**Summary Courts-Martial**

**Frequently Asked Questions\***

**\*And questions that should be asked more frequently, but aren't.**

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**What are the ten most common summary court errors?**

1. Improper referral; i.e., block 14 of the charge sheet does not match the convening order. (See FAQ 3 )

2. Specification fails to state an offense, usually through failure to use model specifications. (See FAQ 7-10)

3. Improper consideration by court of hearsay documents such as police reports or JAG Investigations.(See FAQ 14,15 )

4. Record of trial fails to accurately reflect pleas and findings; usually because it fails to reflect pleas/findings to each of the charges as well as each of the specifications. (See FAQ 29)

5. Record of trial fails to contain a summary of evidence when the accused is convicted despite his plea of not guilty. (See FAQ 29-30)

6. Improper acceptance of guilty plea; usually for failure of the accused to admit all the elements of the offense during the providency inquiry. (See FAQ 16-17 )

7. Officer conducting summary court adjudges an improper sentence; usually by purporting to suspend a portion of the sentence, or by improper forfeitures (failure to express in whole dollars or determining maximum without respect to rank to which the accused is reduced.)

(See FAQ 21-26 )

8. Convening authority takes action prematurely, prior to affording the accused an opportunity to exercise clemency rights per R.C.M. 1105. (See FAQ 33)

9. Premature execution of restriction; i.e., the accused is improperly directed to begin serving restriction even before the convening authority takes action on the case. (See FAQ 27)

10. Failure to forward record for legal review in a timely manner. (See FAQ 35)

**Part I**

**Convening and Referring Courts Martial**

**1. Who is allowed to convene summary courts-martial?**

Only those commanders listed at UCMJ Article 23, Manual of the Judge Advocate General section 120, or holding a specific authorization letter from the Secretary of the Navy can convene summary courts. In general, this means that most summary courts are convened by battalion or squadron commanders or higher. Most company commanders do not have summary court-martial convening authority.

**2. Can an Executive Officer take action on a summary court-martial?**

No. The Executive Officer can not convene the court, refer charges to it, or take post-trial action on the sentence. However, sometimes, in the absence of the officer ordinarily exercising command (i.e., as when the CO is TAD out of the local area) command ***devolves*** to the officer who ordinarily is the Executive Officer. Under such circumstances, the Executive Officer, temporarily, *is* the Commander, and may convene a summary court, refer charges to it, and take action on the sentence. This Officer signs these actions not "by direction" and not "acting," but as "Commanding."

**3. What is referral and why is it so important?**

Referral is the process whereby the convening authority orders certain charges to be tried by a court that has previously been convened. (Thus, the date of the convening order must on or before the date of referral.) Referral is ordinarily accomplished by proper, accurate completion of block 14 of the charge sheet. ***The most common defect in referral of charges is a failure to properly identify, on block 14 of the charge sheet, the convening order to which the charges are referred.***

Improper referral is a jurisdictional error; the court does not have jurisdiction to take any action whatsoever regarding charges that have not been properly referred to it. The entire proceedings are rendered null and void.

**4. How are additional charges referred?**

Additional charges are allegations made after the preferral of the original charges. They are referred to trial much the same way as the original charges. However, regarding additional charges, block 14 of the charge sheet will also contain the following notation "To be tried in conjunction with charges preferred (cite date original charges were preferred)." This notation will be placed after the preprinted words on the charge sheet, DD form 458 "subject to the following instructions."

**5. What kinds of charges are appropriate for referral to a summary court-martial?**

In determining whether to refer charges to a summary court-martial, the prudent commanding officer must weigh the following two general issues:

First, considering the maximum punishment authorized at the summary court, and the facts and circumstances of the individual case, can the accused be appropriately punished if found guilty? Or, put another way, does the summary court forum provide a sufficient range of punishments to appropriately resolve the case?

***Secondly, the commander must ask himself whether the summary court is capable of resolving the practical and legal problems in proceeding through trial.*** Remember that the military rules of evidence and procedure apply, yet the officer conducting the summary court martialis typically not a judge advocate. No military judge presides. The accused does not have a right to detailed military defense counsel. The summary court is, therefore, generally more suitable for resolving simple charges, such as disrespects, unauthorized absences, and simple assaults, where the trial evidence is likely to consist solely of witnesses to the event. On the other hand, the wrongful use of an illegal narcotic, based on a positive urinalysis, is an example of an offense that involves multiple, complex evidentiary issues that the summary court is not equipped to deal with properly. Unless there is a prior pretrial agreement wherein the accused agrees to plead guilty to such an offense, it should not be referred to trial by summary court. The likelihood of reversible error in trying a contested urinalysis case at a summary court martial is near one hundred percent.

**6. Who is authorized to conduct the summary court-martial?**

The officer conducting the summary court-martial **must** be a commissioned officer (i.e., CWO2 or higher), on active duty in the same armed force as the accused.

In addition, the Manual for Courts-Martial, an Executive Order of the President of the United States, strongly encourages commanders to ensure that the officer conducting the court is in the grade 03 or above. A court will not be overturned for failure to heed this advice, although more experienced officers are far less likely to make technical mistakes and may have more seasoned judgement.

**Part II**

**Charging**

The following sample charges and specifications will be used to illustrate many of the points in Part II FAQs.

Charge I: Violation of UCMJ Article 86

Specification 1: In that Pvt Jack J. Jones, U.S. Marine Corps, 9th Battalion 23d Marine Regiment, 5th Marine Division, did, on or about 1 January 1999, without authority, absent himself from his unit, 9th Battalion, 23d Marine Regiment, 5th Marine Division, located at Camp Lejeune, North Carolina, and did remain so absent until on or about 5 March 1999.

Specification 2: In that Private Jack J. Jones, U. S. Marine Corps, 9th Battalion, 23d Marine Regiment, 5th Marine Division, did, on or about 10 March 1999, without authority, absent himself from his unit, 9th Battalion, 23d Marine Regiment, 5th Marine Division, and did remain so absent until he was apprehended on or about 10 November 1999.

Charge II: Violation of UCMJ Article 121

Specification 1: In that Private Jack J. Jones, U.S. Marine Corps, 9th Battalion, 23d Marine Regiment, 5th Marine Division, did, on board Marine Corps Base, Camp Lejeune, North Carolina, between on or about 5 March 1999 and on or about 10 March 1999, wrongfully appropriate a Navy Federal Credit Union automatic teller machine card, of some value, the property of Sergeant Major I.M. Hoppingmad.

Specification 2: In that Private Jack J. Jones, U.S. Marine Corps, 9th Battalion, 23d Marine Regiment, 5th Marine Division, did, in Jacksonville, North Carolina, on or about 10 March 1999, steal U.S. currency of a value of about seven hundred dollars ($700.00), the property of the Navy Federal Credit Union.

Additional Charge: Violation of UCMJ Article 134

Specification: In that Private Jack J. Jones, U.S. Marine Corps, 9th Battalion, 23d Marine Regiment, 5th Marine Division, did, at or near Los Angeles, California, on or about 29 April 2000, with intent to defraud, wrongfully pretend to the American Telephone and Telegraph Company that he was an authorized user of the long distance telephone card number of Sergeant Major I. M. Hoppingmad, U.S. Marine Corps, and by means thereof did wrongfully obtain long distance telephone services, of a value of about five hundred thirty one dollars and sixty two cents ($531.62).

**7. Are the charging requirements for nonjudicial punishment (NJP) different from the requirements for summary court-martial?**

**Yes!** Both the procedural requirements and requirements as to content of the specification are far more rigorous for summary courts-martial than for NJP. NJP only requires a very general statement of the offense alleged. The SCM charge requires proper preferral, referral, and service on the accused. As to content, the SCM specification shall be "a plain, concise, and definite statement of the essential facts constituting the offense charged***. A specification is*** ***sufficient if it alleges every element of the charged offense expressly or by necessary implication***." [R.C.M. 307(c) (3)]

Part IV of the Manual for Courts-Martial contains an explanation of each of the punitive Articles and sample specifications to use in alleging them. While no particular format is required, it is prudent to use the model specifications provided in the Manual. Commands that fail to do so run a substantial risk that findings of guilty to its specifications will be overturned upon legal review, even if the accused pled guilty.

**8. How can I determine whether a specification is properly drafted?**

The specification must be "a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication."[R.C.M. 307(c )(3)] Failure to allege each of the elements will result in any finding of guilty to that specification being overturned on review. For example, the failure to allege that a staff noncommissioned officer was acting in the execution of his duties at the time of the disrespect, or that the accused knew of the victim's rank at the time of the disrespect may defeat a conviction under UCMJ 91(b)(3).

By carefully using the model specifications provided at Part IV of the Manual for Courts-Martial, you can ensure that the specification properly alleges an offense and does not omit any essential element. Applying the facts of your case to fit the model specification is generally a straightforward process. However, some violations are inherently more complex to charge than others. For example, specifications alleging a conspiracy or an attempt to commit a crime tend to be more complex. In such instances, you may want to consult a judge advocate.

Remember, even a specification that is legally flawless will still pose a problem if it does not fit the facts of your case. Only by reviewing the evidence and understanding the definitions of the pertinent punitive article (provided at Part IV of the Manual) can you determine whether the ***right*** offense is alleged; i.e., the facts must match up with the specification alleged.

**9. What is preferral and how is it accomplished?**

Preferral is the process whereby a person on active duty in the U.S. Armed Forces swears in front of an officer authorized to administer oaths that he/she either has personal knowledge of the allegation or has investigated them and believes that they are true. The person who takes this oath is called the accuser, and signs the front of the charge sheet at block 11. The person who administers the oath signs block 11 at the bottom of the front of the charge sheet.

**10. What are charges and specifications and how are they listed on a charge sheet?**

The charge is nothing more than an allegation that the accused violated some article of the Uniform Code of Military Justice. There are three charges in the above example, charge I, alleging a violation of Article 86, charge II, alleging a violation of Article 121, and the additional charge, alleging a violation of Article 134.

As you can see from the example above, the specifications allege the manner in which the accused violated the UCMJ. For clarity, charges are listed in numerical order, lowest number to highest number, of the Article of the UCMJ alleged. Thus, in the example above, the charge alleging a violation of UCMJ Article 86 is listed before the charge alleging a violation of UCMJ Article 121. The specifications under a charge are listed in chronological order. Thus, specification 1of charge I, alleging unauthorized absence between 1 January 1999 and 5 March 1999, is listed before the specification alleging unauthorized absence from 10 March 1999 to 10 November 1999.

**11. What is an additional charge and how is it listed on the charge sheet?**

An additional charge is a suspected violation of the UCMJ charged after the preferral of the original charges. The additional charge(s) and specification(s) will be preferred and referred on a separate charge sheet than the original charges. In the example at the beginning of this chapter, the accused was originally charged with two specifications of unauthorized absence, and, under Article 121, wrongful appropriation of an ATM card and theft of funds from NFCU. Later, the command learned that the accused also used Sgt Maj Hoppingmad's AT&T phone card to make unauthorized long distance phone calls. This violation of Article 134 is placed on a separate charge sheet and is preferred after the original charges.

**Part III**

**Trial Proceedings**

**12.** **I have just been appointed as the summary court-martial officer. How should I prepare for the case?**

Examination of Charge Sheet and Allied Papers. The officer conducting the summary court-martial is charged with very significant pretrial duties. The failure to accomplish these duties often results in an officer that is ill prepared to perform trial duties and an improper trial. The officer must examine the charge sheet and the allied papers; i.e., the convening order, police reports, and other documentary evidence relating to the allegation. The officer should ensure that the charge sheet is properly preferred, referred, and served. He should ensure that the specifications state offenses and that they appear to match the factual information contained in the police report. If there is a pretrial agreement, the officer should review it.

Procuring Witnesses. The officer should examine the police report, the accused's service record, pertinent records, and documentary evidence, to determine what witnesses have pertinent testimony to provide. The officer should be prepared to procure those witnesses for trial.

Review of Offenses The summary court martial officer should read the legal descriptions of the offenses charged, paying careful attention to the elements as listed at Part IV of the Manual for Courts-Martial

Obtain Trial Guides and Administrative Documents. The summary court martial officer should obtain and become familiar with typical documents used to conduct and record the proceedings. Appendix 9 contains a guide, or script to follow in conducting the hearing. Appendix 15is asample trial report. Questions to be asked in the providency inquiry can usually be obtained through the Legal Service Support Section (LSSS), or through the office of the Staff Judge Advocate (SJA).

Report Irregularities. The summary court-martial should report to the convening authority any irregularities or extraordinary costs associated with the trial. For example, if the specification fails to state an offense, or doesn't seem to match the factual data, or is improperly referred, these facts should be reported to the convening authority. If the procurement of a necessary witness requires expenditure of government funds for witness travel and lodging, the convening authority should be so advised.

Ask Questions. The military rules of evidence and procedure apply to summary courts. The U.S. Constitution, Manual of the Judge Advocate General, Uniform Code of Military Justice, and the cases interpreting all of the aforementioned apply as well. Questions frequently do, arise. Ask them prior to trial. You jurisdictional trial counsel, review officer, or SJA should be able to assist. The question that is not asked is likely to result in significant legal error.

**13.** **What lawyer rights does the accused have at a summary court martial?**

*Military Counsel.* The accused does **not** have the right to have a military lawyer assigned, or detailed, to his summary court martial. However, the detailing authority may, in his/her discretion, make a military defense counsel available to represent the accused. (The detailing authority is typically the senior defense counsel in the area. It has been historically very unlikely that the detailing authority chooses to assign a defense counsel to a summary court, since their time is consumed by representing defendants at administrative discharge hearings, Boards of Inquiry, and special and general courts- martial, at which defense counsel are required by law.)

*Civilian Counsel*. The accused may obtain qualified civilian counsel at his own expense, and such counsel "shall be permitted to represent the accused at the summary court-martial if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it." R.C.M. 1301(e) The determination of the reasonableness of such delay and the existence of a military exigency are made by the court, and is subject to legal review on appeal.

**14. Do the military rules of evidence and procedure apply to a summary court-martial?**

Yes. The military rules of evidence, MCM Part III, apply to summary courts [ R.C.M. 1304(B)(2)(e) ]. Military rule of procedure, MCM Part II, also apply to summary courts, unless exempted. [ R.C.M. 101(A) ]

The rules for trial by court-martial are vastly different and generally far more stringent than rules for nonjudicial punishment, competency review boards, Boards of Inquiry, or administrative discharge hearings. The accused has far greater rights to the personal attendance of witnesses on his behalf, particularly in the determination of guilty/innocence. Documents may be considered only when doing so complies with the military rules of evidence. Witnesses must be personally present at trial to testify; written statements and law enforcement agency reports are generally inadmissible.

**15. Can I consider police reports, JAG investigations, command investigations and written statements of witnesses in determining whether the accused is guilty?**

***No. In most cases, you need to hear from the witnesses themselves***. The person who made the observation must be present to testify at trial. It is improper to rely on a written statement rather than on live testimony. The accused has a right under the 6th Amendment to the U.S. Constitution to confront and cross-examine witnesses against him. To admit a statement into evidence confounds these Constitutional rights. Furthermore, the law considers live testimony to be more reliable than second hand documents. Evidence presented to the Court by some means other than the testimony of the person who actually saw or heard the events, is hearsay. Hearsay, albeit with several exceptions, is considered unreliable and inadmissible at trial.

The admissions and confessions of the accused may be related to the court by witnesses who heard them (or the officer who took them, in the case of a written statement). Such statements of the accused are considered to be non-hearsay. (Under some circumstances, the person questioning the accused may be required to advise the accused of his rights under UCMJ Article 31, including the accused's right to remain silent and to have an attorney present during questioning. Statements taken in violation of UCMJ Article 31 should not be considered, particularly if the accused objects thereto at trial.)

Judge Advocates learn evidence and procedure through Law School, the Naval Justice School, trial experience and continuing legal education. It is simply impossible to fully apprise officers concerning the intricacies of procedural and evidentiary rules in a web page. Summary court-martial officers may be able to resolve evidentiary quandaries by turning to the appropriately titled rule in the Manual for Court-Martial. However, many, if not most, evidentiary/procedural issues can only be appropriately resolved through the assistance of a judge advocate.

**16. What is a providency inquiry and how do I conduct one?**

When the accused pleads guilty, the court must question him to ensure that there is a factual basis for the plea and that the accused is willing to admit that he really is guilty of each element of the offense [R.C.M. 1304(b)(2)(D)(ii) and R.C.M. 910] Consider the case of the accused who pleads guilty to larceny of LCpl X's $150 stereo speakers. During the providence inquiry, the Court should ask the accused such questions as whether he knew the property belonged to LCpl X, whether he intended to keep it, and whether he knows and is willing to admit that the speakers have a value of $150.

The Court should carefully inquire into circumstances brought up by the accused that might, under some circumstances, suggest the accused is not guilty. For example, if the accused pleads guilty to disrespect to a commissioned officer, but says that he was drunk, the Court should inquire whether the accused realized the victim's rank, notwithstanding the intoxication.

Sample providency inquiry questions are available through the unit legal officer or through the review section of the Legal Service Support Section (LSSS).

The summary court officer should not merely ask the right questions, but must pay careful attention to the answers. For example, if the accused pleads guilty to wrongful use of cocaine, but says during the providency inquiry that he had no idea how the cocaine got into his body, the guilty plea can not be accepted unless the discrepancy can be resolved. This accused has failed to admit to the ***knowing*** ingestion of cocaine.

**17. What happens if the accused fails to admit to all the elements of the offense during the providency inquiry?**

Sometimes, the accused pleads guilty, but during the providency inquiry either does not admit to all the elements of the offense or raises defenses. For example, an accused pleading guilty to larceny, who states that he always intended to return the property to its owner, has not pled guilty providently. Intent to permanently deprive the owner is an element of the offense of larceny. Or the accused who pleads guilty to unauthorized absence, but asserts that the absence was caused by unforeseeable circumstances beyond his control (e.g., his new car broke down on the way to work) has not providently pled guilty.

In such cases, the court can not accept the accused's guilty plea and should enter a not guilty plea on the accused's behalf. The court is not required to find the accused not guilty; rather, the issue of guilt or innocence must be resolved on the basis of evidence rather than on the accused's plea. (As a practical matter, the court, with the concurrence of the convening authority, may sometimes find the accused not guilty, or guilty of a lesser included offense, if there is an improvident plea. For example, let's say the accused is charged with twelve specifications of unauthorized absence. He is unable to plead providently to one or two of them. Since these two specifications are unlikely to have any effect on the sentence-you've already got him on ten UAs- it may be prudent to dispense with onerous and time consuming trial proceedings and simply withdraw the two specifications or find the accused not guilty thereon.)

In some cases, the accused agrees to plead guilty at a summary court-martial pursuant to ***a pretrial agreement*** with the convening authority. In most cases, the accused's failure to providently plead guilty, as he agreed to do, voids the agreement and the convening authority is no longer bound thereby. For example, let us say that the PTA requires the accused to plead guilty to three specifications of cocaine use in exchange for the commander's agreement to refer the charges to a summary vice a special court-martial. If the accused fails to providently plead guilty at the summary court-martial, the court should stop the proceedings and advise the convening authority, who may, at his discretion, refer the charges to a special court-martial.

**18. What is the last point at which the accused can object to trial by Court Martial?**

The summary court martial officer should conduct a preliminary hearing advising the accused of his rights, the nature of the charges, and other information as indicated at Rule for Court Martial 1304(b) (1). The court can ensure proper advice by reading the script at appendix 9 of the Manual for Court-Martial. After completing the preliminary proceeding, the Court shall give the accused a reasonable period of time to determine whether to accept trial by summary court-martial. If the accused consents to trial by summary court-martial, he may change his mind and object thereto at any time prior to arraignment.

Rule for Court-Martial 1303 provides that "No person who objects thereto ***before arraignment*** may be tried by summary court-martial, even if that person also refused punishment under Article 15 and demanded trial by court-martial for the same offenses." (Emphasis added)

Arraignment is the taking of the accused's pleas to the charges and specifications.

**19. What witnesses is the accused entitled to?**

*On the merits*. In the determination of guilt or innocence, the accused can request the presence of witnesses on his behalf. Particularly, but not exclusively, if the witness requested does not reside in the local area, the Court should require that the accused identify the requested witness' name, address, and phone number. Furthermore, the accused should provide a summary of what he expects that witness to say, and why he thinks the witness will say those things (E.g., based on a written statement provided by the witness, or a telephone conversation). If the Court concludes that the testimony is relevant and necessary that witness must be produced, or else the court-martial can not reach its conclusion, *regardless of the expense or difficulty in procuring the witness*. (If there are multiple charges and specifications, the court may proceed on those charges and specifications concerning which the witness has no relevance.) R.C.M. 703(b).

*In sentencing*. In determining an appropriate sentence, the accused's right to the production of requested witnesses is far more restricted than on the issue of guilt or innocence. The Court must determine whether the significant of the personal appearance of the witness to the determination of an appropriate sentence , when balanced against the practical difficulties of producing the witness, favors production of the witness. In making this determination, the Court should consider a number of factors, including, but not necessarily limited to, the following: cost of producing the witness, timeliness of the witness request, potential delay involved in producing the witness, the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training. R.C.M. 1001(e)

**20. What evidence can be considered in determining an appropriate sentence?**

In determining an appropriate sentence, the Court may consider:

Prosecution Evidence:

Service data from the heading of the charge sheet; e.g., date of enlistment, date of birth, prior service;

Personal data relating to the accused's and the character of the accused's prior service, as reflected in personnel record of the accused; e.g., properly recorded page 11 or 12 entries;

Evidence of prior conviction, military or civilian, where documented by legally admissible evidence;

Evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty; e.g., harm to the victim or to unit readiness;

Evidence of rehabilitative potential, typically from written statements or testimony from the accused's supervisors. The witness may express an opinion as to rehabilitative potential, or lack thereof.

Defense Evidence:

Evidence in extenuation; matters surrounding the offense which explain the circumstances, but do not amount to a defense; e.g., the accused sees his wife insulted publicly, and therefor commits an assault on her tormentor.

Evidence in mitigation; i.e., evidence concerning the accused's dedication to duty, efficient performance, bravery, or other trait that is desirable in a service member.

The accused may make an oral or written statement, sworn or unsworn, or may remain silent. If the accused chooses to remain silent, or to make an oral or written unsworn statement, the accused can not be cross-examined thereon.

The Court may, and probably should, be very liberal in allowing the accused to submit documents on his behalf during sentencing. The Court may relax the rules of evidence in order to receive documents in extenuation and mitigation; e.g., character statements from supervisors on behalf of the accused. These rules should be relaxed to the same degree to allow the prosecution to rebut the accused's extenuation and mitigation evidence. R.C.M. 1001(c).

*The Court should not admit or consider any recommendations for a particular sentence. Thus, testimony by a witness or a written statement asking the Court to reduce the accused in rank, or to refrain from reducing the accused in rank, is inappropriate.*

**Part IV**

**Punishments**

**21.** **What is the maximum punishment authorized at a summary court-martial?**

*For accused persons in pay grades E-4 and below*, the court may adjudge thirty days confinement, reduction to E-1, and forfeiture of 2/3 pay per month for a period of one month. Any sentence of forfeitures must be expressed in whole dollar figures, with the maximum authorized based on the rank to which the accused is reduced, if reduction is also adjudged.

In lieu of confinement, the court may adjudge up to a maximum of forty-five days hard labor without confinement and sixty days restriction to specified limits. (See also FAQ regarding the combination of restraint type punishments)

*For accused persons in the rank of E5 and above*, the court may adjudge reduction to the next lower pay grade only, and forfeiture of 2/3 pay per month for one month. As with more junior enlisted accused's, any sentence to forfeitures must be expressed in whole dollar figures, with the maximum authorized based on the rank to which the accused is reduced, if reduction is also adjudged.

**22.** **What are the rules concerning combinations of restraint type punishments such as confinement, hard labor without confinement (a.k.a. extra duties), and restriction?**

The maximum authorized length of restriction is sixty (60) days. The maximum authorized length of hard labor without confinement is forty-five days. If the sentence of the court does NOT also include confinement, the accused may be sentenced to ***both*** sixty days restriction and forty-five days hard labor without confinement, or any lesser period of such punishments.

However, if any amount of confinement is adjudged, the maximum punishment can not exceed thirty days confinement, given the following table of equivalent punishments:

1day of confinement equals 1.5 days of hard labor without confinement or 2.0 days of restriction.

Example: The court sentences the accused to 20 days confinement.

Therefore, the 10 confinement units remaining may be split among restriction and HL w/o confinement. Thus, the accused may be sentenced to 20 days restriction (10X 2) OR 15 days HL w/o confinement (10 X 1.5) but not both. If the court wants to sentence the accused to both HL w/o confinement and restriction, any combination may be made, so long as it does not exceed ten confinement units, e.g., 8 days restriction (using up four of the ten confinement units) and 9 days HL w/o confinement (using up the remaining six confinement units).

**23. What are forfeitures and what are the rules pertaining to them?**

A sentence of forfeitures reduces the accused's pay as it comes due. For example, a sentence to forfeit $400 per month for a period of one month results in a diminution of the accused pay for the next month by $400.

The maximum authorized forfeiture is an amount equal to two thirds of the accused's base pay for a period of one month. The sentence of forfeitures must be expressed in whole dollar figures rather than fractional shares.

Furthermore, the maximum authorized forfeiture is computed based on the rank to which the accused is reduced (even if the reduction is later suspended) if a reduction is also a part of the Court's sentence.

Unless deferred by the convening authority, at the request of the accused, forfeitures are executed when the convening authority takes action on the case or fourteen days after the date the sentence is announced, whichever comes first.

**24. What is a fine? Can a summary court sentence include a fine?**

A sentence to a fine directs the accused to pay the amount of the fine immediately. Unlike forfeitures, a fine is not an authorized punishment at a summary court-martial.

**25. What is correctional custody? Can a summary court sentence**

**include correctional custody?**

A correctional custody facility provides a boot camp type environment where the accused can be re-taught such matters as grooming, military courtesy, and self- discipline. Assignment to such a facility can be directed as part of Article 15, nonjudicial punishment. However, it is not an authorized punishment at a summary court-martial.

**26. Can a summary court-martial suspend any punishments?**

***The officer conducting the summary court martial has no authority to suspend any punishment. The Court's sentence can not properly suspend any punishments.***

The officer conducting the summary court-martial can only ***recommend*** that the convening authority suspend a portion of the sentence, a recommendation that the convening authority is obligated to consider, but not necessarily agree with. The Court may indicate its recommendation at block 9 of form DD 2329 or in a separate letter to the convening authority.

In taking action on the case, the convening authority may suspend all, or any portion of the unexecuted sentence

**27. When does the accused actually begin to serve the sentence of the court?**

*Confinement.* A sentence to confinement is executed immediately after announced by the Court. Unless properly deferred, each day following the date the sentence is announced will be credited against the sentence to confinement-regardless of whether the accused is actually in jail.

*Forfeitures/Reduction in Grade*. Those portions of the sentence extending to forfeitures or reduction in grade are effective at the time the convening authority takes action on the case, or fourteen days after sentence is announced, whichever is earlier.

*Restriction, Hard labor without confinement, Reprimand*. These punishments may be served only after the convening authority takes action on the case.

1. **Can a sentence to confinement be delayed? How?**

In some cases, the convening authority may want the accused to serve the sentence, but may desire that the sentence be delayed, or deferred. For example, the convening authority may desire that confinement be deferred to allow the accused to attend the birth of a child, or to take care of some emergency.

The convening authority can defer the execution of a sentence, but only at the request of the accused. The deferment request, as well as the response thereto, should be in writing and included in the record of trial. The convening authority action should, at block 13 of DD Form 2329, should also contain language concerning the consideration, granting, or denial of a deferment request.

**Part V**

**Record Keeping**

**29. What are the basic record keeping requirements?**

The record of trial by summary court-martial should include several critical documents, including

a. the charge sheet and any additional charge sheets,

b. the convening order and any modifications thereto,

c. the record of trial by summary court-martial, form DD 2329\*

d. any deferment request from of the accused and the convening

authority response thereto,

e. any sentencing recommendation of the court,

1. any matters submitted by the accused in clemency for

consideration by the convening authority,

1. any waived by the accused of his right to submit a clemency

petition to the convening authority,

h. a record of the providency inquiry,

1. any pertinent statements, investigations, police reports, regardless

of whether admitted into evidence,

1. ***if the accused is found guilty of any offense, despite his plea to the contrary, a summary of the testimony of the witnesses for the***

***government and for the defense, as well as copies of any***

***documentary evidence considered.***

1. At objections raised at trial by the accused, and the Court's responses thereto,

**\*Pleas and findings to charges and specifications must be recorded on the back of DD 2329.**

**30. Any additional record keeping required when the accused is convicted contrary to his pleas?**

Yes. If the accused is convicted of any offense to which he pled not guilty, the record should include a summary of the testimony of all the witnesses (including the accused, if the accused chooses to testify) who testified concerning that offense. The record should also contain the original or copies of all documents considered in determining the accused's guilt. This evidence will greatly assist the officer conducting legal review under UCMJ Article 64a and R.C.M. 1112 to provide meaningful review, and to assess any post trial assertions of error asserted by the accused. Additionally, such evidence will be extremely helpful in determining an appropriate response to any appeal the accused may make to the Judge Advocate General.

**31. Should I tape record the proceedings?**

Tape recording of proceedings is neither required nor recommended, although it is not prohibited. Under no circumstances should the Court surreptitiously record the proceedings.

**32. Where is the record of trial maintained?**

For summary courts tried at Camp Lejeune, the original record of trial is maintained by the Review Office of the Legal Service Support Section, 2d Force Service Support Group. After two years, these records are sent to the National Military Personnel Records Center, St. Louis, Missouri.

The accused's unit will enter the summary court-martial conviction on page 13 of the accused's service record book. Additionally, a copy of the judge advocate review is provided to both the accused and the accused's unit. The unit may, but is not required to, maintain a copy of the entire record of trial.

**Part V**

**Convening Authority Action, Review, and Appeal**

**33. What is a convening authority action and when can it be taken?**

After the conclusion of the court martial proceedings, including the Court's announcement of the sentence, the officer who convened the court ***may*** act on the findings and ***must*** act on the sentence. In general, the convening authority action expresses the commander's desire that a sentence be approved/disapproved and which of the approved portions of the sentence should be executed/suspended. Many of the portions of the sentence (e.g., forfeitures, restriction, reduction) do not become effective; i.e., are not served by the accused, until the convening authority takes this action.

***The convening authority can not take action on the sentence until either the accused has, in writing, waived his right to submit a post-trial clemency request or the time for making such has expired.*** R.C.M. 1105(c) provides that the accused "may submit matters [in clemency] under this rule ***within 7 days after the sentence is announced.*** If the accused shows that additional time is required for the accused to submit such comments, the convening authority may, for good cause, extend the period in which comments may be submitted for up to 20 additional days." (Emphasis added)

Thus, if sentence is announced on 1 January 2000, and the accused neither waived his rights under R.C.M. 1105 nor is granted additional time, the convening authority can not take action until 9 January 2000. This timing gives the accused a full seven days after trial within which to submit his clemency request.

1. **What does the convening authority action consist of?**

Sample Convening Authority Action 1 (A typical action, approving the entire sentence-which includes confinement- and ordering it executed.)

The sentence is approved and ordered executed. The Camp Lejeune base brig is designated as the place of confinement. The record is forwarded to the judge advocate assigned to review under UCMJ Article 64a.

Sample convening authority action 2. (This sample is used to show a variety of elements in an action, including disapproval of some of the findings, approval of the entire sentence, suspension, clemency request, pretrial confinement. Most convening authority actions will be shorter and less complex.)

The findings are approved, except that the findings of guilty to charges II and III and the specifications thereunder are disapproved. The sentence is approved and ordered executed, but the execution of those portions of the sentence extending to confinement in excess of fifteen days and forfeiture of $500 pay per month for one month are suspended for a period of six months from the date of this action, at which time, unless sooner vacated, the suspended portions will be remitted without further action. I have considered matters submitted by the accused pursuant to R.C.M. 1105 prior to taking action in this case. The accused's pretrial confinement from 1-5 January 2000 (totaling 5 days), is credited against then service of the sentence to confinement. The Camp Lejeune base brig is designated as the place of confinement. The record of trial is forwarded to the judge advocate assigned to review under UCMJ Article 64a.

*Action on findings*. The convening authority in his/her discretion, may disapprove any finding of guilty. This will most typically occur when the judge advocate conducting review under UCMJ Article 64a and R.C.M. 1112 concludes that one or more of the specifications is legally defective in some way. In such a case, the convening authority might very well disapprove any findings of guilty to the defective specification(s). The convening authority may not find the accused guilty of any specification to which the accused was found not guilty at trial. In most actions, the convening authority will only comment on the sentence. The failure to comment on the findings indicates an acceptance thereof.

*Action on the sentence.*

*Approval/Disapproval.* The convening authority must determine what portion, if any, of the sentence should be approved. Disapproval of the sentence (or failure to approve the sentence), indicates that the convening authority does not deem the disapproved portion of the sentence to be an appropriate punishment. Disapproved portions of a sentence can not be suspended or vacated.

*Suspension/Execution*. The convening authority must determine what portion of the sentence should be executed immediately, and what portion suspended. If suspended, the action should indicate the length of the suspension; e.g., "The sentence of confinement for one month is suspended for a period of six months from the date of this action, at which time, unless sooner vacated, the suspended portion shall be remitted without further action.

*Sentence Credit*. If the accused has been confined or restricted prior to trial, the convening authority must indicate proper sentence credit. Each day of pretrial confinement must be credited day for day against service of the approved sentence of the Court. Each day of pretrial confinement should be credited as 2 days of restriction or 1.5 days of hard labor without confinement if the sentence contains no confinement or confinement less than the number of days in pretrial confinement. Pretrial confinement must be credited against the sentence of the Court to the extent necessary to ensure that the accused is not compelled to serve a sentence greater than that authorized. (See FAQ 21-22 regarding the maximum authorized punishment.)

Conversely, pretrial restriction should be credited day for day against a sentence of restriction. If confinement, but no restriction is adjudged, each two days of pretrial restriction should be credited as one day of confinement against the sentence to confinement. Such sentence credit should be provided to ensure that the accused is not compelled to serve a sentence greater than the maximum authorized.

*Post-Trial Clemency Request*. The action should indicate that the convening authority has considered any post-trial clemency or deferment requests of the accused

*Pretrial Restraint*. The action should indicate any periods of pretrial restriction or confinement and should credit the accused with such pretrial confinement/restriction against the accused's sentence to confinement. (Crediting the accused according to the following formula: 1 day of confinement equals 2 days of restriction or 1.5 days of hard labor without confinement.)

*Place of Confinement*. The Action should indicate the place in which the accused is to be confined, if the Court's sentence, as approved by the convening authority, included confinement.

*Forwarding the Record.* The Action should indicate where the record is to go next; typically to the judge advocate/SJA assigned to review under UCMJ Article 64a/R.C.M. 1112.

*Rehearing.* When there is an error in trial proceedings that substantially affects the findings or sentence, the convening authority may direct a rehearing. The convening authority may desire to consult a judge advocate prior to directing such rehearing. R.C.M. 1107(e).

1. **What legal review is required after the Convening Authority takes**

**action?**

After the convening authority takes action, the record of trial must be forwarded in a timely manner for legally required review by a judge advocate. This review will be conducted by the Staff Judge Advocate or his designee, or by the review officer assigned to the installation Legal Service Support Section (LSSS). At Camp Lejeune, North Carolina, review is conducted under the direction of the Chief Review Officer, LSSS. The record of trial in a summary court is not voluminous or onerous to create. The legal review judge

The judge advocate conducting this review must state, in writing, conclusion as to whether the court had jurisdiction over the accused and the offenses to which there were findings of guilty, whether the specifications to which there were findings of guilty stated offenses under the UCMJ, and whether the sentence was legal. Furthermore, the judge advocate must respond to any allegations of error asserted by the accused. R.C.M. 1112

**36. What happens if the Judge Advocate conducting review**

**determines that there is legal error?**

If the judge advocate conducting review determines that there is legal error of such significance that it must be corrected, then the record will be forwarded to the Commanding General with recommendations for appropriate corrective action and an opinion as to whether correction is required as a matter of law.

If the Commanding General concludes that corrective action is not required, notwithstanding the judge advocate's opinion, or if the Commanding General fails to take corrective action that is at least as favorable to the accused as that recommended by the judge advocate, then the case must be forwarded for review by the Judge Advocate General. R.C.M. 1112(g)(1)

As a practical matter, the judge advocate conducting review may advise the convening authority of the legal error and need for correction. The convening authority may correct the defect in a supplementary convening authority action.

In some case, the legal error can be cured only by disapproval of the findings and sentence

1. **After the judge advocate completes the first legal review, what**

**other appeals are available?**

If the judge advocate conducting review concludes that there is legal error requiring correction, but the Commanding General disagrees, or takes corrective action less favorable than that recommended by the judge advocate, the record ***must*** be forwarded for review by the Judge Advocate General.

In addition, the accused may apply for the Judge Advocate General to review his case. Such applications must be made within two years of the date the convening authority approved the sentence. (Additional time may be granted if the accused establishes good cause for failing to file within the established deadline.