attachment 5 – DD Form 457, Preliminary Hearing Officer’s Report .....	45

# **ARTICLE 32 PRELIMINARY HEARING OFFICER'S GUIDE**

## **OVERVIEW**

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

The primary authorities governing the preliminary hearing are: Article 32, UCMJ; Rules for Court-Martial (R.C.M.) 404A, 405, 406(b)(2) and 601(d); and AFI 51-201, Chapter 7. Effective 1 January 2019, the Military Justice Act of 2016 made significant changes to these rules. As such, the PHO must review them thoroughly in conjunction with this guide prior to conducting a hearing. This guide is meant to be a tool to assist the PHO and does not confer any additional rights on any party or participant to the preliminary hearing. To the extent this guide contradicts the 2019 Manual for Courts-Martial (MCM), the MCM is controlling.

The issues for determination at a preliminary hearing are limited to the following: whether each specification alleges an offense; whether there is probable cause to believe that the accused committed the offense or offenses charged; whether the convening authority has court-martial jurisdiction over the accused and the offense; and to recommend the disposition that should be made in the case. A preliminary hearing is not intended to serve as a method for the government to perfect its case against the accused and is not intended to serve as a means of discovery or to provide a right of confrontation required at trial. Recommendations of the preliminary hearing officer to the convening authority are advisory.

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

The applicable Rules for Courts-Martial detail the GC's duties to provide witnesses and documentary evidence to the DC within 5 days of your appointment. These rules also require DC to provide notice to GC of the witnesses and evidence the defense wants produced for the preliminary hearing and, if GC objects to production of a defense-requested witness or evidence, grants you the authority to determine whether the witness or evidence is relevant, notcumulative, and necessary. Additionally, you may set a deadline by which the parties must notify you and the opposing party of the witnesses and evidence they intend to introduce.

No later than 24 hours from the close of the preliminary hearing, GC, DC and any victim named in a specification under consideration may submit supplementary information that the submitter deems relevant to the convening authority's disposition decision. GC must serve any government and/or victim supplementary matters on DC, and the defense may submit rebuttal matters within 5 days of the close of the hearing. You must attach the supplementary matters to the PHO report and provide a written summary and analysis in accordance with R.C.M. 405(k).

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

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

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

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

## SECTION I

### 1. AUTHORITY

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

### 2. QUALIFICATIONS OF THE PRELIMINARY HEARING OFFICER

**2.1. Status.** The PHO must be a designated judge advocate (JAG) and should be certified under Article 27(b). If precluded by military necessity or other compelling circumstances, the PHO may be a JAG who is not certified under Article 27(b). This includes reserve JAGs who may be detailed to serve as a PHO while on active duty or performing inactive duty training.

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

**2.2. Grade.** Whenever practicable, PHOs should be equal or senior in grade to the GC and DC. See Article 32(b), R.C.M. 405(d)(1). PHOs should also be senior in rank to the accused. See *United States v. Reynolds*, 24 M.J. 261, 263 (C.M.A. 1987). If you are not senior in rank to the accused and equal or senior in grade to GC and DC, bring that fact to the attention of the appointing authority's Staff Judge Advocate (SJA) immediately. If you remain assigned as the PHO, document the military necessity or other compelling circumstances presented by GC in your report.

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

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

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

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

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

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

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

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

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



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

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

### 3. QUALIFICATIONS OF OTHER PARTICIPANTS

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

3.1.1. **Role.** The GC's role is to present evidence on behalf of the government relevant to the following limited scope and purpose of the preliminary hearing. The GC provides logistical support for the PHO. This aspect is essential where the PHO is not stationed locally. As soon as the GC has been appointed, he or she should contact the PHO to determine the logistics necessary to insure a smooth preliminary hearing. Among the details the GC should expect to take responsibility for are:

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

**3.2. Defense Counsel.** The accused is entitled to be represented by a DC certified under Article 27(b) and sworn under Article 42(a), UCMJ. *See* R.C.M. 405(d) and AFI 51-201, paragraph 7.2.2. Make sure you verify that detailed DC is properly qualified and certified. This item is covered in block 6 if the PHO's report, DD Form 457, and also in the attached script. This accused may also elect to hire a civilian defense counsel at his own expense. Civilian defense counsel must take an oath to perform his or her duties faithfully when representing an accused. The PHO will administer this oath. The accused is entitled to a reasonable time to obtain civilian counsel and have civilian counsel at the preliminary hearing. However, the preliminary hearing shall not be unduly delayed for the accused to obtain and have present civilian counsel. The PHO should ensure any civilian defense counsel has submitted proof of representation before granting a delay. *See* R.C.M. 405(d). The accused may request self-representation, but it is not an absolute right. *United States v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990).

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

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

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

- Objections to questions pertaining to the victim pursuant to R.C.M. 405(i). Objections shall be made to the PHO upon discovery of the alleged error. The PHO shall not be required to rule on any objection except for issues relating to Military Rules of Evidence that apply to the preliminary hearing as listed in R.C.M. 405(i). All objections shall be submitted in writing to the PHO and the PHO will note the objections in the hearing report.
- Requests to close the proceedings pursuant to R.C.M. 405(j)(3);
- Objections to production of the victim's records covered by M.R.E. 412 or Section V (Privileges) of the Military Rules of Evidence (see paragraph 8.2.1 regarding applicability of M.R.E. 412); Note: The witness's counsel should be given adequate opportunity to review the records in question prior to the PHO considering them; and
- Requests for the witness's records covered by Section V (Privileges) of the Military Rules of Evidence to be sealed and for the witness's personally identifiable information to be redacted.

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

## 4. YOUR RESPONSIBILITIES

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

- Determining whether each specification alleges an offense;
- Determining whether there is probable cause to believe that the accused committed the offense or offenses charged;
- Determining whether the convening authority has court-martial jurisdiction over the accused and over the offense(s); and
- Making a recommendation as to the disposition of the offense(s).

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

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

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

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

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

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

4.3.3. **Documents to VC or Witness Counsel.** Upon notice of representation, you should direct the GC to provide VC copies of the charge sheet and PHO appointment letter; and reasonable notice of, and access to, evidence procured from his or her client (*e.g.*, statements, records, physical evidence, etc.) and evidence related to asserting his or her client's right to be heard under M.R.E. 412, 513, and 514 (even if the evidence is from a witness other than the victim). Personally identifiable information redactions should be made to these documents. There is no need to redact the personally identifiable information of the VC's client.

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

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

## 5. REVIEWING THE CHARGE SHEET

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

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

## 6. TIMING OF AND ACCESS TO THE HEARING

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

6.2. **Public Access.** Ordinarily, Article 32 preliminary hearings are open to the public, wherever possible. Victims of crime may only be excluded under Article 6b if you determine by clear and convincing evidence that the testimony by the victim of an offense under the UCMJ would be materially altered if the victim heard other testimony at the hearing. This rule took effect

26 December 2013 and specifically mentions Article 32 preliminary hearings and PHOs. Congress modeled this provision on the Federal Crimes Victims' Rights Act (18 U.S.C. § 3771). Note that the standard is not whether the testimony "may" or "might" or "possibly" would be materially altered. You must find it *would* be materially altered. Federal district court judges have only on very rare occasions found the clear and convincing evidentiary standard to be met. Article 6b defines a victim of an offense as a person who has suffered direct, physical, emotional or pecuniary harm as a result of the commission of an offense under the UCMJ.

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

**6.2.2. Open proceedings.** Article 32 preliminary hearings should ordinarily be open to the public and news media. *See* R.C.M. 405(j)(3); AFI 51-201, paragraph 7.5.1; *San Antonio Express News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996); and *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997). Access by spectators to all or part of the proceeding, however, may be restricted or foreclosed at the discretion of the convening authority who directed the preliminary hearing, or at your discretion when an overriding interest exists that outweighs the value of an open preliminary hearing. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. The convening authority or you must conclude that no lesser methods short of closing the preliminary hearing can be used to protect the overriding interest in the case. The convening authority or you must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether the closure is necessary. You should make every effort, though, to close only those portions of the preliminary hearing that are clearly justified and keep the remaining portions of the preliminary hearing open. If you close a hearing, you are required to provide specific findings of fact in writing that support the closure and the written findings of fact must be included in your report. *See U.S. v. Davis*, 62 M.J. 645 (A.F. Ct. Crim. App. 2006) (holding that the Article 32 Investigating Officer had no factual basis to support closing a portion of the hearing in an effort to encourage the testimony of two witnesses). Examples of overriding interests may include: preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety or privacy of a witness or victim, protecting classified material, and receiving evidence where the witness is incapable of testifying in an open setting.

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

## **7. WITNESSES AND EVIDENCE**

**7.1. Duties of the Counsel for the Government (GC) to provide initial disclosures.** GC must provide initial disclosures to the defense as soon as practicable after preferral and prior to the preliminary hearing as prescribed in RCM 404A.

**7.2. Required Notice by the Parties.** Prior to the preliminary hearing, the Government and defense shall, in accordance with timelines set by the PHO, provide to the PHO and to the opposing party the following IAW R.C.M. 405(h):

- Notice of the name and contact information for each witness the party intends to call at the preliminary hearing;
- Notice of any other evidence that the party intends to offer at the preliminary hearing; and



- Notice of additional information the party intends to submit under R.C.M.405(k).

**7.3. Defense Counsel Request for Production of Witnesses (R.C.M. 405(h)(2)).** You may establish a timeline prior to the preliminary hearing by which DC shall provide to GC the names of proposed military and civilian witnesses whom the accused requests that the government produce to testify at the preliminary hearing and the requested form of the testimony.

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

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

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

**7.3.2.1. Commander Determination of Witness Availability.** The commander of the witness shall determine whether the individual is available based on operational necessity or mission requirements. The commander will also determine whether the witness will testify in person, by video teleconference, by telephone, or by similar means of remote testimony. If the commander determines that the military witness is available, then GC must make arrangements for that individual's testimony. The commander's determination of availability or unavailability is final. *See* R.C.M.405(h)(2)(A)(iii).

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

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

**7.5. Defense Counsel Request for Production of Evidence (R.C.M. 405(h)(2)).** You may establish a timeline prior to the preliminary hearing by which DC shall provide to GC a list of evidence under the control of the government and not under the control of the government that the accused requests the government produce to the defense for introduction at the preliminary hearing. This is not a right to discovery of evidence for future consideration by

the defense. The production of evidence under R.C.M. 405 is limited to evidence that the defense will seek to introduce at the preliminary hearing.

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

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

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

**7.5.1.1.2. Preliminary Hearing Officer Determination for Evidence Not Under the Control of the Government.** If you determine the defense-requested evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing, and that the issuance of pre-referral investigative subpoena would not cause undue delay, you shall direct GC to issue a pre-referral investigative subpoena with the permission of the GCMCA (see R.C.M. 703(g)(3)(c)) or to seek such a subpoena from a military judge under Article 30a, UCMJ. Failure on the part of GC to seek a pre-referral investigative subpoena per your direction shall be noted in your report.

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

**7.5.3. Counsel for the Government Seeks Pre-Referral Investigative Subpoena for Defense- Requested Evidence.** If GC does not object to production of the defense-requested evidence or the PHO determines that the evidence is relevant, not cumulative, and necessary, GC shall seek a pre-referral investigative subpoena for the evidence. *See* R.C.M. 703(g)(3)(C).

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

## 8. CONDUCTING THE PRELIMINARY HEARING

**8.1. Preliminary Advice and Inquiries.** Use the DD Form 457, *Preliminary Hearing Officer's Report*, at Attachment 5. Check off in pencil each required point as you go over it with the accused. Use the script in Section II of this guide to begin the hearing. It covers all the important points required on the DD Form 457. **Note:** It is important to use the DD Form 457 provided at Attachment 5 and not the version currently published by DoD. The DoD version is outdated and does not account for the changes under the Military Justice Act of 2016.

**8.2. Military Rules of Evidence.** The Military Rules of Evidence (M.R.E.) do not apply to Article 32 preliminary hearings, except as discussed below. *See* R.C.M. 405(i). This means, quite simply, that you can consider hearsay. *See, e.g., United States v. Matthews*, 15 M.J. 622 (N.C.M.R. 1982). For those rules of evidence applicable to a preliminary hearing, the PHO assumes the military judge's authority to exclude evidence from the preliminary hearing, using the procedure set forth in the underlying M.R.E. *See* R.C.M. 405(i)(1)(B).

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

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

### 8.2.2. Military Rules of Evidence that Apply InPart:

M.R.E. 412	Sex offenses: the victim's sexual behavior or predisposition
M.R.E. 505	classified information
M.R.E. 506	government information other than classified information
M.R.E. 514	victim advocate—victim privilege

**8.2.3. Military Rule of Evidence 412.** Follow the procedures in R.C.M. 405(i)(2) before admitting evidence under M.R.E. 412. It is the PHO's responsibility to ensure that all motions, related papers, and the record relating to an admissibility hearing for M.R.E. 412 evidence are properly sealed IAW R.C.M. 1113.

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

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

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

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

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

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

**8.3.1. Taking testimony.** After you have informed the accused of the accused's rights, GC will present evidence. Upon the conclusion of GC's presentation of evidence, DC may present matters in defense and mitigation. *See* R.C.M. 405(j). For purposes of the preliminary hearing, "matters in mitigation" are defined as matters that may serve to explain the circumstances surrounding a charged offense. You may also question witnesses called by the parties.

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

**8.4. Other Evidence.** If relevant to the limited scope and purpose of the preliminary hearing, and not cumulative, you may consider other evidence, in addition to or in lieu of witness testimony, including sworn statements, tangible evidence, or reproductions thereof, when submitted by either GC or DC, that you determine to be reliable. This other evidence need not be sworn. *See* R.C.M. 405(j)(2)(B). In making your reliability determination of unsworn statements, you should consider the fact the unsworn nature of the statement in determining the credibility and weight to give to the unsworn statement and should articulate said consideration in your preliminary hearing report.

**8.4.1. Evidence Not Under Control of the Government.** Evidence not under the control of the government may be obtained through noncompulsory means or by investigative subpoenas IAW the process established by R.C.M.703(g)(3)(C).

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

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

8.4.4. **Reports.** Reports are documents, notwithstanding their hearsay nature. Thus, treat them as "other evidence" and follow the rules set forth in R.C.M. 405(j)(2)(B).

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

R.C.M. 601(d)(1) specifically authorizes the GCMCA to consider information from "any source" in deciding whether to refer charges to trial by general court-martial as long as "there has been substantial compliance with the preliminary hearing requirements of R.C.M. 405." It's your job to ensure the preliminary hearing is conducted in substantial compliance with R.C.M. 405, but you should attach evidence, as long as it's not impermissible evidence, such as M.R.E. 412 or M.R.E. 513 evidence, even if you cannot consider it. Of course, you should identify what you did not consider and why it is attached to your report.

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

8.5.2. **Fair and Thorough Proceedings.** The PHO stands in the place of a military judge with respect to the Military Rules of Evidence that apply to the preliminary hearing as articulated in R.C.M. 405(i). However, for all other objections under rules that do not apply at the preliminary hearing, although you don't rule on these objections, you certainly are expected to correct any deficiencies in the conduct of the proceedings when they are brought to your attention and you think it appropriate. For example, suppose the GC presents you with a copy of a witness's statement obviously taken from an OSI or



security police report. Defense objects, citing hearsay as the basis for the objection. Although hearsay is not a valid objection for Article 32 preliminary hearings, you may find the statement is not relevant to the limited scope and purpose of the preliminary hearing or that it is cumulative. *See* R.C.M. 405(j)(2)(B). Be sure to explain what you did in your report, *i.e.*, that you determined the statement to be relevant and not cumulative, and your facts and rationale for that finding. Don't leave the SPCMCA, GCMCA, and their staffs wondering whether you complied with R.C.M. 405.

**8.6. Sealed Exhibits and Proceedings.** You have the authority to order exhibits, proceedings, or other matters sealed as described in R.C.M. 405(j)(8), 405(k)(3) and 1113. Further, be mindful of a victim's right to privacy pursuant to Article 6b(a)(8), UCMJ.

**8.7. Handling Other Offenses (R.C.M. 405(e)(2)).** If evidence adduced during the preliminary hearing indicates the accused committed an uncharged offense, you may examine evidence and hear witnesses relating to the subject matter of such offense and make the findings and recommendations enumerated in R.C.M. 405(a) without the accused first having been charged with the offense. The accused's rights under R.C.M. 405(f)—where the accused must be present at the preliminary hearing; must be informed of each uncharged offenses investigated; and must be afforded the opportunity for representation, cross-examination, and presentation of evidence on his or her behalf—are the same with regard to both charged and uncharged offenses.

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

8.7.2. **Consideration of New Offense(s).** Proceed with the preliminary hearing of the new offenses. If the evidence presented supports the offense, your report should include appropriate recommendations concerning preferral of the new charge prior to anyone forwarding them for referral.

**8.8. Supplementary Information after Close of Preliminary Hearing (R.C.M. 405(k)).** No later than 24 hours after the close of the hearing, GC, DC and any named victim in one of the specifications under consideration (or the SVC) may submit to the PHO additional information that the submitter deems relevant to the convening authority's disposition decision. GC must serve any supplemental information from the government or victim to DC, who may submit rebuttal information within 5 days of the close of the hearing. The PHO must summarize, analyze, and attach supplementary information to the PHO report as required under R.C.M. 405(k). Certain supplemental matters may need to be sealed. *See* R.C.M. 405(k)(3) for the procedure.

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

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

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

**8.10. Recording of the Preliminary Hearing.** It is the GC's responsibility to ensure all preliminary hearings are recorded by a suitable recording device. *See* R.C.M. 405(j)(5). A suitable back-up recording by the GC is also allowed. No other recordings of the preliminary hearing are allowed. The SJA may authorize the completion of a verbatim transcript following the hearing; though, a verbatim transcript is not required. *See* AFI 51-201, paragraph 7.4.2.

8.10.1. **Providing the Recording to the PHO.** The GC shall provide the PHO a copy of the recording in order to be attached to the PHO report as soon as practicable following the conclusion of the hearing. Closed portions of the hearing must be properly sealed.

8.10.2. **Providing the Recording to the Victim.** Upon written request from a victim named in one of the specifications considered at the preliminary hearing (or an SVC), GC shall provide the victim with access to, or a copy of, the recording in accordance with the rules prescribed in AFI 51-201, paragraph 7.4.3. The PHO must assist the GC or court reporter responsible for recording the preliminary hearing with ensuring that closed sessions are noted for ease in delineating closed sessions on the recording.

8.10.3. **Reducing the testimony to writing.** In the event the technology used to record the preliminary hearing fails, you will be required to include in your report a summary of the substance of each witness's testimony. As a result you should take notes as each witness testifies. Your notes of testimony should be preserved until the end of trial. *See* R.C.M. 405(j)(2)(A) *Discussion*. If the recording fails, you should reduce the substance of the testimony of each witness to writing. The witness may sign and swear to the truth of their respective testimonies. You may also sign the statement indicating that the summary is true and accurate.

8.10.4. **Recordings by defense, victim, or others.** Recording the testimony of witnesses at an Article 32 preliminary hearing, other than the recording being accomplished by the government, is not addressed in the Manual for Courts-Martial. If testimony is recorded, a Jencks Act issue may arise, even when the government recording or summarized testimony is prepared and included in the report. The Jencks Act requires the government to provide the defense "any statement of the witness that relates to the subject matter concerning which the witness has testified." *See* R.C.M. 914. Therefore the media or stenographic notes must be retained. *Id.* This will create a potential touchy issue because the tapes should be maintained by the government. You should inform others that perform the recording that the original tapes will need to be turned over to the government for safekeeping.

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

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

## 9. PREPARING THE REPORT

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

make a recommendation to the convening authority as to the disposition of the charge.

**9.2. Contents of the Report.** You will make a written report of the preliminary hearing to the convening authority. Your PHO appointment letter will specify when the report is due to the convening authority who directed the preliminary hearing. The report shall include the following IAW R.C.M. 405(1):

- The qualifications of the PHO;
- The identity, organization, and contact information for DC. Whether DC was present throughout the taking of evidence, or if not, present the reason why;
- The identity, organization, and contact information for VC. Whether or not VC was provided with copies of the charge sheet, PHO appointment letter, and notice of/access to any evidence produced from his/her client;
- An explanation of any delays in the preliminary hearing;
- The manner in which the hearing was recorded and who was responsible for conducting the recording;
- A review of the format and personal data on the charge sheet;
- Whether an investigative subpoena was requested and whether or not GC failed to seek one with GCMCA approval or under Article 30a;
- Whether there was a military witness request, whether the request was found relevant, not cumulative, and necessary. Whether the commander for the military witness determined the witness was available to testify and by what means;
- A discussion of relevant victim issues including, whether victim chose not to testify; whether victim requested to be present during the testimony of other witnesses and if so  
the ruling of the PHO on the victim's request; whether MRE 412 issues were applicable; whether MRE 513 issues were applicable; whether sealed records are attached to the original PHO report; and GC and/or DC objections to those issues;
- Any miscellaneous issues that arose, e.g. media interest;
- A case synopsis;
- A discussion of the elements of the offense(s) charged;
- A discussion of the evidence and a statement that an essential witness may not be available for trial;
- A discussion of relevant legal issues;
- A summary and analysis of supplementary information submitted under R.C.M. 405(k),

sealing analysis on any matters the PHO determines to be privileged;

- Your determination as to whether the specifications allege an offense under the UCMJ;
- Your determination as to whether there is probable cause to believe the accused committed the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing;
- Your determination as to whether the convening authority has court-martial jurisdiction over the accused and the offense(s);
- Your recommendations regarding disposition of the case;
- Under R.C.M. 405, any supplementary information properly submitted by GC, DC, or the victim (or SVC) must be attached to the PHO report. You must provide a written summary and analysis of the supplementary information IAW R.C.M. 405(k)(3).
- A chronology of events relevant to your duties as a PHO.

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

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

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

**9.3.3. Note the Legal Issues.** Although you are not required to rule on the admissibility of evidence, with the exception of evidence that falls within the purview of the rules contained within R.C.M. 405(i), you should note inadmissibility of evidence in your report whenever you are aware that evidence may not be admissible at trial. Thus, you should **briefly** discuss any evidentiary or other legal issues you see. Do not go into a lengthy legal analysis. Cite the proper authorities to save others unnecessary labor, but keep your explanation **brief**. In determining whether the charges are in proper form, you should also consider whether any of the charges are multiplicitous on their face and therefore subject to a preliminary motion to dismiss. It is part of your job to determine whether there's been an unreasonable multiplication of charges. Please note that unreasonable multiplication of charges applies to both findings and sentencing. *U.S. v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). That is, "if an offense is multiplicitous for sentencing it must necessarily be multiplicitous for findings as well." *Id.*

**9.3.4. Recommending changes to the charges.** After hearing and seeing all the evidence, you may note some errors in the charges or wish to make recommendations concerning the referral of the charges to a court-martial; e.g. the date of an alleged offense is inaccurate or a lesser-included offense is warranted because evidence is lacking on a certain element of the offense actually charged. Or, in the extreme, a specification may not be supported at all by the evidence. Remember, you may not make any changes to the charges. You must make

**recommendations** which the GCMCA may later accept. When making recommendations, be sure to state specifically what evidence (or lack thereof) supports them and then determine whether they are “minor,” or “major” changes.

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

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

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

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

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

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



- **Supplementary Information.** Under R.C.M. 405, any supplementary information properly submitted by GC, DC, or the victim (or SVC) must be attached to the PHO report. The preliminary hearing officer shall provide a written summary and analysis of the supplementary information IAW R.C.M. 405(k)(3).

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

**9.4.2. Sealed Exhibits and Proceedings.** If your report contains exhibits, proceedings, or other matters ordered sealed by you in accordance with R.C.M. 405(j)(8), 405(k)(3) and 1103A, GC shall cause such materials to be sealed so as to prevent unauthorized viewing or disclosure.

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

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

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

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

**9.6.2. Accused's Copy.** R.C.M. 405(l)(4) obligates the convening authority who directed the preliminary hearing to "promptly cause a copy of the report to be delivered to each accused." The local SJA normally performs this function for the convening authority so you don't have to worry about it. Note that the requirement is to serve a copy on the accused—not the accused's DC. However, it may be a good business practice to serve a copy of the report on the DC as well. Local SJAs should get in the habit of serving the copy on the accused *and* simultaneously notifying the DC that they have done so. Finally, a signed and dated acknowledgment of service on the accused should be included when forwarding the report.

**9.6.3. Release of Information to Special Victims' Counsel.** Requests from SVCs for records pertaining to Article 32 proceedings involving their clients are properly addressed as

“official use” requests under the Privacy Act and Freedom of Information Act. *See* SORN F051 AFJA 1; 5 U.S.C. § 552a(b)(1). SJAs may release those records that are minimally required to accomplish the SVC’s intended use as articulated in the request. *See* DoD 5400.11-R, *Department of Defense Privacy Program*, paragraph C4.2.1. When Privacy Act material or other personal information is not redacted from records released to an SVC, the SVC is responsible for protecting the information and taking steps to guard against its improper release.

**9.7. Defense Counsel’s Right to Object.** Service of a copy of the report on the accused starts the running of the 5-day period for DC to object to the report. R.C.M. 405(j)(5); AFI51-201, para. 4.1.4. The day the report is delivered to the accused is not counted in calculating the 5-day period. *See* R.C.M. 103(9). Failure to object to matters included or omitted from the report “will constitute a waiver of such objections in the absence of good cause for relief from the waiver.” R.C.M. 405(m) and Discussion. The convening authority, or the PHO, if the convening authority has delegated such authority, may extend the period of time during which the DC may object to the report. The SPCMCA is not required to wait for expiration of the 5-day period before deciding whether or not to forward the charge and report of preliminary hearing. R.C.M. 405(l)(5). If the charges have already been forwarded when timely objections are received, the objections should be sent through the SPCMCA through the GCMCA SJA to the GCMCA.

## **10. DUTIES AFTER SERVICE AS THE ARTICLE 32 PHO**

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

## SECTION II

### PRELIMINARY HEARING OFFICER'S ARTICLE 32 SCRIPT

#### **INTRODUCTION:**

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

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

**ACC:** \_\_\_\_\_.

#### **PRELIMINARY ADVICE:**

*(Use a copy of DD Form 457)*

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

**Do you understand these rights?**

**ACC:** \_\_\_\_\_

**PHO:** By whom do you wish to be represented?

**ACC:** \_\_\_\_\_

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

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

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

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

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

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

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

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

GC/AGC: No sir/ma’am.

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

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

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

*(Civilian counsel must be sworn)*

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

*CIV: I do.*

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

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

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

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

*(Civilian victim’s counsel must be sworn)*

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

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

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

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

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

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

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

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

GC: The government is aware of none.

DC: The defense is aware of none.

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

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

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(e.g.: Desertion from your unit from\_\_\_\_\_to\_\_\_\_\_; Use of cocaine at or near \_\_\_\_\_AFB on or about\_\_\_\_\_.)

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

ACC:\_\_\_\_\_.



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

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

**PHO: You have been accused of these charges by (Grade) (Full name), (commander of the \_\_\_\_\_squadron).**

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

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

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

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

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

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

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

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

**Do you understand these rights?**

**ACC: \_\_\_\_\_**

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

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

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

**1) The specification(s) alleges an offense under the UCMJ;**

- 2) There is probable cause to believe the accused committed the offense charged;
- 3) The convening authority has court-martial jurisdiction over you (the accused) and over the offense; and
- 4) To recommend the disposition that should be made of the charge(s).

These four issues are the issues of determination under Rule for Courts-Martial 405(a). I will reference R.C.M. 405(a) several times throughout this proceeding. If at any point you are confused as to what I mean by the issues of determination under R.C.M. 405(a), you can ask me to re-explain, or we can take a break so you can consult with your defense counsel.

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

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

ACC:\_\_\_\_\_.

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

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

Do you understand this right?

ACC:\_\_\_\_\_.

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

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

I expect the following witnesses to testify:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**PHO:** Do you understand this right?

ACC:\_\_\_\_\_.

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

**PHO:** Do you understand this right?

ACC:\_\_\_\_\_.

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

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

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**PHO: Do you understand this right?**

ACC:\_\_\_\_\_.

**PHO: You have the right to notice, and reasonable access to, evidence that is within the possession or control of counsel for the government that negates or reduces your degree of guilt for any offense charged or evidence that adversely affects the credibility of any prosecution witness or evidence**  
*(PHO should check off block 10f of the DD Form 457.)*

**PHO: You also have the right to cross-examine any witnesses called by the counsel for the government on matters relevant to the issues for determination in R.C.M. 405(a).**

**Do you understand this right?**

ACC:\_\_\_\_\_.

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

**PHO: You also have the right to present matters relevant to the issues for determination in R.C.M. 405(a).**

**Do you understand this right?**

ACC:\_\_\_\_\_.

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

**PHO: You also have the right to make an unsworn or sworn statement relevant to the issues for determination in R.C.M. 405(a). You can make your statement either orally or in writing by yourself or through counsel - the choice is yours. Remember, however, as I advised you before, anything you say in a sworn or unsworn statement - even if it's only in writing and you don't actually say it - can be used against you in a trial by court-martial.**

**Do you understand this right?**

ACC:\_\_\_\_\_.

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

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

**MENTAL RESPONSIBILITY:**

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

DC:\_\_\_\_\_.

GC:\_\_\_\_\_.

### **ARTICLE 32 PROCEDURES:**

**PHO:** Now, let me go over with you the procedures I will use to conduct this preliminary hearing. First, (the counsel for the government) will call any relevant witnesses and offer evidence relevant to the issues for determination under R.C.M. 405(a). Defense counsel will be given an opportunity to cross-examine these witnesses after they have testified. Defense counsel will also be allowed to examine any evidence offered. I will explain in a minute how I intend to handle objections.

Second, after the government completes its presentation, the defense will be permitted to call witnesses and offer evidence which is relevant to the issues for determination under R.C.M. 405(a). Any defense witness will be subject to cross-examination by counsel for the government.

I am permitted to ask questions of the witnesses. If I believe that additional evidence is necessary to meet the specific requirements of this hearing then I may provide the counsel for government and defense counsel an opportunity to present additional testimony or evidence relevant to the issues for determination under R.C.M. 405(a).

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

### **HANDLING OBJECTIONS:**

**PHO:** I will handle any objections in the following fashion. This preliminary hearing does not require me to rule on the admissibility of evidence like a military judge does at trial. But I will rule on objections on matters related to relevancy, cumulativeness, necessity, the issues for determination under R.C.M. 405(a), and the rules of evidence that do apply to this hearing.

I will consider hearsay testimony and evidence if I determine it is reliable and relevant to the issues for determination under R.C.M. 405(a).

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



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

**OBJECTIONS MUST BE IN WRITING TO BE PRESERVED:**

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

GC:\_\_\_\_\_.

DC:\_\_\_\_\_.

**EXAMINATION OF WITNESSES AND EXHIBITS:**

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

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

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

*CR/INT: I do.*

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

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

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

**PHO: Defense, any objection.**

DC:\_\_\_\_\_.

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

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

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

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

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

WIT: I do.

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

WIT:\_\_\_\_\_.

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

WIT:\_\_\_\_\_.

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

WIT:\_\_\_\_\_.

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

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

WIT:\_\_\_\_\_.

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

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

WIT:\_\_\_\_\_.

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

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

WIT:\_\_\_\_\_.

GC: (direct examination relevant to the issues for determination under R.C.M. 405(a).)

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

DC:\_\_\_\_\_.

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

GC:\_\_\_\_\_.

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

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

GC:\_\_\_\_\_.

DC:\_\_\_\_\_.

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

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

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

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

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

DC: I offer PHO Exhibit\_\_\_\_(describe exhibit).

**PHO: Counsel for the government, any objection.**

GC:\_\_\_\_\_.

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

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

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

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

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

WIT: I do.

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

WIT:\_\_\_\_\_.

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

(Civilian) In what city do you live?

WIT:\_\_\_\_\_.

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

WIT:\_\_\_\_\_.

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

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

WIT:\_\_\_\_\_.

DC: (direct examination relevant to the issues for determination under R.C.M. 405(a).)

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

GC:\_\_\_\_\_.

**PHO: Defense Counsel, any re-direct?**

DC:\_\_\_\_\_.

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

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

DC:\_\_\_\_\_.

GC:\_\_\_\_\_.

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

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

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

DC:\_\_\_\_\_.

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

### **CLOSING:**

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

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

GC:\_\_\_\_\_.

DC:\_\_\_\_\_.

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

GC:\_\_\_\_\_.

DC:\_\_\_\_\_.

**PHO: Additionally, no later than 24 hours from the closure of this hearing, counsel for the Government, defense counsel, and any victim named in a specification considered in the course of this hearing (or an SVC) may submit supplementary information to me that the submitter deems relevant to the convening authority's disposition decision. Any supplementary information submitted to me must also be submitted to Government counsel. Government counsel will serve Government and/or victim submissions on the defense counsel, who will have 5 days from the close of this hearing to rebut such matters.**

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

**PHO: This preliminary hearing is closed.**

## ATTACHMENTS

### Attachment 1 – Letter of Appointment

MEMORANDUM FOR PRELIMINARY HEARING OFFICER FROM:

WG/CC

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

1. You are hereby designated as the Preliminary Hearing Officer (PHO) pursuant to Article 32, UCMJ, to conduct a preliminary hearing examining the attached charges against *(name, grade, and squadron of accused)*. The preliminary hearing is your primary duty until its completion. You shall ensure that you meet all requirements of serving as a PHO. You shall review the AFLOA/JAJM Article 32 Preliminary Hearing Officer's Guide before the preliminary hearing.
2. In conducting the preliminary hearing, you will comply with the provisions of Article 31, UCMJ, and Article 32, UCMJ.
3. As required by Article 32, the preliminary hearing will be recorded by the government. A copy of the recording will be provided to you following the close of the hearing. You are required to include in your report, at a minimum, a summary of the substance of all testimony. (Attaching a recording of the preliminary hearing to your report will satisfy this requirement.) A verbatim transcript of witness testimony will only be prepared if approved of my Staff Judge Advocate.
4. Within two days of your appointment, you will issue a written memorandum, to the counsel for the government, the defense counsel, and victims' counsel providing guidance for the upcoming preliminary hearing under the Article 32 statute. A sample memorandum is found at Attachment 2 of the Article 32 PHO Guide.
5. Your report and recommendations using the revised DD Form 457, *Preliminary Hearing Officer's Report*, will be submitted within eight days through my Staff Judge Advocate (SJA) in an original and five copies.
6. You have the authority to order exhibits, proceedings, and other matters sealed IAW R.C.M. 405(j)(8) and R.C.M. 1113. Sealed matters normally involve contraband items, such as sexually explicit pictures, medical information, financial information, or matters involving a significant privacy interest. You should pay careful attention to only seal those portions of the PHO report that you believe warrant heightened protection or where sealing is otherwise required under R.C.M. 405(i) and (k). Do not seal the entire PHO report absent extenuating circumstances.
7. The Article 32 preliminary hearing in this case is scheduled for \_\_\_\_\_. Pursuant to R.C.M. 707, you are hereby delegated authority to approve delays in the Article 32 hearing date. Your decision granting a delay must be noted in the report. Any delay beyond eight days in submitting your report will be fully explained in your report. My SJA will provide any required assistance and support.

Brigadier General, USAF  
Commander



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

MEMORANDUM FOR GC

DC

VC

FROM: Article 32 Preliminary Hearing Officer

SUBJECT: Article 32 Preliminary Hearing - \_\_\_\_\_

1. This is to inform you that an Article 32 preliminary hearing examining the charge(s) against \_\_\_\_\_ has been set for \_\_\_\_\_, at \_\_\_\_\_ in the Legal Office courtroom, \_\_\_\_\_ AFB.
2. The uniform of the preliminary hearing will be \_\_\_\_\_.
3. Counsel for the Government (GC) shall ensure that the preliminary hearing will be recorded by a suitable government recording device.
4. As soon as practicable after notifying the accused of preferred charges under R.C.M. 308, counsel for the Government shall provide the defense with copies of, or if impracticable, permit the defense to inspect the charges and any matters that accompanied the charges when they were preferred.
5. No later than *(date that is 5 business days after date Article 32 appointing order is signed)* GC shall provide to the Defense Counsel (DC) the following information or matters:
  - a. Article 32 appointment letter;
  - b. Statements, within the control of military authorities, of witnesses GC intends to call at the preliminary hearing;
  - c. Evidence GC intends to present at the preliminary hearing; and
  - d. Any matters provided to the convening authority when deciding to direct the preliminary hearing.
6. No later than *(date established by PHO)* GC and DC shall provide me and the opposing parties the following notices:
  - a. Notice of the name and contact information for each witness the party intends to call at the preliminary hearing;
  - b. Notice of any other evidence the party intends to offer at the preliminary hearing;
  - c. Notice of any additional information the party intends to submit under R.C.M. 405(k); and
  - d. Notice of, and reasonable access to, evidence that is within the possession or control of counsel for the government that negates or reduces the degree of guilt of the accused for an offense charged.
7. No later than *(date established by PHO)* DC shall provide to GC the names of both proposed military and civilian witnesses whom the accused requests the government produce to testify at the preliminary hearing and the requested form of the testimony for each requested witness. DC shall also provide to GC a list of evidence under the control of the government

and evidence that is not under the control of the government that the accused requests the government produce to the defense for introduction at the preliminary hearing.

- a. No later than *(date established by PHO)* GC shall respond that either 1) the government agrees that the requested witness testimony or evidence is relevant, not cumulative, and necessary; or 2) that the government objects on the grounds that the witness testimony or evidence is irrelevant, cumulative, or unnecessary.
  - b. If the government objects, DC may request, in writing, that I determine whether a requested witness or evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing. The DC must file this request with me by *(date established by PHO)*.
8. No later than *(date established by PHO)* GC and DC shall provide me and the opposing parties any motions concerning any evidence counsel intends to submit that may trigger the need to conduct an admissibility hearing under R.C.M. 405(i). Counsel have five duty days to respond to any such motions.
9. *[Add paragraph if there is a victim in the case] GC shall ensure that the victim(s) named in the specification(s) under consideration, and their victims' counsel, have been provided reasonable, accurate, and timely notice of the preliminary hearing. The victim(s) (has)(have) the reasonable right to confer with GC. The victim(s) (has)(have) the right not to be excluded from any portion of the preliminary hearing, unless I, after receiving clear and convincing evidence, determine that testimony by the victim would be materially altered if the victim heard other testimony at the preliminary hearing. Government counsel must ensure that all motions and responses are served on victims counsel or victims as required by R.C.M. 405(i).*
10. Should you have any questions concerning the Article 32 preliminary hearing, please contact me at \_\_\_\_\_.

Preliminary Hearing Officer

### Attachment 3 – Invitation to Civilian Witness to Provide Testimony

\_\_AW/JA

Address

Base/ZIP

Mr./Ms. \_\_\_\_\_

Address

City/State/ZIP

Dear Mr./Ms.

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

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

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

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

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

Sincerely

\_\_\_\_\_, Captain, USAF

Chief, Military Justice\*\*

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

#### Attachment 4 – Sample Article 32 Report of Preliminary Hearing

### **SAMPLE ARTICLE 32 REPORT OF PRELIMINARY HEARING**

#### Continuation of Item 13a, DD Form 457

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

#### Continuation of Item 24, DD Form 457

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

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

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

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

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

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

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

**h. Military Witness Request.**

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

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

**i. Relevant Victim Issues:**

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

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

(2) There were no relevant MRE 412 issues.

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

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

**k. Case and Testimony Synopsis.**

(1) On 20 November 2018, the Commander, 22nd Communications Squadron, decided that he would do an inspection of his entire squadron via urinalysis. He consulted with the chief of military justice, Capt Ginny Tea and the drug demand reduction program office and determined that Tuesday, 28 November 2018, would be a good day for the inspection since it fell on the day after Thanksgiving weekend. (PHO Ex. 6, 8, 10)

(2) On 27 November 2018, the Commander met with his First Sergeant to go over the logistics of the inspection. *Id.* After finalizing the plan, the first sergeant printed out letters for each squadron member telling the member to report to the drug demand reduction program office NLT 0730 on 28 November 2018. (PHO Ex. 6, 8)

(3) On 28 November 2018, the Commander signed all of the letters and issued a squadron-wide recall at 0600 with a report time of 0700 at the 22nd CS headquarters building. Once all squadron members were present, the letters were issued to each person, to include the accused (PHO Ex. 4), and the squadron members boarded busses and were taken to the drug demand reduction program office. (PHO Ex. 8)

(4) The accused signed the urinalysis log book at 0745 and, while observed, provided a specimen in excess of 60 ml. (PHO Ex. 5) This specimen was subsequently tested at the Air Force Drug Testing Laboratory (AFDTL), Joint Base San Antonio, Texas which detected and confirmed the presence in it of benzoylecgonine, a cocaine metabolite. (PHO Ex. 3) The lab reported the positive result to base authorities on 7 December 2018, a medical officer reviewed the accused's medical files, and a single charge alleging cocaine use was preferred against the accused on 10 December 2018.

**l. Elements of The Offense Charged.** The specification of the charge alleges that the accused wrongfully used cocaine at or near McConnell Air Force Base, Kansas between 20-28 November 2018, in violation of Article 112a, UCMJ. The elements of this offense are:

(1) That at or near McConnell Air Force Base, Kansas, between 20-28 November 2018, the accused used cocaine;

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

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



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

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

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

**o. Conclusions and Recommendation.** Pursuant to Article 32(a)(2), UCMJ, I find the following:

- (1) The specification(s) (do) (do not) allege an offense under the UCMJ;
- (2) There (is) (is not) probable cause to believe an offense has been committed.  
There (is) (is not) probable cause to believe the accused committed the offense.
- (3) The convening authority (does) (does not) have court-martial jurisdiction over the accused and over the offense.
- (4) I recommend the charge and its specification be disposed as follows: (\_\_\_\_\_).

**p. Supplementary Information.** None of the parties submitted supplemental information under R.C.M. 405(k) for your consideration prior to making a disposition decision.

**q. Chronology:**

10 January 2019 – Appointed PHO

11 January 2019 – Set date and time for

hearing

12 January 2019 – Hearing began at 1300.  
Hearing ended at 1700.

13 January 2019 – Prepared brief synopsis of witness statements and wrote report.

17 January 2019 – Completed report. Delivered to SJA at 1600.

## SUMMARIZED TESTIMONY OF LT COL PHILLIP J. O'BRYANT

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

I am the commander of the 22d Communications Squadron. On 20 November 2018, after consulting with the chief of military justice, Capt Ginny Tea, the head of the drug demand reduction program office, Mr. Johnny March, and my first sergeant, Sergeant O'Day, I decided to do a squadron wide urinalysis inspection following the four-day Thanksgiving weekend.

On 27 November 2018, I met with Sergeant O'Day to go over the logistics of the inspection. After finalizing the plan, the first sergeant printed out letters for each squadron member telling the member to report to the drug demand reduction program office NLT 0730 on 28 November 2018. (I.O. Ex. 5, 6)

On 28 November 2018, I signed all of the letters early in the morning and issued a squadron recall at 0600 with a report time of 0730 at the 22 Communications Squadron headquarters building. I have 30 military members in my squadron. Only 28 people were recalled because 2 were on leave. The letters were issued to each person, to include Sergeant Johnson. Once everyone had their letter, the squadron boarded buses and were taken to the drug demand reduction program office. (I.O. Ex. 6)

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

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

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

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

Preliminary Hearing Officer

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

<b>PRELIMINARY HEARING OFFICER'S REPORT</b> <i>(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)</i> <small>Use this version of DD Form 457 for hearings conducted on or after 1 January 2019</small>				
1a. FROM: (Name of Preliminary Hearing - Officer Last, First, MI)		b. GRADE	c. ORGANIZATION	d. DATE OF REPORT
2a. TO: (Name of Officer who directed the Preliminary Hearing - Last, First, MI)		b. TITLE	c. ORGANIZATION	
3a. NAME OF ACCUSED (Last, First, MI)		b. GRADE	c. ORGANIZATION	d. DATE OF CHARGES
(Check appropriate answer)				
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I CONDUCTED A PRELIMINARY HEARING CONCERNING THE CHARGES APPENDED HERETO (Exhibit 1)				YES <input type="checkbox"/>
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)				NO <input type="checkbox"/>
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d)(3), 502(d)(2)				<input type="checkbox"/>
7a. NAME OF DEFENSE COUNSEL (Last, First, MI)		b. GRADE	8a. NAME OF ASSISTANT DEFENSE COUNSEL (If any)	b. GRADE
c. ORGANIZATION (If appropriate)		c. ORGANIZATION (If appropriate)		
d. ADDRESS (If appropriate)		d. ADDRESS (If appropriate)		
9. TO BE SIGNED BY ACCUSED IF ACCUSED WAIVES COUNSEL. (If accused does not sign, preliminary hearing officer will explain in detail in item 24.)				
a. PLACE		b. DATE		
I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED AT THIS PRELIMINARY HEARING BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL AT THIS PRELIMINARY HEARING.				
c. SIGNATURE OF ACCUSED				
10. AT THE BEGINNING OF THE PRELIMINARY HEARING, I INFORMED THE ACCUSED OF: (Check appropriate answer)				
a. THE RIGHT TO BE ADVISED OF THE CHARGES UNDER CONSIDERATION				YES <input type="checkbox"/>
b. THE IDENTITY OF THE ACCUSER				NO <input type="checkbox"/>
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31, UCMJ				<input checked="" type="checkbox"/>
d. THE PURPOSE OF THE PRELIMINARY HEARING				<input type="checkbox"/>
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE (EXCEPT AS DESCRIBED IN R.C.M. 804(c)(2))				<input type="checkbox"/>
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED THE GOVERNMENT TO PRESENT				<input type="checkbox"/>
g. THE RIGHT TO CROSS-EXAMINE WITNESSES ON MATTERS RELEVANT TO THE ISSUES FOR DETERMINATION IN R.C.M. 405(a)				<input type="checkbox"/>
h. THE RIGHT TO PRESENT MATTERS RELEVANT TO THE ISSUES FOR DETERMINATION IN R.C.M. 405(a)				<input checked="" type="checkbox"/>
i. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT RELEVANT TO THE ISSUES FOR DETERMINATION IN R.C.M. 405(a)				<input type="checkbox"/>
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE (If the accused or counsel were absent during any part of the presentation of evidence, complete item 11b below.)				<input type="checkbox"/>
b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL				
NOTE: If additional space is required for any item, enter the additional material in Item 24 or in the report referenced in Block 12b. Identify such material with the proper numerical and, if appropriate, lettered heading. (Example: "7c".)				

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH:				
NAME (Last, First, MI)	GRADE (If any)	ORGANIZATION/ADDRESS (Whichever is appropriate)	YES	NO
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
b. THE PRELIMINARY HEARING REPORT REQUIRED BY RCM 405(l) IS ATTACHED			<input type="checkbox"/>	<input type="checkbox"/>
c. AT THE HEARING, EVIDENCE WAS OFFERED UNDER MILITARY RULES OF EVIDENCE (Check appropriate box(es))			<input type="checkbox"/> 412	<input type="checkbox"/> 513 <input type="checkbox"/> 514
d. PORTIONS OF THE HEARING WERE CLOSED			<input type="checkbox"/>	<input type="checkbox"/>
e. SEALED MATERIALS ARE INCLUDED IN THIS REPORT			<input type="checkbox"/>	<input type="checkbox"/>
13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH			<input type="checkbox"/>	<input type="checkbox"/>
DESCRIPTION OF ITEM	LOCATION OF ORIGINAL (If not attached)		<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED			<input type="checkbox"/>	<input type="checkbox"/>
14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOTCOMPETENT TO PARTICIPATE IN THE DEFENSE (See R.C.M. 909, 916(k))			<input type="checkbox"/>	<input type="checkbox"/>
15. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL			<input type="checkbox"/>	<input type="checkbox"/>
16. AN EXPLANATION OF ANY DELAYS IN THE HEARING IS ATTACHED HERETO			<input type="checkbox"/>	<input type="checkbox"/>
17. EACH SPECIFICATION ALLEGES AN OFFENSE			<input type="checkbox"/>	<input type="checkbox"/>
18. THERE IS PROBABLE CAUSE TO BELIEVE AN OFFENSE HAS BEEN COMMITTED AND THAT THE ACCUSED COMMITTED THEOFFENSE			<input type="checkbox"/>	<input type="checkbox"/>
19. THE UNITED STATES HAS JURISDICTION OVER THE OFFENSE(S) AND THE ACCUSED			<input type="checkbox"/>	<input type="checkbox"/>
20. ADDITIONAL UNCHARGED MISCONDUCT WAS CONSIDERED AND A RECOMMENDATION FOR DISPOSITION IS ATTACHED HERETO			<input type="checkbox"/>	<input type="checkbox"/>
21. SUPPLEMENTARY MATERIALS SUBMITTED PURSUANT TO R.C.M. 405(k)			<input type="checkbox"/>	<input type="checkbox"/>
22. I AM NOT AWARE OF ANY GROUNDS THAT WOULD DISQUALIFY ME FROM ACTING AS A PRELIMINARY HEARING OFFICER			<input type="checkbox"/>	<input type="checkbox"/>
23. I RECOMMEND:				
a. TRIAL BY: <input type="checkbox"/> SUMMARY <input type="checkbox"/> SPECIAL <input type="checkbox"/> GENERAL COURT-MARTIAL				
b. <input type="checkbox"/> OTHER (Specify)				
24. REMARKS (Include, as necessary, explanation for any answers above.)				
25a. TYPED NAME OF PRELIMINARY HEARING OFFICER		b. GRADE	c. ORGANIZATION	
d. SIGNATURE OF PRELIMINARY HEARING OFFICER			e. DATE	