

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



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## TABLE OF CONTENTS

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

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(l)(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.

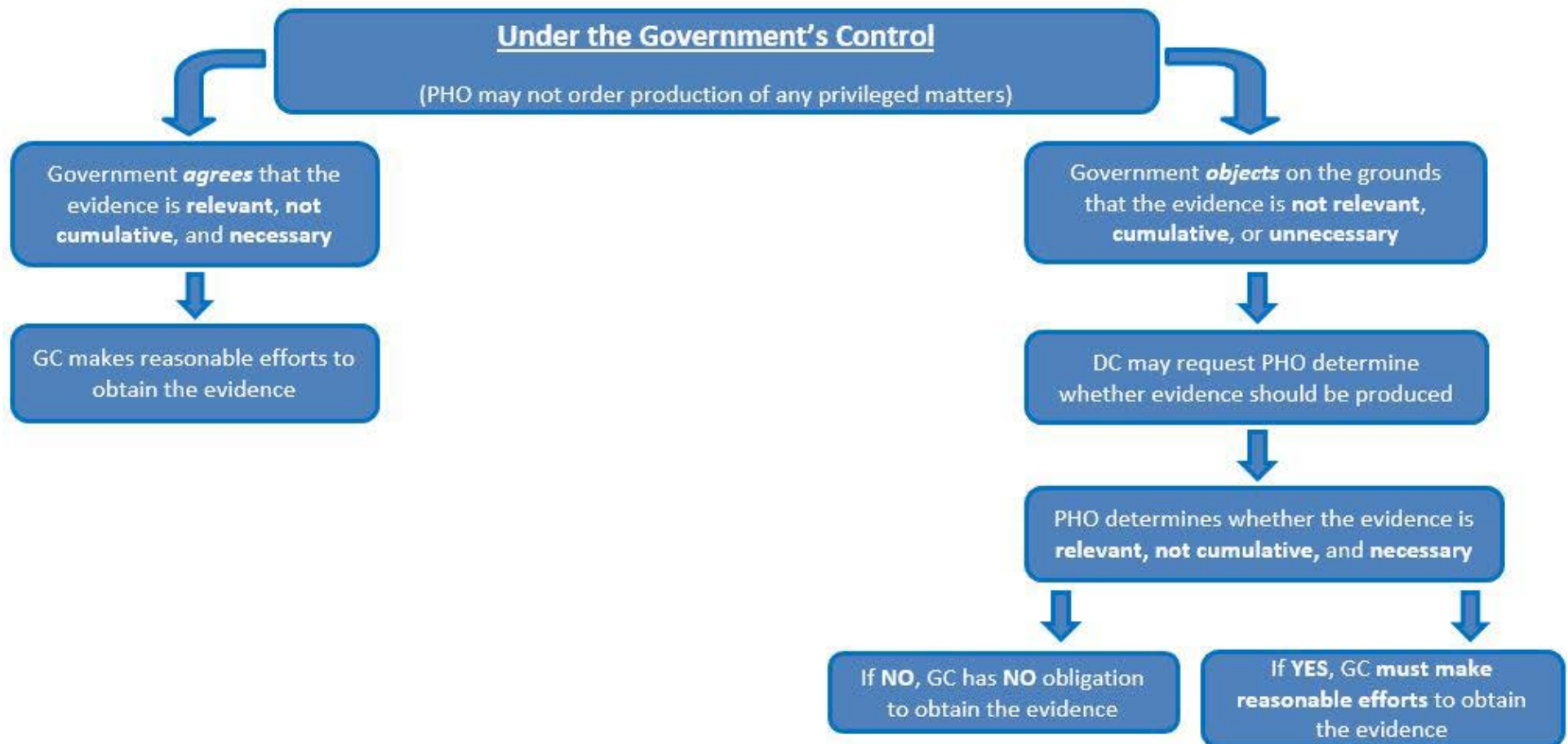
3. Counsel for the government is directed to notify the victim of the alleged offenses of the date change.

P. H. OSLO

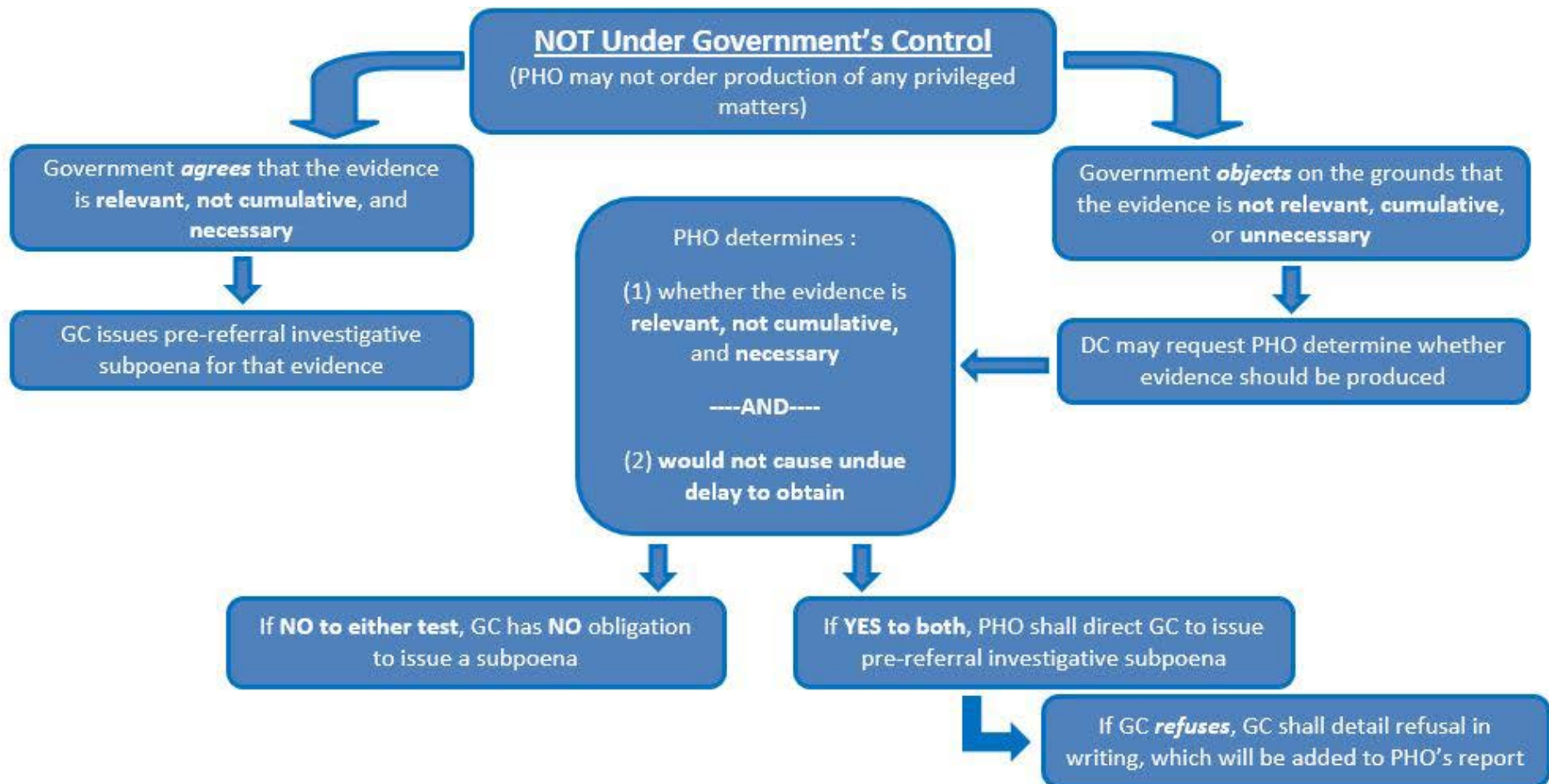
Copy to:  
SJA to CA

Enclosure (3b)

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

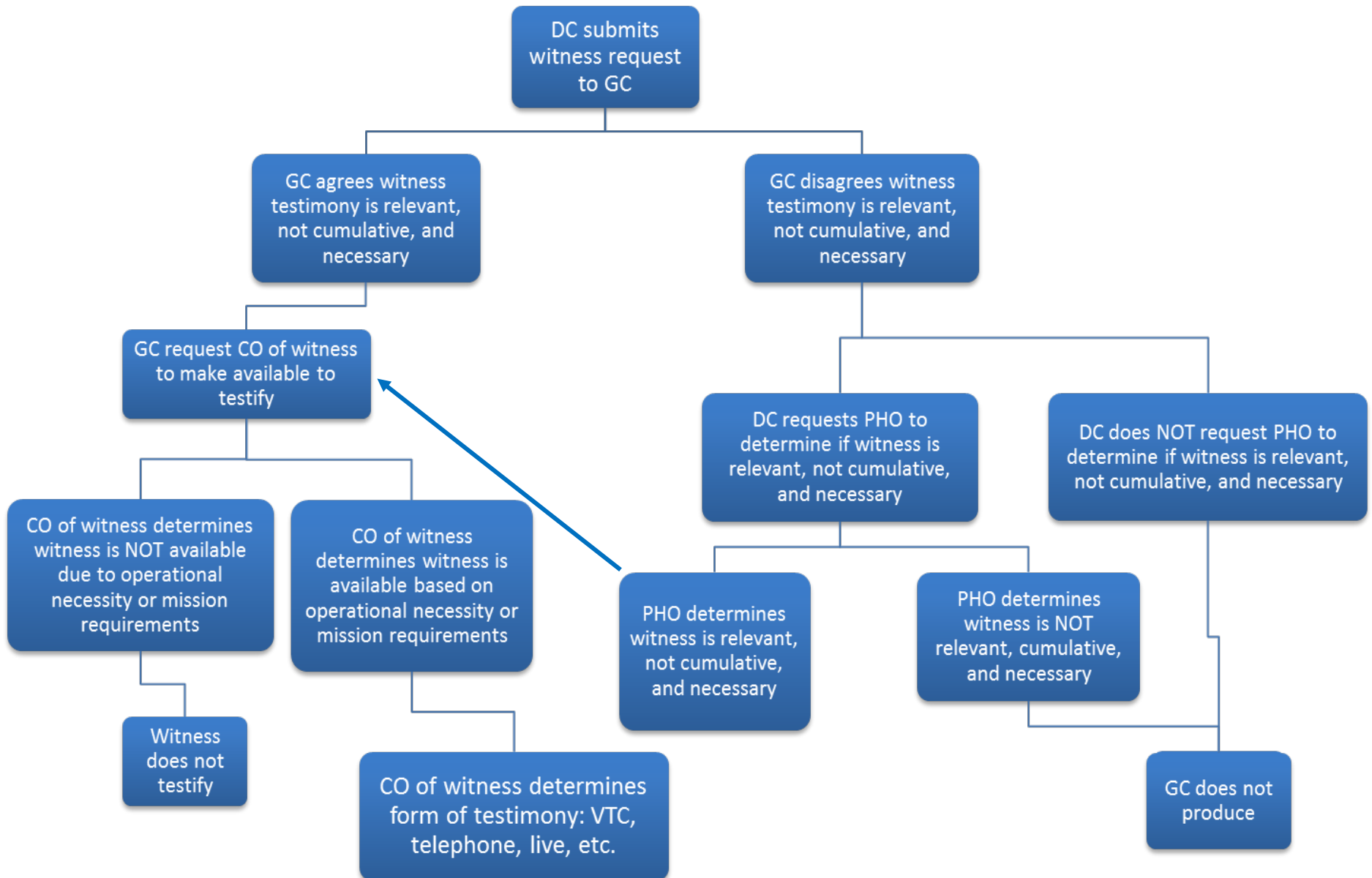


**PRODUCTION OF EVIDENCE NOT UNDER CONTROL OF THE GOVERNMENT**  
**R.C.M. 405(h)(3)(B)**

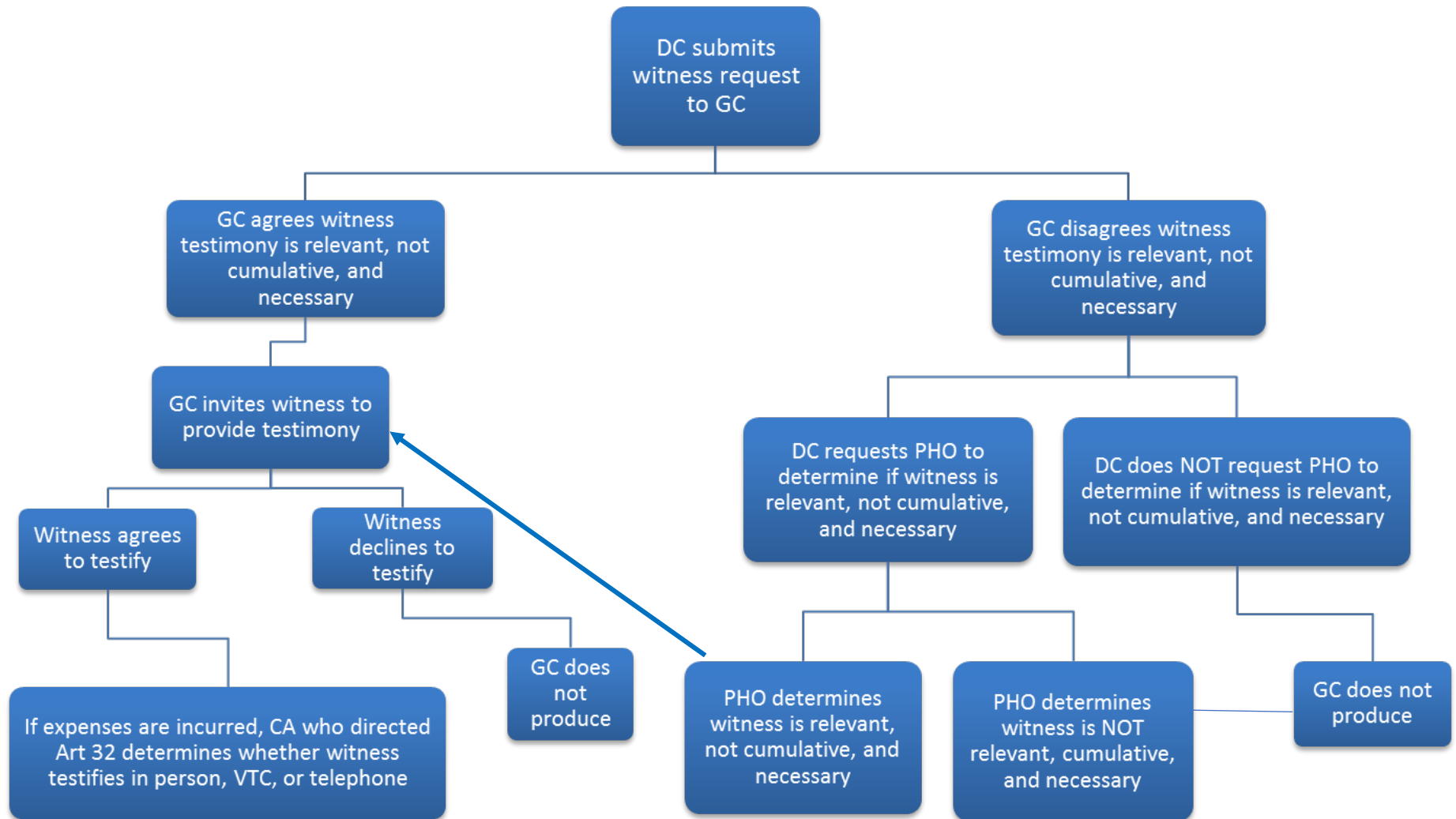




**PRODUCTION OF MILITARY WITNESSES**  
**R.C.M. 405(h)(2)(A)**



**PRODUCTION OF CIVILIAN WITNESSES**  
**R.C.M. 405(h)(2)(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:	<p>(Verifies recording)</p> <p>This preliminary hearing will come to order. This preliminary hearing is convened by <b>(rank and name of CA)</b>, Commanding Officer, <b>(organization)</b> by the appointing order dated <b>(date of letter of appointment)</b>.</p> <p>My name is <b>(rank, name, and service of PHO)</b>. I am a <b>(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)</b>. 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 <b>(date of preferral)</b> in the case of <b>(rank, name, and service of accused)</b>, 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.</p> <p>Present at this hearing are myself <b>(rank, name, and service of PHO)</b>, the detailed preliminary hearing officer; the accused <b>(rank, name, and service of accused)</b>; defense counsel <b>(rank, name, and service of DC, if military; Mrs./Ms./Mr. and name, if civilian)</b>; and counsel for the government <b>(rank, name, and service of GC)</b>;</p> <p>[Present also is <b>(rank, name and service of reporter)</b>, who has been detailed as the reporter for this preliminary hearing].</p> <p>[Present also is <b>(rank, name, and service of translator)</b>, who has been appointed to serve as translator];</p> <p>[Present also is the reported victim in this case, <b>(rank, name, and service of victim; Mrs./Ms./Mr. and name, if civilian)</b> along with his/her counsel <b>(rank, name, and service of VLC/SVC; Mrs./Ms./Mr. and name, if civilian)</b>.]</p> <p>Are you <b>(rank and name of accused)</b>, the accused in this case?</p>
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



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><i>(Rank and name of accused)</i>, 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 align="center"><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.	

PHO:	<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>
------	---

	<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.
<i>PHO can now check off box 10.i of the DD Form 457.</i>	
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:	<i>(Rank and name of GC)</i> , 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 ( <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><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><b>or affirm</b></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><b>so help you God</b></i>)?</p>
<p><i>After every witness, the PHO must determine availability for trial.</i></p>	
PHO:	<p>(<i><b>Rank and/or name of witness</b></i>), 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>(<i><b>Rank and/or name of witness</b></i>), 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, (<i><b>rank and name of DC</b></i>).</p>
<p><i>If the witness is in the military, add the following:</i></p>	
PHO:	<p>(<i><b>Rank and name of witness</b></i>), 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>(<i><b>Rank and name of accused</b></i>), 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>(I/rank and name of accused) (do/do not/does/does not)</i></b> 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>(I will also permit the submission of a closing statement in writing).</i></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:	<b>[Presents closing comments].</b>
PHO:	Counsel for the accused may proceed with a closing comment.
DC:	<b>[Presents closing comments].</b>
<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)				<b>YES</b>
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)				<b>NO</b>
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d)(3), 502(d)(2)				
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: (Check appropriate answer)				
a. THE RIGHT TO BE ADVISED OF THE CHARGES UNDER CONSIDERATION				<b>YES</b>
b. THE IDENTITY OF THE ACCUSER				<b>NO</b>
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31, UCMJ				
d. THE PURPOSE OF THE PRELIMINARY HEARING				
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE (EXCEPT AS DESCRIBED IN R.C.M. 804(c)(2))				
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED THE GOVERNMENT TO PRESENT				
g. THE RIGHT TO CROSS-EXAMINE WITNESSES ON MATTERS RELEVANT TO THE ISSUES FOR DETERMINATION IN R.C.M. 405(a)				
h. THE RIGHT TO PRESENT MATTERS RELEVANT TO THE ISSUES FOR DETERMINATION IN R.C.M. 405(a)				
i. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT RELEVANT TO THE ISSUES FOR DETERMINATION IN R.C.M. 405(a)				
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.)				
b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL				
<b>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".)</b>				

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH:				
NAME <i>(Last, First, MI)</i>	GRADE <i>(If any)</i>	ORGANIZATION/ADDRESS <i>(Whichever is appropriate)</i>	YES	NO
b. THE PRELIMINARY HEARING REPORT REQUIRED BY RCM 405(i) IS ATTACHED				
c. AT THE HEARING, EVIDENCE WAS OFFERED UNDER MILITARY RULES OF EVIDENCE <i>(Check appropriate box(es))</i>		412	513	514
d. PORTIONS OF THE HEARING WERE CLOSED				
e. SEALED MATERIALS ARE INCLUDED IN THIS REPORT				
13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH				
DESCRIPTION OF ITEM	LOCATION OF ORIGINAL <i>(If not attached)</i>			
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED				
14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOTCOMPETENT TO PARTICIPATE IN THE DEFENSE (See R.C.M. 909, 916(k))				
15. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL				
16. AN EXPLANATION OF ANY DELAYS IN THE HEARING IS ATTACHED HERETO				
17. EACH SPECIFICATION ALLEGES AN OFFENSE				
18. THERE IS PROBABLE CAUSE TO BELIEVE AN OFFENSE HAS BEEN COMMITTED AND THAT THE ACCUSED COMMITTED THEOFFENSE				
19. THE UNITED STATES HAS JURISDICTION OVER THE OFFENSE(S) AND THE ACCUSED				
20. ADDITIONAL UNCHARGED MISCONDUCT WAS CONSIDERED AND A RECOMMENDATION FOR DISPOSITION IS ATTACHED HERETO				
21. SUPPLEMENTARY MATERIALS SUBMITTED PURSUANT TO R.C.M. 405(k)				
22. I AM NOT AWARE OF ANY GROUNDS THAT WOULD DISQUALIFY ME FROM ACTING AS A PRELIMINARY HEARING OFFICER				
23. I RECOMMEND:				
a. TRIAL BY:                      SUMMARY                      SPECIAL                      GENERAL COURT-MARTIAL				
b.        OTHER <i>(Specify)</i>				
24. REMARKS <i>(Include, as necessary, explanation for any answers above.)</i>				
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.

**1. 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(1)(2)(C))**

**Observations regarding witness availability or admissibility of evidence at trial (R.C.M. 405(1)(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(1)(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

<b>2</b>	<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.	<b>Accused</b>	<b>NO</b>
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I find that the information in attachments 1 and 2 are relevant to NBDG disposition factor 2.1f (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