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Title 3—

The President

Executive Order 13387 of October 14, 2005

2005 Amendments to the Manual for Courts-Martial, United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946), and in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473, as amended, it is hereby ordered as follows:

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

(a) R.C.M. 103(2) is amended by replacing the word ''without'' with the word ''with'' and by replacing the word ''noncapital'' with the word ''capital''.

(b) R.C.M. 201(e)(2)(B) is amended by adding the word ''general'' between the words ''convene'' and ''courts-martial'' and by inserting the following words after ''armed forces'':

''assigned or attached to a combatant command or joint command''.

(c) R.C.M. 201(e)(2)(C) is amended by inserting the words ''assigned or attached to a joint command or joint task force,'' immediately before the words ''under regulations which the superior command may prescribe''.

(d) R.C.M. 201(e)(3) is amended by inserting the following immediately after the words ''armed force'':

'', using the implementing regulations and procedures prescribed by the Secretary concerned of the military service of the accused,''.

(e) R.C.M. 201(e)(4) is amended by adding the words '', member, or counsel'' after the words ''military judge''.

(f) R.C.M. 201(f)(1)(A)(iii)(b) is amended to read as follows:

''(b) The case has not been referred with a special instruction that the case is to be tried as capital.''

(g) R.C.M. 307(c)(4) is amended by inserting the following at the end thereof:

''What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.''

(h) R.C.M. 501(a)(1) is amended to read as follows:

''(1) General courts-martial.

(A) Except in capital cases, general courts-martial shall consist of a military judge and not less than five members, or of the military judge alone if requested and approved under R.C.M. 903.

(B) In all capital cases, general courts-martial shall consist of a military judge and no fewer than 12 members, unless 12 members are not reasonably available because of physical conditions or military exigencies. If 12 members are not reasonably available, the convening authority shall detail the next lesser number of reasonably available members under 12, but in no event fewer than five. In such a case, the convening authority shall state in the convening order the reasons why 12 members are not reasonably available.''

(i) R.C.M. 503(a)(3) is amended by deleting ''court-martial'' and inserting ''courts-martial'' in lieu thereof.

(j) R.C.M. 503(b)(3) is amended by inserting the words '', a combatant command or joint command'' after the words ''A military judge from one armed force may be detailed to a court-martial convened in a different armed force''.

(k) R.C.M. 503(c)(3) is amended by inserting the words '', a combatant command or joint command'' after the words ''A person from one armed force may be detailed to serve as counsel in a court-martial in a different armed force''.

(l) R.C.M. 504, (b)(2)(A) is amended by inserting the following at the end thereof:

''A subordinate joint command or joint task force is ordinarily considered to be ''separate or detached.''''

(m) R.C.M. 504, (b)(2)(B) is amended by deleting the word ''or'' at the end of the first element thereof, by deleting the period and adding '' ; or'' at the end of the second element thereof, and by inserting the following as a third element:

''(iii) In a combatant command or joint command, by the officer exercising general court-martial jurisdiction over the command.''

(n) R.C.M. 805(b) is amended by replacing the current second sentence with the following:

''No general court-martial proceeding requiring the presence of members may be conducted unless at least five members are present, or in capital cases, at least 12 members are present except as provided in R.C.M. 501(a)(1)(B), where 12 members are not reasonably available because of physical conditions or military exigencies. No special court-martial proceeding requiring the presence of members may be conducted unless at least three members are present except as provided in R.C.M. 912(h).''

(o) R.C.M. 912(f)(4) is amended by deleting the fifth sentence and by inserting the following words immediately after the words ''When a challenge for cause has been denied'' in the fourth sentence:

''the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review. Further,''

(p) R.C.M. 1003(b)(2) is amended by replacing the word ''foreign'' with the word ''hardship.''

(q) R.C.M. 1004(b) is amended by inserting the following after ''(1) Notice.'' and before the word ''Before'':

''(A) Referral. The convening authority shall indicate that the case is to be tried as a capital case by including a special instruction in the referral block of the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the convening authority from later adding the required special instruction, provided:

(i) that the convening authority has otherwise complied with the notice requirement of subsection (B); and

(ii) that if the accused demonstrates specific prejudice from such failure to include the special instruction, a continuance or a recess is an adequate remedy.

(B) Arraignment.''

(r) Insert the following new R.C.M. 1103A after R.C.M. 1103:

''Rule 1103A. Sealed exhibits and proceedings.

(a) *In general.* If the record of trial contains exhibits, proceedings, or other matter ordered sealed by the military judge, the trial counsel shall

cause such materials to be sealed so as to prevent indiscriminate viewing or disclosure. Trial counsel shall ensure that such materials are properly marked, including an annotation that the material was sealed by order of the military judge, and inserted at the appropriate place in the original record of trial. Copies of the record shall contain appropriate annotations that matters were sealed by order of the military judge and have been inserted in the original record of trial. This Rule shall be implemented in a manner consistent with Executive Order 12958, as amended, concerning classified national security information.

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

(1) *Examination of sealed matters.* For the purpose of this rule, ''examination'' includes reading, viewing, photocopying, photographing, disclosing, or manipulating the documents in any way.

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

(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 in the absence of an order from the military judge upon a showing of good cause at a post-trial Article 39a session directed by the Convening Authority.

(4) *Reviewing and appellate authorities.*

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

(B) Reviewing and appellate authorities shall not, however, disclose sealed matter or information in the absence of:

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

(ii) Prior authorization of the appellate court before which a case is pending review under Rules for Courts-Martial 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.

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

(i) Judge advocates reviewing records pursuant to Rule for Courts-Martial 1112;

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

(iii) Appellate government counsel;

(iv) Appellate defense counsel;

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

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

(vii) The Justices of the United States Supreme Court and their professional staffs; and

(viii) Any other court of competent jurisdiction.''

(s) R.C.M. 1301(a) is amended by inserting the following after the second sentence:

''Summary courts-martial shall be conducted in accordance with the regulations of the military service to which the accused belongs.''

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

Mil. R. Evid. 317(b) is amended by replacing the word ''Transportation'' with the words ''Homeland Security.''

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

(a) Paragraph 14c(2)(a) is amended by inserting the following new subparagraph (ii) and renumbering existing subparagraphs (a)(ii) through (iv) as (a)(iii) through (v):

''(ii) Determination of lawfulness. The lawfulness of an order is a question of law to be determined by the military judge.''

(b) Paragraph 16(c)(1)(a) is amended by replacing the word ''Transportation'' with the words ''Homeland Security''.

(c) Paragraph 35a is amended to read as follows:

''a. Text.

(a) Any person subject to this chapter who—

(1) operates or physically controls any vehicle, aircraft, or vessel in a reckless or wanton manner or while impaired by a substance described in section 912a(b) of this title (Article 112a(b)), or

(2) operates or is in actual physical control of any vehicle, aircraft, or vessel while drunk or when the alcohol concentration in the person's blood or breath is equal to or exceeds the level prohibited under subsection (b), as shown by chemical analysis, shall be punished as a court-martial may direct.

(b)(1) For purposes of subsection (a), the applicable level of the alcohol concentration in a person's blood or breath is as follows:

(A) In the case of the operation or control of a vehicle, aircraft, or vessel in the United States, the level is the blood alcohol concentration prohibited under the law of the State in which the conduct occurred, except as may be provided under paragraph (b)(2) for conduct on a military installation that is in more than one State, or the prohibited alcohol concentration level specified in paragraph (b)(3).

(B) In the case of the operation or control of a vehicle, aircraft, or vessel outside the United States, the level is the blood alcohol concentration specified in paragraph (b)(3) or such lower level as the Secretary of Defense may by regulation prescribe.

(2) In the case of a military installation that is in more than one State, if those States have different levels for defining their prohibited blood alcohol concentrations under their respective State laws, the Secretary concerned for the installation may select one such level to apply uniformly on that installation.

(3) For purposes of paragraph (b)(1), the level of alcohol concentration prohibited in a person's blood is 0.10 grams or more of alcohol per 100 milliliters of blood and with respect to alcohol concentration in a person's breath is 0.10 grams or more of alcohol per 210 liters of breath, as shown by chemical analysis.''

(4) In this subsection, the term ''United States'' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa, and the term ''State'' includes each of those jurisdictions.''

(d) Paragraph 35b(2)(c) is amended to read as follows:

''(c) the alcohol concentration level in the accused's blood or breath, as shown by chemical analysis, was equal to or exceeded the applicable level provided in paragraph 35a above.''

(e) Paragraph 35f is amended as follows:

''In that _____(personal jurisdiction data), did (at/on board—required), on or about 20___, (in the motor pool area) (near the Officer's Club) (at the intersection of ___ and ___) (while in the Gulf of Mexico) (while in flight over North America) physically control [a vehicle, to wit: (a truck) (a passenger car) (___)] [an aircraft, to wit: (an AH–64 helicopter)(an F–14A fighter)(a KC–135 tanker) (___)] [a vessel, to wit: (the aircraft carrier USS ___) (the Coast Guard Cutter) (___)], [while drunk] [while impaired by ___] [while the alcohol concentration in his (blood)(breath) was, as shown by chemical analysis, equal to or exceeded (.10) (___) grams of alcohol per (100 milliliters of blood) (210 liters of breath), which is the limit under (cite applicable State law) (cite applicable statute or regulation)] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (by ordering that the aircraft be flown below the authorized altitude)] [and did thereby cause said (vehicle) (aircraft) (vessel) to (strike and) (injure _____)].''

(f) Paragraph 97 is amended by (1) inserting the following new subparagraph (b)(2) and renumbering the existing subparagraphs (b)(2) and (b)(3) as (b)(3) and (b)(4); (2) adding the words ''and patronizing a prostitute'' after the word ''Prostitution'' in subparagraph (e)(1); and (3) inserting the following new subparagraph (f)(2) and renumbering the existing subparagraphs (f)(2) and (f)(3) as (f)(3) and (f)(4):

''(b)(2) *Patronizing a prostitute.*

(a) That the accused had sexual intercourse with another person not the accused's spouse;

(b) That the accused compelled, induced, enticed, or procured such person to engage in an act of sexual intercourse in exchange for money or other compensation; and

(c) That this act was wrongful; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.''

''(f)(2) *Patronizing a prostitute.*

In that ___ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___20___, wrongfully (compel) (induce) (entice) (procure) ___ , a person not his/her spouse, to engage in (an act) (acts) of sexual intercourse with the accused in exchange for (money) (_____).''

(g) Paragraph 109 is amended to read as follows:

''109. ARTICLE 134—(Threat or hoax designed or intended to cause panic or public fear)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) *Threat.*

(a) That the accused communicated certain language;

(b) That the information communicated amounted to a threat;

(c) That the harm threatened was to be done by means of an explosive; weapon of mass destruction; biological or chemical agent, substance, or weapon; or hazardous material;

(d) That the communication was wrongful; and

(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) *Hoax.*

(a) That the accused communicated or conveyed certain information;

(b) That the information communicated or conveyed concerned an attempt being made or to be made by means of an explosive; weapon of mass destruction; biological or chemical agent, substance, or weapon; or hazardous material, to unlawfully kill, injure, or intimidate a person or to unlawfully damage or destroy certain property;

(c) That the information communicated or conveyed by the accused was false and that the accused then knew it to be false;

(d) That the communication of the information by the accused was malicious; and

(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *Threat.* A ''threat'' means an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property presently or in the future. Proof that the accused actually intended to kill, injure, intimidate, damage, or destroy is not required.

(2) *Explosive.* ''Explosive'' means gunpowder, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device, and any other explosive compound, mixture, or similar material.

(3) *Weapon of mass destruction.* A weapon of mass destruction means any device, explosive or otherwise, that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of: toxic or poisonous chemicals, or their precursors; a disease organism; or radiation or radioactivity.

(4) *Biological agent.* The term ''biological agent'' means 12 any micro-organism (including bacteria, viruses, fungi, rickettsiac, or protozoa), pathogen, or infectious substance, and any naturally occurring, bioengineered, or synthesized component of any such micro-organism, pathogen, or infectious substance, whatever its origin or method of production, that is capable of causing—

(a) death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;

(b) deterioration of food, water, equipment, supplies, or materials of any kind; or

(c) deleterious alteration of the environment.

(5) *Chemical agent, substance, or weapon.* A chemical agent, substance, or weapon refers to a toxic chemical and its precursors or a munition or device, specifically designed to cause death or other harm through toxic properties of those chemicals that would be released as a result of the employment of such munition or device, and any equipment specifically designed for use directly in connection with the employment of such munitions or devices.

(6) *Hazardous material.* A substance or material (including explosive, radioactive material, etiologic agent, flammable or combustible liquid or solid, poison, oxidizing or corrosive material, and compressed gas, or mixture thereof) or a group or class of material designated as hazardous by the Secretary of Transportation.

(7) *Malicious.* A communication is ''malicious'' if the accused believed that the information would probably interfere with the peaceful use of the building, vehicle, aircraft, or other property concerned, or would cause fear or concern to one or more persons.

d. *Lesser included offenses.*

(1) *Threat*

(a) Article 134—communicating a threat

(b) Article 80—attempts

(c) Article 128—assault

(2) *Hoax.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeitures of all pay and allowances, and confinement for 10 years.

f. *Sample specifications.*

(1) *Threat.*

In that _____ (personal jurisdiction data) did, (at/on board—location) on or about _____20___, wrongfully communicate certain information, to wit: _____, which language constituted a threat to harm a person or property by means of a(n) [explosive; weapon of mass destruction; biological agent, substance, or weapon; chemical agent, substance, or weapon; and/or (a) hazardous material(s)].

(2) *Hoax.*

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____20____, maliciously (communicate) (convey) certain information concerning an attempt being made or to be made to unlawfully [(kill) (injure) (intimidate) _____] [(damage) (destroy) _____] by means of a(n) [explosive; weapon of mass destruction; biological agent, substance, or weapon; chemical agent, substance, or weapon; and/or (a) hazardous material(s)], to wit: ___, which information was false and which the accused then knew to be false.''

Sec. 4. Part V of the Manual for Courts-Martial, United States, is amended as follows:

(a) Paragraph 1(h) is amended by redesignating existing paragraph 1(h) as 1(i) and inserting the following new paragraph 1(h):

''h. *Applicable standards.* Unless otherwise provided, the service regulations and procedures of the servicemember shall apply.''

(b) Paragraph 2(a) is amended by replacing the words ''Unless otherwise'' with the word ''As''.

(c) Paragraph 2(a) is amended by inserting the following after the second sentence:

''Commander includes a commander of a joint command.''

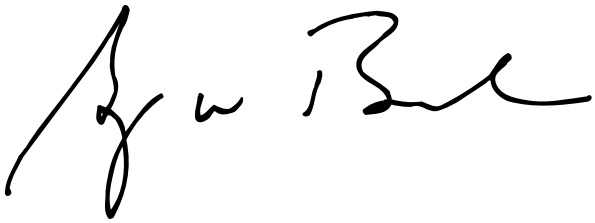
(d) Paragraph 2(a) is amended by inserting the words ''of a commander'' in the third sentence after the words ''the authority.''

Sec. 5. These amendments shall take effect 30 days from the date of this order.

(a) Nothing in these amendments shall be construed to make punishable any act done or omitted prior to the effective date of this order that was not punishable when done or omitted.

(b) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to the effective date of this order, and any such nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial, or other action

may proceed in the same manner and with the same effect as if these amendments had not been prescribed.



THE WHITE HOUSE,

October 14, 2005.

Billing code 3195–01–P

Changes to the Discussion accompanying the Manual for Courts-Martial, United States

(a) The Discussion section of Part I (Preamble) is amended by replacing the word "Transportation" both times it appears with the words "Homeland Security".

(b) The Discussion section following R.C.M. 103(19), Definition for 10 U.S.C. 801(1), is amended by replacing the words "the General Counsel of the Department of Transportation." with the following: "an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security. [NOTE: The Secretary of Homeland Security has designated the Chief Counsel, U.S. Coast Guard, to serve as the Judge Advocate General of the Coast Guard.]"

(c) The Discussion following R.C.M. 201(e)(7)(B) is amended by adding the following sentence to the beginning of the Discussion: "As to the authority to convene courts-martial, *see* R.C.M. 504."

(d) The Discussion accompanying R.C.M. 307(c)(4) is amended by striking the first sentence.

(e) The Discussion accompanying R.C.M. 601(e) is amended by replacing the sixth paragraph with the following:

"The convening authority shall indicate that the case is to be tried as a capital case by including a special instruction in the referral block of the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the convening authority from later adding the required special instruction, provided that the convening authority has otherwise complied with the applicable notice requirements. If the accused demonstrates specific prejudice from such failure to include the special instruction, a continuance or a recess is an adequate remedy."

(f) The Discussion following R.C.M. 907(b)(2)(B) is amended by inserting, in the first sentence, the word "either:" before the words "no limitation"; by inserting the words "; or child

Changes to Appendix 21, Analysis of Rules for Courts-Martial

(a) Appendix 21, Introduction, paragraph b (Supplementary Materials), is amended by replacing the word "Transportation" with the words "Homeland Security".

(b) The Analysis accompanying R.C.M. 103(2) is amended by inserting the following prior to the discussion of R.C.M. 103(3):

"*2005 Amendment*: The definition was amended to provide consistently with the contemporaneous amendment to R.C.M. 201(f)(1)(A)(iii)(b), which altered the default referral position for capital cases."

(c) The Analysis accompanying R.C.M. 201 is amended by inserting the following paragraph at the end thereof:

"*2005 Amendment*: Subsections (e)(2)(B) and (C) were revised to clarify that the reciprocal jurisdiction authority of joint commanders designated in either subsections (A), (B), or (C), is limited. This limitation is intended to preclude a joint commander from convening courts upon members who are not assigned or attached to a joint command."

(d) The Analysis accompanying R.C.M. 201(e)(3) is amended by inserting the following paragraph at the end thereof:

"*2005 Amendment*: This rule clarifies that when a service member is tried by a court-martial convened by a combatant or joint commander, the implementing regulations and procedures of the service to which the accused is a member shall apply."

(e) The Analysis accompanying R.C.M. 201(e)(4) is amended by inserting the following paragraph:

"*2005 Amendment*: Subsection (e)(4) was amended to clarify that members and counsel from different services may be detailed to a court-martial convened by a combatant or joint commander."

(f) The Analysis accompanying R.C.M. 201(f) is amended by inserting the following

the government in order to refer a court-martial as capital. It also provides a default construct that is applicable to the vast majority of actual capital eligible cases."

(g) The Analysis accompanying R.C.M. 307(c)(4) is amended by inserting the following prior to the discussion of subsection (c)(5):

"*2005 Amendment*: The first sentence of the non-binding discussion was moved to subsection (4) to reflect the decision of *United States v. Quiroz*, which identifies the prohibition against the unreasonable multiplication of charges as a "a long-standing principle" of military law. *See United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001)."

(h) The Analysis accompanying R.C.M. 503(b)(3) is amended by inserting the following paragraph:

"*2005 Amendment*: Subsection (b)(3) was amended to clarify that a military judge from any service may be detailed to a court-martial convened by a combatant or joint commander."

(i) The Analysis accompanying R.C.M. 503(c)(3) is amended by inserting the following:

"*2005 Amendment*: Subsection (c)(3) was amended to clarify that counsel from any service may be detailed to a court-martial convened by a combatant or joint commander."

(j) The Analysis accompanying R.C.M. 504(b)(2)(B) is amended by inserting the following paragraph:

"*2005 Amendment*: Subsection (b)(2)(B) was amended to clarify those authorized to determine when a unit is "separate or detached.""

(k) The Analysis accompanying R.C.M. 601(e) is amended by inserting the following paragraph:

"*2005 Amendment*: The Discussion section was amended to reflect the rule changes that require the convening authority to affirmatively refer a capital punishment eligible offense for trial as a capital case."

(l) The Analysis accompanying R.C.M. 907(b)(2) is amended by inserting the following

abuse cases in which the five-year statute of limitations was expired at the time the amendment to Article 43, UCMJ, became effective. *See generally Stogner v. California*, 539 U.S. 607, 609 (2003). All child abuse offenses committed prior to that date would be subject to the previous five-year statute of limitations that would expire on the day prior to the effective date of the amendment - November 24, 2003. The referenced case permits unexpired periods to be extended by the new statute, but does not allow the statute to renew an expired period."

(m) The Analysis accompanying R.C.M. 912(f)(4) is amended by inserting the following paragraph:

"*2005 Amendment*: This rule change is intended to conform military practice to federal practice and limit appellate litigation when the challenged panel member could have been peremptorily challenged or actually did not participate in the trial due to a peremptory challenge by either party. This amendment is consistent with the President's lawful authority to promulgate a rule that would result in placing before the accused the hard choice faced by defendants in federal district courts – to let the challenged juror sit on the case and challenge the ruling on appeal or to use a peremptory challenge to remove the juror and ensure an impartial jury. *See United States v. Miles*, 58 M.J. 192 (C.A.A.F. 2003); *United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001), *petition for reconsideration denied*, 57 M.J. 48 (C.A.A.F. 2002); *United States v. Armstrong*, 54 M.J. 51 (C.A.A.F. 2000)."

(n) The Analysis accompanying R.C.M. 1003(b)(2) is amended by inserting the following paragraph:

"*2005 Amendment*: Hardship Duty Pay (HDP) superceded Foreign Duty Pay (FDP) on 3 February 1999. HDP is payable to members entitled to basic pay. The Secretary of Defense has established that HDP will be paid to members (a) for performing specific missions, or (b) when assigned to designated areas."

(o) The Analysis accompanying R.C.M. 1004(b) is amended by replacing the first

(p) The following Analysis of new R.C.M. 1103A is inserted following the Analysis of R.C.M. 1103:

"Rule 1103A.

2005 Amendment: The 1998 Amendments to the Manual for Courts-Martial introduced the requirement to seal M.R.E. 412 (rape shield) motions, related papers, and the records of the hearings, to "fully protect an alleged victim of [sexual assault] against invasion of privacy and potential embarrassment." MCM Appendix 22, p. 36. As current Rule 412(c)(2) reads, it is unclear whether appellate courts are bound by orders sealing Rule 412 information issued by the military judge.

The effect and scope of a military judge's order to seal exhibits, proceedings, or materials is similarly unclear. Certain aspects of the military justice system, particularly during appellate review, seemingly mandate access to sealed materials. For example, appellate defense counsel have a need to examine an entire record of trial to advocate thoroughly and knowingly on behalf of a client. Yet there is some uncertainty about appellate defense counsel's authority to examine sealed materials in the absence of a court order. This authority applies to both military and civilian appellate defense counsel.

The rule is designed to respect the privacy and other interests that justified sealing the material in the first place, while at the same time recognizing the need for certain military justice functionaries to review that same information. The rule favors an approach relying on the integrity and professional responsibility of those functionaries, and assumes that they can review sealed materials and at the same time protect the interests that justified sealing the material in the first place. Should disclosure become necessary, then the party seeking disclosure is directed to an appropriate judicial or quasi-judicial official or tribunal to obtain a disclosure order."

(r) The Analysis accompanying R.C.M. 1301(a) is amended by inserting the following paragraph:

Changes to Appendix 22, Analysis of The Military Rules of Evidence

(a) The Introduction to Appendix 22 is amended by inserting the following at the end of the first sentence:

"(the Department under which the Coast Guard was operating at that time)."

(b) The Introduction to Appendix 22 is amended by replacing the word "Transportation" in the second paragraph with the words "Homeland Security."

(c) The Analysis to M.R.E. 317(b) is amended by replacing the word "Transportation" with the words "Homeland Security."

(d) The Analysis to M.R.E. 801(d)(1)(B) is amended to read as follows:

"Rule 801(d)(1)(B) makes admissible on the merits a statement consistent with the in-court testimony of the witness and "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Unlike Rule 801(d)(1)(A), which addresses prior inconsistent statements given under oath, the earlier consistent statement need not have been made under oath or at any type of proceeding.

Rule 801(d)(1)(B) provides in pertinent part that a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. The court has interpreted the rule to require that a prior statement, admitted as substantive evidence, precede any motive to fabricate or improper influence that it is offered to rebut. *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998). Where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut. *United States v. Faison*, 49 M.J. 59, 63 (C.A.A.F. 1998). This interpretation of the rule is consistent with the Supreme Court's decision in *Tome v. United States*, 513 U.S. 150, 159 (1995)."

The Rule strikes a balance between the general policy behind the Rules of Evidence of permitting admission of probative and reliable evidence and the congressional intent "that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances." S. Rep. No. 93-1277, *reprinted in* 1974 U.S.C.C.A.N. 7051, 7066. MRE 807 represents the acceptance of the so-called "catch-all" or "residual" exception to the hearsay rule. Because of the constitutional concerns associated with hearsay statements, the courts have created specific foundational requirements in order for residual hearsay to be admitted. *See United States v. Haner*, 49 M.J. 72, 77-78 (C.A.A.F. 1998). These requirements are: necessity, materiality, reliability, and notice.

The necessity prong "'essentially creates a 'best evidence' requirement.'" *United States v. Kelley*, 45 M.J. 275, 280 (C.A.A.F. 1996) (quoting *Larez v. City of Los Angeles*, 946 F.2d 630, 644 (9th Cir. 1991)). Coupled with the rule's materiality requirement, necessity represents an important fact that is more than marginal or inconsequential and is in furtherance of the interests of justice and the general purposes of the rules of evidence.

There are two alternative tests in order to fulfill the reliability condition. If the residual hearsay is a "non-testimonial statement," the proponent of the statement must demonstrate that the statement has particularized guarantees of trustworthiness as shown from the totality of the circumstances. *Idaho v. Wright*, 497 U.S. 805 (1990). The factors surrounding the taking of the statement and corroboration by other evidence should be examined to test the statement for trustworthiness. The Court of Appeals for the Armed Forces has held that the Supreme Court's prohibition against bolstering the indicia of reliability under a Sixth Amendment analysis does not apply to a residual hearsay analysis. Therefore, in addition to evidence of the circumstances surrounding the taking of the statement, extrinsic evidence can be considered. *United States v. McGrath*, 39 M.J. 158, 167 (C.M.A. 1994)." However, if the residual hearsay is a "testimonial statement," e.g. "affidavits, custodial examinations, prior testimony that the [accused] was

Changes to Appendix 23, Analysis of Punitive Articles

(a) Paragraph 14. The Analysis accompanying Punitive Article 90 is amended by inserting the following new subparagraph c(2)(a)(ii) and redesignating existing subparagraphs (a)(ii) through (iv) as (a)(iii) through (v):

"(ii) *2005 Amendment*: The Court of Appeals for the Armed Forces held that the lawfulness of an order is a question of law to be determined by the military judge, not the trier of fact. *See United States v. New*, 55 M.J. 95, 100-01 (C.A.A.F. 2001)."

(b) Paragraph 35. The Analysis accompanying Punitive Article 111 is amended by inserting the following new paragraph at the end of paragraph a:

"Additionally, this change defines the offense in terms of what alcohol concentration level is prohibited by operation of State law or as otherwise provided. Also, the text reflects an amendment to section 911 of title 10, United States Code, in section 552 of the National Defense Authorization Act for Fiscal Year 2004 to restore the blood alcohol concentration limit that defines the offense of drunken operation of a vehicle, aircraft, or vessel in the United States to the limit that existed before the passage of section 581 of the National Defense Authorization Act for Fiscal Year 2002. Before passage of that Act, an alcohol concentration level in the person's blood or breath of 0.10 grams "or more" of alcohol per 100 milliliters of blood (or 210 liters of breath) was a punishable offense. By relying on the term "blood alcohol content limit," as defined to be the maximum permissible concentration to operate a vehicle, aircraft, or vessel, section 581 resulted in eliminating the level of 0.10 grams as a prohibited level of alcohol concentration and raised the definition of the offense to some level in excess of 0.10 grams."

(c) Analysis for paragraph 97 is amended by adding the following:

"*2005 Amendment*: b. Elements. Subparagraph (2) defines the elements of the offense of patronizing a prostitute. Old subparagraphs (2) and (3) are now (3) and (4) respectively."

(d) Paragraph 109. The Analysis accompanying Punitive Article 134, subparagraph c, is

used in this amendment are based on the following U.S. Code provisions: 40 U.S.C. § 2302 (weapons of mass destruction); 22 U.S.C. § 6701 (chemical weapons); 50 U.S.C. § 1520a (biological agents); and 49 U.S.C. § 5301 (hazardous material)."

(e) Paragraph 109. The Analysis accompanying Punitive Article 134, subparagraph e, is amended by inserting the following at the end thereof:

"*2005 Amendment*: This amendment increases the maximum punishment currently permitted under paragraph 109 from five years to ten years. Ten years is the maximum period of confinement permitted under 18 U.S.C. § 844(e), the U.S. Code section upon which the original paragraph 109 is based."

Changes to Appendix 24, Analysis of Nonjudicial Punishment Procedure

(a) The Analysis section of Part V, Nonjudicial Punishment Procedure, paragraph 1(h), is amended by renaming it paragraph 1(i) and inserting the following as paragraph 1(h):

"*2005 Amendment*: Subsection (h) is new. This subsection was added to clarify that nonjudicial punishment proceedings conducted in a combatant or joint command are to be conducted in accordance with the implementing regulations and procedures of the service of which the accused is a member."

(b) The Analysis accompanying Part V, Nonjudicial Punishment Procedure, paragraph 2, is amended by inserting the following paragraph:

"*2005 Amendment*: Subsection (2) was amended to clarify the authority of the commander of a joint command to impose nonjudicial punishment upon service members of the joint command."

(c) The Analysis accompanying Part V, Nonjudicial Punishment Procedures, paragraph 7(e), is amended by replacing the word "Transportation" with the words "Homeland Security."

Changes to Other Appendices Accompanying the Manual for Courts-Martial

(a) Appendix 3.1, "Memorandum of Understanding Between the Departments of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction," is deleted.

(b) Appendix 12, "Maximum Punishment Chart" is amended as follows:

(1) Substituting "Prostitution and patronizing a prostitute" for "Prostitution."; and

(2) Substitute "Threat or hoax designed or intended to cause panic or public fear" for "Threat, bomb, or hoax," and substitute "10 yrs" for "5 yrs" in the Confinement column.

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