

ANNEX 1

Section 1. Part II of the Manual for Courts-Martial, United States is amended as follows:

(a) R.C.M. 104(b)(1)(B) is amended to read as follows:

“(B) Give a less favorable rating or evaluation of any defense counsel or special victims’ counsel because of the zeal with which such counsel represented any client. As used in this rule, “special victims’ counsel” are judge advocates and civilian counsel who, in accordance with 10 U.S.C. 1044e, are designated as Special Victims’ Counsel.”

(b) R.C.M. 601(d)(2)(B) is amended to read as follows:

“The convening authority has received the advice of the staff judge advocate required under Article 34. ~~These requirements may be waived by the accused.~~”

(c) R.C.M. 701(g)(2) is amended to read as follows:

“(2) *Protective and modifying orders.* Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. If any rule requires, or Upon motion by a party, the military judge may review any materials in camera and permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge in camera. If the military judge reviews any materials in camera grants relief after such an ex parte showing the entire text of the party’s statement, the entirety of any materials not ordered disclosed by the military judge shall be sealed and attached to the record of trial as an appellate exhibit. Such material may be examined by reviewing or appellate authorities in accordance with R.C.M. 1103A ~~closed proceedings for the purpose of reviewing the determination of the military judge.~~”

(d) R.C.M. 704(c) is amended to read as follows:

“(c) *Authority to grant immunity.* ~~Only a~~ A general court-martial convening authority, or

designee, may grant immunity, and may do so only in accordance with this rule.”

(e) R.C.M. 704(c)(1) is amended to read as follows:

“(1) *Persons subject to the code.* A general court-martial convening authority, or designee, may grant immunity to ~~a any~~ person subject to the code. However, a general court-martial convening authority, or designee, may grant immunity to a person subject to the code extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.”

(f) R.C.M. 704(c)(3) is amended to read as follows:

“(3) *Other limitations.* Subject to Service regulations, ~~the~~ authority to grant immunity under this rule may ~~not~~ be delegated in writing at the discretion of the general court-martial convening authority to a subordinate special court-martial convening authority. Further delegation is not permitted. The authority to grant or delegate immunity may be limited by superior authority.”

(g) R.C.M. 704(e) is amended to read as follows:

“(e) *Decision to grant immunity.* Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the general court-martial convening authority, or designee. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated, upon findings that:

(1) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; and

(2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses.”

(h) The header for R.C.M. 1103(b) is amended to read as follows:

“(b) *General and special courts-martial.*”

(i) R.C.M. 1103(b)(2)(A) is amended to read as follows:

“(A) *In general.* The record of trial in each general and special court-martial shall be separate, complete, and independent of any other document.”

(j) R.C.M. 1103(b)(3)(G) is amended to read as follows:

“(G) Any ~~The~~ post-trial recommendation of the staff judge advocate or legal officer and proof of service on defense counsel in accordance with R.C.M. 1106(f)(1);”

(k) R.C.M. 1103(b)(3)(H) is amended to read as follows:

“(H) Any response by defense counsel to any ~~the~~ post-trial review;”

(l) R.C.M. 1103(b)(3)(J) is amended to read as follows:

“(J) Any statement as to why it is impracticable for the convening authority to act;”

(m) R.C.M. 1103(c) is amended to read as follows:

“(c) ~~[DELETED]~~ *Special courts martial.*

~~(1) Involving a bad conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months. The requirements of subsections (b)(1), (b)(2)(A), (b)(2)(B), (b)(2)(D), and (b)(3) of this rule shall apply in a special court martial in which a bad-~~

~~conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, has been adjudged.~~

~~(2) *All other special courts martial.* If the special court martial resulted in findings of guilty but a bad conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, was not adjudged, the requirements of subsections (b)(1), (b)(2)(D), and (b)(3)(A)–(F) and (I)–(M) of this rule shall apply.”~~

(n) R.C.M. 1103A is amended to read as follows:

Sealed exhibits and proceedings.

“(a) *In general.* If the report of preliminary hearing or record of trial contains exhibits, proceedings, or other ~~matter~~ materials ordered sealed by the preliminary hearing officer or military judge, counsel for the ~~government~~ Government, the court reporter, or trial counsel shall cause such materials to be sealed so as to prevent unauthorized ~~viewing~~ examination or disclosure. Counsel for the ~~government~~ Government, the court reporter, or trial counsel shall ensure that such materials are properly marked, including an annotation that the material was sealed by order of the preliminary hearing officer or military judge, and inserted at the appropriate place in the ~~original~~ record of trial. Copies of the report of preliminary hearing or record of trial shall contain appropriate annotations that ~~matters~~ materials were sealed by order of the preliminary hearing officer or military judge and have been inserted in the report of preliminary hearing or record of trial. This ~~Rule~~ rule shall be implemented in a manner consistent with Executive Order 13526, concerning classified national security information.

(b) *Examination and disclosure of sealed materials* ~~*exhibits and proceedings.*~~ Except as provided in the following subsections to this rule, sealed exhibits materials may not be examined or disclosed.

(1) *Prior to referral.* ~~Prior to referral of charges.~~ ~~The~~ the following individuals may examine and disclose sealed materials only if necessary for proper fulfillment of their responsibilities under the UCMJ, ~~the MCM~~ this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility: the judge advocate advising the convening authority who directed the Article 32 preliminary hearing; the convening authority who directed the Article 32 preliminary hearing; the staff judge advocate to the general court-martial convening authority; a military judge detailed to an Article 30a proceeding; and the general court-martial convening authority.

(2) *Referral through* ~~Prior to~~ *authentication.* Prior to authentication of the record by the military judge, sealed materials may not be examined or disclosed in the absence of an order from the military judge based ~~on~~ upon good cause.

(3) *Authentication through action.* After authentication and prior to disposition of the record of trial pursuant to Rule for Courts-Martial 1111, sealed materials may not be examined or disclosed in the absence of an order from the military judge upon a showing of good cause at a post-trial Article 39(a) session directed by the ~~Convening Authority~~ convening authority.

(4) *After action* ~~Reviewing and appellate authorities.~~

(A) *Examination by reviewing and appellate authorities.* Reviewing and appellate authorities may examine sealed materials when those authorities determine that examination ~~such action~~ is reasonably necessary to a proper fulfillment of their responsibilities under the UCMJ Uniform Code of Military Justice, the Manual for Courts-Martial this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility.

(B) Examination by appellate counsel. Appellate counsel may examine sealed materials

subject to the following procedures.

(i) Sealed materials released to trial counsel or defense counsel. Materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial counsel or defense counsel, and sealed, may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of their responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility.

(ii) Sealed materials reviewed *in camera* but not released to trial counsel or defense counsel. Materials reviewed *in camera* by a military judge, not released to trial counsel or defense counsel, and sealed may be examined by reviewing or appellate authorities. After examination of said materials, the reviewing or appellate authority may permit examination by appellate counsel for good cause.

~~(BC) Disclosure. Reviewing and appellate authorities~~ Appellate counsel shall not, however, disclose sealed ~~matter or information~~ materials in the absence of:

(i) Prior authorization of the Judge Advocate General in the case of review under ~~Rule for Courts-Martial~~ R.C.M. 1201(b); or

(ii) Prior authorization of the appellate court before which a case is pending review under ~~Rules for Courts-Martial~~ R.C.M. 1203 and 1204.

~~(C) In those cases in which review is sought or pending before the United States Supreme Court, authorization to disclose sealed materials or information shall be obtained under that Court's rules of practice and procedure.~~

~~(D) The authorizing officials in paragraph (B)(ii) above may place conditions on~~

~~authorized disclosures in order to minimize the disclosure.~~

(~~D~~E) For purposes of this rule, reviewing and appellate authorities are limited to:

(i) Judge advocates reviewing records pursuant to ~~Rule for Courts-Martial R.C.M.~~ R.C.M. 1112;

(ii) Officers and attorneys in the office of the Judge Advocate General reviewing records pursuant to ~~Rule for Courts-Martial R.C.M.~~ R.C.M. 1201(~~b~~) and 1210;

~~—(iii) Appellate government counsel;~~

~~—(iv) Appellate defense counsel;~~

(~~iii~~v) Appellate judges of the Courts of Criminal Appeals and their professional staffs;

(~~iv~~v) The judges of the United States Court of Appeals for the Armed Forces and their professional staffs;

(~~v~~vi) The Justices of the United States Supreme Court and their professional staffs;
and

(~~vi~~vii) Any other court of competent jurisdiction.

(5) ~~Examination of sealed materials-matters.~~ For the purposes of this rule, “examination” includes reading, inspecting, and viewing, ~~photocopying, photographing, disclosing, or manipulating the sealed matters in any way.~~

(6) Disclosure of sealed materials. For purposes of this rule, “disclosure” includes photocopying, photographing, disseminating, releasing, manipulating, or communicating the contents of sealed materials in any way.

(E) Notwithstanding any other provision of this rule, in those cases in which review is sought or pending before the United States Supreme Court, authorization to disclose sealed materials or information shall be obtained under that Court's rules of practice and procedure.

Section 2. Part III of the Manual for Courts-Martial, United States is amended as follows:

(a) Mil. R. Evid. 311(c)(4) is amended to read as follows:

“(4) *Reliance on Statute or Binding Precedent.* Evidence that was obtained as a result of an unlawful search or seizure may be used when the official seeking the evidence acted ~~aets~~ in objectively reasonable reliance on a statute or on binding precedent later held violative of the Fourth Amendment.”

(b) Mil. R. Evid. 311(d)(5)(A) is amended to read as follows:

“(A) *In general.* When the defense makes an appropriate motion or objection under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant; that the evidence was obtained by officials in objectively reasonable reliance on a statute or on binding precedent later held violative of the Fourth Amendment; or that the deterrence of future unlawful searches or seizures is not appreciable or such deterrence does not outweigh the costs to the justice system of excluding the evidence.”

(c) Mil. R. Evid. 505(l) is amended to read as follows:

“(l) *Record of Trial.* If under this rule any information is reviewed in camera by the military judge and withheld from the accused, the accused objects to such withholding, and the trial is

continued to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as ~~the prosecution's~~ any motions and any materials submitted in support thereof must be sealed in accordance with R.C.M. 701(g)(2) and 1103A and attached to the record of trial as an appellate exhibit. Such material must be made available to reviewing and appellate authorities in closed proceedings for the purpose of reviewing the determination of the military judge. The record of trial with respect to any classified matter will be prepared under R.C.M. 1103(h) and 1104(b)(1)(D).”

(d) Mil. R. Evid. 506(m) is amended to read as follows:

“(m) *Record of Trial*. If under this rule any information is reviewed in camera by the military judge and withheld from the accused, the accused objects to such withholding, and the trial is continued to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as ~~the prosecution's~~ any motions and any materials submitted in support thereof must be sealed in accordance with R.C.M. 701(g)(2) and 1103A and attached to the record of trial as an appellate exhibit. Such material must be made available to reviewing and appellate authorities in closed proceedings for the purpose of reviewing the determination of the military judge.”

(e) Mil. R. Evid. 513(e)(6) is amended to read as follows:

“(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 701(g)(2) or 1103A ~~and must remain under seal unless the military judge or an appellate court orders otherwise.~~”

(f) Mil. R. Evid. 514(e)(6) is amended to read as follows:

“(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 701(g)(2) or 1103A ~~and must remain under seal unless the military judge or an appellate court orders otherwise.~~”

Section 3. Part IV of the Manual for Courts-Martial, United States is amended as follows:

(a) Paragraph 45c, Article 120c—Other sexual misconduct, subsections b-f, are amended to read as follows:

“b. *Elements.*

(1) *Indecent viewing.*

(a) That the accused knowingly and wrongfully viewed the private area of another person;

(b) That said viewing was without the other person’s consent; and

(c) That said viewing took place under circumstances in which the other person had a reasonable expectation of privacy.

(2) *Indecent recording.*

(a) That the accused knowingly recorded (photographed, videotaped, filmed, or recorded by any means) the private area of another person;

(b) That said recording was without the other person’s consent; and

(c) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(3) *Broadcasting of an indecent recording.*

(a) That the accused knowingly broadcast a certain recording of another person’s private area;

(b) That said recording was made ~~or broadcast~~ without the other person’s consent;

(c) That the accused knew or reasonably should have known that the recording was made ~~or broadcast~~ without the other person's consent;

(d) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy; and

(e) That the accused knew or reasonably should have known that said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(4) Distribution of an indecent recording.

(a) That the accused knowingly distributed a certain recording of another person's private area;

(b) That said recording was made ~~or distributed~~ without the other person's consent;

(c) That the accused knew or reasonably should have known that said recording was made ~~or distributed~~ without the other person's consent;

(d) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy; and

(e) That the accused knew or reasonably should have known that said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(5) Forcible pandering.

That the accused compelled another person to engage in an act of prostitution with any person.

(6) Indecent exposure.

(a) That the accused exposed his or her genitalia, anus, buttocks, or female areola or nipple;

(b) That the exposure was in an indecent manner; and

(c) That the exposure was intentional.

c. Explanation.

(1) *In general.* Sexual offenses have been separated into three statutes: offenses against adults (120), offenses against children (120b), and other offenses (120c).

(2) *Definitions.*

(a) *Recording.* A “recording” is a still or moving visual image captured or recorded by any means.

(b) Other terms are defined in subparagraph 45c.a.(d), *supra*.

d. Lesser included offenses. See paragraph 3 of this Part and Appendix 12A.

e. Maximum punishment.

(1) *Indecent viewing.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Indecent recording.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Broadcasting or distribution of an indecent recording.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(4) *Forcible pandering.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 12 years.

(5) *Indecent exposure.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specifications.*

(1) *Indecent viewing, recording, or broadcasting.*

(a) *Indecent viewing.*

In that _____ (personal jurisdiction data), did (at/on board— location), on or about _____ 20__, knowingly and wrongfully view the private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(b) *Indecent ~~visual~~ recording.*

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, knowingly (photograph) (videotape) (film) (make a recording of) the private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(c) *Broadcasting or distributing an indecent recording.*

In that _____ (personal jurisdiction data), did (at/on board— location), on or about _____ 20__, knowingly (broadcast) (distribute) a recording of the private area of _____, when the said accused knew or reasonably should have known that the said recording was made (~~made~~) (~~and/or~~) (~~distributed/broadcast~~) without the consent of _____ and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(2) *Forcible pandering.*

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, wrongfully compel _____ to engage in (a sexual act) (sexual contact)

with _____, to wit: _____, for the purpose of receiving (money) (other compensation) (_____).

(3) *Indecent exposure.*

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, intentionally expose [his (genitalia) (anus) (buttocks)] [her (genitalia) (anus) (buttocks) (areola) (nipple)] in an indecent manner, to wit: _____.”

(b) Paragraph 111A, Article 134—(Visual depictions, nonconsensual distribution or broadcast) is newly inserted immediately following Paragraph 111, Article 134—(Unlawful entry) and reads as follows:

“111A. Article 134—(Visual depiction, nonconsensual distribution or broadcast)

a. Text of statute. See paragraph 60.

b. Elements.

(1) That the accused knowingly distributed or broadcast a visual depiction;

(2) That the visual depiction was of another person who is identifiable from the depiction itself or from information conveyed in connection with the depiction;

(3) That the person depicted is engaging in sexually explicit conduct or the depiction is of the private area of the person depicted;

(4) That the visual depiction was originally produced under circumstances in which the person depicted had a reasonable expectation of privacy;

(5) That the distribution or broadcasting was committed—

(a) with the intent to realize personal gain;

(b) with the intent to humiliate, harm, harass, intimidate, threaten, or coerce the depicted person; or

(c) with reckless disregard as to whether the depicted person would be humiliated, harmed, harassed, intimidated, threatened, or coerced;

(6) That the accused knew or should have known that the depicted person did not consent to the distribution or broadcast of the visual depiction; and

(7) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. Explanation

(1) *Distribute*. Distribute means delivering to the actual or constructive possession of another, including transmission by electronic means.

(2) *Broadcast*. Broadcast means to electronically transmit a visual depiction with the intent that it be viewed by a person or persons.

(3) *Identifiable*. Whether an individual is identifiable is determined under the totality of the circumstances.

(4) *Visual depiction*. Visual depiction includes any developed or undeveloped photograph, picture, film, or video; any digital or computer image, picture, film, or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image. Visual depiction does not include cartoons or drawings.

(5) *Sexually explicit conduct*. Sexually explicit conduct means actual or simulated—

(a) genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex;

(b) bestiality;

(c) masturbation; or

(d) sadistic or masochistic abuse.

(6) *Private area.* Private area means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.

(7) *Reasonable expectation of privacy.* The term “under circumstances in which the person depicted had a reasonable expectation of privacy” means circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public.

(8) *Law enforcement and other legal proceedings.* This paragraph—

(a) does not prohibit any lawful law enforcement, correctional, or intelligence activity;

(b) shall not apply in the case of a person reporting unlawful activity; and

(c) shall not apply to a subpoena or court order for use in a legal proceeding.

(9) *Voluntary public or commercial exposure.* This paragraph does not apply to a visual depiction of a person’s voluntary engagement in sexually explicit conduct or a voluntary exposure of the person’s own private area if such exposure takes place in public or in a lawful commercial setting.

(10) *Certain categories of visual depictions excepted.* This paragraph shall not apply in the case of a visual depiction, the disclosure of which is in the bona fide public interest.

d. *Lesser included offenses.* See Paragraph 3 of this Part and Appendix 12A.

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20 _____, knowingly (distribute) (broadcast) a visual depiction of _____, who is identifiable from (the depiction itself) (information conveyed in connection with the depiction), [with the intent to (realize personal gain) (humiliate) (harm) (harass) (intimidate) (threaten) (coerce) the depicted person),] [with reckless disregard as to whether the depicted person would be (humiliated) (harmed) (harassed) (intimidated) (threatened) (coerced),] where the depiction was of (_____ engaging in sexually explicit conduct to wit: _____) (the private area of _____ to wit: _____), where the visual depiction was originally produced under circumstances in which the person depicted had a reasonable expectation of privacy, where the accused (knew) (should have known) that the depicted person did not consent to the (distribution) (broadcast) of the visual depiction, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).”